

April 26, 2017

**Via Electronic Mail**  
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Tom Berge, Jr.  
Berge Company  
900 East Main  
Alhambra, CA 91801

Re: NAR Multiple Listing Issues and Policies Committee

Request for Expedited Consideration of Policy Exempting Non-participating Licensees from MLS Fees

Dear Mr. Berge:

This office is counsel to eXp Realty, LLC ("eXp"). eXp is a rapidly growing national, publicly traded, residential real estate brokerage firm, currently operating in 43 states and the District of Columbia. As a result of its broad national footprint, eXp participates in more than 180 multiple listing services. All eXp brokers and agents are proud to be Realtors®.

eXp fully embraces the independent contractor model of real estate brokerage. The firm provides extraordinary support for its licensees' businesses, significantly in an internet-based cloud-based office environment. eXp believes this business model allows it to provide its licensees the highest quality services with the most advanced tools more efficiently than other brokerages. The cloud-based office environment also allows eXp to provide administrative services, broker oversight, and transaction support unimpaired by typical geographic constraints affecting "brick and mortar" brokerages. By way of example, eXp's designated broker may reside in Seattle, yet supervise and support the services of agents operating exclusively in Spokane, 300 miles away, as well as agents serving Seattle. eXp's business model has been well received by agents and the public. eXp now has more than 3,000 agents and is rapidly growing.

Unfortunately, the efficiencies of eXp's operations have been significantly and adversely affected by the application of a nearly ubiquitous MLS rule that requires all licensees affiliated with a participant to be subscribers of an MLS, with fees paid to the MLS accordingly. Thus, using the same Washington example, a broker participating in the MLS serving Seattle must pay MLS fees for all agents licensed to the broker, including agents operating exclusively in Spokane and not availing themselves of the services of the Seattle MLS. Moreover, assuming the Spokane MLS has the same rule (and, again, most MLSs do have the same rule), the participant and all licensees must also pay Spokane MLSs fees for the same reason. The result is, obviously, fundamentally unfair.

The origin of the MLS rule requiring all licensees affiliated with a broker to pay fees to the broker's MLS was to promote fairness by preventing "free riding." Simply stated, licensees obtaining access to, and the benefits of, an MLS should pay for the service. In light of the fact that MLS access is essential to residential real estate brokerage, it was reasonable to assume that active licensees not paying MLS dues were nevertheless obtaining access to the MLS through unscrupulous subscribers, or directly using other subscribers' passwords and identification

numbers. The simple solution to prevent free riding was to simply require all active licensees affiliated with a participant to pay MLS fees as subscribers, which was both reasonable and fair.

With the development of technology such as that employed by eXp, the assumption that all active licensees affiliated with a participant need access to *any particular* MLS is no longer valid. While it is still reasonable to assume that an active licensee must have access to an MLS, it is now entirely possible, and in fact likely, that some licensees affiliated with a participant who practice in an area served by an MLS other than the MLS to which the participant subscribes, will have no use for access to the participant's MLS, and instead *must* have access to another MLS. Thus, MLS rules developed to promote fairness and prevent free riding now have the reverse effect – those same rules enable MLSs to exact fees from licensees who get nothing from the MLS in return.

With the technology and tools available to brokers today, the quality of remote supervision of licensees can be equal, or even superior, to that of in-person supervision. It is not surprising that almost every state allows a broker to supervise affiliated licensees anywhere in the state, and the vast majority of states do not require the broker's physical presence within the state. eXp embraces the opportunity to provide high-quality remote supervision.

Fees for MLS services are a significant cost to licensees. A licensee faced with the prospect of paying MLS fees for two MLSs, one of which the licensee will not use, is not inviting. If given a choice, the licensee will certainly opt to avoid paying double fees. The prospect of double MLS fees can often, if not more often than not, determine the licensee's selection of a brokerage firm. Thus, in order to stay on a level playing field with its competitors with geographically local operations, eXp must either absorb any superfluous MLS fees without passing them on to its licensees or, establish unnecessary "branch" offices that are not required by state law and that result in additional cost and inconvenience to eXp. The obvious and unfortunately realistic extension of this problem might help make the point: There are, on average, approximately 15 multiple listing services per state. If eXp were to have licensees operating in each of the service areas of the all MLSs serving a state operating under the licenses of a single company and a single managing broker, all of eXp's licensees would be forced to subscribe to each MLS in the state, despite the fact that most of the services are unnecessary to them. The cost to eXp of paying MLS fees for 14 extra MLSs for each licensee would quickly eclipse the efficiencies of eXp's business model.

eXp is aware that NAR and your Multiple Listing Issues and Policies Committee are aware of this dilemma and are currently studying possible solutions. Thus, we suspect that this problem is well appreciated by the Committee and we are optimistic that the problem will be addressed promptly. Consequently, the purpose of this letter is not so much to bring the challenge to your attention, but rather to highlight the severity and immediacy of the problem.

There are several ways to address the challenge of free riding without the existing unintended discrimination against "statewide" brokers and their licensees. eXp has confidence that, in due course, the Committee has or will explore the options. eXp's pressing concern is that the Committee address the fundamental and gross unfairness of the enforcement of the existing anti-free riding rules. While the ultimate resolution of the problem may include revisions to MLS policy resembling "Board of Choice," there is a simple and immediately available solution: Mandate a rule requiring MLSs to exempt from fees any licensee affiliated with a participant who, together with the participant, signs a certificate in a form approved by the MLS certifying

that the licensee (1) neither has direct or indirect access to the MLS nor uses the MLS and (2) pays fees to another MLS<sup>1</sup>. It is that simple.

We believe that enforcement of the anti-free riding rules under circumstances resulting in superfluous MLS subscriptions unjustly enriches the enforcing MLS. From a simplistic but fair perspective, the rules require participants to pay for something they do not get, and they have no choice because an MLS is an essential facility to residential brokerage and there is no way to “opt out” of the MLS’s services. The dogmatic enforcement of the rules is made more egregious by the fact that there are obvious less draconian solutions, such as the “waiver” approach suggested above. A waiver rule would be very easy to implement and would protect against free riding without unjustly enriching the MLS at the expense of some REALTORS® because of their business model.

In conclusion, the purpose of this letter is to urge your earliest possible action (preferably at the May REALTORS® Legislative Meetings) in the form of a mandatory MLS policy requiring that all MLSs offer an exemption from MLS fees to licensees and participants providing a sworn waiver certifying the licensee does not have access to and does not utilize the MLS services in any way.

Thank you for taking the time to consider eXp’s concerns. We welcome your response and would be happy to assist in your study and response to this problem with additional information or in any other way we can.

Very truly yours,

FOSTER PEPPER PLLC



Christopher R. Osborn

CRO:jpb

cc: Russ Cofano, eXp President and General Counsel  
Katherine Johnson, National Association of Realtors® General Counsel

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<sup>1</sup> This is the approach taken by the Heartland MLS serving the greater Kansas City, Missouri region. To the best of our knowledge, the rule works without problem.