

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

REGIONAL MULTIPLE LISTING
SERVICE OF MINNESOTA, INC., d/b/a
NORTHSTARMLS,

Civil No. 12-CV-0965 JRT/FLN

Plaintiff, Counterclaim
Defendant

**ANSWER, AFFIRMATIVE
DEFENSES AND SECOND
AMENDED COUNTERCLAIM**

v.

AMERICAN HOME REALTY
NETWORK, INC.,

Defendant,

v.

EDINA REALTY, INC., and
HOMESERVICES OF AMERICA, INC.,

Counterclaim Defendants

Defendant American Home Realty Network denies each allegation in the complaint except as specifically admitted below. In further answer to the complaint, AHRN states as follows:

1. AHRN admits that the plaintiff has asserted claims under the Copyright Act, and denies that it has violated any valid copyrights owned by RMLS.

2. The allegations of paragraph 2 of the Complaint are Plaintiff's own

summary of its allegations contained in the rest of the Complaint, are not allegations in themselves, and thus do not require a response by AHRN. To the extent a response is required, AHRN admits that RMLS markets its multiple listing service as the NorthstarMLS Database, denies that the database, which is a collection of uncopyrightable facts, is an original compilation subject to copyright protection, denies that RMLS owns copyrights to the photographs displayed on NorthstarMLS, and denies that it has violated any valid copyrights owned by RMLS.

3. AHRN admits the allegations in paragraph 3 on information and belief.

4. AHRN admits the allegations in paragraph 4.

5. The allegations of paragraph 5 of the Complaint state legal conclusions to which no response is required.

6. The allegations of paragraph 6 of the Complaint state legal conclusions to which no response is required and are Plaintiff's own summary of its allegations contained in the rest of the Complaint and thus do not require a response by AHRN. AHRN denies all other allegations in paragraph 6.

7. AHRN denies the allegations in paragraph 7.

8. AHRN denies that RMLS's multiple listing service is employed primarily to benefit buyers and sellers of real property, and otherwise admits the allegations in paragraph 8 on information and belief.

9. AHRN admits the allegations in paragraph 9 on information and belief.

10. AHRN denies the allegations in paragraph 10.

11. AHRN admits upon information and belief that the registration numbers contained within paragraph 11 of the Complaint are those of public record with the United States Copyright Office. AHRN is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 11 of the Complaint, and therefore denies them. In particular, AHRN denies that the uncopyrightable facts appearing in the NorthstarMLS database became subject to copyright protection merely by virtue of their compilation.

12. AHRN admits, upon information and belief, that the registration numbers contained within paragraph 12 of the Complaint are those of public record with the United States Copyright Office. AHRN is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 12 of the Complaint, and therefore denies them.

13. AHRN denies the allegations in paragraph 13.

14. AHRN denies that the materials the plaintiff labels the “Copyrighted Works” have been published merely by virtue of inclusion in the NorthstarMLS Database, and admits some of the material labeled “Copyrighted Works” may be viewed and downloaded by member agents and brokers with password-protected access. AHRN further denies that pages of the NorthstarMLS Database contain a copyright notice because it does not have access the NorthstarMLS Database and so has no way of knowing whether this assertion is true. AHRN admits that the so-called “Photographic Works” contain a copyright notice. AHRN denies any implication in paragraph 14 that

RMLS owns a valid and enforceable copyright in the material.

15. AHRN admits the allegations contained in paragraph 15.

16. AHRN admits that some of the factual information that RMLS's complaint seeks to include in its definition of "Copyrighted Works" appears on its neighborcity.com website, admits that the "Photographic Works" identified in the complaint appeared on the website but affirmatively states that all of the "Photographic Works" were removed within days of service of the complaint, denies that the material on the website is subject to a valid copyright enforceable by RMLS, and otherwise denies the allegations in paragraph 16.

17. To the extent the allegations of paragraph 17 state legal conclusions, no response is required. Otherwise, AHRN denies the allegations in Paragraph 17.

18. AHRN admits that it received a letter from RMLS in November 2011, states affirmatively that the letter speaks for itself, states affirmatively that the "Photographic Works" identified in the complaint had not been registered – or even taken – at the time the letter was sent in November 2011, and denies all other allegations in paragraph 18.

19. AHRN denies the allegations in paragraph 19.

FIRST CLAIM FOR RELIEF

20. AHRN restates and incorporates its answers to paragraphs 1-19 as though fully set forth herein.

21. AHRN admits that a copy of a certificate of registration for the

“Compilation Content” is attached to the complaint, denies that the “Compilation Content” comprises original works of authorship constituting copyrightable subject matter, and denies on information and belief that RMLS has complied with all statutory requirements in securing federal copyright registrations for the “Compilation Content.”

22. AHRN denies the allegations in paragraph 22.

23. AHRN denies the allegations in paragraph 23.

24. AHRN denies the allegations in paragraph 24.

25. AHRN denies the allegations in paragraph 25.

SECOND CLAIM FOR RELIEF

26. AHRN restates and incorporates its answers to paragraphs 1-21 as though fully set forth herein.

27. AHRN admits that copies of certificates of registration are attached as Exhibit B to the complaint, and otherwise denies the allegations in paragraph 27.

