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

MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT ON LIABILITY

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I. NATURE OF THE CASE

By this antitrust action, the United States seeks to enjoin a group of real estate brokers – operating collectively through defendant Consolidated Multiple Listing Service, Inc. ("CMLS") – from excluding and restricting new forms of competition, thereby harming consumers throughout the Columbia area. The United States moves the Court to grant summary judgment that CMLS's conduct violates Section 1 of the Sherman Act, 15 U.S.C. § 1.

II. INTRODUCTION

The antitrust laws are based on the fundamental principle that competition benefits consumers by creating better options, improved service, and lower prices. Consumers lose these benefits when firms work together to block new competition. This is precisely what defendant CMLS has done by imposing upon its members (substantially all of the active residential real estate brokers in the Columbia area) a set of rules that bans innovative forms of competition and raises barriers to entry for new competitors. Predictably, these rules have injured consumers by limiting the variety of services available from Columbia-area brokers and raising the commissions that consumers must pay them.

CMLS controls access to the Columbia brokerage market because it operates the area's only multiple listing service ("MLS"), a database of nearly all homes for sale through a broker. Because local brokers need to be members of CMLS to be in business, CMLS has the power to dictate how brokers can compete and to exclude from the market brokers who plan to compete in ways that traditional brokers do not like.

CMLS has exercised its market power by adopting, among others, the following rules, none of which are required by any other MLS in South Carolina:

- *Freedom-of-contract restriction*: CMLS prohibited brokers and their clients from entering into any agreement other than the single form contract dictated by CMLS. In other markets, clients can negotiate an "exclusive agency" agreement with the broker under which the seller owes no commission to the broker if the seller finds a buyer for his home. CMLS outlawed these agreements and any other deviations from the mandatory form contract.

- *"Active involvement" requirement*: CMLS required brokers to be "active[ly] involve[d]" in the marketing, sale, and closing of each property. This prevented brokers from competing by offering sellers only the specific services they want, at a lower price than brokers typically charge for full service.

- *Home office prohibition*: CMLS required all new members to maintain commercial offices and prohibited them from operating out of their homes. This prevented brokers from reducing their overhead by using home offices and passing on the savings to their clients in the form of lower fees.

- *Out-of-area broker prohibition*: CMLS insulated itself from competition from brokers outside of the Columbia area by requiring that all brokers maintain an office in the CMLS service area.

- *$5,000 initiation fee*: CMLS charged applicants a "nonrefundable" initiation fee that greatly exceeded its costs in adding new members and that was five times higher than the fees typically charged by other MLSs in South Carolina. CMLS used these initiation fees, together with other fees, to fund annual payments to its members that disproportionately enriched the large incumbent brokers who sat on the CMLS Board.

The content of these restrictions, which are codified in the CMLS By-Laws and Rules, is not in dispute. That these rules restrain competition is evident simply by reading them.[1] And CMLS admits that it has no procompetitive justifications for the challenged rules, a fatal admission under relevant antitrust precedent. These undisputed facts, standing alone, warrant summary judgment without the need for further analysis.

[1] The text of the rules challenged by the United States is set forth in Appendix A.

Summary judgment is even more appropriate here because this is not the first time CMLS has violated the antitrust laws. This Court previously found that CMLS violated Section 1 of the Sherman Act by engaging in some of the same conduct challenged in this lawsuit – excluding a broker who worked from his home. *DuPre v. Columbia Board of Realtors, Inc. & The Consolidated Multiple Listing Servs. of Greater Columbia, Inc.*, Case No. C.A. 78-670-0 (D.S.C. June 2, 1987) (Perry, J.).[2] Under the doctrine of collateral estoppel, this Court's decision in *DuPre* entitles the United States to summary judgment on a number of relevant issues. But even assuming no estoppel, the Court should reach the same result here. In *DuPre*, CMLS violated the antitrust laws by using one facially anticompetitive rule to exclude one broker from the market, without offering any legitimate procompetitive justification. This Court found these facts alone established CMLS's liability, even absent a showing of harm to consumers. Here, CMLS's conduct is much worse. Not only has it disregarded this Court's decision in *DuPre* by committing the same violation again, it has also committed many more violations and harmed many more brokers and consumers.

