

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JENNIFER NOSALEK, RANDY HIRSCHORN, :
and TRACEY HIRSCHORN, individually and : No.: 1:20-cv-12244-PBS
on behalf of all others similarly situated :
Plaintiff, : CLASS ACTION
: :
v. : March 27, 2024
: :
MLS PROPERTY INFORMATION NETWORK, :
INC., *et al.* :
Defendants.

**MOTION OF NORTHWEST MULTIPLE LISTING SERVICE TO
LIFT STAY AND FOR LEAVE OF COURT TO FILE AMICUS CURIAE BRIEF**

Non-party Northwest Multiple Listing Service (“NWMLS”) moves the Court for an order lifting the stay presently in place in this matter and granting NWMLS leave of Court to file its amicus curiae brief in response to the Statement of Interest (“SOI”) filed by the United States through the Department of Justice (“DOJ”). A copy of NWMLS’s proposed amicus curiae brief is attached as Exhibit 1. The basis for this motion is that the SOI mischaracterizes the nature, purpose, and impact of changes made by NWMLS to its rules and forms regarding broker compensation. Several of NWMLS’s changes are similar to the rule changes set forth in the proposed settlement in this matter. NWMLS is singularly well-positioned to respond to inaccuracies in DOJ’s description and analysis of NWMLS’s rules and forms changes, and thus help ensure that the Court’s decision regarding the proposed settlement in this matter is based on accurate and complete information.

I. BACKGROUND

NWMLS is a not-for-profit Washington corporation owned by the more than 2,200 real estate brokerage firms comprising its membership. It is an independent multiple listing service and not affiliated with the National Association of Realtors or any state or local association of Realtors. It provides multiple listing services to approximately 33,000 real estate brokers and appraisers across most of Washington State. In addition to multiple listing services, NWMLS creates and publishes transaction forms used to list and sell properties.

Prior to 2019, almost every multiple listing service in the country, including NWMLS, had rules (i) requiring listings to include an offer of compensation for the broker representing a buyer, and (ii) precluding publication of such offers of compensation by brokers to consumers on their websites. NWMLS recognized consumers' need and desire for greater choice and transparency regarding broker compensation and eliminated those rules in October 2019.

Eliminating the mandatory compensation rule enabled greater flexibility and choice for sellers when listing a property and a related rule change gave buyers and buyers' brokers a vehicle for negotiating for compensation when making an offer to purchase. Additionally, eliminating the restriction on publishing offers of compensation resulted in offers of compensation becoming widely available to consumers, increasing transparency and addressing concerns with the potential for brokers "steering" buyers to listings with higher commissions. DOJ's account of these rule changes in the SOI is incomplete and inaccurate.

In October 2022 NWMLS again revised its rules and forms to “de-couple” listing broker and buyer broker compensation, restructure how compensation is offered and paid, and create additional transparency and opportunities for negotiation of compensation. These changes, together with the amendment of Washington’s real estate agency law, have created a new market landscape where buyers agree how much to compensate their own broker; all buyers can see how much (if anything) sellers are offering buyers to pay the buyer’s broker; and buyers can then negotiate with sellers to adjust any seller contribution toward the buyer broker’s compensation. DOJ dismissively asserts that these changes were not meaningful.

II. LEGAL ARGUMENT

This Court has recognized the role of amici curiae “to ‘assist the court in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39, 52 (D. Mass. 2015) (quoting *Sierra Club v. Wagner*, 581 F. Supp. 2d 246, 250 n.1 (D.N.H. 2008)). The Court has broad discretion to permit the filing of an amicus curiae brief “when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Ryan v. Commodity Future Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997); see also *Wash. All. of Tech. Workers v. U.S. Dep’t of Homeland Sec.*, 50 F.4th 164, 193-94 (D.C. Cir. 2022) (same); see also, e.g., *Mass. Food Ass’n v. Mass. Alcoholic Beverages Control Comm’n*, 197 F.3d 560, 567 (1st Cir. 1999) (“[A] court

is usually delighted to hear additional arguments from able amici that will help the court toward the right answers[.]”). NWMLS satisfies this standard.

To argue that NWMLS’s changes were not meaningful, DOJ uses data from only one of NWMLS’s more than 2,200 member firms as evidence that the proposed settlement agreement in this case “would not limit steering or reduce buyer-broker commissions.” DOJ represents its evidence as reflective of “NWMLS’s experience,” but due to omitted critical information and deficiencies in DOJ’s analysis, DOJ’s account of NWMLS rules, forms, and data is not representative of “NWMLS’s experience.” NWMLS cannot let mischaracterizations and incomplete and inaccurate information go unaddressed. Clearly, NWMLS is best suited to provide correct information regarding its own rules, forms, and data. NWMLS thus possesses exactly the type of “unique information” and “unique perspective” that justify granting NWMLS leave to file its amicus brief.