28. AHRN denies the allegations in paragraph 28.

29. AHRN denies the allegations in paragraph 29.

30. AHRN denies the allegations in paragraph 30.

31. AHRN denies the allegations in paragraph 31.

FIRST AFFIRMATIVE DEFENSE

The copyright infringement claims asserted by RMLS are barred by the invalidity of the alleged copyrights because the NorthstarMLS Database is not an original work and contains elements not subject to copyright protection.

SECOND AFFIRMATIVE DEFENSE

The copyright infringement claims asserted by RMLS are barred by the invalidity of the alleged copyrights in whole or in part because RMLS does not own the alleged copyrighted works.

THIRD AFFIRMATIVE DEFENSE

The copyright infringement claims asserted by RMLS are barred because RMLS has not properly registered the copyrights.

FOURTH AFFIRMATIVE DEFENSE

The copyright infringement claims asserted by RMLS are barred because any material allegedly copied by AHRN is not subject to protection under the Copyright Act.

FIFTH AFFIRMATIVE DEFENSE

The claims of RMLS are barred by the doctrine of unclean hands.

SIXTH AFFIRMATIVE DEFENSE

The claims of RMLS are barred by the doctrine of fair use.

SEVENTH AFFIRMATIVE DEFENSE

The claims of RMLS are barred by copyright misuse.

EIGHTH AFFIRMATIVE DEFENSE

RMLS's claims of copyright infringement are barred because any copying alleged was *de minimus*.

NINTH AFFIRMATIVE DEFENSE

RMLS is not entitled to statutory damages or attorneys' fees under 17 U.S.C. §

412(2) to the extent it did not register its claims of copyright prior to AHRN's alleged infringement or within three months after the first publication.

COUNTERCLAIM

1. AHRN brings this counterclaim to remedy the profound harm it has sustained resulting from a group boycott of AHRN, perpetrated in part by RMLS, with the goal of eliminating or suppressing competition in the market for real estate broker services.

2. Edina Realty, Inc. is a corporation organized under the laws of the State of Minnesota, with its principal place of business in Minneapolis, Minnesota. On information and belief, it is the largest real estate company in the state of Minnesota, and the largest member of RMLS. Its website states that it is one of the largest real estate companies in the country. Edina Realty is a subsidiary of HomeServices of America, Inc..

3. HomeServices of America, Inc., is a corporation organized under the laws of the State of Minnesota, with its principal place of business in Minneapolis, Minnesota. HomeServices owns real estate brokerage firms in states across the country, including Iowa, Pennsylvania, Indiana, Kentucky, Missouri, California and North Carolina. It is the second-largest real estate brokerage firm in the United States.

4. Because a substantial portion of the events alleged in this counterclaim occurred in Minnesota, venue is proper in this judicial district. This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 for AHRN's claims arising under Section 1 of the Sherman Act and 28 U.S.C. § 1367 supplemental jurisdiction over the related

claims arising under California and Minnesota law.

AHRN AND ITS BUSINESS MODEL

5. AHRN is a five-year-old San Francisco real estate brokerage referral services and technology startup that provides information to home buyers and sellers, identifying the real estate agents best suited to assist them in purchasing or selling properties in their local market on a nationwide basis. AHRN owns NeighborCity®, an online residential real estate service and operates a website, www.neighborcity.com. www.neighborcity.com allows consumers to search for homes for sale and obtain recommendations for the local real estate agents best suited to assist them with their purchase, as evaluated by its proprietary AgentMatch® software system, utilizing the available universe of listing and transactional data. This use of real estate data creates highly targeted recommendations of the real estate agents most likely to connect buyers and sellers in closing sales, an innovation formerly unavailable to the public.

6. AHRN has developed a real estate search engine that searches the Internet for data on real estate listings, including “for sale” listings, “for sale by owner” listings, foreclosures, transaction records and real estate agents. AHRN’s program also applies its proprietary algorithms to this data to identify, rate and rank buy- and sell-side agents most suitable to represent potential buyers and sellers in proposed transactions and then monitors the customer’s satisfaction with those introductions by obtaining related quantitative and qualitative data in the form of customer feedback.

7. Unlike other web sites where real estate agents or brokers pay to be ranked

as "featured agents," AHRN's site does not sell advertising, sponsorships or accept any payments related to its real estate agent ratings and rankings. Instead AHRN applies the same scoring heuristics and algorithms to every active real estate agent in the country.

8. The NeighborCity web site makes the residential real estate market more transparent by giving home buyers and sellers the information they need to make intelligent real estate decisions, especially when hiring a real estate agent and broker. Once a property of interest is identified by a website user, AHRN's services qualify and introduce homebuyers and sellers to relevantly experienced and vetted real estate agents who are available to represent them exclusively.

9. Consumers can use neighborcity.com to search for properties in their desired location. When a consumer clicks on a particular property, AHRN's algorithm identifies local real estate agents who are determined by the algorithm to be most effective at representing that buyer in the purchase of that property, as well as the most effective agents to represent the sale of that buyer's existing property.

10. To efficiently match consumers with real estate agents, AHRN uses information about the property and then matches it against each agent's particular sales and listing history, analyzing each agent's professional performance from the homeowner's perspective, relative to other competing agents who assist in the listing, purchase and sale of comparable properties at about the same point in time, while making certain assumptions about the best interest of the homeowner or prospective homeowner, e.g. sellers want to sell their home for the highest price possible and in the least amount

of time, while most buyers want the best suited home for their individual needs, at the lowest possible price.

