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Date: September 13, 2011

CT- 2011-003

Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

CT-2011-003

OTTAWA, ONT.

31

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER OF certain rules, policies and agreements relating to the residential multiple listing service of the Toronto Real Estate Board.

B E T W E E N :

COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

**AFFIDAVIT OF DONALD JOHN RICHARDSON
SWORN THE 13TH DAY OF SEPTEMBER, 2011**

I, Donald John Richardson, of the Town of Newmarket in the Province of Ontario,
MAKE OATH AND SAY AS FOLLOWS:

1. I am the Chief Executive Officer (CEO) of The Toronto Real Estate Board (TREB) and, as such, have direct knowledge of the matters to which I hereafter depose.
2. I have held the position of CEO of TREB since September 5, 2000. Prior to that time I acted as the CEO of the Ontario Real Estate Association for some six years.
3. For approximately six years, during the period from on or about 2001 to on or about mid-2007, TREB retained the firm Gowling Lafleur Henderson LLP (Gowlings) to act as TREB's general counsel.

4. On May 25, 2011, the Commissioner of Competition (**Commissioner**) filed a Notice of Application with the Competition Tribunal (**Tribunal**) alleging that TREB has been and is engaged in anti-competitive conduct in breach of section 79 of the *Competition Act* (the **proceedings**). An Amended Notice of Application was filed by the Commissioner on July 7, 2011. The proceedings are being vigorously defended by TREB. Now shown to me and marked as Exhibits "A" and "B" respectively is a copy of the Commissioner's Amended Notice of Application and a copy of TREB's Response to the Amended Notice of Application, filed August 19, 2011.

5. On September 1, 2011 TREB was served with a Request for Leave to Intervene on behalf of Realtysellers Real Estate Inc. (**Realtysellers**). Mark Nicholson of the Gowlings firm is noted on the Request for Leave to Intervene as counsel for Realtysellers. Now shown to me and marked as Exhibit "C" is a copy of Realtysellers Request For Leave to Intervene in the proceedings.

6. In its Request for Leave to Intervene, Realtysellers states that it intends to support generally the position of the Commissioner, a position adverse to TREB.

7. At issue in the proceedings are, among other matters, the effect and intent of various of TREB's rules, policies and by-laws, TREB's previous dealings with businesses associated with Mr. Lawrence Dale and Mr. Fraser Beach (alleged to support allegations of anti-competitive conduct), TREB's intellectual property rights in the TREB MLS® and TREB's position with respect to the operation of "virtual office websites".

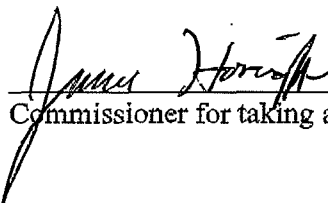
8. During the period from on or about 2001 to on or about mid-2007, TREB disclosed commercially sensitive and confidential information to Gowlings. That information included information necessary for Gowlings to advise on matters directly relevant to the proceedings, including:
 - a) TREB's dealing with the Competition Bureau;
 - b) TREB's rules and policies with respect to the operation of the TREB MLS®, including issues relating to enforcement;
 - c) the protection of TREB's intellectual property rights;
 - d) internet enabled search services, including virtual office websites; and
 - e) proceedings commenced by or against Mr. Lawrence Dale, Mr. Fraser Beach and various of the business enterprises engaged in by those individuals.

9. At no time has anyone from Gowlings requested a waiver from TREB with respect to the


conflict of interest arising as a result of Gowlings representation of Realtysellers.

10. Further, at no time has anyone from TREB consented to Gowlings acting for Realtysellers.
11. Affleck Greene McMurtry LLP (AGM) has been retained by TREB to represent it in the proceedings. On 9 September, 2011 I instructed AGM to write to Gowlings and put them on notice that TREB considered them to be in a conflict of interest and breach of their duty of loyalty to TREB by reason of their representation of Realtysellers. Now shown to me and marked as Exhibit "D" is a copy of AGM's letter to Gowlings dated September 9, 2011. I am informed by Donald Affleck, partner of AGM, and verily believe, that as at the time of swearing this affidavit, Gowlings has provided no substantive response to AGM's September 9, 2011 letter.
12. I make this affidavit in support of TREB's motion to remove Mark Nicholson and the firm of Gowlings as solicitors of record for Realtysellers and for no other or improper purpose.

SWORN BEFORE ME
at the City of Ottawa, Province of Ontario
on September 13, 2011.




Commissioner for taking affidavits



Donald Richardson

This Affidavit and Exhibits thereto is an electronic version of a paper document that has been executed by the Affiant, Donald Richardson. The signed document and Exhibits is available in paper copy and will be made available if requested.

This is Exhibit A referred to in the
affidavit of DONALD J. RICHARDSON
sworn before me, this 13th
day of SEPTEMBER, 2011

A COMMISSIONER FOR TAKING AFFIDAVITS

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT Date: July 7, 2011 CT- 2011-003 Chantal Fortin for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 10

CT-2011-003

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER OF certain rules, policies and agreements relating to the residential multiple listing service of the Toronto Real Estate Board.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

AMENDED NOTICE OF APPLICATION

TAKE NOTICE that the Applicant will make an application to the Competition Tribunal (the "Tribunal") pursuant to section 79 of the *Competition Act* (the "Act") for an order pursuant to subsections 79(1) and (2) of the Act, prohibiting the Respondent from enacting, interpreting and enforcing rules, policies, and agreements that exclude, prevent or impede the entry of innovative business models and impose restrictions on real estate brokers who wish to use the Internet to

more efficiently serve home buyers and home sellers. The particulars of the Order sought by the Applicant are set out in paragraph 66.

AND TAKE NOTICE that the timing and place of hearing of this matter shall be fixed in accordance with the practice of the Tribunal;

AND TAKE NOTICE that the Applicant has attached hereto as Schedule "A" a concise statement of the economic theory of the case.

AND FURTHER TAKE NOTICE that the Applicant will rely on the following Statement of Grounds and Material Facts in support of this Application, and such further or other material as counsel may advise and the Tribunal may permit.

STATEMENT OF GROUNDS AND MATERIAL FACTS

PART I: GROUNDS

1. The Toronto Real Estate Board ("TREB") is a trade organization whose membership is comprised of over 30,000 real estate brokers and salespersons (together, "brokers") principally in the Greater Toronto Area (the "GTA"). TREB owns and operates an electronic database known as the TREB Multiple Listing Service system (the "TREB MLS" or "TREB MLS system"), which contains current and historical information about the purchase and sale of residential real estate in the GTA.
2. The TREB MLS system is pervasively used by brokers and is a key input into the supply of residential real estate brokerage services in the GTA. Only members of TREB have direct access to the TREB MLS system, which contains a full inventory of active and historical listings.
3. The Commissioner of Competition (the "Commissioner") submits that TREB and its members substantially or completely control the market for the supply of residential real estate brokerage services in the GTA. TREB has used and is using its control of the TREB MLS system to enact and interpret rules, policies and agreements, including, but not limited to TREB's Proposed Rules (as described and defined in paragraph 33), with exclusionary and restrictive effects (the "TREB MLS Restrictions", described in detail below) on brokers' access to and use of the TREB MLS system. The TREB MLS Restrictions are a practice of anti-competitive acts, the purpose and effect of which is to discipline and exclude innovative brokers who would otherwise compete with TREB's member brokers who use traditional methods. If a broker does not abide by the TREB MLS Restrictions, TREB can terminate the broker's access to the TREB MLS system (and has done so).
4. As TREB has known for years, the TREB MLS Restrictions restrict and prevent innovation in the supply of residential real estate brokerage services, particularly services offered over the Internet. For example, TREB restricts and prevents innovative brokers from using a secure, password-protected "virtual office website" ("VOW") to provide real estate brokerage services to their customers over the Internet. If TREB's member brokers were able to offer VOWs with online search capabilities, their customers could conduct their own searches for, and

review information relevant to, the purchase and sale of homes in the GTA, without the personal assistance or direct intervention of a broker. Currently, brokers and their staff obtain such information from the TREB MLS system themselves and provide it to their customers by hand, email or fax.

5. The TREB MLS Restrictions perpetuate the traditional "bricks and mortar" business model used by a majority of its member brokers ("traditional brokers"). As a result of the TREB MLS Restrictions, brokers are prevented from using the information in the TREB MLS system to create and support innovative business models and service offerings, such as VOWs, which would improve the efficiency and productivity of their businesses. Such innovations and the resulting cost savings would enable those brokers to compete more effectively against traditional brokers. At the same time, TREB deprives all consumers of the choice to receive some services from their brokers conveniently, at a time of their choosing, often at home, via the Internet.

6. Real estate boards and associations in other Canadian jurisdictions, such as Nova Scotia, allow their members access to and use of their MLS information to provide Internet-based services. In the United States, such access to and use of MLS information is commonplace and many U.S. brokers compete by providing innovative services using the Internet. As a result, such brokers have lower operating costs and are able to offer markedly reduced commission rates or significant rebates to their customers, a practice denied to would-be innovative brokers in the GTA.

7. In late June, 2011, after the Commissioner commenced this Application, TREB provided its members with proposed policy and rule amendments that TREB claims will allow its member brokers to operate VOWs. In fact, if TREB's Proposed Rules (as described and defined in paragraph 33) are enacted, they will continue to prevent TREB member brokers from operating a VOW as described in this Application; as such, TREB will continue to thwart the development of new, innovative, and efficient models of providing real estate brokerage services using the Internet. TREB's Proposed Rules will discriminate against brokers seeking to innovate, and will constitute a further anti-competitive act by TREB.

8. The TREB MLS Restrictions have lessened and prevented, and will continue to lessen and prevent, competition substantially in the market for the supply of residential real estate

brokerage services in the GTA. But for the TREB MLS Restrictions, there would be substantially more competition in the GTA, including more innovation, enhanced quality of service and increased price competition, through such means as commission rebates.

9. As a result of the TREB MLS Restrictions, consumers in the GTA have no access to VOWs – or the lower prices that typically go with them. If such competition existed, the Commissioner believes that it would result in significant savings to GTA consumers.

10. The Commissioner therefore seeks an Order prohibiting TREB from directly or indirectly enacting, interpreting or enforcing restrictions, including the TREB MLS Restrictions, that exclude, prevent or discriminate against TREB member brokers who wish to use the information in the TREB MLS system to offer services over the Internet, such as through a VOW as described in this Application; directing TREB to pay the costs and disbursements of the Commissioner and the Tribunal in relation to this Application; and such other interim, interlocutory or final relief as the Commissioner may request and this Tribunal may consider appropriate.

PART II: MATERIAL FACTS

The Parties

11. The Applicant, the Commissioner, is appointed pursuant to section 7 of the Act, and is charged with the administration and enforcement of the Act.

12. The Respondent, TREB, is Canada's largest real estate board. It is a not-for-profit corporation, incorporated pursuant to the laws of Ontario. The membership of TREB consists of 31,300 brokers principally in the GTA. TREB provides a range of services to its member brokers, including access to and use of the TREB MLS system.

Facts Giving Rise to this Application

The TREB MLS system

13. The TREB MLS system is an electronic database owned and operated by TREB for the benefit of its broker members. It is designed to collect and store information from brokers about properties offered for sale in the GTA. The information for each property is regularly updated and, over many years, the TREB MLS system has become a vital source of both current and historical information about the purchase and sale of residential real estate in the GTA.

