UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. **CONSOLIDATED MULTIPLE LISTING SERVICE, INC.,** Defendant.	Case No. 3:08-CV-01786-SB

UNITED STATES' MEMORANDUM IN OPPOSITION TO THE CONSOLIDATED MULTIPLE LISTING SERVICE, INC.'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

In its motion, CMLS does not contest that its members – virtually all active residential real estate brokers in the Columbia area – agreed to rules that ban innovative forms of competition, raise barriers to entry for new brokers, and injure consumers by limiting their choices and raising their commission fees. Instead, CMLS asks the Court to grant it immunity from liability for this conduct based upon the mere fact that it is a corporation, as reflected on the certificate of incorporation it offers as the only evidence supporting its motion. CMLS's motion ignores an enormous body of antitrust law, including Supreme Court cases, applying Section 1 to competitor associations like CMLS.

In at least nine cases involving multiple listing services (MLSs) like CMLS, courts have uniformly held that MLS rules governing their broker members are subject to Section 1, and none of these cases has extended the doctrine of intra-corporate immunity to such rules. *Infra* 5-6. Similarly, the Supreme Court has consistently applied Section 1 to associations, standard-setting organizations and joint ventures formed by competitors, even when such combinations are incorporated. *Infra* 6-8. CMLS fails to address, and its argument would effectively overrule, this long line of cases. Competitors who join forces to restrain competition cannot avoid scrutiny by using a corporation to carry out their agreement. If so, even a criminal price-fixing cartel could easily escape Section 1 liability merely by formalizing the structure of its illegal enterprise.

CMLS relies upon two Fourth Circuit cases[1] that apply the doctrine of intra-corporate immunity established by the Supreme Court in *Copperweld Corporation v. Independence Tube*

[1] *Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc.*, 367 F.3d 212, 223-24 (4th Cir. 2004), and *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 699-701 (4th Cir. 1991) (en banc).

Corporation, 467 U.S. 752 (1984), but CMLS fails to mention or apply the relevant standard from these cases. Intra-corporate immunity existed in these cases only because they involved "wholly unilateral" actions by corporate agents who were "not separate economic actors pursuing separate economic interests, so agreements among them d[id] not suddenly bring together economic power that was previously pursuing divergent goals." *Id.* at 768-69; *accord Trigon*, 367 F.3d at 223; *Oksanen*, 945 F.2d at 703. In determining whether "separate economic actors" are involved, courts "must examine the substance, rather than the form, of the relationship". *Oksanen*, 945 F.2d at 703. CMLS has ignored the relevant test announced in *Copperweld* – and applied even in the cases on which CMLS relies – and has elevated form over substance by relying solely on its certificate of incorporation.

Under the *Copperweld* standard, intra-corporate immunity does not apply here. CMLS's rules are an agreement among substantially all of the active competitors in the Columbia area, who have combined their economic power to enforce restrictions on how they can compete with each other. This fact distinguishes *Copperweld, Trigon* and *Oksanen*, each of which involved unitary action by a single corporate enterprise and not an agreement among competitors combining their economic power. Accordingly, the Court should deny CMLS's motion.

II. STATEMENT OF FACTS[2]

CMLS is owned by its approximately 370 members, most of whom are competing real estate brokers who represent buyers and sellers of homes in the Columbia area. *See* Answer at ¶ 4

[2] For purposes of CMLS's motion for summary judgment, the evidence submitted by the United States "is to be believed and all justifiable inferences are to be drawn in [its] favor." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). As used here, "Ex. __" refers to an exhibit to the Declaration of Owen M. Kendler, filed in support of this memorandum.