Although proof of actual anticompetitive effects is *not* necessary to establish CMLS's liability, CMLS cannot dispute that it has harmed competition and consumers. At least twenty brokers have testified that the CMLS rules either excluded them from the Columbia market entirely or hurt their ability to compete. *See, infra*, Part III.C.1. Consumers who hoped to save

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[2] *See* Ex. A (*DuPre* Judgment & Order). ("Ex. __," as used in this memorandum, refers to an exhibit to the Declaration of Ethan C. Glass, filed in support of this motion.) Despite an error in the case caption, the trial record shows that the defendant in *DuPre* was the same as the one named here: "Consolidated Multiple Listing Service, Inc." Ex. B at 11:10-13:16 (*DuPre* trial transcript) (granting a motion to amend the pleadings after CMLS's attorney told the Court "the name is not Consolidated Listing Service of Greater Columbia, Incorporated. I represent Consolidated Multiple Listing Service, Incorporated. There is no 'of Greater Columbia, Inc.,' as part of the name.").

money by entering into an alternative exclusive agency contract with their broker and finding a buyer themselves were thwarted by CMLS's freedom-of-contract restriction, which did not allow that form of agreement. Consumers who wanted to save money by paying brokers for only a particular basket of services could not do so in Columbia because of CMLS's "active involvement" requirement. Transaction data shows that on average, Columbia-area consumers pay approximately $1,000 more per sale in commissions than consumers pay in other South Carolina markets that are unburdened by the CMLS rules. *See, infra*, Part III.C.2.

CMLS has largely failed to defend its rules. Its officers, directors, and expert witness have acknowledged that a number of CMLS's restrictions on competition were inappropriate. These witnesses also conceded that none of the challenged rules are necessary for CMLS to operate effectively. In the face of this lawsuit, CMLS has even abandoned a number of its rules in apparent recognition that those rules are impossible to defend. *See, infra*, Part IV.B.3.

The only defenses that CMLS has offered are foreclosed by Supreme Court precedent. First, CMLS attempts to defend *some* of its rules as necessary to preserve what some of its Board members regard to be the only "professional" way of competing and serving customers, forbidding any competition that, not coincidentally, differs from their chosen way of doing business. Second, CMLS claims that *isolated portions* of certain rules enforce the requirements of South Carolina's real estate laws. Third, CMLS seeks to avoid responsibility for the harm it has caused to competition and consumers by claiming that it has abandoned *some* of its practices in response to the United States' lawsuit. As a matter of controlling precedent, each of these defenses is irrelevant, and the Court should grant summary judgment on liability.

III. STATEMENT OF FACTS

A. CMLS CONTROLS ACCESS TO THE RELEVANT MARKET

CMLS is owned by, and its membership consists of, real estate brokers who represent buyers and sellers of homes in the Columbia area.[3] 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. D at 61:5-12 (Baucom Dep.); Ex. E at 68:17-69:9 (Walker Dep.); *see also* Ex. F (CMLS website) ("This MLS-sponsored web site provides all the real estate listings for the consumer for Greater Columbia South Carolina."). The CMLS database provides its members with the means to list properties for sale on behalf of sellers and to view the inventory of properties for sale on behalf of buyers. Ex. E at 64:2-10 (Walker Dep.); *see also* Ex. C at Art. II, § 2 (CMLS's purpose is "[t]o provide a sales service medium through which real estate may be merchandised more efficiently and expeditiously to the advantage of both buyer and seller.").