14. Subject to interboard agreements, only members of TREB have direct access to the TREB MLS system, which contains a full inventory of active and historical listings. By listing properties for sale in the TREB MLS system, TREB brokers agree to share their listings with all other participating TREB brokers. It is used by TREB member brokers to facilitate the matching of buyers and sellers of residential real estate.

15. TREB brokers often conduct searches of the TREB MLS system and provide their customers with information derived from those searches. TREB brokers do so both before and after they have entered into a formal broker/customer arrangement. Such searches as provided to customers may include detailed information about properties for sale, including listing prices, addresses, room dimensions, sales prices of recently sold homes, and comparative market analyses conducted using historical sales data.

16. Brokers for home sellers advise their customers on the appropriate price at which to list a property for sale, based in large part on information available only to brokers by searching in the TREB MLS system (such as prices of comparable houses recently sold in the same neighbourhood).

17. Brokers for home buyers use the TREB MLS system to locate properties that may be of interest to their buying customers. Buyers' brokers also search recent sale prices of comparable properties to advise their customers on the appropriate price to offer for a specific property.

18. The search information obtained by brokers from the TREB MLS system is not directly accessible to their customers in an efficient manner. TREB brokers may provide information to their customers in a variety of ways including in person, by fax, or by email, but are restricted from doing so through more efficient methods, such as through VOWs.

Innovative Business Models: Virtual Office Websites

19. A VOW is an example of an innovative service model that is prohibited by the TREB MLS Restrictions. A VOW is a secure, password-protected website that enables residential real estate customers to search a database containing MLS information themselves, thus obtaining MLS information over the Internet. Prior to accessing any of the services available through a VOW, such as conducting a search, a VOW user registers with the website and agrees to certain terms and conditions. These steps establish the person as a customer of the VOW brokerage.

20. VOWs provide the same services as traditional brokers in a "bricks and mortar" setting but more efficiently (as outlined in paragraphs 23 and 61-64 below).

21. A VOW is designed to allow a registered customer to search, over the Internet, a complete inventory of information available on an MLS system, including historical sales data (such as information on comparable properties recently sold in an area) and all properties currently listed for sale. A full inventory of these properties and data in the MLS system is essential for the operation of a successful VOW; otherwise, customers must use several websites to conduct their searches, which is inefficient and a significant deterrent to using a VOW. In addition, some information, such as the sales price of recently sold homes, is only available through an MLS system.

22. Where free from anti-competitive rules such as the TREB MLS Restrictions, brokerages operating VOWs typically supplement the MLS data with additional information of interest to potential buyers, such as detailed maps, demographic information, traffic and crime statistics and the locations of local amenities such as schools and hospitals. Using this additional information, VOW brokerages can create innovative websites that substantially enhance the consumer's buying or selling experience.

23. VOWs make brokerages more efficient. For example, the use of a VOW allows for the transfer of the task of searching information on the MLS system from the broker to those customers who wish to do so. This reduces or eliminates the time and expense incurred by brokers. In effect, customers use a VOW to educate themselves about the residential real estate market and the properties available. The additional information provided through a VOW assists customers in narrowing down the properties in which they are interested, allowing brokers to spend less time responding to questions and showing properties that are ultimately not of interest. In this and other respects (described further below), VOW brokers operate more efficiently than traditional brokers who provide MLS information only by traditional methods, such as in a "bricks and mortar" environment.

24. The efficiencies realized by VOW brokerages may be passed on to consumers in the form of price competition, through such means as commission rebates. Currently, there are VOW brokerages operating in the United States that offer to rebate up to 50 percent of the broker's commission to the buyer. These brokerages can offer greater rebates to their customers owing to the efficiencies and cost savings made possible by VOWs.

The TREB MLS Restrictions

25. To become a member of TREB and have access to the TREB MLS system, a broker must agree to be bound by TREB's By-Laws and TREB's MLS Rules and Policies and must execute an Authorized User Agreement ("AUA"). The terms of these rules, policies and agreements, as imposed and interpreted by TREB, are referred to in this Application as the "TREB MLS Restrictions".

26. TREB members are bound by TREB's MLS Rules and Policies, which include the following provisions:

RULES

R-101

Use of the MLS® System is subject to the provisions of the Authorized User Agreement as amended, restated or replaced from time to time.

RULE 400 - ADVERTISING

R-430

Members other than the Listing Brokerage may advertise an MLS® Listing only when an MLS® Listing Agreement so indicates and Members have received specific written permission from the Listing Brokerage prior to each occasion of advertising.

R-431

Members shall not use any marketing materials prepared by or created for another Member, including but not limited to, photographs, floor plans, virtual tours, personal marketing materials or feature sheets without the written consent of that Member who created or purchased the material.

POLICIES

RULE 500 – TREB COMPUTER SYSTEM

P-501

Any Member wishing to obtain access to any MLS® data (whether for office use or individual use by a Broker or Salesperson registered with a Brokerage) shall enter into an MLS® Access Agreement, or such other agreement as TREB may require from time to time.

P-508

TREB in its sole discretion, may terminate or suspend a Member's user name and Password code in the event of any unauthorized or improper use of the MLS® Online system.

27. Further, each member of TREB must agree to the following material terms of AUA:
- (a) In section 2, TREB grants a broker member a non-exclusive, non-transferable licence to access and use the TREB MLS system;
 - (b) In section 2, the broker must unconditionally agree to access and use the MLS system "for the exclusive and internal use" by the broker;
 - (c) In section 3, the broker may make "Copies" of the information in the MLS system but such Copies are limited to paper printouts and electronic copies of reports "generated from" the MLS system;
 - (d) In section 4, brokers acknowledge that the MLS Database (as defined in the AUA) has special value "due to access only by TREB members and users authorized by TREB";

- (e) In section 4(c), the MLS Database is considered to be confidential property of TREB and requires that the user "not circulate or copy ... the MLS database ... in any manner except to authorized users... and except to persons or entities who desire or may desire to acquire or dispose of certain of their rights respecting real estate";
- (f) Section 4(d) prohibits members from using, copying, reproducing, or exploiting the database for the purposes of "creating, maintaining or marketing, or aiding in the creation, maintenance or marketing, of any MLS database ... which is competitive with the MLS database ... or which is contrary to the By-Laws, the MLS Rules and the MLS Policies ..."

28. TREB's MLS Rules and Policies (as outlined in paragraphs 25-27), on their face, and as interpreted, applied, and enforced by TREB, prevent brokers from offering innovative, Internet-based services such as VOWs to their customers.

29. For example, TREB considers the display of a listed property on a VOW to be "advertising" that property for sale. TREB Rule 430 requires "specific written permission from the Listing Brokerage prior to each occasion of advertising". According to TREB's interpretation of Rule 430, to operate a VOW with the necessary full inventory of current properties for sale, a VOW broker would have to obtain specific written permission from each brokerage in the GTA, for each occasion of advertising, potentially for the up to 25,000 new listings that are added to the TREB MLS system each month. This creates a practical barrier to entry that makes it virtually impossible to operate a VOW.

30. VOWs are not a form of advertising, just as a broker providing a physical copy of a listing to a customer does not constitute advertising. When a consumer registers with a VOW and accepts its terms, that consumer is just as much a customer of the VOW brokerage as a traditional broker's customers (who are able to receive information in person, by fax, or by email).

31. The terms of the AUA require brokers to access and use the TREB MLS system "for the exclusive and internal use" of the broker and prohibit providing copies of TREB MLS information to customers unless they are reports "generated from" the TREB MLS system. TREB has interpreted the terms of the AUA to thus prohibit the transfer from TREB to brokers of the information that is necessary to operate a VOW, including a complete listings inventory and historical sales data. Effectively, the AUA only allows brokers to operate in a "bricks and

mortar" environment. In addition, the terms of the AUA have been interpreted to prohibit direct access to such TREB MLS information in a searchable form, through a VOW. Without access to such complete information, neither brokers nor customers can enjoy the benefits of a VOW.

32. Finally, in the event of an "unauthorized or improper" use of the TREB MLS system (which would include a TREB member broker attempting to create a VOW), the member's access to the TREB MLS system can (and has been), in TREB's sole discretion, terminated or suspended under TREB Policy 508. Without access to the TREB MLS system, brokers cannot realistically provide competitive real estate brokerage services in the GTA.

TREB's Proposed Rules

33. After this Application was filed, TREB announced on June 23, 2011 that it had published a proposal for a VOW Policy and Rules, and that members would have 60 days to provide input and feedback. To this end, TREB provided its members with several documents, including the new Policy concerning VOWs, a section for frequently asked questions, and a document entitled "Virtual Office Website (VOW) Rules" (together, "TREB's Proposed Rules").

34. TREB's Proposed Rules will, if ultimately enacted in their present form by TREB's Board of Directors, impose obligations and restrictions on member brokers who wish to operate VOWs that are not imposed on traditional brokers. As such, TREB's Proposed Rules will entrench and perpetuate the traditional "bricks and mortar" business model for providing real estate brokerage services; accordingly, TREB's Proposed Rules are discriminatory and their enactment will constitute a further anti-competitive act under the Act.

35. Specifically, under TREB's Proposed Rules, TREB will, under certain conditions, provide a data feed for those member brokers who wish to establish a website to display listings for residential properties currently available for sale. However, according to TREB's Proposed Rules, member brokers may not make available for search or display on a VOW the following information (all of which is available in TREB's MLS system and is provided today by members to customers by hand, email or fax):

(a) MLS data on pending solds, including listings where sellers and buyers have entered into an agreement that has not yet closed.

(b) MLS data on sold properties, unless the method of use of the actual sales price of completed transactions is in compliance with the rules of the Real Estate Council of Ontario ("RECO") and applicable privacy laws;

(c) The compensation offered by the seller's broker to the buyer's broker.

In addition, and significantly given the value potential customers place on this information, the data feed provided to member brokers for VOWs will not include any MLS data pertaining to sold properties, unless the data is "readily publicly accessible". This restriction does not apply in a "bricks and mortar" environment, as such TREB's Proposed Rules discriminate and are in violation of the Act.

36. The effect of TREB's Proposed Rules will be merely to allow TREB's member brokers to display current listings on their own websites using a data feed from TREB, but significantly, a data feed intentionally compromised to exclude the very information of value to customers. As noted above, TREB will prevent VOWs from offering a complete inventory of listings and other data, including valuable historical data, that is available for download from TREB's MLS system. This information is required by a VOW brokerage to effectively provide real estate brokerage services to their customers over the Internet. TREB's Proposed Rules will continue to require customers to contact a member broker personally to obtain such information, entrenching the traditional "bricks and mortar" model and discriminating against member brokers wanting to innovate.

37. In addition, the TREB Proposed Rules will not allow consumers to see a key component of the ultimate purchase price of a residential property, because TREB's Proposed Rules do not allow a member broker to display the compensation offered to the cooperating member broker as part of a listing on a VOW. In contrast, this information is available in a "bricks and mortar" environment. The offer of compensation is made by the seller's broker to the buyer's broker and, when offered by a broker in a traditional brokerage, is almost always a fixed percentage of the purchase price. Particularly with the significant increases in the price of homes in the GTA over the last decade, the price of a broker's services will continue to be a very large part of the real estate transaction that is non-transparent to consumers, especially buyer customers.