11. AHRN also tracks each agent's effectiveness by identifying such information as the percentage of homes listed for sale that result in a sale, the difference between a property's asking price and the price for which it actually sold, the price per square foot, the days on market and days to sale, as well as other performance indicators relative to comparable listings and recent transactions. All of these various data points or "performance attributes" for each agent are compared relative to their peers (or direct competitors) through the dynamic and automated formation of a peer-index unique to each particular real estate agent, thus allowing a consumer to understand how well an agent has performed in the past relative to the universe of agents that could potentially serve them. All of this information provides consumers with performance indicators, not otherwise available, to effectively select a representative for purchasing or selling a home.

12. Once an AHRN customer selects a real estate agent for the identified property, that customer can instantly get in contact via email or text message, inviting the agent to assist without the customer having to disclose any personal information. The first agent to connect with the customer has an exclusive opportunity to win that client's business. However, the client remains in control of the relationship, deciding if and when to hire the agent after meeting or going on a property tour.

13. AHRN is compensated for its agent matching and referral services out of the local agent's commissions. The home buyer is not charged any fee. If the home

purchase is not closed by the particular agent to whom a referral is made, no compensation is collected. Unless prohibited by law, if the consumer-agent relationship results in a commission bearing transaction, the AHRN client is entitled to a Feedback Bonus, a partial commission rebate that is delivered by NeighborCity.

14. AHRN's neighborcity.com is designed to allow consumers to make an independent selection of a real estate agent who will represent their interests, rather than to feed leads to listing agents. Consumers in the residential real estate market have responded positively to the increased access to information about properties and real estate agents that AHRN provides. As a result, AHRN has grown significantly in the last year in terms of revenues, transactions referred and full-time employees.

RMLS AND ITS PARTICIPANT-BROKERS' ANTI-COMPETITIVE BUSINESS MODEL

15. RMLS is among several dozen Multiple Listing Services (“MLS”) and their member-brokers who have also taken notice of AHRN’s success and have decided to band together to stop the company before it becomes a larger threat to their business model, which is designed to maximize brokerage commissions through their own referrals and dual-agency home sales – arrangements in which the broker who lists a property is also the broker for the buyer of that property, and so is entitled to the entire commission for the sale, as well as the referral fee for directing the buyer to the listing and/or selling agent through the broker's website. AHRN threatens that model by connecting potential buyers directly with independent agents who do not face the conflict

of interest inherent in dual-agency sales.

16. RMLS acts on behalf of its member-brokers, including Edina Realty – “Participants” in the language of the RMLS Rules and Regulations – within the relevant market, and is governed by a Board of Governors whose members are appointed by those Participant brokers. However, the Participant brokers continue to act as independent economic entities and to compete with each other in the markets at issue in this action.

17. Edina Realty has three members on the RMLS Board of Governors, one of whom is its chairman, and is the largest member of RMLS. It, and HomeServices as its parent company, thus have significant influence over RMLS, and on information and belief, influenced RMLS and its broker Participants to engage in the concerted action alleged in this Counterclaim.

18. RMLS and its Participant brokers, including Edina Realty, compete with AHRN over the referral of potential customers to agents. The brokers seek to have web traffic directed to their own websites. When potential customers find a property on the listing broker's website, that broker can direct the customers to its own listing agent. That diverts the customer away from an independent agent, and also maximizes revenue for the broker: The broker collects both the buyer-side and the seller-side commission for the sale, and also charges its agent a referral fee for steering the customer to the agent.

19. Thus the listing agent and broker both want to receive all of the customer inquiries made on the Internet via the major real estate portals and websites, so that they earn a commission on both the buy and sell side of each transaction, as opposed to just

the sell-side commission. AHRN, however, makes referrals to agents determined to be the best suited by its AgentMatch® algorithm. That agent is typically not an agent with the listing broker and is therefore an independent representative of the client. RMLS's control over listing information and the restrictive manner in which it is licensed, published, used and disseminated, helps its large broker members who control a disproportionate share of the available inventory get a significantly higher share of commissions for both sides of a transaction. AHRN and other innovators in the market for real estate information and referrals can break this pattern by making referrals to agents outside the listing brokerage.

THE RELEVANT MARKET

20. The relevant market in this action consists of the market for information regarding homes for sale and for referrals to real estate agents in the markets in which RMLS operates. RMLS, like other MLS's throughout the United States, is a local cooperatives run by local broker-members, affiliated with the National Association of Realtors (“NAR”), who pool and disseminate information on homes available for sale in their regions. An MLS combines its members’ listing data and offers of cooperation (the commission split the listing broker will pay other brokers who bring a buyer) and then makes it available to all of its member-brokers, which enables more efficient exchange of offers of cooperation among brokers.

21. The relevant geographic market in this case is Minnesota and Western Wisconsin because RMLS, as the vehicle for its Participant brokers and in concert with

its fellow MLSs in other sections of the United States, is refusing to license AHRN data for properties, brokers and agents located in this area because they dislike the manner in which AHRN competes.