NWMLS’s amicus brief accurately presents the nature, purpose, and impact of its rules and forms changes and corrects crucial omissions and mischaracterizations in the SOI. In addition, the amicus brief details the significant shortcomings of DOJ’s data analysis, including its failure to explain or define basic terms, its unjustified reliance on a single anonymous source of data, and limitations posed by the remarkably short time period analyzed. The brief points out that DOJ has had unfettered access to information and data from NWMLS through multiple Civil Investigative Demands and interviews over several years and that it had access to other brokers’ data that it failed to consider. NWMLS shows how these shortcomings render DOJ’s analysis in its SOI unreliable.

The amicus brief will assist the Court in a matter that may become central to its decision on whether to approve the proposed settlement. NWMLS seeks to file its amicus brief to accurately present NWMLS's rules and forms changes which have delivered a platform that provides consumers transparency, choice, and the opportunity to negotiate. Most importantly, it seeks to correct the record before the Court and share the perspective of a multiple listing service that has real experience with rules very similar to those proposed by the parties, thereby helping ensure that the Court's decision regarding the proposed settlement in this matter is based on reliable and complete information.

NWMLS notes in conclusion that no party or counsel for a party authored this motion or the proposed amicus brief, and no person or entity other than NWMLS funded their preparation. NWMLS further notes that no party will be prejudiced by allowing the filing of the proposed amicus brief, as evidenced by the fact that both Plaintiffs and Defendant MLS Property Information Network assent to this motion.

WHEREFORE, Northwest Multiple Listing Service respectfully requests that the Court enter an order lifting the stay in this case, and granting it leave to file its proposed amicus curiae brief.

RULE 7.1 CERTIFICATION

Pursuant to Local Rule 7.1(a)(2), counsel for Northwest Multiple Listing Service conferred with counsel for Plaintiffs and Defendant MLS Property Information Network regarding the above motion, and both Plaintiffs and Defendant MLS Property Information Network assent to the above motion.

Respectfully submitted,

NORTHWEST MULTIPLE LISTING SERVICE,

By its Attorneys,

/s/ Robert Clark Corrente

Robert Clark Corrente (BBO# 544593)
WHELAN CORRENTE & FLANDERS LLP
100 Westminster Street, Suite 710
Providence, RI 02903
Tel. (401) 270-4500
Fax (401) 270-3760
rcorrente@whelancorrente.com

/s/ Christopher R. Osborn

Christopher R. Osborn, Esq. (*Pro Hac Vice Pending*)
Andrew L. Mathews, Esq. (*Pro Hac Vice Pending*)
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101
Tel: (206) 624-0900
christopher.osborn@stoel.com
andrew.mathews@stoel.com

Dated: March 27, 2024

CERTIFICATE OF SERVICE

I, Robert Clark Corrente, hereby certify that a true copy of the foregoing document filed through the ECF system will be electronically sent to the registered participants as identified on the Notice of Electronic Filing on March 27, 2024.

/s/ Robert Clark Corrente

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JENNIFER NOSALECK, RANDY
HIRSCHORN and TRACEY HIRSCHORN,
individually and on behalf of all others
similarly situated,

Plaintiff,

v.

MLS PROPERTY INFORMATION
NETWORK, INC., et al.

Defendants.

No. 1:20-cv-12244-PBS

CLASS ACTION

**AMICUS CURIAE BRIEF OF
NORTHWEST MULTIPLE LISTING
SERVICE**

The antidote to steering is transparency. The Department of Justice’s (“DOJ”) ill-informed, ill-supported critique of Northwest Multiple Listing Service’s (“NWMLS”) rules and forms changes fails to acknowledge this. NWMLS submits this *amicus curiae* brief to explain the nature and context of NWMLS’s rule changes inaccurately described in DOJ’s Statement of Interest filed in this case (the “SOI”). DOJ obscures, or misses altogether, the purpose and impact of NWMLS’s changes, which ushered in ahead-of-their-time enhancements to transparency, consumer choice, and opportunities for negotiation. Additionally, DOJ’s critique of NWMLS is based on a highly flawed analysis of woefully incomplete data.

I. Introduction

NWMLS is a not-for-profit Washington corporation owned by the more than 2,200 real estate brokerage firms comprising its membership. (Concurrently filed Declaration of Justin D. Haag (“Haag Dec.”) at ¶ 2.) It is an independent multiple listing service, not affiliated with the National Association of Realtors or any state or local association of Realtors. (*Id.*) It provides multiple listing services to approximately 33,000 real estate brokers and appraisers across most of Washington State. (*Id.* at ¶ 3.) In addition to multiple listing services, NWMLS creates and

publishes transaction forms used to list and sell properties. (*Id.*) Use of NWMLS forms is not required, but the forms are used in most transactions in Washington. (*Id.*)

II. NWMLS Rules Give Consumers Control of Their Brokers' Compensation.

Prior to 2019, almost every MLS in the country, including NWMLS, had a rule requiring listings to include an offer of compensation to a broker representing a buyer. Another ubiquitous rule precluded publication of such offers of compensation by brokers to consumers on their websites – limiting a buyer's ability to determine the compensation the listing firm offered the buyer's broker. Recognizing the need and desire of consumers for greater transparency regarding broker compensation, NWMLS eliminated these rules in October, 2019. (*Id.* at ¶ 4.) DOJ's account of these rule changes is incomplete and inaccurate.