38. Furthermore, TREB's Proposed Rules are vague and ambiguous, allowing TREB to frustrate or disadvantage member brokers who wish to offer VOWs, in the very same way TREB has done, to date, using the existing set of TREB MLS Restrictions as described in this Application. The resulting uncertainty reduces the likelihood of investment in, and thus impedes the entry of, innovative real estate business models.

39. Thus, rather than opening up the market to new, innovative models of providing residential real estate brokerage services through the Internet, and stimulating competition in the supply of such services, TREB's Proposed Rules, if enacted, will in fact constrain competition. They will impose discriminatory, anti-competitive restrictions on member brokers who wish to operate a VOW and effectively exclude those member brokers who would like to establish a VOW brokerage. By restricting member brokers' websites to the display of current listings, TREB's Proposed Rules will deny both member brokers and customers the benefits of the efficient, innovative VOW model of delivering services.

40. If the TREB Proposed Rules are enacted in their current form, TREB will continue to prevent or lessen competition substantially in the market for the supply of residential real estate brokerage services in the GTA in the very policy that purports to (but does not) allow its members to innovate and operate a VOW, as described in this application. As such, TREB's Proposed Rules will continue and aggravate TREB's practice of anti-competitive acts contrary to section 79 of the Act, and will comprise part of the "TREB MLS Restrictions" as defined in this Application.

Elements of Section 79 of the Act

The Product Market

41. The relevant product markets are the supply of residential real estate brokerage services to home buyers and the supply of residential real estate brokerage services to home sellers. Both of these services are considered to be relevant product markets, and are not acceptable substitutes for one another. Home buyers require a different package of services from those required by home sellers, such as finding suitable properties, showing these properties to the buyer, and providing information about historical prices in the area. Conversely, home sellers require

services such as evaluating a property's value and advertising that property to potential buyers. As the vast majority of brokers operate in both markets, and the TREB MLS Restrictions affect both markets, in this Application the Commissioner considers it appropriate to aggregate these services and treat them as a single market.

42. For the vast majority of home buyers and sellers, there are no acceptable substitutes to residential real estate brokerage services.

The Geographic Market

43. Markets for the supply of residential real estate brokerage services are local in nature. In this Application, the geographic coverage of the TREB MLS system, subject to interboard agreements, determines the boundaries of the relevant geographic market.

TREB Substantially or Completely Controls a Class or Species of Business

44. TREB substantially or completely controls the supply of residential real estate brokerage services in the GTA through its ability to enact, interpret, and enforce rules, policies and agreements, including the TREB MLS Restrictions, that govern the use of and access to the TREB MLS system. As the TREB Proposed Rules demonstrate, TREB has the ability to establish (and has established) rules that restrict how TREB brokers can compete, and constrain (and has constrained) the ability of its members to innovate and deliver better quality services to their customers.

45. The TREB MLS system is a key input in the supply of residential real estate brokerages services. The TREB MLS system is the only comprehensive source of both current and historical information about the purchase and sale of residential real estate in the GTA. The TREB MLS system has information about specific properties that is not available on other websites, such as www.realtor.ca, namely sold data, days on market, price changes and pending sold data, all of which are highly salient to consumers' home purchase and sale decisions. While this information may be provided to brokers' customers by such means as fax, email or in person, the TREB MLS Restrictions prohibit brokers from sharing the same information through a VOW.

46. TREB's control of the relevant market is demonstrated by its ability to exclude brokers and brokerages that do not abide by its rules, policies and agreements. TREB brokers must conform to the TREB MLS Restrictions, as interpreted and enforced by TREB, or lose access to the TREB MLS system. TREB can and does terminate such access to brokers who do not comply with TREB's requirements.

47. There are significant barriers to entry for any listing system that could potentially emerge as a substitute to the TREB MLS system and provide the information necessary to operate a VOW. The value of the TREB MLS system is derived from network effects, meaning that the value of the TREB MLS system is greater as its number of users increases. As the incumbent real estate listing platform in the relevant market, the TREB MLS system is supported by TREB's membership of over 31,300 brokers, has a very large volume and value of property sales, and contains a critical mass of active and historical property listing information. Creating a competitive rival listing service platform would be extremely difficult, if not impossible, particularly in the near to medium-term. Network effects make the entry of a rival real estate listing system highly unlikely.

48. Brokerages require a complete inventory of listings, including historical data, from the TREB MLS system in order to provide real estate brokerage services to their customers. This holds particularly true for brokerages operating a VOW. Even withholding a small percentage of listings would impede their ability to compete in the relevant market. Given the importance of access to such a complete source of current listings, and the importance of access to historical listings to provide advice to customers, brokers in the GTA cannot realistically offer competitive residential real estate brokerage services to customers using VOWs without access to and use of the TREB MLS system. There are no effective substitutes to the TREB MLS system.

Practice of Anti-competitive Acts

49. The TREB MLS Restrictions are a practice of anti-competitive acts, the purpose and effect of which is to discipline and exclude innovative brokers who would otherwise compete with TREB's member brokers who use traditional methods. These restrictions constrain the ability of TREB's member brokers to compete if they wish to expand their service offerings to

provide innovative, Internet-based services to their customers, such as through a VOW. This effectively raises the costs of member brokers who wish to operate a VOW, by forcing them to adopt a traditional brokerage model. Furthermore, the TREB MLS Restrictions exclude potential competitors, who are not yet in the market, from joining TREB and launching innovative real estate business models.

50. The TREB MLS Restrictions impose discriminatory restrictions on brokerages that wish to operate a VOW. For example, TREB's interpretation of Rule 430 requires that VOW brokerages obtain permission from every brokerage before providing the latter's listings through a VOW. However, no such permission is required of brokerages providing this same information by more traditional delivery methods, such as in person, by fax, or by email.

51. Similarly, compliance with TREB's Proposed Rules would impose obligations and restrictions on member brokers who would like to provide real estate brokerage services and information through the Internet as a VOW brokerage, that are not imposed on traditional brokers operating a bricks and mortar environment. Innovative, Internet-based brokerages would be prevented from providing valuable information to their customers that traditional brokerages currently provide without any such restrictions. It is instructive to note that, for all the concerns now suddenly expressed by TREB about privacy laws and compliance with RECO, TREB has made no attempt to enact or enforce rules to restrict traditional brokerages from providing, at their sole discretion, all information relating to historical solds, pending solds and other information that they would now propose to exclude from the data feed provided to member brokers who want to operate VOWs under TREB's Proposed Rules.

TREB's Enforcement of the TREB MLS Restrictions

52. In 2007, TREB's enforcement of the TREB MLS Restrictions forced a prospective VOW operator to cease its operations. After court proceedings in Ontario, TREB's right to terminate the broker's access to the TREB MLS system was upheld under the terms of its written contractual agreements with the broker, but expressly without deciding the issues related to the Act and raised in this Application.

53. Since exercising its power to terminate innovative brokers in 2007, TREB has made it clear that it will continue to use its control over the TREB MLS system, through its enforcement of the TREB MLS Restrictions, to terminate access to the TREB MLS system for brokers who seek to innovate. TREB has cultivated a reputation for shutting down any broker who develops an innovative service that is prohibited by the TREB MLS Restrictions, including VOWs. Through its termination of the prospective VOW in 2007 and the subsequent legal proceedings, TREB has created a hostile environment for VOWs in the GTA, resulting in a chilling effect on any broker who would otherwise wish to invest the time and money (including legal fees) necessary to begin operating a VOW.

Overall Character of the Anti-competitive Acts

54. TREB has been aware, since at least 2007, that its rules, policies and agreements, particularly the TREB MLS Restrictions, have an exclusionary and disciplinary effect on brokers who would like to offer services to their customers through a VOW. TREB has enacted, interpreted and enforced the TREB MLS Restrictions in a manner that is intended to have, and does have, exclusionary and disciplinary effects on VOW brokers who would otherwise compete with TREB's other member brokers. In any event, given the exclusionary effects of the TREB MLS Restrictions, it is reasonably foreseeable that they would have a negative exclusionary effect on competitors wishing to operate a VOW or similar business model.

55. In the case of TREB's Proposed Rules, TREB has deliberately proposed "changes" to its MLS Rules and Policies that, if passed, will prevent member brokers from operating VOWs as described in this Application, will prevent the entry of new, innovative brokerages into the market for the supply of real estate brokerage services in the GTA and will entrench the existing traditional model of delivering such service to customers.

56. Despite its knowledge of the exclusionary effect and its awareness of the efficiencies of VOWs, TREB continues to deny its brokers the ability to offer VOWs and other innovative business models to customers.

TREB's MLS Restrictions Lessen or Prevent Competition Substantially

57. The TREB MLS Restrictions have lessened and prevented, and will continue to lessen and prevent, competition substantially in the market for the supply of residential real estate brokerage services in the GTA. Furthermore, TREB's Proposed Rules, if enacted, will continue to lessen and prevent competition substantially. But for the TREB MLS Restrictions, consumers would benefit from substantially greater competition in the relevant market.

58. TREB's control of the relevant market through the TREB MLS Restrictions gives it the power to exclude innovative brokerage models, thereby protecting and perpetuating the static traditional brokerage model for the delivery of residential real estate brokerage services. TREB's exclusion of innovative, Internet-based business models, such as VOWs, negatively affects the range of services being offered over the Internet by brokers to their customers. Further, the exclusion of VOWs and other innovative models denies consumers the benefits of the downward pressure on commission rates that would likely otherwise exist. VOW brokerages would impose competitive discipline on brokerages that currently operate in the relevant market; that discipline is denied by TREB's practice of anti-competitive acts.

59. The TREB MLS Restrictions allow TREB to terminate access to the TREB MLS to any brokers who operate VOWs or similar innovative business models, denying them use of this key input. As no broker can effectively compete in the relevant market without access to the TREB MLS, brokers have no incentive to incur the significant costs associated with VOWs as doing so would result in their losing access to the TREB MLS. The TREB MLS Restrictions thus constitute a significant barrier to entry or expansion for brokers who would otherwise be interested in operating VOWs. Traditional brokers generate much of their business through a large referral base of satisfied customers, which may take years to develop. VOWs allow newer brokers to develop leads and establish relationships with potential buyers, enhancing the former's ability to compete with established brokers. VOW brokers may also establish relationships with high-traffic Internet sites to help them attract consumers. By preventing brokers from using VOWs, the TREB MLS Restrictions discourage entry and expansion by brokers wishing to offer innovative services, including less experienced brokers, with the result that competition is

reduced and the positions of traditional brokers are entrenched and their market power maintained.

60. Through its enactment, interpretation and enforcement of the TREB MLS Restrictions, TREB has created a business environment that is hostile to brokers who wish to operate VOWs. The increased risks and costs associated with such a climate of uncertainty reduce the likelihood of investment in, and thus impede the entry of, innovative real estate business models, such as VOWs.

61. The TREB MLS Restrictions prevent innovation and development of more efficient business models for brokers who would compete with traditional broker models in the GTA.

62. VOWs allow home searches to be conducted in a more efficient manner. By enabling customers to take control of the home search process, VOW brokers are freed from this labour-intensive task. VOWs often also provide convenient access to additional useful information that is not contained in an MLS database, such as demographic information and school locations. This allows consumers to further narrow the properties they are interested in prior to meeting with their broker, thus freeing the broker from conducting such searches and reducing the number of homes a broker must show before closing a sale. VOWs also free brokers from having to search for price changes and comparable properties for home sellers. By freeing brokers from search tasks, VOWs also enable brokers to focus on services where they have special expertise, providing greater value to consumers.