22. As they have done when other innovative businesses attempted to enter the real estate market, MLS's and their member-brokers have sought to prevent competition by maintaining an iron grip on real estate data that is critical to consumers, and by denying access to that information to anyone who declines to use it in a manner that promotes the MLSs' anticompetitive business model. In furtherance of that goal, RMLS and several dozen other MLSs have agreed not to license to AHRN any material from their respective databases, and have instructed third party syndicators of that data to likewise refuse AHRN access to the data, all with the intent of "[t]hrowing a world of hurt" on AHRN and destroying its business.

23. These exclusionary practices continue a pattern in the real estate industry in which traditional brokerages have undertaken various suppressive measures when challenged by new business models. This conduct has prompted lawsuits by the Department of Justice and investigations by the Federal Trade Commission, all seeking to promote access to property information for new entrants to the real estate industry who challenge or compete with the traditional broker model. The conduct of RMLS and the brokers and MLS's cooperating with it is another stratagem by powerful real estate brokers to suppress information, from which they derive value, to the detriment of consumers.

24. Buying or selling a home is the largest financial transaction most Americans will ever undertake. Thus, competition in the real estate industry is critical to consumers and the health of the real estate market and US economy. Traditionally, consumers have contracted with a real estate agent to buy or sell a home; the agent, in turn, is generally employed by or in an exclusive independent contracting arrangement with a real estate broker. Real estate brokers, and their agents, match buyers and sellers of homes and provide ancillary services related to closing the transaction. Historically, consumers had very limited access to property data in any given geographic region because brokers – the members of the local MLS – served as the sole source of information, and prior to the widespread adoption of the Internet, this information was not widely distributed.

25. According to an April 2007 Joint Report by the Federal Trade Commission and the U.S. Department of Justice entitled “Competition in the Real Estate Brokerage Industry,”

MLSs are so important to the operation of real estate markets that, as a practical matter, any broker who wishes to compete effectively in a market must participate in the local MLS and brokers must have access to their local multiple listing service (MLS) to compete effectively. Because brokers usually set the rules for each others’ participation in the MLS, it is possible for one dominant group of brokers to establish rules that disfavor other brokers who compete in a manner they dislike.

26. While other sources of property information exist, they are often so out of date as to be useless to consumers, and none are known to contain the relationship

between a property listing or transaction and the agents that represented the clients on both sides of the transaction. Hence, there are no reasonable alternative sources of complete real estate data for the relevant areas other than from the MLS or directly from the brokers – though that would require the participation of virtually 100 percent of the brokers.

27. The residential real estate industry has undergone substantial changes over the last decade, particularly the increased access buyers and sellers have to property information via the Internet. A 2011 NAR Survey indicates that 88 percent of home buyers use the internet as a resource and, “[w]hile buyers also use other resources, they generally start their search process online and then contact an agent.” Thus, tasks that were once the exclusive province of real estate brokerages are now available to the consuming public.

28. This increased access to information has given rise to new business models like AHRN’s. Those new business models are challenging traditional brokers in the \$60 billion market for real estate broker commissions by creating tools for consumers and, in turn, greater market efficiency and transparency. In response, MLSs and their traditional broker-members have instituted a variety of exclusionary devices to retain their grip on the flow of information and the corresponding profits in this multi-billion dollar market. As the Department of Justice recognizes, “[n]ew business models are emerging that allow consumers to save thousands of dollars when they buy or sell a home,” but “competition also suffers when brokers exclude low-cost rivals from the multiple listing service (MLS),

which limits price competition.” That is what this action is about.

RMLS's ANTI-COMPETITIVE CONDUCT

29. In response to AHRN’s increasing presence in the market, as well as the efforts of other innovators to enter the market for real estate referrals and information, RMLS and other MLS's, including their member-brokers and HomeServices and Edina Realty, have entered into a continuing agreement to suppress competition in at least two ways. First, they have agreed to refuse to license AHRN access to data feeds containing real estate listing data. Second, they have agreed to assert sham copyright claims to that listing data, and to employ those sham copyright claims to intimidate businesses like AHRN that seek to compete with and challenge their existing business model.

30. Information contained within MLS databases is shared with other entities that are neither brokers nor members of an MLS. The information is generally made available through data syndicators, such as Point2/Yardi Systems, Inc. and ListHub/Threewide Corporation/Move, Inc..

31. The MLS's, including on information and belief RMLS, set restrictions on which third parties the syndicators can allow to access the data feeds, based upon the third parties' business models. Among those restrictions are requirements that a syndicator only grant access to third parties that send customer leads directly to the agent or broker that listed the residential property, and conversely that syndicators not grant access to third parties like AHRN that provide buyer-side referrals – that is, referrals to real estate agents not affiliated with the listing broker. On information and belief, Edina

Realty, as RMLS's largest member, and acting under the direction of HomeServices, has endorsed and participated in the decision to enforce these restrictions.

32. These restrictions allow the MLS's and their participating brokers, to perpetuate their dual-agency business model that maximizes brokers' commissions on real estate sales while suppressing competition in the real estate market. When interested home buyers are referred to the listing agent for a property, and become clients of that agent, the agent and his or her broker get to retain the entire commission for the sale of the property. Because that commission is based on the sale price of the home, a broker and agent relying on dual agency have little incentive to negotiate in the interests of either the buyer or the seller, and both the buyer and the seller lose any right to independent advice and representation from the agent and broker.

