

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

THE REAL ESTATE BAR ASSOCIATION )  
FOR MASSACHUSETTS, INC., )

Plaintiff, )

v. )

CIVIL ACTION NO. 07-10244

NATIONAL REAL ESTATE )  
INFORMATION SERVICES, INC., )

NATIONAL REAL ESTATE )  
INFORMATION SERVICES, L.P., and )

MARK S. SOLOMON, )

Defendants. )

**ANSWER AND COUNTERCLAIMS OF NATIONAL  
REAL ESTATE INFORMATION SERVICES**

Defendant National Real Estate Information Services (“NREIS”)<sup>1</sup> hereby answers the Amended Complaint (“Amended Complaint”) brought by plaintiff The Real Estate Bar Association for Massachusetts, Inc (“plaintiff” or “REBA”).

Except as expressly admitted or denied herein below, NREIS is without knowledge or information sufficient to form a belief as to the truth of the allegations of each and every paragraph of the Amended Complaint. Further, NREIS is answering the Amended Complaint solely on its own behalf and not on the behalf of any other defendant.

1. Paragraph 1 of the Amended Complaint sets forth plaintiff’s characterization of this action and legal conclusions to which no response is required. To the extent that a further

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<sup>1</sup> Defendant National Real Estate Information Services (“NREIS”) is misnamed in the caption as “National Real Estate Information Services, L.P.” While NREIS is a limited partnership, the initials “L.P.” do not appear after NREIS’s name.

response is required, NREIS denies the allegations set forth in paragraph 1 of the Amended Complaint.

2. NREIS denies the allegations set forth in paragraph 2 of the Amended Complaint.

3. Paragraph 3 of the Amended Complaint sets forth plaintiff's characterization of this action to which no response is required. To the extent that a further response is required, NREIS denies the allegations set forth in paragraph 3 of the Amended Complaint and denies that plaintiff is entitled to the relief sought.

4. Paragraph 4 of the Amended Complaint sets forth plaintiff's characterization of this action and legal conclusions to which no response is required. To the extent that a further response is required, NREIS denies the allegations set forth in paragraph 4 of the Amended Complaint and denies that plaintiff is entitled to the relief sought.

## **PARTIES**

5. NREIS is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 5 of the Amended Complaint.

6. NREIS admits the allegations set forth in paragraph 6 of the Amended Complaint.

7. NREIS admits the allegations set forth in paragraph 7 of the Amended Complaint, except that the initials "L.P." do not appear after NREIS's name.

8. NREIS admits, upon information and belief, the allegations set forth in paragraph 8 of the Amended Complaint, except NREIS is without information and belief as to whether Solomon is a "citizen" of Massachusetts.

**JURISDICTION**

9. Paragraph 9 of the Amended Complaint sets forth legal conclusions to which no response is required. To the extent a further response may be required, NREIS denies the allegations in paragraph 9 of the Amended Complaint.

**STATEMENT OF FACTS**

10. NREIS is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 10 of the Amended Complaint.

11. NREIS is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 11 of the Amended Complaint.

12. NREIS is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 12 of the Amended Complaint.

13. Paragraph 13 of the Amended Complaint sets forth legal conclusions to which no response is required. Further, NREIS states that Opinion of Justices, 289 Mass. at 613, speaks for itself as to its content. To the extent a further response is required, NREIS denies the allegations in paragraph 13 of the Amended Complaint.

14. NREIS is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 14 of the Amended Complaint.

15. NREIS is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 15 of the Amended Complaint.

16. In response to paragraph 16 of the Amended Complaint, NREIS admits the allegations in the first sentence. In further answering, NREIS admits that it is not an attorney or law firm, but denies that it is engaged in the unauthorized practice of law.

17. In answering the allegations set forth in the first sentence of paragraph 17, NREIS admits that it has contractual relationships with a number of lenders to perform settlement services and provide title insurance in Massachusetts. NREIS denies the remaining allegations in paragraph 17 of the Amended Complaint.

18. NREIS denies the allegations set forth in paragraph 18 of the Amended Complaint.

19. NREIS admits the allegations set forth in paragraph 19 of the Amended Complaint.

20. NREIS admits the allegations set forth in the first sentence of paragraph 20 of the Amended Complaint. NREIS denies the remaining allegations in paragraph 20 of the Amended Complaint.

21. NREIS denies the allegations set forth in paragraph 21 of the Amended Complaint.

22. NREIS denies the allegations set forth in paragraph 22 of the Amended Complaint.

23. NREIS denies the allegations set forth in paragraph 23 of the Amended Complaint.

24. NREIS is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first sentence of paragraph 24 of the Amended Complaint. In answering the allegations set forth in the second sentence of paragraph 24, NREIS admits that it engages attorneys, but denies the remaining allegations set forth in paragraph 24 of the Amended Complaint.