63. The increases in efficiency and productivity, outlined immediately above, allow brokers to reduce their costs and work with more customers at a time, leading to increased competition in the market and benefits for consumers. As VOWs and other innovative models enter the market, brokers would increasingly pass these cost savings on to their customers through reduced commission rates or rebates, as demonstrated by some VOWs operating in the United States.

64. Finally, VOWs encourage innovation and increased quality of service, as firms compete to add value and attract consumers by finding creative ways in which to provide more information and services to customers. By preventing innovation such as VOWs, the TREB MLS Restrictions seriously inhibit competitive innovation.

Conclusion

65. The Commissioner submits that if TREB is prohibited from imposing restrictions, such as the TREB MLS Restrictions, that exclude or prevent its member brokers from innovating by using the information in the TREB MLS system to operate a VOW, there would be substantially greater competition, which would manifest itself as follows:

- (a) VOW brokerages would enter and compete in the relevant market;
- (b) existing brokerages would adopt VOWs as part of the range of services they offer to their customers;
- (c) there would be greater efficiency in the operation of brokerages, as tasks formerly carried out by brokers become automated or done by their customers, making brokers more productive;
- (d) there would be consequential innovation in the market for the supply of residential real estate services in the GTA, as brokerages devote resources to VOWs and websites in order to compete;
- (e) the quality of residential real estate brokerage services offered would be substantially greater, as customers who use the Internet would be offered a wider range of services and information on Internet websites that are not available on www.realtor.ca and other GTA real estate websites at the present time;
- (f) customers would be more likely to be offered discounts or rebates on their commissions paid to brokers, as brokers use VOWs to deliver services more efficiently and reduce their costs. The savings to residential real estate brokerage customers in the GTA would likely be very substantial over a period of years; and
- (g) consumers would benefit from substantially greater choice, better service and lower costs in the relevant market.

PART III: RELIEF SOUGHT

66. The Commissioner therefore seeks an Order under sections 79(1) and (2):

- (a) prohibiting TREB from directly or indirectly enacting, interpreting or enforcing any restrictions, including the TREB MLS Restrictions, that exclude, prevent or discriminate against TREB member brokers who wish to use the information in the TREB MLS system to offer services over the Internet, such as through a VOW as described in this Application;

- (b) directing TREB to implement such resources and facilities as the Tribunal deems necessary to ensure the operation of VOWs or similar services by, or on behalf of, member brokers;
- (c) directing TREB to pay the costs and disbursements of the Commissioner and the Tribunal in relation to this Application;
- (d) all other orders or remedies that may be required to give effect to the foregoing prohibitions, or to reflect the intent of the Tribunal and its disposition of this matter; and
- (e) an order granting such further and other relief as this Tribunal may consider appropriate.

Procedural Matters

- 67. The Applicant requests that this Application be heard in English.
- 68. The Applicant requests that this Application be heard in the City of Toronto.
- 69. The Applicant proposes that documents be filed electronically.
- 70. For the purposes of this Application, service of all documents on the Applicant may be effected on:

John F. Rook
Andrew D. Little
Bennett Jones LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

And to:

Roger Nassrallah
Competition Bureau Legal Services
Department of Justice
50 Victoria Street
Gatineau, Quebec
K1A 0C9

Counsel for the Applicant

Copies to:

Toronto Real Estate Board
1400 Don Mills Road
North York, ON
M3B 3N1

And to:

Donald S. Affleck
Affleck Greene McMurtry
365 Bay Street, Suite 200
Toronto, Ontario
M5H 2V1

Counsel for the Respondent

And to:

The Registrar
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 5B4

DATED AT Gatineau, Quebec, this 7th day of July, 2011

"Melanie L. Aitken"

Melanie L. Aitken
Commissioner of Competition

Schedule "A"
Concise Statement of the Economic Theory
The Commissioner of Competition
And
The Toronto Real Estate Board

Introduction

1. The respondent, the Toronto Real Estate Board ("TREB") represents approximately 31,300 real estate brokers and salespersons ("brokers") licensed to trade in real estate in Ontario. TREB owns and operates an electronic database known as the TREB Multiple Listing Service system (the "TREB MLS system"), which contains current and historical information about the purchase and sale of residential real estate in the Greater Toronto Area (the "GTA"). The TREB MLS system is used by member brokers to facilitate the matching of buyers and sellers of residential real estate.
2. TREB's restrictions, which include existing and proposed rules and policies, imposed on members' access to and use of the TREB MLS system constitute an abuse of dominance contrary to section 79 of the *Competition Act*. TREB and its members "substantially ... control, throughout Canada or any area thereof, a class or species of business," namely, the provision of residential real estate brokerage services in the GTA. TREB has "engaged ... in a practice of anti-competitive acts" by disciplining and excluding innovative brokers who would otherwise compete with TREB's member brokers who provide residential real estate brokerage services by traditional methods. TREB's practice effectively limits the degree to which its member brokers compete with one another and as such, "has had, [and] is having ... the effect of preventing or lessening competition substantially."

79(1)(a)

3. The relevant product market in which to evaluate the competitive impact of TREB's conduct is the market for the provision of residential real estate brokerage services. The relevant geographic market is local and its boundaries are determined by the geographic coverage of the TREB MLS system, subject to interboard agreements.

4. TREB exerts control over the relevant product market through its ability to enact, interpret, and enforce rules, policies, and agreements that govern access to and use of the TREB MLS system.
5. The TREB MLS system is a key input into the supply of residential real estate brokerage services in the GTA. The TREB MLS system is the only comprehensive source of both current and historical information about the purchase and sale of residential real estate in the GTA. Brokers in the GTA cannot realistically compete in the market for residential real estate brokerage services without access to and use of the complete inventory of listings in the TREB MLS system. There are no effective substitutes to the TREB MLS system.
6. There are significant barriers to entry that prevent the creation of a competing real estate listing system that could emerge as a potential substitute to the TREB MLS system. The value of the TREB MLS system is derived from network effects, meaning that the value of the TREB MLS system is greater as its number of users increases. The TREB MLS system is superior to that of any other real estate listing system because it is supported by TREB's membership of approximately 31,300 brokers and contains a critical mass of active and historical real estate listing information. Network effects make the entry of a rival real estate listing system highly unlikely.

79(1)(b)

7. TREB enacts, interprets, and enforces rules, policies and agreements that discriminate and constrain the manner in which its brokers may provide real estate brokerage services to their customers. TREB's interpretation and enforcement of its rules prevent brokers from providing innovative residential real estate brokerage services over the Internet, such as through a Virtual Office Website ("VOW") and raise the costs of brokers by forcing them to adopt a traditional brokerage model.
8. Brokers who operate VOWs are in violation of TREB's rules and are subjected to disciplinary action by TREB, such as having their access to the TREB MLS system terminated. Without access to the TREB MLS system, brokers who wish to provide brokerage services over the Internet, such as through a VOW, are excluded from the market. TREB has enacted,

interpreted and enforced rules, policies and agreements in a manner that is intended to have, and does have, exclusionary and disciplinary effects on innovative brokers who would otherwise compete with TREB's member brokers.

79(1)(c)

9. TREB's conduct has lessened and prevented, and will continue to lessen and prevent, competition substantially in the relevant market. This conduct constitutes a significant barrier to entry and expansion for brokers who would like to offer brokerage services over the Internet. TREB's conduct effectively limits the degree to which its member brokers compete with one another, such that the positions of traditional brokers are entrenched and their market power maintained.
10. TREB's conduct discourages entry and expansion by brokers who would like to offer innovative real estate brokerages services over the Internet. The exclusion of VOWs and other innovative business models has negatively affected the range of brokerage services being offered to consumers.
11. TREB prevents innovation in the supply of residential real estate brokerage services and impedes the development of more efficient business models and service offerings. Innovative business models, such as VOWs, increase broker efficiency and productivity by enabling them to reduce their costs, work with more customers at a time, and to specialize in providing a subset of brokerage services in which they have a comparative advantage.
12. But for TREB's conduct, there would be substantially greater competition in the market for the provision of residential real estate brokerage services in the GTA.

File No. CT-2011-003

THE COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

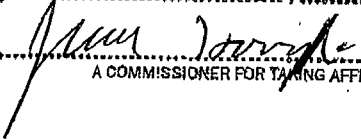
Respondent

AMENDED NOTICE OF APPLICATION

BENNETT JONES LLP
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John F. Rook, Q.C. (LSUC #13786N)
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Counsel for the Applicant

This is Exhibit.....B..... referred to in the
affidavit of...DONALD J. RICHARDSON
sworn before me, this.....13th.....
day of.....SEPTEMBER 2011.....

A COMMISSIONER FOR TAKING AFFIDAVITS

COMPETITION TRIBUNAL

IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the Competition Act;

AND IN THE MATTER OF certain rules, policies and agreements relating to the residential multiple listing service of the Toronto Real Estate Board.

B E T W E E N :

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT August 19, 2011 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 13

THE COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

RESPONSE OF THE TORONTO REAL ESTATE BOARD
TO THE AMENDED NOTICE OF APPLICATION

PART I: OVERVIEW

1. The Commissioner of Competition's Amended Notice of Application ("Application") seeks an order pursuant to subsections 79(1) and 79(2) of the *Competition Act* ("Act") but ignores the copyright of The Toronto Real Estate Board ("TREB") and its members. Subsection 79(5) of the Act states that the exercise of those rights is not an anti-competitive act. Without proof of an anti-competitive act or acts, the Competition Tribunal ("Tribunal") should decline to make an order under either subsection 79(1) or subsection 79(2).

2. TREB does not compete in the product markets referred to by the Commissioner of Competition ("Commissioner") in the Application. TREB has no market power in those markets and no motivation to exercise any market power for the simple fact that TREB is not a supplier of residential real estate brokerage services. There is simply no basis upon which the Application can succeed.
3. TREB owns the TREB Multiple Listing System ("TREB MLS®"). The TREB MLS® is a multiple listing service used by suppliers of residential real estate brokerage services to facilitate trade. Access to the TREB MLS® is unrestricted to qualified brokers who are members of TREB.
4. Rules imposed by TREB over members' access to and use of the TREB MLS® serve to protect the intellectual property rights of TREB and its members, as well as the privacy rights of those who agree to the use of the TREB MLS® to market their property. In addition, such rules promote the accuracy and reliability of the information on the TREB MLS®.
5. As an organization committed to the success of its members, TREB prides itself on its ability to respond to members' evolving requirements, including with respect to the use of information on the TREB MLS®. Within this context, TREB formed a task force in July, 2010 to examine how best to facilitate the operation by its members of virtual office websites ("VOWs"). The report of that task force was released in June, 2011 and the membership of TREB is presently considering the task force's proposed VOW Policy and accompanying Rules ("TREB's Proposed VOW Policy"). It is expected that the

membership and the TREB Board of Directors will approve TREB's Proposed VOW Policy without major change.