33. The restrictions RMLS and other MLS's place on syndicators also suppress competition for the referral fees agents pay to have customers directed to their listings. By limiting syndication to third-party sites that direct potential customers back to the listing broker, RMLS shields its Participant-brokers from competition with third parties like AHRN for agent referral fees, permitting the brokers to charge referral fees well in excess of the 30 percent collected by AHRN.

34. Prior to the initiation of this litigation, AHRN contacted the major established syndicators of MLS data feeds to apply for a license to access the data. All of the syndicators refused to extend the license. In each case, the syndicator told AHRN that it could not have a license because neighborcity.com did not send interested customers to

listing agents and instead referred customers to buy-side agents. They stated that they do not work with “referral models” and that NeighborCity did not qualify to receive a syndicated data feed because of the buy-side agent recommendations on the NeighborCity listing pages.

35. The effort to restrict AHRN's participation in the market for real estate information and services has been coordinated, at least in part, and supported by the National Association of Realtors (“NAR”), a trade association that, on information and belief, establishes and enforces policies for its individual members and promulgates rules governing the conduct of NAR-member MLS's – including RMLS.

36. NAR held its annual meeting in Anaheim, California from November 11 to 14, 2011. The NAR annual meeting featured discussions of the perceived threat AHRN poses to the industry and what the industry could do to shut down AHRN.

37. Following the annual NAR meeting, as part of the ongoing campaign to shut AHRN out of the market, AHRN received more than 30 similar cease and desist letters from MLSs and brokers across the country – including from RMLS, Edina Realty and its parent, HomeServices. Each letter claimed that AHRN was improperly using information – including basic factual information regarding properties on the market – over which each respective MLS claimed a copyright.

38. Though it disputed the copyright assertions for reasons described in more detail below and in its Answer in this suit, AHRN responded to each of these MLS letters with an offer to purchase a license to the disputed material.

39. In furtherance of their group boycott, all of the MLSs and brokers, including Edina Realty and its parent, HomeServices, refused to even discuss a licensing agreement. As part of that group boycott, in a June 11, 2012 letter, Edina Realty told AHRN that it was rescinding any agreements that any of its agents or managing brokers had entered with AHRN, and that Edina Realty “has no interest in entering” any agreement with AHRN and directed AHRN not to contact any agents working with Edina Realty. On January 5, 2012, HomeServices sent a similar letter to AHRN, in which it repudiated “any agreements with any of our brokerage company’s agents.”

40. These actions by brokers and multiple listing services came shortly after AHRN rolled out updated profile pages for 850,000 agents that feature agent scores and performance metrics based on their transaction history.

41. The NAR held its Midyear Meeting in Washington D.C. between May 14 and 19, 2012. On information and belief, NAR’s Board voted on Saturday, May 19, 2012 to fund this lawsuit and a substantially similar lawsuit against AHRN in the United States District Court for the District of Maryland.

42. On the final day of the Midyear Meeting, the NAR Board of Directors approved new rules to further exclude competitors like AHRN from receiving MLS data or cooperating with MLS-member brokers to receive or share the MLS listing data, as reported in the meeting minutes:

[A]pproved a set of comprehensive amendments to NAR’s Internet Data Exchange (IDX) policy and MLS rules to clarify that “participant websites” are those in which MLS participants

have actual and apparent control of the sites. ... Control means participants can add, delete, modify, or update their information, and a reasonable consumer would recognize the information as the participants.

Separately, the board acknowledged the growing complexity of MLS technology issues by creating an MLS Technology and Emerging Issues Subcommittee, which will anticipate and analyze MLS technology issues.

Approved \$161,667 in legal assistance for seven cases, involving ... 4) challenging misappropriation of MLS data by a third-party Web site....

43. The concerted and uniform reaction among the MLS's is consistent with the plan conceived, in general terms, by John Mosey, president of RMLS. On December 22, 2011, AHRN was copied on an email that Mosey sent to Mitchell Skinner, RMLS' counsel. In that email, Mosey acknowledges that RMLS and other MLS's acted in concert against AHRN, stating: "[a]cross the country, multiple MLS's . . . called in the full force and fury of their respective legal advisors. . . ." Mosey's email then asks how to "connect the dots" between the MLS's so "we can act collectively, either in cost sharing and/or strategically by taking action against [AHRN] that has the desired outcomes of . . . throwing a world of hurt on [AHRN and its CEO]...[and] sending a message that our copyrights are enforceable and we are serious about punishing anyone who doesn't take us seriously."

44. This plan to "throw[] a world of hurt" on a company that challenges the MLS's long-established business model is another example of anticompetitive conduct

that has drawn the attention of the Department of Justice and the Federal Trade Commission to the real estate industry in recent years:

- In the November 18, 2008 Final Judgment upon consent in *United States v. National Association of Realtors®*, Case No. 05 C 5140 (N.D. Ill.), NAR agreed “not to adopt, maintain, or enforce any Rule, or enter into or enforce any agreement or practice, that directly or indirectly . . . prohibits, restricts, or impedes the referral of Customers whose identities are obtained from a [virtual office website] by a [Person who possesses a Broker’s license] who uses a [virtual office website] to any other Person, or establishes the price of any such referral[.]”
- Likewise, the August 27, 2009 Final Judgment upon consent in *United States v. Consolidated Listing Service, Inc.*, Case No. 2:08-CV-01786-SB (D.S.C.), stated that the defendant MLS “shall not adopt, maintain, or enforce any Rule, or enter into or enforce any agreement or practice, that directly or indirectly . . . discriminates against or disadvantages any Member or Licensee based on the Member’s or Licensee’s office location, pricing or commission rates, business model, contractual forms or types used, or services or activities the Member or Licensee performs or does not perform for any home buyer or home seller[.]”
- Other courts have similarly found that anticompetitive MLS rules are unreasonable. “When broker participation in the [MLS] is high, the service itself is economically successful and competition from other listing services is lacking, rules which invite the unjustified exclusion of any broker should be found unreasonable.” *United States v. Realty Multi-List*, 629, F.2d 1351, 1374 (5th Cir. 1980). Defendants’ conduct is the old guard real estate industry’s next effort to stifle competition.