For this reason, brokers in the Columbia area need to be members of CMLS to be in business. CMLS's own management and Board members admit that brokers must participate in CMLS to effectively compete for buyers and sellers. CMLS's Director of Operations, Bob Baucom, testified that he "can't imagine that [a new broker] would not choose to belong." Ex. D at 72:10-74:3 (Baucom Dep.). Mr. Baucom also acknowledged that he would have to "question [his] sanity" if he considered leaving CMLS because it "would probably have a significant impact on my business." *Id.* Likewise, CMLS President Jimmy Derrick admitted that "it would be very difficult to be . . . in the residential real estate business and not be a member of the

[3] The CMLS territory includes the South Carolina counties of Richland, Lexington, Saluda, Kershaw, Calhoun, Newberry, and Fairfield. Ex. C at Art. III, § 1.

Multiple Listing Service." Ex. G at 181:12-22 (Derrick Dep.).[4] Virtually all area brokers who represent buyers and sellers of homes belong to CMLS. Ex. L at ¶ 68 (Mayo Rep't); *see also id.* at ¶ 60 (concluding that CMLS "possess[es] and exercise[s] significant market power over the provision of brokerage services in the greater Columbia area."). Even CMLS's own expert witness, Dr. Marcus Allen, does not dispute that CMLS has market power. Ex. M at 36 (Allen Rep't) (showing that 96.6% of the brokers he polled use the MLS); Ex. N at 303:1-305:12 (Allen Dep.) ("Q. So you don't disagree with Dr. Mayo's conclusion that CMLS has market power? A. I'm okay with that. I think that's a reasonable assumption.").

B. CMLS HAS ADOPTED RULES THAT RESTRICT COMPETITION

CMLS is controlled by its Board of Trustees, which in turn, has been dominated by traditional brokerage firms. For example, of the nine CMLS Board members in 2008, eight represented traditional, high-end brokerage firms that do not employ discount or alternative business models. *See* Ex. O at 79:1-5, 81:14-84:4 (Roe Dep.).[5] The CMLS Board has the power to admit new members, propose by-laws (subject to membership approval), and make rules for

[4] Many other brokers have reached the same conclusion. *See, e.g.*, Ex. E at 65:13-66:1 (Walker Dep.) ("The reason that I would think we would never get out of the Multiple Listing Service is because that's our inventory. I mean, that's how, when we have clients that either want to buy property or sell property, that is the best mechanism around here to help those clients achieve those goals."); Ex. H at 92:12-19 (Ballentine Dep.) ("[W]ithout Consolidated Multiple Listing Service it would be hard for us to survive"); Ex. I at ¶ 10 (Zimmerman Decl.) ("I could not operate a successful real estate brokerage in Columbia without membership in CMLS."); Ex. J at 152:8-10 (Brant Dep.) ("Q. What would happen to Assist-2-Sell if it was expelled from CMLS? A. We'd go out of business, probably."); Ex. K at 20:17-22 (Wood Dep.) ("You cannot be in real estate in Columbia without access to the CMLS database.").

[5] The ninth member was Laura Nichols of Landmark Resources, a property management company and commercial real estate brokerage. It largely does not compete with the other Board members, who focus on residential real estate. *See* Ex. O at 62:12-24 (Roe Dep.) (testifying that Laura Nichols does not compete with the other Board members because she "does property management").

members. Ex. C at Art. X, § 2, Rule 5(c). All members must agree, in writing, to follow the CMLS rules as a condition of membership. *Id*. at Art. III, § 5.

CMLS has insulated traditional brokerage firms (such as its Board members) against competition from innovative business models and new competitors, through its adoption of the following rules.[6]