6. At all times TREB has cooperated with the Commissioner. Commencing in mid-2008 the Commissioner initially sought TREB's assistance in creating a VOW policy that could be utilized throughout Canada. Subsequently, the Commissioner decided to commence negotiations with The Canadian Real Estate Association ("CREA") in respect to creating such a Canada-wide policy. Between September, 2008 and February, 2011, TREB responded to two extensive voluntary information requests received from the Commissioner related to that initiative.
7. When the Commissioner was unable to conclude an agreement on VOWs with CREA, she again turned to TREB. The Commissioner became aware that TREB had formed the VOW task force referred to above in July, 2010. The Commissioner knew of the report of that task force and knew that, pursuant to TREB's corporate guidelines, the report had to be considered by TREB's full membership and ultimately by TREB's Board of Directors. Notwithstanding that knowledge, and despite TREB's direct and forthright approach to its dealings with the Commissioner, the Commissioner commenced this Application before the consideration mandated by TREB's corporate guidelines could be completed.

PART II: ADMISSIONS AND DENIALS

8. TREB admits paragraphs 11, 12, and 25 of the Application.
9. TREB admits the first sentence of paragraph 1 of the Application.

10. TREB admits paragraph 26 of the Application, subject to the rules and policies referenced therein being simply referred to as "TREB's Rules and Policies" and not "TREB's MLS Rules and Policies".
11. TREB admits paragraph 33 of the Application, subject to noting that it announced to its members TREB's Proposed VOW Policy on June 24, 2011.
12. TREB denies all other allegations contained in the Application, except as expressly admitted below.
13. Contrary to the allegation at paragraph 14 of the Application, TREB denies that only its members have direct access to the TREB MLS®.
14. Contrary to the allegation at paragraph 24 of the Application, TREB denies that the alleged efficiencies realized by VOW brokerages in the United States or elsewhere are passed along to consumers, to the extent that such efficiencies exist at all.
15. TREB specifically denies the allegation at paragraph 42 of the Application and states that there are acceptable substitutes to residential real estate brokerage services. A number of providers offer services to home buyers and sellers that do not rely on those home buyers or sellers acquiring the traditional suite of residential real estate brokerage services offered by "bricks and mortar" brokers (including services that do not make use of the TREB MLS®).
16. Contrary to the allegation at paragraph 50 of the Application, TREB has never issued an interpretation of Rule 430. In fact, TREB yielded enforcement of Rule 430 to the Real Estate Council of Ontario ("RECO") in 2008.

PART III: MATERIAL FACTS ON WHICH TREB RELIES

17. TREB is an Ontario corporation without share capital. It does not engage in business transactions involving residential real estate and has never done so.
18. TREB's corporate objects include the following:
- to advance and promote the interests of those engaged in real estate as brokers, agents, valuers, examiners and experts and to increase public confidence in and respect for those engaged in the calling of real estate broker;
 - to institute, promote and manage listing systems with the object of rendering better service to the public by providing vendors of real estate with a wider potential market.
19. TREB is not licensed under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002 ("REBBA") to trade in real estate and it has never done so.
20. In addition to its ownership and operation of the TREB MLS®, TREB offers additional services to its members, including:
- (a) Internet Data Exchange – a platform that permits participating brokers to share their listings with other participating brokers on their web sites;
 - (b) arbitration services;
 - (c) access to Teranet (Ontario's electronic land registration system) by means of a portal;
 - (d) a commercial real estate website;
 - (e) continuing education seminars attended by some 2,880 members of TREB each month; and
 - (f) enforcement of professional standards.

21. For the purposes of TREB's Proposed VOW Policy, TREB states that a VOW:

... refers to a Member's secure, password-protected internet website, or a feature of a Member's internet website, through which the Member is capable of providing real estate brokerage services to consumers with whom the Member has first established a broker-consumer relationship (as may be designated by provincial and/or federal law) where the consumer has the opportunity to search MLS® data, subject to the Member's oversight, supervision, and accountability.

22. Up until the issuance of the Application, the Commissioner had been adamant that a VOW was:

a website operated by a Member [of TREB] or on behalf of a Member that enables Members to provide real estate brokerage services in an online environment, and where Customers [a person or persons who has an interest in acquiring or selling residential real estate, including, but not limited to, a Member's client] have the opportunity to search and review TREB MLS® Data.

23. For the first time, the Commissioner has in paragraph 4 of the Application referred to a VOW as a "...secure, password-protected "virtual office website".

24. Paragraphs 3, 32, 46 and 52 of the Application reference a situation in which TREB was forced to terminate the access of a member to the TREB MLS® when that member sought to take or scrape all of the residential listing data for an area of the City of Toronto and republish it on a website of a third party. The member commenced a proceeding in the Ontario Superior Court of Justice against TREB. The Court held that TREB was justified in suspending access to the TREB MLS® and that the member had breached his contract with TREB. The Court dismissed the member's application with costs. The Ontario Court of Appeal dismissed the member's appeal on December 21, 2010 with costs.

25. Despite the inferences set out in the Application, the facts set out above represent the only situation in which TREB has terminated a member's access to the TREB MLS®.
26. At paragraph 18 and elsewhere in the Application it is alleged that information found on the TREB MLS® is not efficiently available to customers of brokers. This is inaccurate. Such information, if not protected by federal privacy legislation or withheld at the request of a vendor, may well be found at www.realtor.ca and on literally hundreds of websites. There are no restrictions whatsoever placed by TREB on its members that preclude members from also making their listings available through the multitude of websites and listing services not affiliated with TREB.

**PART IV: STATEMENT OF THE GROUNDS ON WHICH THE APPLICATION IS
OPPOSED**

27. The Commissioner brings the Application in reliance on section 79 of the *Competition Act* and, as such, bears the burden of satisfying the Tribunal that:
- (a) TREB substantially or completely controls the markets identified by the Commissioner for the purpose of this Application, namely, the supply of residential real estate brokerage services to home buyers and home sellers within the geographic limits of the TREB MLS®;
 - (b) TREB's policies with respect to the use of and access to the TREB MLS® constitutes a practice of anti-competitive acts; and
 - (c) such policies have had, are having or are likely to have the effect of preventing or lessening competition substantially in a market.

28. The elements of subsection 79(1) of the Act are cumulative, such that the Commissioner bears the burden of establishing each element on the balance of probabilities.
29. For the reasons set out below, the Commissioner cannot satisfy even one of the elements required by section 79. Therefore, the Application must necessarily fail.

TREB does not substantially or completely control the Relevant Markets

30. The product markets identified by the Commissioner in paragraphs 41 to 43 of the Application are the supply of residential real estate brokerage services to home buyers and the supply of residential real estate brokerage services to home sellers, in each case defined geographically by the geographic coverage of the TREB MLS® (together, "the Relevant Markets").
31. TREB does not supply residential real estate brokerage services, either to home buyers or to home sellers.
32. While the Commissioner fails to identify the suite of services alleged to comprise "residential real estate brokerage services" for the purposes of the Application, TREB submits that the process of both defining "residential real estate brokerage services" and identifying competitors within the Relevant Markets must accord with applicable legislation.
33. The supply of residential real estate brokerage services in the Relevant Markets is governed by REBBA and regulations made under REBBA ("REBBA Regulations"). Pursuant to section 4 of REBBA:

Prohibition against trade in real estate unless registered

4. (1) No person shall,
- (a) trade in real estate as a brokerage unless the person is registered as a brokerage;
 - (b) trade in real estate as a broker unless he or she is registered as a broker of a brokerage;
 - (c) trade in real estate as a salesperson unless he or she is registered as a salesperson of a brokerage; or
 - (d) trade in real estate unless registered under this Act, 2002, c. 30, Sched. C, s.4 (1).

Unregistered persons

- (2) A person who is not registered as a brokerage, broker or salesperson shall not,
- (a) directly or indirectly hold himself, herself or itself out as being a brokerage, broker or salesperson, respectively; or
 - (b) perform any of the functions of a brokerage, broker or salesperson as provided in this Act, 2002, c. 30, Sched. C, s.4 (2).

34. Pursuant to subsection 1(1) of REBBA:

“brokerage” means a corporation, partnership, sole proprietor, association or other organization or entity that, on behalf of others and for compensation or reward or the expectation of such, trades in real estate or holds himself, herself or itself out as such.

“trade” includes a disposition or acquisition of or transaction in real estate by sale, purchase, agreement for purchase and sale, exchange, option, lease, rental or otherwise and any offer or attempt to list real estate for the purpose of such a disposition, acquisition or transaction, and any act, advertisement, conduct or negotiation, directly or indirectly, in furtherance of any disposition, acquisition, transaction, offer or attempt, and the verb “trade” has a corresponding meaning.

35. TREB is not registered as a brokerage for the purposes of REBBA and, as such, is legislatively prohibited from supplying residential real estate brokerage services in the Relevant Markets.

36. TREB cannot compete with its members in the supply of residential real estate brokerage services in the Relevant Markets because it would be *ultra vires* the purposes and objects of TREB, as set out in its Letters Patent.
37. While some of TREB's members may supply residential real estate brokerage services in the Relevant Markets, TREB itself cannot. TREB does not offer to consumers in the Relevant Markets any of the services expected from realtors and brokers (such as property identification, providing valuation guidance and conducting open houses); does not guide a buyer or seller through the transaction process; and does not assist in the negotiation of contracts for the sale and purchase of residential property. TREB does not hold itself out as being a brokerage and does not perform any of the functions of a brokerage.
38. TREB has no legislative authority upon which it could supply residential real estate brokerage services in the Relevant Markets and does not supply residential real estate brokerage services in the Relevant Markets.
39. TREB's status as a supplier of an input used in the delivery of residential real estate brokerage services in the Relevant Markets (i.e. the TREB MLS®) does not confer on TREB the status of a competitor in those "downstream" markets. Indeed, this is the position adopted publicly by the Competition Bureau at page 39 of its current *Draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions* (January 2009):

Where there is no vertical integration, simply charging a monopoly price for access to a facility, imposing conditions on its use*, or choosing not to offer access to downstream purchasers at any price would not, by itself, raise concerns. If a facility owner does not compete in the downstream market(s) in which the facility is used, the Bureau will not consider that supplier to have an incentive to affect downstream competition, and will not consider them to have downstream market power.

*Such conditions could include exclusive territories or field-of-use restrictions that limit the geographic and/or product markets in which downstream purchasers can use the facility.

(emphasis added)

40. TREB is not a competitor in the Relevant Markets and, as such, cannot have market power in the Relevant Markets. Without market power, TREB does not and cannot substantially or completely control the Relevant Markets.
41. Furthermore, the TREB MLS® is "owned" by TREB's members. TREB has no incentive to exercise any market power against its broker members. Instead, TREB has an incentive to operate the TREB MLS® to facilitate buying and selling of real estate.

TREB has not and is not engaged in a practice of anti-competitive acts

42. The conduct impugned by the Commissioner does not constitute a practice of anti-competitive acts for the purpose of subparagraph 79(1)(b) of the Act.
43. Conditions TREB places on members' access to and use of the TREB MLS®, including by way of TREB's By-Law, TREB's Rules and Policies and the requirement that members execute an Authorised User Agreement (together, "TREB's Access Terms") do not constitute a practice of anti-competitive acts.
44. As acknowledged by the Commissioner, TREB is the owner of the electronic database that constitutes the TREB MLS®, as well as its author. As the author of the TREB MLS®, TREB owns the copyright in the TREB MLS®. Pursuant to subparagraph 3(1)(a) of the *Copyright Act*, this right includes the sole right "to produce, reproduce, perform or publish any translation of the [TREB MLS®], ... and to authorize any such acts".