(Docket #6); CMLS Br. at 4 (Docket #35); Ex. A at 75:21-76:1 (Rule 30(b)(6) Dep. of CMLS). CMLS operates the Columbia area's only MLS, a listing service that maintains a database of nearly all homes for sale through a broker. Ex. B at 37:7-39:21 (Roe Dep.); Ex. C at 33:5-9, 60:14-61:9 (Baucom Dep.). The CMLS database provides its members with the means to expose their seller clients' properties to CMLS members and to view the inventory of properties for sale to assist potential buyers. Ex. D at Art. II, § 2. For this reason, area brokers need to be members of CMLS to be in business. *See* Pl.'s Mem. in Supp. of Summ. J. at 5-6 (Docket #38) (citing evidence that CMLS has market power and controls access to the relevant market). Virtually all active, Columbia-area brokers who represent buyers and sellers of homes belong to CMLS. *Id.*

CMLS is controlled by competing brokerage firms. The brokers on CMLS's Board have the power to admit new members, propose by-laws, and enact rules for members. Ex. D at Art. X, § 2 & Rule 5(c). Board members have a duty to represent the interests of all CMLS members. Ex. E at 66:14-18 (Roe Dep.). In addition, the brokers who comprise CMLS's larger membership vote on the Board's proposed slate of directors and can approve changes to CMLS's by-laws at annual meetings. Ex. D at Art. XIII, § 1; Ex. C at 22:20-23:10 (Baucom Dep.). All members of CMLS must agree in writing to be bound by CMLS's rules. Ex. D at Art. III, § 5; Ex. F at 34:6-14 (Rule 36(b)(6) Dep. of CMLS). Thus, the CMLS rules are agreements among competitors. Ex. F at 32:21-33:18 (Rule 30(b)(6) Dep. of CMLS); Ex. G at 96:22-97:7 (Ness Dep.).

The broker members of CMLS are separate economic actors operating hundreds of independent brokerage businesses. CMLS's members "compete fiercely" against each other in the market for residential real estate brokerage services. Ex. F at 32:21-33:18 & 34:25-35:7 (Rule 30(b)(6) Dep. of CMLS); CMLS's Answer at ¶ 16 (Docket #6); Ex. H at 32:1-19 (Walker Dep.);

Ex. B at 36:14-37:6 (Roe Dep.) (acknowledging that the other members of CMLS are his brokerage's competitors).

Through the CMLS rules, these brokers agreed among themselves to ban innovative forms of competition and raise barriers to entry for new competitors. For example, incumbent CMLS members agreed that none would compete by offering contract terms other than those they had all agreed to, none would compete by agreeing to perform fewer services in return for a lower fee, none would compete for customers from lower-cost home offices or from offices outside of the Columbia-area, and that all new competitors would pay high initiation fees. *See* Pl.'s Mem. in Supp. of Summ. J. at 2, 6-17 (Docket #38). These agreements deny consumers the benefits of competition, resulting in fewer choices and higher fees. *Id.* at 12-13, 17.

III. ARGUMENT

A. INTRA-CORPORATE IMMUNITY DOES NOT APPLY TO AGREEMENTS BETWEEN INDEPENDENT ACTORS COMBINING THEIR ECONOMIC POWER.

CMLS claims immunity from Section 1 of the Sherman Act because the brokers who formed CMLS chose to incorporate it. The Supreme Court has rejected such a formalistic approach and held that courts should look to the "reality" and not the "form of an enterprise's structure." *Copperweld*, 467 U.S. at 772-73 (antitrust liability should not depend "on the garb in which a corporate subunit was clothed"); *see also Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982) (nonprofit corporation's rule on maximum price for medical services constituted "an agreement among hundreds of competing doctors" who comprised it). Permitting competitors to avoid Section 1 scrutiny simply by incorporating their combination would overturn decades of Supreme Court precedent and ultimately legalize all agreements that restrain trade, including criminal price fixing.