SHAM COPYRIGHT CLAIMS

45. The concerted effort to suppress competition from companies like AHRN depends in large part on the ability of RMLS and other MLS's to, as Mosey put it in his December 22, 2011 e-mail, “send a message that our copyrights are enforceable” and intimidate potential competitors with threats of copyright enforcement litigation – despite

knowing that much of the information over which they claim copyright privilege is not copyrightable, not properly registered in compliance with the Copyright Act, or not owned by them.

46. MLS's acknowledge that they cannot feasibly register a copyright for each of the elements in their databases. At the 2012 Council of MLS meeting in Boston, for example, a speaker told the attendees that it would be “extremely burdensome” if each “MLS must recognize every copyright element in the database to register.”

47. Rather than take on that burden, the MLSs – including RMLS in this litigation and Metropolitan Regional Information Systems, Inc. in the Maryland litigation, as well as the MLS's and brokers that sent the series of cease and desist letters to AHRN in late 2011 and early 2012 – have elected to misrepresent the nature of their rights to the information contained in the MLS databases.

48. Section 101 of the Copyright Act of 1976, 17 U.S.C. §101, defines a “compilation” for purposes of a compilation copyright as:

a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

49. Section 103(b) of the Act further provides:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect

or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

50. In 1987, the Copyright Office of the Library of Congress issued Circular 65 titled "Copyright Registration for Automated Databases," which states the following:

Databases may be considered copyrightable as a form of compilation, which is defined in the law as a work "formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."

51. Circular 65 also specifies that Copyright protection is not available for:

- ideas, methods, systems, concepts, and layouts;
- individual words and short phrases, individual unadorned facts; and,
- the selection and ordering of data in a database where the collection and arrangement of the material is a mechanical task only, and represents no original authorship; e.g., merely transferring data from hard copy to computer storage.

52. Real estate listings are collections of facts: the location of the listed property, the date of construction, number of bedrooms and bathrooms, square footage, size of lot, asking price, time on the market and similar information.

53. While under certain circumstances compilations of facts are copyrightable, "facts are not copyrightable." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (U.S. 1991). As the Supreme Court observed in *Feist*:

Many compilations consist of nothing but raw data, i.e., wholly factual information, not accompanied by any original written expression. On what basis may one claim a copyright in such a

work? Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered in one place.... The *sine qua non* of copyright is originality.

54. The collective action described by John Mosey in his December 22, 2011 e-mail, including the barrage of cease and desist letters from around the country and the filing of substantially similar lawsuits in Minnesota and Maryland, is designed to create the inaccurate and false impression that RMLS, MRIS and other MLS's own valid and enforceable copyrights to the facts and photographs that appear in their listings, and that AHRN's use of the information is unlawful, with the intent of discouraging brokers and agents from working with AHRN client referrals.

55. However, the RMLS listing database is based not on its own creative efforts, but on software created by a third party. As RMLS acknowledges on its NorthstarMLS website:

NorthstarMLS® Matrix. Matrix is our primary, full-featured MLS system where licensed Realtors and Appraisers list properties for sale with offer of compensation, search available properties for their clients, conduct market analyses, set up searches and listing portals for their clients, run reports, etc. Developed and maintained by Tarasoft Corporation, Matrix is a cutting edge and leading MLS system used by tens of thousands of agents across the U.S. and Canada.

56. Tarasoft no longer owns or maintains the Matrix software. In 2011, the company was acquired by CoreLogic, which, on information and belief, continues to develop and maintain the software for RMLS and other MLS's around the country. CoreLogic describes its Matrix product as “an enterprise-class MLS system that provides

real estate brokers and agents with a flexible, high-performance platform for managing real estate listings.”

57. Contrary to the assertions of RMLS, the selection, coordination and arrangement of data in MLS listing databases are standard in the MLS industry, dating back to the days the MLS listings were maintained in books. The collection and arrangement of the material in MLS listing databases is only a mechanical task of data entry, involving individual words and short phrases, representing no original authorship. It involves merely the transfer of individual unadorned facts from home sellers to computer storage. If any authorship were involved, it would be involve the creativity of CoreLogic in the creation of the Matrix software, not the MLSs.

58. This collective action is additionally advanced by RMLS's practice of placing watermarks on all photographs in its database, falsely asserting that RMLS holds the copyright to those photographs. On information and belief, RMLS has not received assignments of the copyrights to those photographs that meet the requirements of the Copyright Act, and has only even attempted to register the 50 photographs identified as the “Photographic Works” in its complaint solely for the purpose of bringing this action against AHRN.