Freedom-of-contract restriction. CMLS mandates that "[e]ach listing submitted by a Member shall be in writing on the Exclusive Right to Sell Form as approved by the Board from time to time. No alteration of any kind to the provisions of the Listing Agreement shall be allowed." *Id*. at Rule 1(a). This rule forbids consumers from entering into any agreement with their broker other than the single form contract dictated by CMLS. Since the rule prescribes an "exclusive right to sell" contract, it effectively bans alternative contractual relationships such as "exclusive agency," which is permitted in every other MLS in South Carolina. *See*, *infra*, Part III.D. Under an exclusive right to sell contract, a seller must pay his broker a commission even if the seller finds a buyer on his or her own. Ex. P at 115:16-116:12 (Rule 30(b)(6) Dep. of CMLS). Under an exclusive agency contract, on the other hand, the seller owes no commission to the broker if the seller finds a buyer for his home. *Id.* These contracts are favored by sellers who want to market their own properties, even after hiring a broker, and to preserve the option of not paying a commission. CMLS's freedom-of-contract restriction denies Columbia-area home sellers this option by forbidding brokers from offering exclusive agency contracts – or any other contract that differs from CMLS's mandatory form.

[6] CMLS has made several changes to its rules in response to the United States' investigation and lawsuit. Unless otherwise indicated, the citations in this brief are to the rules that were in effect until immediately prior to the filing of this case, when CMLS began its series of modifications. *See* Ex. C (CMLS's Rules).

"Active involvement" requirement. The CMLS By-Laws state:

> **NO PROPERTY SHALL BE LISTED WITH THE CMLS UNLESS THE AGREEMENT BETWEEN THE SELLER AND THE LISTING AGENT EXPRESSLY REQUIRES ACTIVE INVOLVEMENT BY THAT AGENT IN THE MARKETING, SALE, AND CLOSING OF THE PROPERTY. FAILURE TO ABIDE BY THIS PRECEPT SHALL CAUSE A PROPERTY TO BE DE-LISTED AND MAY SUBJECT THE LISTING AGENT TO EXPULSION FROM CMLS.**

Ex. C at Art. IV (emphasis in original). This rule protects full-service brokers from competition and prevents home sellers in Columbia from saving money by contracting only for the specific services they want, at a lower commission fee than would be charged by a full-service broker.

CMLS has taken additional steps to prevent sellers from saving money by performing for themselves tasks typically handled by traditional brokers. CMLS has enacted rules that prevent sellers from marketing their own homes or from dealing with buyers directly (e.g., a rule prohibiting sellers' names or phone numbers from appearing on yard signs). *Id*. at Rules 3 & 7. CMLS's rules also require its members to submit offers only to other members, and not directly to sellers. *Id*. at Rule 2 ("Offers on properties included in the CMLS shall be made in written form to the Selling Company and not directly to the Owner.").

Home office prohibition. CMLS requires that "all Members must have a commercial place of business," *id*. at Rule 5(b), which means that members' offices "cannot be located in the home." Ex. Q (CMLS website).[7] This rule shields traditional brokerage firms with commercial offices from having to compete with brokers who use home offices to reduce their overhead. As former CMLS President and current Board member Ron Roe acknowledged, without a prohibition against home offices, "all of us would be working out of our houses and saving a lot

[7] Members who already had home offices before CMLS established the prohibition were excused from this requirement for as long as they stayed in their current homes. Ex. C at Rule 5(b).

of money." Ex. R at 91:6-7 (Roe Dep.). CMLS's home office prohibition denies consumers opportunities to pay lower fees by working with brokers who recognize the cost savings of a home office and pass those savings onto their clients.

Out-of-area broker prohibition. CMLS membership is available only to brokers who maintain an office within the CMLS territory. Ex. C at Art. III, § 1 (requiring members to be "primarily in the real estate business within primary areas served by the CMLS"); Ex. S at 74:3-19 (Walker Dep.); Ex. T at 219:13-15 (Derrick Dep.). CMLS has used this prohibition to insulate itself against competition from brokers outside of the Columbia area. Ex. S at 140:5-141:11 (Walker Dep.) (testifying that CMLS used this requirement to reject the application of a traditional broker from Orangeburg). Technology advances have allowed brokers in other parts of South Carolina and around the country to reduce their overhead and expand the territory they serve. *See* Ex. L at ¶¶ 90, 107-08, 110-13 (Mayo Rep't). CMLS has excluded these brokers from the Columbia area. Other CMLS rules further increase the costs of brokers who would provide services to Columbia area consumers from Greenville, Charleston, and similar locations by requiring unnecessary trips to Columbia.[8]