The law is clear. A long line of antitrust cases involving MLSs like CMLS establish that "[t]he concerted action necessary to establish a Section 1 violation exists in the agreement of [the MLS's] members to adopt and apply [its] rules and membership criteria." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1361 n.20 (5th Cir 1980).[3] These cases include this Court's decision in *DuPre v. Columbia Bd. of Realtors, Inc. & The Consol. Multiple Listing Servs. of Greater Columbia, Inc.*, Case No. C.A. 78-670-0 (D.S.C. June 2, 1987), in which Judge Perry held that CMLS violated Section 1 by denying admission to a broker who operated out of his home.[4] The leading treatise on antitrust law uses MLSs as a classic example of joint ventures among competitors that warrant heightened antitrust scrutiny. *See* Areeda & Hovenkamp,

[3] *See also Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1569-70, 1581-82 (11th Cir. 1991) (defendant MLS was a "cooperative venture" and its membership requirements were agreements subject to Section 1); *Pope v. Mississippi Real Estate Comm'n*, 872 F.2d 127, 130-31 (5th Cir. 1989) (per curiam) (applying Section 1 to MLS's revised fee structure; finding the fees reasonable); *Penne v. Greater Minneapolis Area Bd. of Realtors*, 604 F.2d 1143, 1147-50 (8th Cir. 1979) (applying Section 1 to MLS practice of distributing to members information about commission rates of member competitors; reversing summary judgment for defendant); *O'Riordan v. Long Island Bd. of Realtors, Inc.*, 707 F. Supp. 111, 115-16 (E.D.N.Y. 1988) (subjecting rule requiring Realtor membership as condition of MLS membership to Section 1; finding no unreasonable restraint); *Cantor v. Multiple Listing Serv. of Dutchess County*, 568 F. Supp. 424, 426, 430 (S.D.N.Y. 1983) (MLS bylaws regulating yard signs violated Section 1); *United States v. Nat'l Ass'n of Realtors*, No. 05 C 5140, 2006 WL 3434263, at *12 (N.D. Ill. Nov. 27, 2006) (denying motion to dismiss Section 1 challenge to MLS rules restricting how brokers could use the internet to compete, stating that "MLSs are joint ventures among competing brokers to share their clients' listings and to cooperate in other ways."); *Austin Bd. of Realtors v. E-Realty, Inc*, No. Civ. A-00-CA-154 JN, 2000 WL 34239114, at *4 (W.D. Tex. Mar. 30, 2000) (entering preliminary injunction against MLS rules restricting broker's ability to compete using internet); *cf. United States v. Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485, 494-95 (1950) (stating that it was "clearly" appropriate to characterize code of ethics and bylaws adopted by Realtor association as agreements governed by Section 1).

[4] In disregard of this judgment, CMLS has repeated the same unlawful conduct by adopting a rule that denies admission to any broker operating out of a home office. This Court's decision in *DuPre* is discussed in greater detail in the United States' brief in support of its motion for summary judgment. Docket #38 at 3, 21-22, 25-26.

Antitrust Law at ¶¶ 2220, 2221 & 2223 (Supp. 2008). CMLS fails to address these relevant authorities.

Instead of ending the search for a Section 1 agreement at the certificate of incorporation, courts look to see whether the defendant operates on behalf of at least two independent economic actors who have combined their economic power. *See Copperweld*, 467 U.S. at 772-73; *Maricopa County Med. Soc'y*, 457 U.S. at 356-57 (organization's rule was an agreement among its "independent competing entrepreneur[]" members); *Virginia Excelsior Mills v. FTC*, 256 F.2d 538 (4th Cir. 1958) (finding agreement among the competitors who formed joint venture, where venture set prices that its independent owners charged for packaging materials); *see also Texaco, Inc. v. Dagher*, 547 U.S. 1, 5-6 (2006) (holding the two owners of a joint venture could not form an antitrust agreement because the companies merged and no longer competed against each other in the relevant market). The Supreme Court has long applied Section 1 to associations,[5] standard setting organizations,[6] and joint ventures,[7] when they adopt rules affecting how separate economic

[5] *See, e.g., FTC v. Indiana Fed'n. of Dentists*, 476 U.S. 447, 459 (1986) (the defendant's "policy takes the form of a horizontal agreement among the participating dentists to withhold from their customers a particular service they desire"); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 682-83 (1978) (characterizing ethical cannon regulating price negotiations an agreement).