A. NWMLS's 2019 Rules Revisions Increased Transparency and Eliminated the Potential for "Steering."

Eliminating the mandatory compensation rule meant that sellers, through their listing brokers, were no longer required to offer compensation to the buyer's broker. If a listing did not contain an offer of compensation, the revised rule allowed the buyer and the buyer's broker, as part of the buyer's offer, to negotiate for compensation for the buyer's broker. (*Id.*) The change enabled greater flexibility and choice for sellers when listing a property and gave buyers and buyers' brokers a vehicle for negotiating for compensation when making an offer to purchase. (*Id.*)

Eliminating the restriction on publishing offers of compensation meant that offers of compensation to buyers' brokers were widely available to the public on NWMLS's member firms' and brokers' websites and also available through listings provided to consumers by brokers via NWMLS's systems. (*Id.*) The SOI lacks any reference to this NWMLS rule change.

While DOJ claims to be concerned about brokers’ “steering” of buyers to higher commission listings, it ignores entirely NWMLS’s rule change that made information about sellers’ offers readily available to consumers. DOJ invokes consumers’ access to real estate information when it serves DOJ’s rhetorical purposes (*see, e.g.*, Dkt. 290 at 3-4 (noting the popularity of real estate sites like Redfin and Zillow)), and yet it ignores NWMLS’s concrete actions putting compensation information directly into the hands of consumers.

Notably, DOJ, at one time, agreed with the importance of transparency for consumers and endorsed NWMLS’s rule changes. In a November 2020 proposed settlement with the National Association of Realtors, DOJ required “MLSs to repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying compensation offered to other MLS Participants.” *United States v. Nat’l Ass’n of Realtors*, No. 20-cv-3356 (D.D.C. 2020), Dkt. 2-1 ([Proposed] Final Judgment).¹ DOJ’s apparent change of heart in its SOI in this case is striking.

B. The 2022 NWMLS Rule Revisions “De-Coupled” Broker Compensation and Created Additional Opportunities for Negotiation.

Following the 2019 changes, NWMLS continued analyzing potential changes to its rules and forms regarding broker compensation. In October of 2022, NWMLS revised its rules and forms to “de-couple” broker compensation, change the seller’s unilateral offer of compensation

¹ DOJ’s press release similarly supported such transparency. *See* Press Release, DOJ, Justice Department Files Antitrust Case and Simultaneous Settlement Requiring National Association of Realtors to Repeal and Modify Certain Anticompetitive Rules (Nov. 19, 2020), <https://www.justice.gov/opa/pr/justice-department-files-antitrust-case-and-simultaneous-settlement-requiring-national> (“Buying a home is one of life’s biggest and most important financial decisions,’ said Assistant Attorney General Makan Delrahim of the Justice Department’s Antitrust Division. ‘Home buyers and sellers should be aware of all the broker fees they are paying. Today’s settlement prevents traditional brokers from impeding competition – including by internet-based methods of home buying and selling – by providing greater transparency to consumers about broker fees. This will increase price competition among brokers and lead to better quality of services for American home buyers and sellers.’”).

to a bilateral agreement between the parties, ensure transparency of compensation for buyers, and create additional opportunities for both sellers and buyers to negotiate broker compensation:

- The listing agreement clearly separates the seller’s compensation of the listing firm from any compensation the seller might choose to offer to the buyer’s broker. (Haag, Dec. at ¶ 5.)
- Any compensation offered to the buyer’s broker is determined and offered solely by the seller – rather than “commission sharing” between the brokerage firms. Any offer of compensation from the seller to a buyer’s broker was converted by the revisions from a unilateral offer, accepted by performance by the buyer’s broker, into a bilateral contract. (*Id.*)
- Buyer broker compensation is paid as offered in the listing if accepted by the *buyer* on behalf of the broker in the purchase and sale agreement, or as modified by the parties in the purchase and sale agreement. (*Id.*)
- Buyer broker compensation is a term prominently displayed on the first page of the purchase and sale agreement, to be negotiated by the buyer and seller like any other contract term such as the purchase price. NWMLS also prepared an addendum to the purchase and sale agreement giving the parties various options for negotiating any buyer broker compensation. (*Id.*)
- NWMLS revised its buyer representation agreement to include alternatives for buyers and their brokers for compensation that depend on the terms of the listing. (*Id.*)

DOJ passingly describes these 2022 rule changes, relegating the discussion to a footnote, and questions the authenticity of NWMLS’s stated objectives for the changes. (*See* Dkt. 290 at

16 (labeling NWMLS’s stated objective of ensuring understanding, discussion, and negotiation of compensation as merely a “purported” purpose of the changes).) The suggestion that NWMLS, which invests substantial resources in development, implementation, training, and enforcement of its rules and forms (Haag. Dec. at ¶ 3), engaged in performative policy change is unfounded and incorrect.