25. NREIS denies the allegations set forth in paragraph 25 of the Amended Complaint.

**FIRST CLAIM FOR DECLARATORY JUDGMENT**

26. NREIS repeats and incorporates by reference its answers to paragraphs 1 through 25, inclusive, of the Amended Complaint.

27. NREIS denies the allegations set forth in paragraph 27 of the Amended Complaint.

28. NREIS denies the allegations set forth in paragraph 28 of the Amended Complaint.

**SECOND CLAIM FOR DECLARATORY JUDGMENT**

29. NREIS repeats and incorporates by reference its answers to paragraphs 1 through 28, inclusive, of the Amended Complaint.

30. NREIS denies the allegations set forth in paragraph 30 of the Amended Complaint.

31. NREIS denies the allegations set forth in paragraph 31 of the Amended Complaint.

**INJUNCTION AGAINST UNAUTHORIZED PRACTICE OF LAW**

32. NREIS repeats and incorporates by reference its answers to paragraphs 1 through 31, inclusive, of the Amended Complaint.

33. NREIS denies the allegations set forth in paragraph 33 of the Amended Complaint.

34. In answering paragraph 34 of the Amended Complaint, NREIS states that Section 46 of Chapter 221 of the General Law speaks for itself as to its content.

35. NREIS denies the allegations set forth in paragraph 35 of the Amended Complaint.

The remainder of the Amended Complaint contains a prayer for relief to which NREIS is not required to respond. To the extent that a further response is required, NREIS denies that plaintiff is entitled to any of the relief requested in the Amended Complaint.

**AFFIRMATIVE DEFENSES**

**First Defense**

The Amended Complaint fails to state a claim upon which relief can be granted against NREIS.

**Second Defense**

Plaintiff lacks standing to assert each of the claims against NREIS.

**Third Defense**

Interpreting G.L. c. 221 § 46A as plaintiff contends would render the statute unconstitutional under the Dormant Commerce Clause of the U.S. Constitution.

**Fourth Defense**

Interpreting G.L. c. 221 § 46A as plaintiff contends would violate the non-delegation doctrine.

**Fifth Defense**

Interpreting G.L. c. 221 § 46A as plaintiff contends would violate the doctrine of separation of powers.

**Sixth Defense**

Interpreting G.L. c. 221 § 46A as plaintiff contends would render the statute unconstitutionally vague and deprive NREIS of its rights to due process.

**Seventh Defense**

NREIS hereby gives notice that it intends to rely upon such other and further defenses as may become available during discovery proceedings in this case and hereby reserves its right to amend the Answer and assert such defenses.

WHEREFORE, defendant National Real Estate Information Services respectfully requests that the Court:

- i. Enter a judgment in NREIS's favor on all counts of the Amended Complaint;
- ii. Dismiss the Amended Complaint with prejudice;
- iii. Award NREIS its costs and expenses, including attorneys' fees, incurred in this action;
- iv. Grant such other relief as the Court deems just and proper.

## **COUNTERCLAIM**

Pursuant to Rule 13 of the Federal Rules of Civil Procedure, the defendant/counterclaimant, National Real Estate Information Services (“NREIS”) hereby brings this Counterclaim against plaintiff/defendant-in-counterclaim The Real Estate Bar Association for Massachusetts, Inc. (“REBA” or “plaintiff”) and states:

1. The Amended Complaint by plaintiff against NREIS, and its interpretation of G.L. c. 221 § 46A, is an act of economic protectionism by Massachusetts lawyers against out-of-state competition for settlement services. Through this action, NREIS seeks a declaration that G.L. c. 221 § 46A, if interpreted as plaintiff contends, violates the Dormant Commerce Clause of the U.S. Constitution by discriminating against and imposing an undue burden on interstate commerce. Pursuant to 42 U.S.C. § 1983, NREIS requests that the Court enjoin plaintiff from discriminating against and imposing an undue burden on interstate commerce by depriving NREIS of its right to engage in interstate commerce free from state restriction. Pursuant to 42 U.S.C. § 1988, NREIS is entitled to an award of reasonable attorneys fees and costs.

### **The Parties**

2. NREIS is a limited partnership organized under the laws of the Commonwealth of Pennsylvania. Its principal place of business is at 100 Beecham Drive, Pittsburgh, PA 15205.

NREIS is a title agent and vendor management company.