[6] *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-501 (1988) (competitor organization subject to Section 1 because its "product standards [are], after all, implicitly ... agreement[s] not to manufacture, distribute, or purchase certain types of products."); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 577 (1982) (standard setting organization liable under Section 1).

[7] *See, e.g., Silver v. New York Stock Exch.*, 373 U.S. 341, 347 (1963) (describing shut off of wire connection to plaintiff to be "collective action" by stock exchange and its members); *Associated Press v. United States*, 326 U.S. 1, 11-12, 16 (1945) (concluding that joint venture's bylaws "in and of themselves were contracts" and that "these publishers have, by concerted agreements, pooled their power").

actors may compete. The Supreme Court also subjects agreements to Section 1 even where competitors incorporated their combination as a nonprofit company, as CMLS has done.[8]

Almost one hundred years ago in *United States v. Terminal Railway Association of St. Louis*, 224 U.S. 383 (1912), the Court imposed Section 1 liability on fourteen railroads that created and controlled a single company that operated the only crossings over the Mississippi River at St. Louis. *Id.* at 391 & 399-400. Like CMLS, the defendant argued that the company was a single entity of "common control and ownership" and therefore immune from Section 1. *Id.* at 399-400. The Court disagreed, finding that the company was subject to Section 1 because it was owned and operated by fourteen separate railroads, which jointly controlled admission to, and use of, the company's facilities. *Id.* at 399-400, 404-05. Similarly, CMLS's competing brokers control admission to CMLS and regulate how members may compete and serve customers.

More recently, in *California Dental Association v. FTC*, the Supreme Court analyzed the FTC's case against a group of approximately 19,000 competing dentists under Section 1 even though the dentists registered their corporation as a tax exempt 501(c), noting that the dentists all agreed as a condition of membership in the organization to abide by its code of ethics. 526 U.S. 756, 759-60, 762 n.3, 779-81 (1999) (remanding case for a more complete rule of reason analysis under Section 1). CMLS likewise forces its members to agree to and adhere to its bylaws and rules as a condition of membership. Ex. D at Art. III, § 5.

[8] *See, e.g.*, *Hydrolevel*, 456 U.S. at 576 ("[T]he fact that ASME is a nonprofit organization does not weaken the force of the antitrust and agency principles that indicate that ASME should be liable for [plaintiff's] antitrust injuries."); *Maricopa County Med. Soc'y*, 457 U.S. at 339 (Section 1 liability for nonprofit corporation).

The Fourth Circuit has also looked beyond corporate structure to apply Section 1 to an agreement among competitors. In *Virginia Excelsior Mills*, producers of excelsior created a new company, owned and governed by the producers, to act as their exclusive sales agent. The owners continued independent production operations but used their new company to fix the price at which they sold excelsior. The court refused to find that, merely because the producers formed the new company to facilitate their price fixing, they were a single entity. 256 F.2d at 540.

In *Terminal Railroad*, *California Dental*, and *Virginia Excelsior Mills*, the courts' inquiry did not end upon discovering that the defendant was a stand-alone corporation. The courts instead found that each defendant was subject to Section 1 because it was controlled by competitors who had agreed to combine their economic power. Accordingly, the Court should not end its inquiry here with CMLS's certificate of incorporation. As CMLS admits, it is ultimately controlled by its members – horizontal competitors in the residential real estate brokerage market. Def. Br. at 4 (Docket #35) ("[T]he membership controls the by-laws which ultimately control CMLS."). CMLS's rules are subject to Section 1 because they are "an agreement among competitors on the way in which they will compete with one another." *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 99 (1984).