C. NWMLS Supported Changes in Washington Law That Complement Its Rule and Form Revisions.

NWMLS supported amendment of Washington’s real estate agency law (the “Agency Law”) effective January 1, 2024, to require brokers to enter written contracts to represent buyers, in addition to sellers. (*Id.* at ¶ 6.) All such contracts must comprehensively address the brokers’ compensation and the scope of representation. (*Id.*) The amended Agency Law also requires written disclosure of any terms of compensation offered by a party or a real estate firm to a real estate firm representing another party, to further ensure transparency. (*Id.*)

NWMLS’s 2019 changes and the 2022 changes, together with the revised Agency Law, have created a new market landscape where buyers agree how to compensate their own broker from the beginning of their relationship, and buyers can then negotiate with the seller to help cover that cost as part of the purchase. (*Id.* at ¶ 7.) Likewise, sellers decide how much to compensate their broker and also decide how much, if any, compensation to offer the buyer to pay the buyer’s broker. (*Id.*) In addition, all of NWMLS’s listing agreements and buyer representation agreement forms make clear that broker compensation is negotiable and the seller is not required to offer compensation to the buyer’s broker. (*Id.*)

D. DOJ Ignores the Consumer-Empowering Effect of the Revised Rules and Mischaracterizes NWMLS's Messaging.

DOJ's myopia allows for no criteria other than "decreased buyer broker commissions" to evaluate competition and innovation.² Transparency and the expansion of informed consumer choice are the guiding principles of NWMLS's revised rules. Providing consumers with more information in turn promotes competition and lowers prices.

In revising the rules, NWMLS created a more open and free market for consumers of brokerage services. NWMLS made no assumptions about how the revised rules might affect pricing, only that more transparency and better-informed consumer decision making was better for the market. (*Id.* at ¶ 8.)³ NWMLS's revised rules broaden, not limit, consumer choice and therefore do not promote any specific brokerage service model, compensation structure, or compensation amount. They give sellers and buyers, as well as brokers, information and choices to allow the market to operate unimpeded by MLS rules. (*Id.*)

DOJ also cynically mischaracterizes NWMLS's description of its rule changes to eliminate mandatory compensation and permit publication of offers of compensation. In an eight-minute video describing the 2019 rule changes, NWMLS reassured members that their business providing brokerage services will continue as usual. DOJ takes this comment out of context, without acknowledging the balance of the video explaining the purpose and significance of the rule changes for brokers and consumers alike, including greater flexibility, transparency, and innovation. (*Id.* at ¶ 14.) NWMLS also describes in the video associated changes to several

² Even if DOJ were correct that decreased buyer broker compensation is the one true benchmark for evaluating whether NWMLS's rule changes have increased competition, for the reasons explained in Section III below, DOJ marshals insufficient and incomplete data to support its claim.

³ In fact, NWMLS does not analyze levels of compensation offered by its members, much less the amounts of compensation actually received by buyers' brokers after negotiations between parties. (Haag Dec. at ¶ 8.)

NWMLS forms, including NWMLS's buyer representation agreement forms, which NWMLS predicts will be used more often. DOJ likewise ignores NWMLS's 2022 training materials that emphasize discussion and negotiation of compensation, various compensation options for brokers and consumers, and enhanced transparency and flexibility. (*Id.*) To the contrary, DOJ positions its discussion of the 2019 training video alongside its discussion of the 2022 changes (*see* Dkt. 290 at 17), creating the inference that NWMLS expected de-coupled compensation to have no benefit for consumers. Those changes, of course, were made *after* the 2019 training video.

DOJ ignores that a de-coupled compensation system, in which buyers agree at the outset of the brokerage relationship how their broker will be compensated, eliminates the concerns for steering and buyers' ability to reduce buyer broker commissions that animate its SOI. In fact, DOJ's preferred system, in which there is literally no opportunity for compensation transparency in the MLS, invites brokers to make deals in secret, creating opportunities for deceptive practices, discrimination, and unfair housing.

Depriving buyers of information also risks harming buyers who are already financially disadvantaged. This especially includes some first-time homebuyers and veteran buyers using VA financing, which precludes the use of loan proceeds to pay brokerage fees. A buyer whose loan proceeds may not be used for brokerage fees and who lacks independent resources to pay their broker therefore relies heavily on offers of buyer broker compensation from sellers. DOJ's preferred system would harm such buyers by requiring them to enter the home buying process lacking critical information, or encourage them to engage in the biggest financial event of their lives without a broker who is tasked with representing the buyer's interests.

III. DOJ's Data Analysis Is Vague and Flawed.

DOJ claims that NWMLS's "[r]ecent experience confirms" that the proposed settlement will not limit steering or reduce buyer broker compensation. (Dkt. 290 at 16.) DOJ derives "confirmation" from the Declaration of Erik A. Schmalbach ("Schmalbach Dec."), a data scientist employed by DOJ. (Schmalbach Dec. at ¶ 1.)⁴ Schmalbach analyzed data of an undisclosed national real estate firm operating in NWMLS's service area and concludes that, after the rule revisions, buyer broker compensation rates did not decrease faster within NWMLS's service area than they did outside the area. DOJ urges a conclusion that the rule revisions were ineffective because buyer broker compensation did not decrease at a faster rate, but provides no support for such conclusion. DOJ assumes that the compensation rates Schmalbach observed are not in line with the market, but DOJ fails to provide any evidence for this. Further, for reasons never stated, Schmalbach ignores plentiful data that was available to him. Compounding that omission, critical aspects of Schmalbach's methodology are undefined and unexplained.