59. Edina Realty and HomeServices have participated in the perpetuation of the sham copyright claims by asserting vague copyrights over the listing data for the properties their agents have been retained to sell. In a January 5, 2012 letter, HomeServices, writing on behalf of Edina Realty and its other subsidiaries, demanded

that AHRN cease its alleged “infringement of copyrights.” It did not specify in that letter any copywritten material that had been used by AHRN, nor did it do so when AHRN expressly asked it to identify any copywritten content that had been used improperly. The letter, with its threat of litigation, was sent to intimidate AHRN into ceasing its competition with Edina Realty and other brokers.

60. The ultimate goal of this collective action by RMLS and its co-conspirators is to maintain their control over the manner in which real estate information is shared with the consuming public, and to direct the flow of buyer demand generated by the Internet to its largest broker-members, allowing them to maintain control over the manner in which real estate brokers set their compensation. The goal of this collective action to enforce dubious copyrights, as one presenter at the Council for MLS 2012 meeting in Boston candidly acknowledged, is to “Keep the cows in the barn, and milk them for the MLS and [their] members.”

COUNT I

Violation of Sherman Act § 1

61. RMLS and its member brokers, including HomeServices and Edina Realty, have joined the National Association of Realtors, other MLS's – including MRIS – and their respective member brokers in a common scheme to impose unreasonable restraints of trade in individual state and local real estate markets served by MLSs and in the national real estate market, including, but not limited to Minnesota, Maryland and California, and other states from which AHRN has received cease and desist letters

(“Relevant Markets”).

62. The scheme in restraint of trade has been effectuated in two distinct ways:

1. The concerted refusal to deal with AHRN by refusing to engage in any good faith negotiation of licensing agreements for the data in the scheme participants' real estate listing databases. This group boycott constitutes a *per se* violation of the Sherman Act.
2. The coordinated sham assertion of invalid copyright claims to facts, data and other material that is not subject to copyright protection, or for which the scheme participants do not hold a valid copyright, all for the purpose of preventing competitors from making lawful use of the information and thus suppressing competition in the market for real estate brokerage referrals and the market for real estate agent services.

63. The scheme's unlawful objectives are to inhibit competition between and among member real estate brokers of MLSs and AHRN; to inhibit innovation in the delivery of information to, and for the benefit of, buyers and sellers of residential real estate, i.e. consumers of real estate brokerage services; and illegally stabilize and inflate real estate broker commissions, by raising barriers to entry to impede AHRN's entry into, and eventually drive AHRN out of, the Relevant Markets.

64. The collective action among actual and potential competitors, including between Edina Realty (acting under the direction of its parent, HomeServices) and its fellow members of RMLS, "depriv[ed] the marketplace of independent centers of

decision-making.”

65. MLS's, including RMLS, have substantial market power. They control nearly all of the listing information for properties within their geographic service areas. A decision by an MLS, such as RMLS in Minnesota and Western Wisconsin, to refuse to license that data to a business because the MLS and its broker members do not like its business model effectively shuts that business out of the market for real estate referral services. “Particularly in an area served by only one MLS, access to MLS resources may be critical for a brokerage referral service to successfully participate in the real estate market.” *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 282 (4th Cir. 2012).

66. This anti-competitive conduct by RMLS and its members, including Edina Realty (acting under the direction of its parent, HomeServices), damages AHRN by dissuading brokers and agents within RMLS's service area from entering referral agreements with AHRN and by denying AHRN – but not competitors who do not threaten the business model of RMLS's Participants – data that will permit it to offer consumers complete information on the market for real property within the RMLS service area. The conduct has the anti-competitive effects of eliminating price competition in the market for brokerage referral services and impeding the entry of AHRN and other innovative providers of brokerage referral services into the market. This damage to competition has injured AHRN's sales and good will, as demonstrated by 50 percent decreased traffic to the neighborcity.com website pages related to Minnesota, reduced acceptance of referrals by brokers and agents, and increased repudiation of

existing referral agreements. This has resulted in financial losses to AHRN in an amount to be determined at trial.

67. This anti-competitive conduct by RMLS and its members, including Edina Realty (acting under the direction of its parent, HomeServices), also causes harm to consumers in the real estate market by suppressing information about and access to agents who are independent of listing brokers and agents, thus discouraging price competition for brokerage services and for home prices. RMLS's conduct thus "operates to deny to consumers the opportunity to choose among alternative offers," in contravention of the legislative purpose that underlies the Sherman Act. *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1364 (5th Cir. 1980)

COUNT II

Violation of Minnesota Antitrust Law Minn. Stat. § 325D.49 et. seq

68. The common scheme alleged in this counterclaim, as effectuated by RMLS both in conjunction with other MLS's and as the vehicle for its own Participant brokers, constitutes a "contract, combination, or conspiracy between two or more persons refusing to deal with another person" in violation of Minn. Stat. § 325D.53 subd. 1(3).

