

Proposed DOJ ban on commission offers against the law, MLS says

MLS PIN on Monday urged a district court to reject the Department of Justice's arguments against a settlement with homeseller plaintiffs in the Nosalek antitrust commission case

BY [ANDREA V. BRAMBILA](#)

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A large broker-owned multiple listing service is pushing back against the Department of Justice's take on a proposed settlement seeking to resolve antitrust claims lodged by homesellers in a major commission case known as [Nosalek](#).

On Monday, MLS Property Information Network (MLS PIN) urged Judge Patti B. Saris of the U.S. District Court for the District of Massachusetts to reject the DOJ's arguments against the settlement and approve the deal, saying that the federal agency's [proposed "total ban" on commission offers](#) from sellers to buyer brokers — both on and off the MLS — itself violates antitrust law and the First Amendment's free speech provision.

"DOJ's policy position not only goes far beyond what antitrust law requires; it also creates an antitrust problem for MLS PIN where none existed," attorneys for MLS PIN wrote in the [June 10 response](#) to the [DOJ's statement of interest](#).

"MLS PIN cannot enter into an agreement to ban the publication of free-market compensation offers without offending the very antitrust principles DOJ claims to be protecting. To impose such a ban through a federal injunction would also suppress speech that is protected under the First Amendment."

MLS PIN points out that the DOJ is not saying that sellers should not pay buyer brokers, since the antitrust enforcer has explicitly said that buyers can ask sellers to pay buyer brokers in their purchase offers, but rather that pre-emptive offers to pay should be restricted.

"DOJ never denies that sellers have the right to compensate buyer brokers; it only advocates arbitrary restraints on the communication of compensation offers," the filing says.

"But the payment of buyer-broker commissions has long been legal under Massachusetts and federal law. This proposal to ban truthful and non-misleading speech made in furtherance of a lawful activity runs headlong into a string of Supreme Court cases recognizing that such bans cannot survive First Amendment scrutiny."

For MLS PIN to ban homesellers from offering compensation to buyer brokers would be "a blatant restraint on trade much more severe than other MLS rules that have been struck down as anticompetitive," the filing adds.

MLS PIN also argues that the DOJ has other avenues to change how commissions are paid should it choose to.

"Crucially, nothing in the proposed settlement between Plaintiffs and MLS PIN would limit DOJ's ability to pursue changes to real estate market practices, in Massachusetts or anywhere else, through legislative advocacy or administrative rulemaking," the filing says.

“Indeed, the entirety of DOJ’s Statement sounds in the realm of policy and should be addressed to those bodies responsible for crafting statutes and regulations: namely, Congress or the Federal Trade Commission.”

MLS PIN pointed out that the Biden Administration has already [directed the FTC](#), which shares responsibility over antitrust with the DOJ, to exercise its rule-making authority “in areas such as ... unfair occupational licensing restrictions; unfair tying practices or exclusionary practices in the brokerage or listing of real estate; and any other unfair industry-specific practices that substantially inhibit competition.”

According to MLS PIN, the FTC “is the appropriate forum for resolving the policy concerns.”

Like federal commission suits [Moehrl](#) and [Sitzer | Burnett](#), Nosalek seeks class-action status and alleges that the sharing of commissions between listing and buyer brokers inflates seller costs and is a conspiracy in restraint of trade, a violation of the [Sherman Antitrust Act](#).

However, Nosalek differs in one important respect from the other suits: The National Association of Realtors is not named as a defendant, while [MLS PIN](#) is. The MLS, which has a full-time staff of 60 employees, boasts approximately 46,000 subscribers in six New England states and New York.

The settlement class is made up of sellers who paid, or on whose behalf sellers’ brokers paid, buyer broker commissions starting Dec. 17, 2016, in connection with the sale of residential real estate listed on Pinergy, MLS PIN’s multiple listing service system.

If Judge Saris chooses to deny final approval to the settlement with MLS PIN, the case against the MLS will continue unless and until another settlement deal is reached and finalized.

Under the current proposed settlement, MLS PIN would remove a requirement that homesellers must offer compensation to buyer brokers; would require listing brokers to notify sellers that they’re not required to offer compensation to buyer brokers and that they can decline if a buyer broker requests compensation; and would clarify that if the seller makes an offer to a buyer broker and the buyer makes a counteroffer, commissions would be negotiated among the seller, the buyer, the seller broker and the buyer broker.

“MLS PIN maintains that these three additional changes — (1) no required offer of compensation, (2) mandatory disclosure, and (3) mandatory certification — are unnecessary,” the filing says.

“But they undeniably address MLS PIN’s alleged role in the conspiracy as a mere conduit between buyers and sellers. These changes fully resolve the disputed antitrust conspiracy claim presented in this litigation.”

However, in its statement of interest, the DOJ rejected the rule changes in the settlement and instead called for “an injunction that would prohibit sellers from making commission offers to buyer brokers at all,” which the agency said would promote competition and innovation between buyer-brokers because buyers would be empowered to negotiate directly with their own brokers.

But MLS PIN emphasizes that the DOJ’s own policy statements have previously said that sellers may offer compensation to buyer brokers “up-front” on MLSs and that doing so can reduce

transaction costs because listing brokers don't have to negotiate separately with each potential buyer broker.

"It is simply not the case that antitrust law requires an MLS to ***affirmatively prohibit*** sellers from offering compensation to buyer brokers," the filing says [emphasis in original].

"Yet DOJ's core position here is that any proposed settlement must do exactly that to be fair and reasonable. DOJ ignores that scores of federal cases have already confirmed the legitimacy of the practice it now seeks to prohibit.

"So too have state laws, federal statutes and regulations, and the DOJ's own prior policy positions. DOJ provides no on-point authorities to the contrary."

Moreover, MLS PIN contends that "an evaluation of the proposed class settlement does not require a mini-trial on fiercely disputed antitrust issues," but rather whether the deal is "fair and reasonable to the class members."

"DOJ focuses entirely on the question of whether the proposed settlement would allow the alleged anticompetitive conduct to continue," the filing says. "But this is exactly the kind of question the Court need not entertain in evaluating a proposed antitrust settlement."

The DOJ declined to comment for this story. A joint statement from the DOJ, the plaintiffs and MLS PIN regarding the settlement is due to the court on June 21.