A. Critical Terms Are Undefined, and Modes of Analysis Are Unexplained.

Schmalbach's self-described purpose is to analyze how buyer brokerage compensation was impacted by the revised rules, but fails to define essential terms used throughout his analysis, starting with his term "buyer-broker prices" itself. Does this refer to the amount paid to the buyer broker for its services? Or does it refer to the amount actually retained by the buyer broker after rebates paid to the buyer or other concessions? Or is it the amount offered by the

⁴ DOJ also cites media stories from Inman and the Consumer Federation of America in support of its data analysis. (See Dkt. 290 at 17 n.10.) NWMLS has never provided data to either of those sources (or any other media outlet for that matter), so any purported conclusion concerning compensation rates based on those sources is unreliable and invalid. (Haag Dec. at ¶ 13.)

seller or listing agent? It appears perhaps to be the second (*see, e.g., id.* at ¶ 2 (referring to “prices paid for buyer brokerage”)), but Schmalbach is hardly clear even though this is the cornerstone of his analysis.

Further, because Schmalbach never addresses the difference between compensation offered, compensation paid, and compensation received, he does not attempt to account for or even recognize how the difference between the three could impact his analysis. For instance, what if data showed a material difference between compensation offered and compensation paid before and after the rule revisions? The difference could subvert DOJ’s conclusion about the impact of the rule revisions.

Schmalbach’s analysis excludes certain transactions for no reason. First, he excludes transactions in which the brokerage firm acted as a dual agent, i.e., where the firm represented both the buyer and the seller. (*Id.* at ¶ 8(b).) Schmalbach says that this “limited the set of transactions to those in which the brokerage firm acted only as the buyer broker, which is what is relevant for assessing buyer broker commissions.” (*Id.*) That statement provides no explanation for the exclusion. No one would dispute that acting as a buyer broker is relevant for assessing buyer broker compensation. But there is no coherent reason for excluding transactions in which the firm also acted as a listing broker. (This exclusion broadly applies to transactions in which the *firm* represented both sides. In other words, Schmalbach excludes transactions in which different brokers represented the buyer and seller solely because the two brokers were both associated with the firm.) Schmalbach does not say that some aspect of the data made it impossible to distinguish buyer broker compensation and listing broker compensation in a dual

agency transaction. Unlike some of his other exclusions, Schmalbach does not offer explanation of the effect of this exclusion on his analysis or conclusions.

Second, Schmalbach excludes “outliers involving extreme values of buyer-broker commission rates or closing prices.” (*Id.* at ¶ 8(c).) Schmalbach never explains what constitutes an “extreme value.” Further, even though this “extreme value” exclusion also pertains to “closing prices” (which is itself undefined), Schmalbach sheds no light on how an “extreme value” closing price impacts the validity of the analysis of buyer broker compensation. The “outliers” could indeed be relevant to the overall analysis insofar as they may reflect negotiated buyer broker compensation rates. But only DOJ’s expert knows for sure.

B. DOJ’s Entire Analysis Is Based on a Single Anonymous Source.

More than 2,200 brokerage firms operate in the NWMLS service area. (Haag Dec. at ¶ 2.) And yet, DOJ’s assessment of the rule revisions’ impact on buyer broker compensation relies entirely on Schmalbach’s analysis of a *single unidentified firm*. This is by DOJ’s choice – DOJ had practically unfettered access to the data, resources, and information from NWMLS. Specifically, DOJ had the benefit of full responses from NWMLS to two different Civil Investigative Demands (“CIDs”) in 2019 and 2023, as well as its voluntary production of documents in response to an informal request from DOJ in 2022, consistent with NWMLS’s on-going offer to cooperate. (*Id.* at ¶¶ 9-11.) In connection with each of these productions, NWMLS engaged in robust and lengthy discussions with DOJ’s attorneys and economists. At all times, NWMLS cooperated with DOJ and provided all non-privileged information and documents requested by DOJ. (*Id.*)

But, DOJ chose to use none of this information in connection with its SOI. Moreover, NWMLS understands that DOJ served CIDs to other real estate firms in NWMLS's service area, but chose not to use information from these additional resources. (*See id.* at ¶ 11.) DOJ elected instead to have Schmalbach base his analysis on a single undisclosed firm and thus only a small fraction of the transactions occurring in NWMLS. Assuming that the term "buyer broker price" in the SOI means amount of compensation paid, as opposed to offered or received, the identity of the firm matters immensely. There are significant differences between firms that operate in NWMLS (*id.* at ¶ 12), and those differences impact the data one could expect to see regarding buyer broker compensation. Without knowing which of the following factors are present, no one can lodge a truly informed critique of DOJ's data analysis.