45. While "anti-competitive act" is not exhaustively defined by the Act, subsection 79(5) of the Act specifically excludes from the definition the lawful exercise of intellectual property rights. Subsection 79(5) of the Act provides:

... an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trademarks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

46. TREB's Access Terms constitute no more than the mere exercise of the rights derived by TREB from the *Copyright Act*. In the context of the Relevant Markets, TREB's Access Terms confer on TREB no advantage other than that derived from the *Copyright Act* itself.

47. As summarised by the Bureau itself at page 7 of its long-standing *Intellectual Property Enforcement Guidelines* (September, 2000):

The unilateral exercise of the IP right to exclude does not violate the general provisions of the Competition Act no matter to what degree competition is affected.

To hold otherwise could effectively nullify IP rights, impair or remove the economic, cultural and educational benefits created by them and be inconsistent with the Bureau's underlying view that IP and competition law are generally complementary.

48. Neither TREB's Access Terms nor TREB's Proposed VOW Policy are informed by the requisite purpose of having a negative effect on a competitor that is predatory, exclusionary or disciplinary:

(a) TREB is not a competitor in either of the Relevant Markets. Even if TREB's Access Terms negatively affect competition in the Relevant Markets, which is expressly

denied, any such effects are irrelevant for the purpose of subparagraph 79(1)(b) of the Act as they do not manifest a negative effect on a competitor of TREB.

- (b) TREB's Access Terms are informed by TREB's legitimate interest in preserving the value of the TREB MLS® for the benefit of TREB's members.
- (c) TREB's Access Terms have been formulated to safeguard the privacy rights of TREB's members and TREB's members' customers (both buyers and sellers of residential real estate in the Relevant Markets) in their individual listings and to ensure TREB and its members are compliant with their respective statutory obligations, including those arising from the *Personal Information Protection and Electronic Documents Act*, SC 2000, and the Code of Ethics established by Ontario Regulation 580/05 to REBBA.
- (d) TREB's Access Terms are a legitimate exercise of the intellectual property rights of TREB and its members, including by operation of the *Copyright Act*.

TREB'S Access Terms do not substantially prevent or lessen competition

- 49. The Tribunal is not required to consider whether TREB's Access Terms substantially prevent or lessen competition in the relevant markets because the Commissioner is unable to satisfy the burden with respect to either subparagraph 79(1)(a) or subparagraph 79(1)(b) of the Act.
- 50. TREB's Access Terms do not substantially prevent or lessen competition, whether in the manner alleged by the Commissioner or at all.

51. Neither TREB's Access Terms, nor TREB's Proposed VOW Policy, will or are likely to substantially prevent or lessen competition, whether in the manner alleged by the Commissioner or at all.
52. No business model or subset of members is preferred by TREB's Access Terms, either in practice or in reality. TREB serves, represents and treats its members equally, in accordance with its By-Law, Rules and Policies, and constating documents.
53. TREB's Access Terms are neither static nor entrenched. TREB's Access Terms are, and have historically been, developed and amended in consultation with TREB's members in response both to members' evolving requirements (including in answer to consumer demand) and legislative developments. It was within this context that TREB's VOW Task Force was struck in July 2010, and is within this context that TREB's Proposed VOW Policy is now under consideration by its members.
54. There is no basis for the Commissioner's allegation that "but for" certain of TREB's Access Terms, the Relevant Markets might benefit from "more innovation, enhanced quality of service and increased price competition, through such means as commission rebates."
55. TREB's Access Terms do not prescribe the commission structures that must be adopted by its members. There is clear evidence of price competition among participants in the Relevant Markets.
56. Consumers of residential real estate brokerage services already have a number of search tools open to them for the purpose of identifying and then narrowing the search to those properties of interest to them. A number of providers offer services to home buyers and sellers that do not rely on those home buyers or sellers acquiring the traditional suite of

residential real estate brokerage services offered by "bricks and mortar" brokers (including services that do not make use of the TREB MLS®). Further, there are no restrictions whatsoever placed by TREB on its members that preclude members from also making their listings available through the multitude of websites and listing services not affiliated with TREB.

57. The Commissioner's Application significantly undervalues both the services that many brokerages offer home buyers and the very real role brokers play in stimulating trade in the Relevant Markets. The work of a broker is not meaningfully lessened by reason of home buyers having undertaken their own searches. Brokers must still discharge their obligations under REBBA's Code of Ethics.
58. Services offered by buyers' brokers include market education, liaising with selling agents to obtain viewings, taking prospective buyers to inspect properties, guiding buyers through the financing and purchasing process, advising on and negotiating price and preparing and submitting offers. While identifying properties of interest is certainly an important aspect of the buying process, it is by no means either the most time intensive aspect of the service brokers provide, nor the aspect of service that is of greatest value to the home buyer. Any suggestion to the contrary is simply inaccurate.
59. TREB's Access Terms encourage the continued use of the TREB MLS® as a viable business tool, both from the perspective of TREB's members and the consumers they serve. In circumstances where concerns such as privacy and intellectual property rights are prevalent, the protections built in to TREB's Access Terms act to encourage consumers and members to continue to use and allow to be used in the marketing of their property, the

TREB MLS®. Without these protections, buyers and sellers would be less likely to use the TREB MLS®, with the likely result of a reduction in the value and volume of trade.

60. Neither TREB's Access Terms, nor TREB's Proposed VOW Policy substantially lessen or prevent competition in the Relevant Markets.

PART V: STATEMENT OF ECONOMIC THEORY

61. TREB's Concise Statement of Economic Theory is set out in Schedule "A" to this Response.

PART VI: RELIEF SOUGHT

62. TREB requests an Order dismissing the Application with costs payable to TREB. TREB submits that the circumstances surrounding the commencement of this Application warrant the awarding of costs to TREB on a full indemnity basis.

PART VII: PROCEDURAL MATTERS

63. TREB agrees that the Application be heard in English.
64. TREB agrees that the Application be heard in the City of Toronto.
65. TREB agrees with the Commissioner's proposal that documents be filed electronically.

DATED AT Toronto, this 19th day of August, 2011.


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**SCHEDULE A:
CONCISE STATEMENT OF ECONOMIC THEORY**

Background on The Toronto Real Estate Board

1. The Toronto Real Estate Board ("TREB") represents over 31,000 real estate brokers and salespersons licensed to trade in real estate in the Greater Toronto Area ("GTA"). TREB operates a multiple listing service ("MLS®") system. The TREB MLS® is an electronic database of available properties that has two relevant aspects. First, it compiles listings of current residential property for sale in the GTA by TREB members. Second, it contains historical information regarding the sale of residential real estate.
2. Sellers of residential property sign a listing agreement with a broker or the agent of a broker ("broker"). Listing agreements identify the property for sale, the seller's asking price, and the broker's commission. Listings may also contain other information related to the property, such as the seller's contact information and remarks intended for cooperating brokers, e.g., information regarding showing the property. TREB's member brokers post this information, along with the portion of the commission that they are willing to share with the buyer's broker, on the TREB MLS®. A participating TREB member broker, whether representing sellers or buyers, receives access to the listings of all other member brokers.
3. Posting a house on the TREB MLS® enables a seller's broker to communicate with all TREB members, increasing the pool of potential buyers. Prior to the institution of multiple listing services, sellers would list their homes with a broker, and buyers (or their brokers) would have to search the inventory of each broker that represented sellers. Multiple listing

service ("MLS") systems therefore are typically acknowledged as efficient because they reduce search costs for buyers. MLS systems also increase the liquidity of local real estate markets because of indirect network effects, leading to an enhanced chance of a match and better matches between buyers and sellers. Indirect network effects arise because more sellers mean more demand for access by buyers, and more buyers mean more demand for access by sellers. Increases in access to a MLS on both sides of the platform implies more transactions.

4. TREB is a membership organization that encourages professional standards in the industry and provides other services to members. Membership is open to all licensed real estate brokers in the GTA. Its activities are guided by an elected Board of Directors. TREB also has a full time staff providing services that include the TREB MLS® as well as arbitration, education, professional standards, communications, government relations and member outreach. TREB is a non-profit organization and has an incentive to operate the TREB MLS® to maximize the extent of trade in the GTA.
5. Brokers assist buyers and sellers in all stages of the real estate process. For sellers, among other things, they assist in determining the list price, marketing the listing and including it in a MLS, negotiate the terms of sale, and facilitate closing. Not only do they find buyers, but they also assist buyers, for instance by providing buyers with information useful in selecting houses—including accessing and interpreting information on a MLS, advising on offers and negotiations, and completing paper work. Brokers provide value to buyers and sellers because of their expertise in completing transactions and local market conditions. Given

how infrequently most individuals buy and sell homes and the complexity and size of the investment, brokers are valued for their professional assistance.

Economics of Two-Sided Platforms

6. MLS systems are two-sided platforms. Characteristics of two-sided platforms are that two distinct groups of users are connected by an intermediary platform, and demand for the intermediary service on one side of the platform increases as the number of participants on the other side increases (i.e., demand is interdependent). Examples include newspapers, which connect advertisers to subscribers, and payment card systems, which connect merchants to cardholders.

7. A MLS is a two-sided platform that connects buyers and sellers of real estate. The more buyers that access the platform (MLS) the greater the value to a seller from listing; the more sellers that market their property using the platform (MLS) the greater the value to buyers. Economically, a MLS acts as a means to match buyers and sellers, and its owner/operator will try to do so in a way that encourages the participation of both sides (buyers and sellers, with their respective brokers), thereby maximizing the value of the platform. Efforts to encourage participation by buyers and sellers involve trying to reward buyers and sellers for the benefit they create for other users of the system. Novel institutional arrangements will arise that attempt to internalize or capture and transfer the external value created by participation. For instance, the platform operator may be able to do this by setting the structure of its prices appropriately.

Pricing in two-sided platforms

8. A feature of two-sided platforms is the use of the price structure to encourage usage of the platform and determine the incidence of the costs of operating the platform. The price charged each side will reflect its elasticity of demand and the extent of cross platform externalities. The side with the more inelastic demand for services will generally pay a higher price (*ceteris paribus*) and hence bear more of the costs. The side whose size has a smaller effect on the value to the other side of joining the platform will pay a higher price (*ceteris paribus*) and hence bear more of the costs. The real estate market and operation of a MLS is an example where sellers whose houses are sold bear the cost of sale via the selling broker's commission, which is then shared with the buyer's broker. Typically the buyer pays nothing directly to the broker, whether they buy or not. Also, if a seller lists a house and does not sell it they do not pay. In economic terms, the subsidy from sellers to other participants is a way to partially internalize the network benefits buyers and unsuccessful sellers create when they use a MLS. That is, the subsidy is a means to return to buyers and unsuccessful sellers part of the benefits they create for others when they participate in a MLS. This implies, in short, that the current structure of prices (commissions) facilitates transactions in the real estate market.

9. Moreover, in a two-sided platform, the price paid on one side does not necessarily reflect the costs of providing services to that side. For profitable service, the sum of prices for a transaction must at least cover the costs of facilitating the transaction. This also means that a comparison between the costs of providing access to one side of the market and the price charged that side is not indicative of market power or overall efficiency.