69. By their participation in the common scheme, RMLS and its member brokers, including Edina Realty (acting under the direction of its parent, HomeServices), have caused injury to AHRN, including loss of sales, a decrease in AHRN's ability to market and grow its business, and curtailment of AHRN's ability to obtain funding to support and expand its business. RMLS's anti-competitive conduct damages AHRN by

dissuading brokers and agents within RMLS's service area from entering referral agreements with AHRN and by denying AHRN – but not competitors who do not threaten the business model of RMLS's Participants – data that will permit it to offer consumers complete information on the market for real property within the RMLS service area. The conduct has the anti-competitive effects of eliminating price competition in the market for brokerage referral services and impeding the entry of AHRN and other innovative providers of brokerage referral services into the market. This damage to competition has injured AHRN's sales and good will, as demonstrated by decreased traffic to the neighborcity.com website, reduced acceptance of referrals by brokers and agents, and increased repudiation of existing referral agreements. This has resulted in financial losses to AHRN in an amount to be determined at trial.

70. This anti-competitive conduct by RMLS and its member brokers, including Edina Realty (acting under the direction of its parent, HomeServices), also causes harm to consumers in the real estate market by suppressing information about and access to agents who are independent of listing brokers and agents, thus discouraging price competition for brokerage services and for home prices. RMLS's conduct thus denies consumers the opportunity to choose among alternative offers, in contravention of the legislative purpose that underlies the Sherman Act and Minnesota's anti-trust statutes.

71. Pursuant to Minn. Stat. § 325D.57, AHRN is entitled to an award of three times its actual damages, together with costs, disbursements and reasonable attorney fees.

COUNT III

Violation of Cartwright Act, Cal Bus. & Prof. Code §16720 et seq.

72. The common scheme alleged in this counterclaim is a “combination of capital, skill or acts by two or more persons” designed to “create or carry out restrictions in trade or commerce” in the market for residential real estate referral services in all of the states in which the scheme's participants do business, including Minnesota and California. Such a combination constitutes a trust in violation of Cal. Bus. & Prof. Code §§ 16720 and 16726.

73. By their participation in the common scheme alleged in this counterclaim, RMLS, HomeServices and Edina Realty have directed their actions against AHRN, which has its primary business operations and sole headquarters in California, have caused injury to AHRN, including loss of sales, a decrease in AHRN's ability to market and grow its business, and curtailment of AHRN's ability to obtain funding to support and expand its business. The anti-competitive conduct damages AHRN by dissuading brokers and agents within RMLS's service area from entering referral agreements with AHRN and by denying AHRN – but not competitors who do not threaten the business model of RMLS's Participants – data that will permit it to offer consumers complete information on the market for real property within the RMLS service area. The conduct has the anti-competitive effects of eliminating price competition in the market for brokerage referral services and impeding the entry of AHRN and other innovative providers of brokerage referral services into the market. This damage to competition has injured AHRN's sales and good will, as demonstrated by decreased traffic to the neighborcity.com website,

reduced acceptance of referrals by brokers and agents, and increased repudiation of existing referral agreements. This has resulted in financial losses to AHRN in an amount to be determined at trial.

74. This anti-competitive conduct by RMLS and its member brokers, including Edina Realty (acting under the direction of its parent, HomeServices), also causes harm to consumers in the real estate market by suppressing information about and access to agents who are independent of listing brokers and agents, thus discouraging price competition for brokerage services and for home prices. RMLS's conduct thus denies consumers the opportunity to choose among alternative offers, in contravention of the legislative purpose that underlies the Sherman Act and Minnesota's anti-trust statutes.

75. Pursuant to Cal. Bus. & Prof. Code § 16750, AHRN is entitled to an award of three times its actual damages, injunctive relief and reasonable attorney fees.

COUNT IV

Violation of Minnesota Deceptive Trade Practices Act § 325D.44

76. By advising its member brokers that information obtained and used by AHRN on its neighborcity.com website is subject to valid copyright protection, and that AHRN's use of such information is unlawful, RMLS has disparaged the services and business of AHRN with false and misleading statements in violation of Minn. Stat. § 325D.44 subd. 1(8).

77. For the reasons detailed above, RMLS's assertion that the listing data used by AHRN is subject to copyrights owned by RMLS is false: The data itself is

noncopyrightable facts. The data is arranged in a database created not by RMLS, but CoreLogic and its predecessor in interest, Tarasoft. With the exception of the 50 Photographic Works registered for the purposes of this lawsuit, RMLS has not registered copyrights for any of the photographs in the Northstarmls database, and the purported assignments of any copyrights in those photographs do not comply with the requirements of the Copyright Act.

78. Pursuant to Minn. Stat. § 325D.45, AHRN is entitled to an order enjoining RMLS from making false and misleading statements regarding its services and business and an award of reasonable attorney fees.

WHEREFORE, AHRN requests judgment against RMLS, HomeServices of America, Inc., and Edina Realty, Inc. as follows:

1. A declaration that the unlawful combination and conspiracy alleged in this complaint is an unreasonable restraint on trade or commerce in violation of the Sherman Act, the Minnesota Antitrust Law and the Cartwright Act;
2. An injunction, enjoining, both preliminarily and permanently, RMLS, HomeServices of America, and Edina Realty from continuing their participation in the unlawful combination and conspiracy alleged in this complaint;
3. An award to AHRN of damages, as provided by law, in an amount to be determined at trial and trebled in accordance with antitrust law;
4. An award to AHRN of the costs of this suit and reasonable attorneys' fees, as

- provided by law;
5. Interest from and after the date of the service of this counterclaim; and
 6. Such other and further relief as the court deems just, equitable.

Dated: April 1, 2013

SNYDER GISLASON FRASIER LLC

/S CHAD A. SNYDER

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