- Broker affiliation: Whether brokers are employees or independent contractors. The former can be tightly controlled by firmwide policy; the latter cannot.
- Central national ownership vs. franchise: Centrally owned national firms can establish nationwide policies and uniform pricing modes, whereas franchisors are extremely limited in the degree of control they exercise over franchisees.
- Differing compensation models: Firms offer consumers a variety of compensation models, including rebates (where a buyer is rebated back a portion of the firm's compensation), flat fees (in lieu of a percentage-of-sale compensation formula), a la carte services (where a consumer can choose from a menu of brokerage services with an associated cost structure), or a hybrid of any of the above.

- Differing pricing models: Some firms negotiate prices for buyer brokerage services with buyers, while others generally accept the compensation offered by the seller or listing firm.

Without knowing any of these attributes applicable to DOJ's data source, analysis of Schmalbach's report is impossible.

C. DOJ's Data Analysis Covers Too Short a Period of Time.

Despite having data from the anonymous real estate firm dating back to January of 2016, Schmalbach uses only a fraction of that data for his analysis of "difference-in-differences" of buyer broker compensation. The period subject to Schmalbach's analysis begins on January 1, 2020, and ends sometime in late 2023.⁵ Schmalbach compared buyer broker compensation between January 1, 2020, and October 1, 2022 (which he defines as "before") to buyer broker compensation in transactions on or after October 1, 2022 (which he defines as "after"). Schmalbach disregarded four years of data between January of 2016, and January of 2020, without explanation.

Additionally, Schmalbach's "after" sample is too small to inform any reliable analysis. As described above, NWMLS's forms and rules were revised in October of 2022, to de-couple buyer broker compensation from listing-broker compensation. Schmalbach's definition of "before" and "after" treats that date as a clear line between the two sets of rules and practices. It is not. Rather, many of the transactions that closed in the 30 to 90 days after the changes became

⁵ The cutoff date of data analyzed by DOJ is unclear. Schmalbach states that he received an initial data set covering transactions between January 2016 and November 2023. (Schmalbach Dec. at ¶ 4.) He then reports that "someone" (he does not say who) told him that a different data set, which DOJ received on December 28, 2023, is "analogous" to the initial data set and that it "cover[s] a longer time period." (*Id.*) He does not state what that longer time period is. The date range is unknown.

effective on October 3, 2022, would have been based on contracts entered prior to October 3, 2022, meaning the transactions were governed by the “old” rules and forms. It would have taken at least two months for a significant volume of transactions under the new forms to close, meaning that there is less than a year of actual comparison data in the set of transactions Schmalbach refers to as “after.” Given the dynamic nature of NWMLS, this is far too small a period to yield worthwhile analysis. This timeframe also coincides with a period of low transaction volume (Haag Dec. at ¶ 12), rendering the data analysis even less relevant. Moreover, the notion that the residential real estate brokerage industry “turns on a dime” and reacts to new rules and forms immediately is almost silly.

IV. Conclusion

NWMLS’s rules and forms revisions deliver a platform that provides consumers with transparency, choice, and the opportunity to negotiate. NWMLS’s rules and forms do not favor any particular business or pricing model and accordingly support brokerage firm innovation. Unfortunately, DOJ demands immediate impact from NWMLS’ changes, and then using limited data from a single brokerage firm in a very short time period, DOJ declares NWMLS’s changes to be ineffective. Evolution takes time. As the Consumer Federation of America observed regarding the recent settlement by the National Association of Realtors of claims similar to this case, the impact of significant rule changes takes time, “perhaps several years,” to be processed, but over time, innovation of compensation models and a more transparent marketplace will greatly benefit consumers. *See* Press Release, Consumer Federation of America, CFA Comment on the Settlement of Major Lawsuits by the National Association of Realtors (Mar. 19, 2024), https://consumerfed.org/press_release/cfa-comment-on-the-settlement-of-major-lawsuits-by-the-

[national-association-of-realtors/](#). One of the plaintiffs' lawyers involved in that settlement agrees that change will not be immediate, stating this week that "it's going to take some time for the market to shift after the settlement and that's to be expected." Andrea Brambila, *Moehrl attorney: Market shift after NAR settlement 'will take time,'* Inman (Mar. 25, 2024), <https://www.inman.com/2024/03/25/moehrl-attorney-market-shift-after-nar-settlement-will-take-time/>.

NWMLS's changes are significant advancements for a transparent and consumer-friendly marketplace. As a dynamic multiple listing service, NWMLS has, and will continue, to take every opportunity to enhance the quality of real estate brokerage services in the Northwest.

Respectfully submitted,

NORTHWEST MULTIPLE LISTING SERVICE,

By its Attorneys,

/s/ Robert Clark Corrente
Robert Clark Corrente (BBO# 544593)
WHELAN CORRENTE & FLANDERS LLP
100 Westminster Street, Suite 710
Providence, RI 02903
Tel. (401) 270-4500
Fax (401) 270-3760
rcorrente@whelancorrente.com

/s/ Christopher R. Osborn
Christopher R. Osborn, Esq. (*Pro Hac Vice Pending*)
Andrew L. Mathews, Esq. (*Pro Hac Vice Pending*)
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101
Tel: (206) 624-0900
christopher.osborn@stoel.com
andrew.mathews@stoel.com

Dated: March 27, 2024

00101419.DOCX

**DECLARATION OF
JUSTIN D. HAAG
IN SUPPORT OF
*AMICUS CURIAE***

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JENNIFER NOSALECK, RANDY
HIRSCHORN and TRACEY HIRSCHORN,
individually and on behalf of all others
similarly situated,

Plaintiff,

v.