Non-Price Competition

10. In a two-sided platform, like a MLS, the platform operator will typically also engage in conduct that facilitates liquidity, i.e., increases the use of a MLS by buyers and sellers. Similarly the platform operator will have an incentive to impose restrictions on conduct that reduces liquidity, i.e., decreases the use of a MLS by buyers and sellers.
11. TREB, sellers and sellers' brokers will have an interest in the incentives provided to brokers working for buyers, and in particular, that buyers' brokers have the right mix of incentives between price and non-price competition to attract buyers and close sales. Brokers can earn the right to represent buyers by rebating some of their commission, or through better or more innovative services. Sellers will want to make sure that brokers interested in representing buyers do not focus too much on representing buyers that are already in the market (inframarginal buyers) and not enough on widening the pool of buyers, i.e., bring into the market new buyers (marginal buyers). To the extent that price and non-price competition affect marginal and inframarginal buyers differentially, sellers will want to provide the optimal mix of incentives for brokers that represent buyers. Non-price competition to close sales involves effort and investment in activities beyond listing prices on a MLS or website, e.g., providing guidance on pricing, showing houses, negotiating the deal, etc.
12. Recognizing that the TREB MLS® is a two-sided platform has implications for market definition, market power, and understanding TREB's policies and rules (i.e., TREB's Access Terms and TREB's Proposed VOW Policy) as they apply to the operation and use of the TREB MLS®.

Market Definition and Market Power

Market Definition

13. In assessing market power there are three relevant services—two downstream services (buyers' brokerage and sellers' brokerage) and one upstream service (a MLS). The upstream service is a two-sided platform, with access provided to brokers representing buyers and sellers. While demand for the upstream service comes from these brokers, it is a derived demand, i.e., based on the demand by brokers' customers, buyers and sellers of real estate.
14. The upstream service provided by a MLS is not just access to one of the two downstream services. Instead, the ultimate "product" is a transaction, i.e., a successful sale. This follows immediately from understanding that a MLS is a platform that matches buyers and sellers. If this was not the case then the derived demand to list and access listings would be zero. The price of using the upstream service (in this case, the TREB MLS® platform) is the total price paid by the brokers for using a MLS when completing a downstream transaction (i.e. buying or selling real estate).
15. Proper market definition for the upstream service therefore involves considering the competitive constraint of other "platforms" on the TREB MLS®. Other platforms include other methods, technologies, and means whereby a buyer and a seller (or their brokers) could meet and make a transaction and would include, in particular, consideration of the competitive importance of competing services/platforms enabled by the internet.
16. The cost of a transaction to participants on a MLS equals the prices charged to brokers for placing a listing plus the price for accessing listings. These two services are both required

for a transaction on a MLS. It is the total price for these two complementary services which should be the price used in the hypothetical monopoly test.

17. In the context of a two-sided platform (such as the TREB MLS®), care must be taken when using the hypothetical monopoly test to define relevant markets. Applying it to one side of the platform by considering the impact of a small but significant non-transitory impact on price ("SSNIP") without considering the potential for feedback effects from the other side may lead to defining one side of the platform as a relevant market when in fact a SSNIP would not be profitable because of feedback effects.

Market Power

18. Similarly, in assessing the market power of TREB, the relevant issue is whether the aggregate price of the two services required to transact on the TREB MLS® is above competitive levels. If TREB had market power, the total price of the two services (access to brokers of buyers and sellers) would be raised above the cost of using a MLS to complete a transaction, the total price if there is no exercise of market power.
19. Because of the governance of TREB and the availability of alternative means of listing and advertising residential real estate, it is unlikely that TREB will exercise market power.
20. While theoretically there might be market power in the provision of access to the TREB MLS® (e.g., due to network externalities and economies of scale in a large comprehensive listing base), the TREB MLS® is operated not-for-profit and is "owned" by TREB's members. TREB has no incentive to exercise any market power against its broker members. Instead TREB has an incentive to operate TREB's MLS® to facilitate buying and selling of

real estate. Further, brokers who use the TREB MLS® are free to list on any competing MLS or similar service. For these reasons, TREB does not exercise significant market power, i.e., TREB is not dominant, even if the market is assumed to be the TREB MLS® in the GTA and excludes other platforms used to match buyers and sellers of residential real estate in the GTA.

TREB's Access Terms and Proposed VOW Policy

21. TREB's Access Terms and Proposed VOW Policy must be assessed and understood within the context of the incentives of TREB to promote usage of the TREB MLS® and in particular the potential of VOWs to affect, either positively or negatively the incentives of buyers and sellers to use the TREB MLS®.
22. The Commissioner's narrow focus on price competition and service differentiation on one side of the platform is a partial and incomplete analysis of the effects of TREB's Proposed VOW Policy. If VOWs or other innovations reduce costs without negatively affecting the TREB MLS®, then TREB and its members would adopt these practices, or they would determine how these practices and innovations could be incorporated into the TREB MLS®, by incorporating rules and restrictions that allow the benefits to be realized while at the same time minimizing any negative effects on the operation of the system in its entirety.
23. Restrictions on VOWs that draw data from the TREB MLS® may be pro-competitive if they limit negative effects on the liquidity of the TREB MLS®, i.e., without the restriction the number of buyers and sellers using the MLS system would be negatively impacted.

24. The restrictions contained in TREB's Proposed VOW Policy may be pro-competitive for a number of reasons, including the following:

- VOWs may deplete the value the TREB MLS®. For example, VOWs may add information that reduces the reputation of the TREB MLS® in general for accuracy. Or VOWs may result in the addition of information that is private. Both of these effects may negatively impact the incentives of buyers and sellers to participate in the TREB MLS®, reducing its overall value.
- Unrestrained VOWs may create excessive incentives for price competition among buyers' brokers and divert the focus away from non-price competition. This may reduce the effectiveness of the TREB MLS® from the perspective of sellers, resulting in fewer listings.
- Similarly, sellers may prefer to ensure that brokers have an incentive to enlarge the pool of potential buyers. Rather than compete over price (by offering a discount) to a buyer already in the market, sellers may prefer instead to provide incentives for finding new buyers by promising a large commission.
- VOWs may result in listing brokers leaving a MLS or reducing their incentive to find listings. This will be true, for instance, if listings generate additional listings and the link between the broker and a listing is weakened by posting on VOWs. That is, if a key factor to generate new listings is a stock of existing listings associated with a broker, then to the extent a VOW reduces the ability of sellers to assess the stock of existing listings, brokers do not have the same incentive to find listings.
- Because of network effects, a VOW might become the public face of the TREB MLS®, creating market power for the VOW. If this market power is used to charge fees above costs for referral, the total costs of a transaction could be raised. Alternatively, VOWs might decrease the incentive of buyers to participate, by charging an access fee or subjecting them to other implicit costs.
- VOWs may also have little incentive or capability to recruit new sellers/buyers compared to full service brokers. An important role of brokers is to locate new sellers and buyers who might otherwise not participate in the market, expanding the market and

increasing liquidity. To the extent that VOWs result in a reduction in the number of active traditional brokers, liquidity could be harmed.

- VOWs may access TREB MLS® data at only the incremental cost of providing the data and without contributing to the database directly by adding new listings. As such, they would be free riding on the efforts of full service brokers because they do not contribute appropriately to the cost of maintaining the TREB MLS® and because they do not contribute to the number of listings.
 - The success of a VOW might encourage brokers to withdraw (opt out) from the TREB MLS® and compete for listings directly. This could lead to fragmentation of the listings into different platforms, with different VOWs covering only parts of the market. This would likely reduce the value of the listings compared to a single comprehensive listing service. Since these VOW listings may be operated with different aims than the TREB MLS®, which exists as a means of facilitating the real estate market, this may reduce the efficiency of the real estate market.
 - A VOW that only refers buyers might not save significant costs for the buyer's broker handling the purchase. Yet the VOW referral could become an established route for buyers to enter the market, with the buyer's broker now needing to bear an additional cost of the referral, without corresponding reductions in the broker's subsequent costs. In other words, separating out the VOW from the buyer's broker may incur some doubling of costs compared to performing all functions within a single buyer agent. If a VOW acts as an additional search mechanism this *might* improve buyer broker efficiency and cut total buyer costs. If, however, it acts as an additional front end service, and merely shifts activity between different types of buyer brokers (which might *appear* to be increased competition on the buyer side but which in fact does not reduce costs or increase the efficiency of the matching process) then it might act as an additional cost to the system.
25. The Commissioner's narrow focus on price competition in buyer brokerage appears to mischaracterize the rationale for restrictive VOW policies and rules. There is in fact no market power to preserve or enhance in the operation of the TREB MLS®. Instead an

efficient VOW policy may have certain restrictions which are aimed to reduce overall costs and to promote usage of the TREB MLS®, thereby preserving its value. That is, a restrictive VOW policy is likely efficiency enhancing. The design and control of the TREB MLS® is intended to facilitate trade, not to create or maintain market power.

26. The *Competition Act* does not exist to regulate industry practice but only to remedy the abuse of market power.

CT-2011-003

COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

RESPONSE OF THE TORONTO REAL ESTATE BOARD

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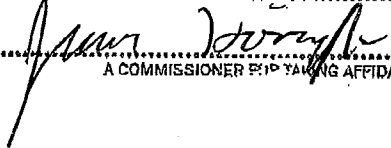
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Counsel for The Toronto Real Estate Board

This is Exhibit..... C referred to in the
affidavit of..... DONALD J. RICHARDSON
sworn before me, this..... 13th
day of..... SEPTEMBER 2011

.....
A COMMISSIONER TAKING AFFIDAVITS

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

Date: September 1, 2011

CT- 2011-003

Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

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CT-2011-003

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER OF certain rules, policies and agreements relating to the residential multiple listing service of the Toronto Real Estate Board

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

REQUEST FOR LEAVE TO INTERVENE ON BEHALF OF REALTYSELLERS REAL ESTATE INC.

REALTYSELLERS REAL ESTATE INC. ("Realtysellers") requests leave of the Competition Tribunal (the "Tribunal") pursuant to subsection 9(3) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended, and pursuant to subsection 46(2) of the Competition Tribunal Rules, to intervene in the above-noted proceedings. This request is made on behalf of Realtysellers by his Counsel, whose name and address is set forth below. In support of this request, Realtysellers intends to rely on the affidavit of Lawrence Mark Dale, President and CEO of Realtysellers, sworn August 31st, 2011.

STATEMENT OF FACTS

The following is a concise statement of facts presently known to Realtysellers on which this request is based:

1. On May 25, 2011, the Commissioner of Competition (the "Commissioner") filed a Notice of Application (the "Application") pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), and naming as respondent: The Toronto Real Estate Board ("TREB").
2. On July 7, 2011 the Commissioner filed an Amended Notice of Application.
3. On August 19, 2011 the Respondent filed a Response.
4. In the Amended Notice of Application, the Commissioner applied to the Tribunal for an order as set in paragraph 66 therein.
5. Realtysellers is a residential real estate resale brokerage and a member of TREB.
6. As a result of the Commissioner securing a Consent Agreement with the Canadian Real Estate Association ("CREA") that was filed with the Tribunal on October 25, 2010 and the Commissioner filing its initial Notice of Application in this proceeding on May 25, 2011, Realtysellers finalized plans to enter the residential real estate brokerage marketplace in the Greater Toronto Area and elsewhere in Canada. In the past two months, Realtysellers and its related parties (collectively "Realtysellers") have acquired brokerages in other provinces, became licensed as a brokerage or have taken steps to become licensed as a brokerage in several provinces and made a strategic investment in PropertyGuys.com Inc., Canada's largest franchise network helping private sellers sell their homes.
7. Realtysellers' objectives are to provide consumers with a different approach to obtaining residential real estate brokerage services at better value than provided by traditional agents and

brokerages. Realtysellers' business philosophy is to offer a choice of services to consumers so that they only need to purchase the services they desired and to utilize all available technology to provide an efficient delivery of services and MLS property information at better value than provided by traditional agents and brokerages.