3. Plaintiff, formerly known as the Massachusetts Conveyancers Association, Inc., is a corporation organized under the laws of the Commonwealth of Massachusetts. Upon information and belief, plaintiff’s principal place of business is at 50 Congress Street, Suite 600 Boston, Massachusetts 02109-4075. Plaintiff’s stated mission is to “advance the practice of real estate law” in Massachusetts.

### **Jurisdiction and Venue**

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under Article I, Section 8, Clause 3 of the U.S. Constitution (the Commerce Clause). This Court also has subject matter jurisdiction under 28 U.S.C. § 1343, because this is an action under 42 U.S.C. § 1983 to redress a deprivation, under color of state law, of a right secured by the Constitution of the United States. This Court also has subject matter jurisdiction over this action under 28 U.S.C. § 2201 (the federal Declaratory Judgment Act).

5. Venue is proper pursuant to 28 U.S.C. § 1391 because a substantial part of the actions giving rise to the counterclaims alleged herein occurred within this judicial district and plaintiff's principal place of business is also in this judicial district.

### **Facts**

6. NREIS provides centralized title, appraisal, and settlement services to mortgage lenders throughout the country. As a vendor manager, NREIS also arranges for the provision of settlement services by third-party providers. The majority of transactions in which NREIS provides, or arranges for, services are mortgage refinancings.

7. The provision of settlement services involves interstate commerce. A substantial portion of the funds and insurance involved in the purchase of real estate and refinancing of mortgage loans in Massachusetts comes from out-of-state.

8. None of the settlement services directly provided by NREIS for Massachusetts loan transactions involves the rendering of legal advice. In connection with the settlement services that NREIS provides for Massachusetts loan transactions, NREIS does not practice law or hold itself out as authorized, entitled, competent, qualified or able to practice law.

9. NREIS arranges for Massachusetts attorneys to prepare deeds and other legal documents affecting title to real estate, where applicable, and to conduct closings in Massachusetts on behalf of mortgage lenders.

10. G.L. c. 221 § 46B states:

Section 46B. The supreme judicial court and the superior court shall have concurrent jurisdiction in equity, upon petition of any bar association within the commonwealth, or of three or more members of the bar of the commonwealth, or of the attorney general, or of the district attorney within his district, to restrain violations of section forty-six, forty-six A or forty-six C.

11. In seeking to enforce G.L. c. 221 § 46A against NREIS, plaintiff is acting as a bar association within the meaning of G.L. c. 221 § 46B. In seeking to enforce G.L. c. 221 § 46A against NREIS, plaintiff is acting under color of state law.

12. On or about March 30, 2006, plaintiff's attorneys sent NREIS a letter on behalf of plaintiff, which stated that NREIS was engaged in the unauthorized practice of law within the meaning of G.L. c. 221 § 46A.

13. On October 11, 2006, plaintiff issued an opinion regarding so-called "witness" closings. See link to "ethics final opinion" at [http://www.reba.net/news/new\\_upl](http://www.reba.net/news/new_upl) and incorporated herein by reference. The opinion states that all activities included within plaintiff's broad definition of "conveyancing," within which plaintiff includes purchase and refinancing transactions, must be conducted by, or under the supervision of, a Massachusetts attorney.

14. The relief now sought by plaintiff under the guise of c. 221 § 46A would prevent NREIS from, among other things, offering settlement services to mortgage lenders including, but not limited to, (1) arranging for attorneys to close loans on behalf of mortgage lenders, (2) reviewing title to real property in Massachusetts, (3) preparing any non-legal documents necessary to close a mortgage loan, including pre-printed HUD forms, (4) disbursing funds post-

closing, (5) reviewing loan documents post-closing, and (6) arranging for documents to be recorded post-closing.

15. None of the foregoing activities constitutes “the practice of law” within the meaning of G.L. c. 221 § 46A and as interpreted by the Supreme Judicial Court.

16. G.L. c. 221 § 46A, if interpreted as plaintiff requests, violates the Dormant Commerce Clause of the U.S. Constitution by discriminating against and imposing an undue burden on interstate commerce by, among other things, preventing NREIS from offering centralized title and settlement services to national mortgage lenders for Massachusetts loan transactions. Any legitimate purpose of the statute could be achieved by non-discriminatory means.

17. G.L. c. 221 § 46A, if interpreted as plaintiff requests, would impose an undue burden on interstate commerce by effectively barring out-of-state companies from offering a commercial service within Massachusetts and conferring the right to provide that service -- and to reap the associated economic benefit -- upon Massachusetts attorneys, a class largely composed of Massachusetts citizens. This burden is not justified by any purported local benefit. The cost to NREIS of losing its Massachusetts business would be substantial.