MLS PROPERTY INFORMATION
NETWORK, INC., et al.

Defendants.

No. 1:20-cv-12244-PBS

CLASS ACTION

**DECLARATION OF
JUSTIN D. HAAG**

I, JUSTIN D. HAAG, declare as follows:

1. I am the President and CEO of the Northwest Multiple Listing Service (“NWMLS”). Prior to serving as President and CEO, I served as the General Counsel for NWMLS for many years. As the President and CEO, and in my prior role as General Counsel, I am familiar with NWMLS’s rules and forms, its membership, and the brokerage industry served by NWMLS.

2. NWMLS is a not-for-profit Washington corporation owned by its more than 2,200 member real estate brokerage firms. NWMLS is an independent multiple listing service and is not affiliated with the National Association of Realtors or any state or local association of Realtors. Some of the real estate brokerage firms that are members of NWMLS are also members of the Realtor organization; some are not.

3. NWMLS provides multiple listing services to approximately 33,000 real estate brokers (in Washington, all real estate licensees are referred to as “brokers”) and appraisers across the majority of the state of Washington. In addition to traditional multiple listing services, NWMLS creates and publishes transaction forms used to list and sell properties. Although use of NWMLS forms is not required, they are used in the vast majority of transactions completed in the state. NWMLS invests substantial resources in the development, implementation, training, and enforcement of its rules and forms.

4. NWMLS began analyzing potential changes to its rules and forms related to broker compensation in 2018. In June of 2019, NWMLS announced two changes to its rules, which became effective in October of 2019:

a. The first change enabled real estate firms (in Washington, real estate brokerages are referred to as “firms”) and brokers to publish any offer of compensation to the buyer’s broker on the firms’ and brokers’ public internet web sites. That information was also available to the public through listings provided to consumers by brokers via NWMLS’s systems. Making this information readily available to consumers provided transparency with regard to buyers’ broker compensation and provided consumers with additional information at the outset of the transaction. Clear access to all the relevant information about a real estate transaction assists consumers in making informed decisions about every component of listing, selling, and purchasing real estate.

b. The second change eliminated the requirement that a listing include an offer of compensation to the buyer’s broker. If the listing did not contain an offer of compensation, the revised rule allowed the buyer and the buyer’s broker the opportunity, as a part of the buyer’s offer, to negotiate for compensation for the buyer’s broker. This change allowed for greater flexibility

and choice for sellers when listing property, while affording buyers and buyers' brokers a vehicle for negotiating for compensation when making an offer to purchase.

5. NWMLS continued analyzing potential changes to its rules and forms related to broker compensation. In June of 2022, NWMLS announced several additional changes to its rules and significant changes to its forms, which became effective in October of 2022:

a. Broker compensation was "de-coupled," and NWMLS rules and forms eliminated the notion of "commission sharing" between the listing broker and the buyer's broker. Any offer of compensation to the buyer's broker is determined by the seller and offered directly from the seller and not the listing broker. NWMLS's listing agreement clearly separated the seller's compensation of the listing broker from compensation the seller might choose to offer to the buyer's broker. The listing agreement also included various compensation options a seller might consider, including options for adjusting compensation if the buyer is unrepresented or if the listing broker serves as a dual agent.

b. The offer of compensation from the seller to a buyer's broker was converted from a unilateral offer, accepted by the performance by the buyer's broker, into a bilateral contract. The compensation the seller offers to the buyer's broker, if any, must be prominently stated on the first page of the NWMLS form purchase and sale agreement, with an opportunity for the compensation to be accepted by the buyer on behalf of the buyer's broker or negotiated by the parties in an addendum to the agreement, just like any other contract term. An addendum to the purchase and sale agreement published by NWMLS was revised to include various options for the negotiation of buyer broker compensation, including options for credits to the buyer, a reduction in compensation paid by the seller, and other options for the parties.

c. The NWMLS buyer representation agreement was revised to include alternatives for buyers and their broker for compensation that depend on the terms of the listing. In addition, brokerage firms could create their own form of listing and buyer agreements to differentiate their services and compensation models.

6. In 2023, NWMLS supported the legislature's revisions to Washington's real estate brokerage "Agency Law" that require brokers to enter into a written contract to represent either a buyer or a seller. All agreements must comprehensively address the broker's compensation and the scope of representation. The changes to the law also require the written disclosure of any terms of compensation offered by a party or a real estate firm to a real estate firm representing another party (which was already accommodated by NWMLS's rules and forms changes). The revisions to the law were effective January 1, 2024. Similar state law changes are progressing in Oregon and being contemplated by other states.

7. With the revised Agency Law and NWMLS's system of rules and forms, buyers agree on the compensation for their own brokers from the beginning of their relationship in a written agreement, and buyers can then negotiate with the seller to help cover that cost as part of the purchase. For their part, sellers negotiate how much to compensate the listing firm and also decide whether to offer compensation to the buyer's broker and the amount of any such offer. Both the NWMLS listing and buyer representation forms make clear that there are no standard compensation rates, compensation is fully negotiable and not set by law, and that the seller is not required to offer compensation to the buyer's broker.