B. THE CASES RELIED UPON BY CMLS ARE DISTINGUISHABLE BECAUSE THEY INVOLVE A SINGLE ECONOMIC ACTOR.

The cases cited by CMLS are consistent with the substantial body of law discussed above. Both *Trigon* and *Oksanen* are health care cases involving a single corporate defendant that created an advisory group of doctors. In both instances, the Fourth Circuit properly applied *Copperweld* and considered whether independent economic actors operated in concert and pooled

their economic power. Finding a unitary actor in each instance, the Fourth Circuit concluded that each defendant's actions were not subject to Section 1.

Oksanen involved a "disgruntled physician" who, upon his suspension from the defendants' hospital, attempted to "cloak in federal antitrust law what [was] in essence a workplace dispute." 945 F.2d at 699-701, 711. Pursuant to *Copperweld*, the Court "examine[d] the substance, rather than the form, of the relationship between the hospital and the medical staff during the peer review process" that led to the plaintiff's suspension and found there was no Section 1 agreement. Because the doctors were simply agents of the hospital, which retained ultimate authority to act on the recommendation of its advisory peer-review committee, "[t]he decision to conduct the peer review process does not represent the sudden joining of independent economic forces that section one is designed to deter and penalize." *Id*. at 703.[9]

In *Trigon*, the plaintiff alleged a conspiracy between an insurance company and its advisory group of doctors to limit insurance coverage for chiropractic services. 367 F.3d at 217-18. The Court again concluded that the doctors who served on the advisory panel were "corporate agents" of and "lacked the capacity" to conspire with the insurance company. *Id.* at 225. The decision of the insurance company to form an advisory panel of doctors did "not bring together independent economic forces." *Id.* The insurance company retained ultimate control

[9] The court also recognized that, because a "medical staff can be comprised of physicians with independent and at times competing economic interests," doctors could, under different circumstances, engage in conduct subject to Section 1. *Id*. at 706. During the peer review process, however, the doctors acted as agents of the hospital and not separate economic actors. *Id.* at 703. Likewise, there are some instances in which CMLS might act as a single entity not subject to Section 1. For example, there would likely be no concerted action when CMLS purchases office supplies. But when its members adopt rules that dictate how brokers can compete with each other as separate economic actors, Section 1 applies.

over the advisory panel and could ignore, modify, or accept its recommendations. *Id.* Therefore, the advisory panel was not independent from the insurance company. *Id.*

Oksanen and *Trigon* are inapplicable here. CMLS's rules are an agreement among hundreds of Columbia-area competitors who have combined their economic power to enforce restrictions on how they can compete as independent firms in the market for brokerage services. *Supra* 2-4. *Oksanen* and *Trigon*, by contrast, concern a single corporation's decision about its own affairs (hospital privileges and insurance coverage, respectively). These unitary actions did not trigger Section 1 because there was no agreement among competitors about how they would compete. As discussed above, in finding unitary action the Fourth Circuit emphasized that the doctors in *Oksanen* and *Trigon* had no control over the corporate defendant. Here, CMLS is controlled by the competing brokers who adopted and approved the CMLS rules. These incumbent brokers profited from the diminished competition and higher fees that the rules have produced. *Supra* 3-4. As the product of concerted action by independent economic actors, CMLS's rules are an agreement among competitors that unreasonably restrains competition and are therefore subject to Section 1.

IV. CONCLUSION

For the reasons set forth above, the United States requests that this Court deny CMLS's motion for summary judgment.

Respectfully submitted,

FOR PLAINTIFF
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CERTIFICATE OF SERVICE

I, Jennifer J. Aldrich, certify that on this 9th day of March, 2009, I caused a copy of UNITES STATES' MEMORANDUM IN OPPOSITION TO CONSOLIDATED MULTIPLE LISTING SERVICE INC.'S MOTION FOR SUMMARY JUDGMENT to be served on the person listed below by ECF.

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