18. Massachusetts’s tenuous interest in having G.L. c. 221 § 46A interpreted expansively to require a Massachusetts attorney to conduct all of the settlement services necessary to complete a mortgage loan transaction, even those services that clearly do not involve the practice of law, cannot constitutionally justify the requirement that NREIS incur such a loss.

**COUNT I - DECLARATORY JUDGMENT PURSUANT  
TO DECLARATORY JUDGMENT ACT, 28 U.S.C. § 2201  
(DORMANT COMMERCE CLAUSE)**

19. NREIS repeats and realleges the allegations set forth in paragraphs 1 through 18 above.

20. Article I, Section 8, Clause 3 of the U.S. Constitution (the “Commerce Clause”) provides that Congress shall have the power to “regulate commerce ... among the several States.” The Commerce Clause limits the power of the states to discriminate against interstate commerce and confers a right to engage in interstate trade free from restrictive state regulation.

21. G.L. c. 221 § 46A, if interpreted as plaintiff contends, would violate the Dormant Commerce Clause of the U.S. Constitution. Specifically, G.L. c. 221 § 46A, if interpreted as plaintiff contends, would discriminate against NREIS’s ability to do business in Massachusetts by, among other things, preventing NREIS, and other similar interstate vendor management companies, from offering centralized settlement services for mortgage loan transactions occurring in Massachusetts. Alternatively, G.L. c. 221 § 46A, if interpreted as plaintiff contends, would impose a burden on NREIS’s ability to engage in interstate commerce that clearly exceeds any local benefit.

22. An actual controversy has arisen and exists between NREIS and plaintiff regarding whether NREIS has a right to continue to provide centralized title and settlement services to mortgage lenders for transactions occurring in Massachusetts.

23. Plaintiff alleges that NREIS is violating G.L. c. 221 § 46A by providing, or arranging for, centralized title and settlement services for mortgage lenders engaged in lending transactions in Massachusetts. NREIS denies these allegations.

24. NREIS hereby seeks a declaration of the rights, duties, and liabilities of the parties including, without limitation, a declaration that G.L. c. 221 § 46A, if interpreted against NREIS as plaintiff contends, violates the Dormant Commerce Clause of the U.S. Constitution.

**COUNT II – INJUNCTIVE RELIEF PURSUANT TO 42 U.S.C. § 1983**

25. NREIS repeats and realleges the allegations set forth in paragraphs 1 through 24 above.

26. The constitutional right to be free from restrictive state regulation is enforceable under 42 U.S.C. § 1983. Dennis v. Higgins, 498 U.S. 439, 448 (1991).

27. Plaintiff purports to enforce G.L. c. 221 § 46A under the authority provided to it by the Massachusetts legislature pursuant to G.L. c. 221 § 46B.

28. Plaintiff's legal action against NREIS to enforce G.L. c. 221 § 46A in the manner alleged in the Amended Complaint is taken under color of state law for the purpose of protecting its members from competition from out-of-state providers.

29. Plaintiff is using G.L. c. 221 § 46A to seek an injunction against commercial conduct, performed out-of-state, that is not the practice of law.

30. Plaintiff's interpretation of G.L. c. 221 § 46A deprives NREIS of a right secured by the Constitution and laws of the United States.

31. Pursuant to 42 U.S.C. § 1983, NREIS requests that the Court enjoin plaintiff from preventing NREIS from engaging in interstate commerce free from restrictive state action.

32. Pursuant to 42 U.S.C. § 1988, NREIS is entitled to recover its reasonable costs and attorneys fees.

**RELIEF REQUESTED**

WHEREFORE, defendant/counterclaimant NREIS respectfully requests that the Court:

- A. Enter a declaration that G.L. c. 221 § 46, if enforced as plaintiff requests, would violate the Dormant Commerce Clause of the U.S. Constitution as applied to NREIS;
- B. Enjoin plaintiff from engaging in activity that deprives NREIS of its constitutional right to engage in interstate commerce including, but not limited to, enforcing G.L. c. 221 § 46A against NREIS in the manner set forth in the Amended Complaint;
- C. Award NREIS its reasonable costs and attorneys fees pursuant to 42 U.S.C. § 1988; and
- D. Award such additional relief as the Court may deem just and proper.

Respectfully submitted,

NATIONAL REAL ESTATE INFORMATION  
SERVICES,

By its attorneys,

/s/ Irene C. Freidel

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Dated: February 6, 2007

CERTIFICATE OF SERVICE

I, Irene C. Freidel, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on this 6th day of February 2007 and was also caused to be sent to all the following counsel of record via Hand Delivery or U.S. Mail, postage prepaid, as indicated below:

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/s/ Irene C. Freidel

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Irene C. Freidel