8. NWMLS's objective in making these changes was to enhance consumer and broker choice, provide greater flexibility for consumers and brokers when selling and purchasing

property, ensure complete transparency with regard to buyer broker compensation, and promote innovation and competition in the marketplace. NWMLS chose not to limit either consumer or broker choice by prohibiting compensation options, making broker compensation less transparent, or dictating compensation models or rates. By creating an open and transparent process through the multiple listing service with opportunities for consumers and brokers to negotiate, along with enhancing consumer and broker choice, the marketplace controls compensation in each transaction. NWMLS has no interest in the compensation rates paid to brokers; its only interest is in a fair and open marketplace. NWMLS does not analyze compensation offered by sellers or amounts of compensation actually received by buyers' brokers after negotiations between the parties.

9. In August 2019, after announcing its 2019 rules changes, NWMLS received a Civil Investigative Demand ("CID") from the Department of Justice ("DOJ"). NWMLS cooperated with DOJ's request for information, produced documents, and engaged in several lengthy conversations with multiple DOJ attorneys. After responding to the CID, NWMLS continued to cooperate with DOJ's verbal and written inquiries and provided additional information as requested over the next year.

10. In October 2022, after announcing its 2022 rules and forms changes, NWMLS received an informal request from DOJ to provide information about those changes. NWMLS again cooperated, provided information to DOJ, produced documents, and engaged in several lengthy conversations with multiple DOJ attorneys and DOJ economists to explain the changes.

11. In April 2023, DOJ served a second CID on NWMLS requesting, among other information, all NWMLS listing data beginning January 1, 2016. NWMLS again cooperated with

DOJ's requests, provided additional information, produced documents and listing data, and engaged in several additional lengthy conversations with DOJ attorneys and economists. At all times, NWMLS cooperated with DOJ and provided all non-privileged information and documents it requested. NWMLS also expressly encouraged DOJ to request any additional or updated information and listing data it wanted from NWMLS. If asked, NWMLS would have promptly cooperated, as NWMLS had over the preceding four years. NWMLS understands that DOJ also served CIDs to real estate firms in NWMLS's service area.

12. Despite having access to NWMLS information and listing data and ready access to NWMLS staff and attorneys, DOJ in its statement of interest relied on data from a single real estate firm in NWMLS's service area. NWMLS has more than 2,200 member real estate firms. Those firms range in size from one broker to nearly 1,800 brokers. Those diverse firms have business models, policies, compensation rates, hiring practices, training programs, etc. that differ, sometimes radically. Some firms require that brokers pay a monthly desk fee, some require brokers to pay "commission splits," some charge brokers a transaction fee, some brokers are compensated as employees of a firm, and some firms use a combination of all those various methods. Many firms provide "full service" brokerage to clients, others offer "limited service" or "discount" brokerage services, some only provide referral services, and some use a combination of service models. There are firms that are franchisees that must follow franchisor policies, there are franchisee firms with local owners, there are franchisee firms with corporate ownership, there are independent local brokerage firms, there are large national firms, and there are many other types of member real estate firms. A small sample size of data from one single real estate firm is not reflective of the diverse NWMLS marketplace. Moreover, the period of time following

implementation of NWMLS's 2022 rule changes coincides with a period of low transaction volume.

13. In addition, despite having access to NWMLS's information and listing data, DOJ cited information from an article by real estate media company "Inman" and a report by the Consumer Federation of America ("CFA") to reach conclusions about NWMLS's marketplace. NWMLS has never provided its listing data to Inman or the CFA (or any other media outlet). Any "analysis" of the limited data reviewed by these entities would only include the amount offered by the seller and not the amount actually paid to the buyer brokerage firm, thus ignoring the consequences of the negotiation process now integral to NWMLS's system of rules and forms. Simply put, the amount offered by the seller is not necessarily the amount paid to the buyer brokerage firm.

14. DOJ refers to a 2019 NWMLS training video to argue that "NWMLS itself expected 'business as usual' after that change." DOJ singled out one comment, taken out of context, from the eight-minute video. DOJ did not include the context including comments related to the reasons for the changes (i.e., greater flexibility for sellers when listing property and increased transparency for buyers), the fact that NWMLS created a form for buyers to negotiate for compensation if none is offered, or excerpts from the written materials published by NWMLS. DOJ also ignored the 2022 training materials published by NWMLS that emphasize discussion and negotiation of compensation, various compensation options for brokers and consumers, and enhanced transparency and flexibility. The 2022 training materials provide that "these revisions further enhance transparency regarding broker compensation, create additional opportunities for consumers and brokers to discuss and negotiate compensation, provide greater flexibility for

consumers and brokers when listing and purchasing real estate, and promote innovation and competition among member brokers. These revisions are critical to the evolution of the real estate brokerage industry and will help NWMLS members better serve their clients for years to come.”

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 26th day of March, 2024, at Kirkland, Washington


Justin D. Haag