8. Even though Realtysellers has only been operating for less than two months offering very limited programs, Realtysellers has established itself as TREB's largest non-traditional brokerage. Realtysellers has also established itself as Canada's largest non-traditional brokerage.

9. Realtysellers is only offering limited a la carte MLS services such as a simple MLS posting for consumers who do not want to purchase any other brokerage services. To expand its programs and services, the restrictions that TREB has regarding communicating MLS information to customers and potential customers over the internet in a virtual office environment must be removed as set out in the Proposed Order sought by the Commissioner in her Amended Notice of Application.

10. In the less than two months since Realtysellers has launched its first programs, Realtysellers has posted more than 600 properties on realtor.ca and has commitments with more than 1000 additional customers to post their properties on realtor.ca. Realtysellers currently is signing up more than 100 customers per week, with that number growing each week. Realtysellers anticipates assisting over 30,000 consumers with only its current limited program offerings in the next 12 months representing approximately \$4 billion in property-transaction value.

11. However, Realtysellers is unable to materially expand its service offerings with the current restrictions that TREB has placed on its ability to provide the same MLS information that traditional agents and brokerages can provide to consumers by hand delivery. Realtysellers does not want to provide any different information than what is provided by the traditional agents and brokerages, but wants to use what Realtysellers believes is a better and more efficient delivery process for this same

information, namely through the internet in a virtual office environment as apposed to by hand in a bricks and mortar environment as provided by traditional agents and brokerages.

12. If Realtysellers could provide information to customers and potential customers over the internet in a virtual office environment, Realtysellers can offer services to buyers and sellers at a cost substantially less than currently provided by typical traditional agents and brokerages through a bricks and mortar office environment.

**REALTYSELLERS IS DIRECTLY AFFECTED AND OFFERS A UNIQUE AND
DISTINCT PERSPECTIVE TO THE PROCEEDING**

13. Realtysellers is currently operating as a member of TREB offering innovative and non-traditional brokerage services. Even though its program offerings are restricted by the subject matter in these proceedings, in less than two months Realtysellers has established itself as a serious market participant. Realtysellers has posted more properties for sale on the TREB MLS system in the past two months than virtually any other brokerage member of TREB.

14. Realtysellers is TREB's largest non-traditional brokerage.

15. Realtysellers is likely TREB's only non-traditional brokerage wanting to operate a true virtual office.

16. Realtysellers can offer a unique and distinct perspective to these proceedings.

17. Realtysellers is the only known non-traditional brokerage member in TREB that wants to operate a virtual brokerage but is prevented from doing so by TREB's current rules and policies that the Commissioner seeks to remove in her Proposed Relief.

18. Two senior members of the Realtysellers executive group, Lawrence Dale and Fraser Beach, are the only current non-traditional realtors who have ever operated a virtual office in TREB, albeit both for limited time frames until TREB stopped their previous activities.

19. Realtysellers' President and CEO Dale brings an unique and distinct perspective to these proceedings as he has more experience operating and attempting to operate non-traditional brokerages than any member of TREB, having been pursuing the cause for over a decade. In addition, Dale has also been involved with some of TREB's largest traditional brokerage members including being President and CEO of the group of that in 2007 purchased 80% of Chestnut Park Real Estate Limited, one of TREB's largest traditional brokerage members. Dale's knowledge and experience that he acquired owning and operating both non-traditional and traditional brokerages will provide a distinct and unique perspective on the subject matter of these proceedings that cannot be provided by any other TREB member.

20. Realtysellers is not able to fully expand its program offerings until it is able to operate a virtual office to provide MLS information to its customers and potential customers which would be permitted under the Proposed Order.

21. Realtysellers is planning to provide additional innovative service programs for buyers and sellers that require that the MLS information be communicated to consumers through a virtual office environment to be more operationally efficient resulting in cost savings that can be passed on to consumers through lower costs and better value in the services they choose.

22. Realtysellers can offer a unique and distinct perspective to these proceedings as it is currently operating as a successful non-traditional brokerage with a developed business approach to utilize a virtual office to expand its scope of program offerings if permitted to do so with the removal of TREB's current unlawful rules and policies.

23. In the event that the Tribunal grants the relief sought by the Commissioner in the Application, Realtysellers has plans to expand its services to including programs that requires Realtysellers to operate a virtual office as described by the Commissioner in her Amended Notice of Application.

**TOPICS FROM THE MATTERS IN ISSUE WITH RESPECT TO WHICH THE
PROPOSED INTERVENOR WISHES TO MAKE REPRESENTATIONS AND
PROPOSED SCOPE OF THE PROPOSED INTERVENTION**

24. If Realtysellers is granted leave to intervene, the topics that Realtysellers would like to intervene on are as follows:

- (a) How a brokerage like Realtysellers would operate a virtual office and provide MLS information to consumers over the internet as opposed to through a bricks and mortar office and by hand;
- (b) The cost savings and operational efficiencies of operating a virtual office and the savings that can be passed along to consumers;
- (c) The impact of the current TREB rules and policies including its recent VOW policy on a non-traditional brokerage like Realtysellers who wants to provide consumers with MLS information in a virtual office environment over the internet as opposed to through a bricks and mortar office by hand;
- (d) The absence of any privacy issues and other issues preventing virtual offices as described herein; and
- (e) The Proposed Order and the impact it will have on non-traditional brokerages who want to provide consumers with MLS information through its virtual office over the internet as opposed to through a bricks and mortar office by hand.

25. If granted leave to intervene, Realtysellers requests that it be permitted, provided that the evidence provided by such witnesses is relevant and non-repetitive to call a maximum of three witnesses.

26. If granted leave to intervene, Realtysellers is prepared to produce all documents relevant to the topics of its intervention and deliver an affidavit of documents related thereto.

27. If granted leave to intervene, Realtysellers will produce a representative for discovery in relation to the topics of its intervention.

28. If granted leave to intervene, Realtysellers asks that, subject to any confidentiality orders, Realtysellers is to be served with the parties' productions and affidavits of documents as they become available.

29. If granted leave to intervene, Realtysellers asks that it be entitled to be present at the discoveries and to ask questions only on the topics of its intervention but not to repeat any questions already asked by other counsel.

30. If granted leave to intervene, Realtysellers asks that at the hearing it be entitled to cross-examine witnesses only on the topics of its intervention but not to repeat any questions already asked by other counsel.

31. If granted leave to intervene, Realtysellers asks that it can make oral and written submissions which are not repetitive only on the topics of its intervention as well oral and written submissions as to the Proposed Order.

NAME OF THE PARTY THE PROPOSED INTERVENOR INTENDS TO SUPPORT

32. Realtysellers intends to support the Commissioner's position generally.

33. While Realtysellers supports the Commissioner's position generally, Realtysellers is in a unique and distinct position to participate in these proceedings in the limited way proposed. Realtysellers is the largest innovative brokerage member in TREB wanting to offer the very type of services that the Commissioner has alleged TREB has prevented through anti-competitive conduct. The outcome of these proceedings will directly materially affect the business of Realtysellers. Realtysellers has established itself as significant market participant and will become a much more vigorous and effective competitor once TREB's anticompetitive rules are eliminated. Realtysellers is directly affected by any

Order made in this proceeding and would like the opportunity to intervene in the limited manner proposed. The Commissioner has a broader public interest mandate to serve, whereas Realtysellers has a unique and distinct perspective as an innovative brokerage seeking to compete in the market. This perspective will allow Realtysellers to assist the Tribunal by asking unique, non-repetitive questions of witnesses by presenting a limited amount of evidence if such evidence has not been put forward by the Commissioner and by making a final argument that will likely not be advanced by the Commissioner.

OFFICIAL LANGUAGE TO BE USED

34. Realtysellers requests that any hearing of the Request for Leave to Intervene and, if such leave is granted, the proceedings relating to the Application be conducted in the English language.

DATED at Toronto, Ontario, this 1st day of September, 2011

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Counsel for Realtysellers Real Estate Inc.

TO:

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AND TO:

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DEPARTMENT OF JUSTICE CANADA
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Counsel for the Respondent

CT-2011-003

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the
Commissioner of Competition pursuant to
section 79 of the *Competition Act*, R.S.C. 1985,
c. C-34, as amended

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

**REQUEST FOR LEAVE TO INTERVENE
ON BEHALF OF REALTYSELLERS REAL
ESATATE INC.**

Gowling Lafleur Henderson LLP
1 First Canadian Place
100 King Street West
Toronto, ON, Canada M5X 1G5

Mark Nicholson
Phone: (416) 369-7396
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Counsel for Realtysellers Real Estate Inc.

This is Exhibit D referred to in the
affidavit of DONALD J. RICHARDSON
sworn before me, this 13TH
day of SEPTEMBER 2011

.....
A COMMISSIONER FOR TAKING AFFIDAVITS

Affleck
Greene
McMurtry



Affleck Greene McMurry LLP

Barristers and Solicitors

Donald S. Affleck, Q.C.
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September 9, 2011

File: 2502-005

BY COURIER

Gowling Lafleur Henderson LLP
1 First Canadian Place
1600 - 100 King Street West
Toronto, ON M5X 1G5
Attention: Mr. Mark Nicholson

Dear Sirs:

Re: Realtysellers Real Estate Inc.

As you are aware, our firm acts for The Toronto Real Estate Board ("TREB") with respect to the application (including the amended notice of application) commenced by the Commissioner of Competition against TREB before the Competition Tribunal ("the Application").

We note that your firm represents Realtysellers Real Estate Inc. ("Realtysellers") with respect to its request for leave to intervene in the proceedings that are the subject of the Application and that Realtysellers has indicated an intention to support "generally" the position taken by the Commissioner of Competition.

We are instructed by TREB that your firm had a long standing prior retainer with TREB pursuant to which it acted as TREB's general counsel. As a result of this retainer, we are instructed that your firm is seized with confidential information of TREB relevant to subject matters in issue in the Application.

In the circumstances, it is a conflict of interest and breach of your firm's duty of loyalty to TREB for your firm to continue to act in this matter on behalf of Realtysellers.

...2

365 Bay Street, Suite 200, Toronto, Canada M5H 2V1 Telephone 416 360 2800 Fax 416 360 5960

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Affleck Greene McMurtry LLP

Barristers and Solicitors

We are instructed that if your firm does not remove itself as lawyers of record for Realtysellers, our client will have no choice but to move for an order requiring it to do so. In the event that this is necessary, our client will rely on this letter when seeking costs on a full indemnity basis.

We request your response by close of business on Monday, September 12, 2011 failing which our client will immediately proceed with a motion seeking your firm's removal.

Yours very truly,

A handwritten signature in black ink, appearing to read 'D.S. Affleck'.

D.S. Affleck

DSA/rw

c The Toronto Real Estate Board

CT-2011-003

COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

AFFIDAVIT OF DONALD RICHARDSON

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