$5,000 initiation fee. CMLS has required prospective members to pay a "nonrefundable" $5,000 initiation fee to join. Ex. C at Rule 5(b); Ex. Q (CMLS website). CMLS's fee is at least five times higher than the initiation fees charged by eleven other MLSs in South Carolina. Ex. L at ¶ 99 (Mayo Rep't). By describing this fee as "nonrefundable," CMLS has deterred some

[8] *See* Ex. C at Art. III, § 7 (requiring that applicants physically appear at CMLS for an interview); *id*. at Rule 20(21) (requiring that all members use CMLS's keyboxes, which causes out-of-area members to travel to the Columbia area to install and remove all keyboxes, instead of sellers purchasing a keybox from a hardware store and installing it themselves); Ex. Q (CMLS website) (requiring all applicants to physically appear at CMLS to pick up an application – "No application can be sent to a prospective company via mail or fax.").

discount and non-traditional brokers from even applying for membership because they feared losing their $5,000 investment if CMLS's Board members rejected their applications. Ex. U at 44:22-25 (Jamison Dep.).[9]

This $5,000 fee is unrelated to the cost of adding an additional member to CMLS. Ex. P at 54:2-55:4 (Rule 30(b)(6) Dep. of CMLS). In fact, CMLS maintains a million-dollar surplus at the end of each year, and distributes a portion of that surplus to its members. Ex. V at 5 & attachs. (CMLS Resps. to Interrogs.); *see also* Ex. W at 253:23-268:14, Dep. Exs. 112-14 (Baucom Dep.).[10] CMLS funds these annual payments with its high initiation fees and other member and agent fees. The payments disproportionately favor brokers affiliated with CMLS's largest firms, including longstanding Board members Ron Roe (with market leader Russell & Jeffcoat) and Jimmy Derrick (with Century 21 Bob Capes Realty).[11] These Board members – who participated in setting the high initiation fees that contribute to these distributions – actually receive more in distributions from CMLS at the end of the year than they pay in fees.[12] Even

[9] CMLS also raises entry costs by requiring that applicants obtain at least $500,000 in errors and omissions insurance coverage. Ex. C at Rule 21. This requirement forced a number of CMLS members who were unable to obtain insurance coverage to terminate their memberships in CMLS. Ex. PP at 107:17-110:12 (Ellis Dep.).

[10] CMLS distributes hundreds of thousands of dollars in excess fees collected each year. Ex. X (minutes from CMLS's 2005-2008 annual meetings showing a distribution of $253,735 in excess funds in 2005, $489,575 in 2006, $522,050 in 2007, and $332,500 in 2008).

[11] CMLS divides its surplus among its members based on the number of agents each member has. Brokers with more agents receive a larger share of the surplus. Ex. W at 253:23-268:14, Dep. Exs. 112-14 (Baucom Dep.).

[12] For example, Century 21 Bob Capes made a profit of approximately $20,000 from 2004 to 2007 merely because of its membership in CMLS. Ex. T at 125:11-126:25 (Derrick Dep.). Russell & Jeffcoat received even larger distributions. Ex. W at Dep. Ex. 112 (Baucom Dep.) (showing a distribution to Russell & Jeffcoat of $53,300 in 2007).

though CMLS participation is a net cost for many members, these Board members (as well as other large brokers in Columbia) reap profits from this Robin Hood-in-reverse scheme.

Restrictive membership procedures. CMLS has established a membership application process that allows it to identify and prevent challenges to the established ways of doing business. With each application, a broker must include "a thorough resume of the new Member's Broker-in-Charge and owner." Ex. C at Art. III, § 6; *see also* Ex. Q (CMLS website) ("All members must submit a resume showing their real estate activities for each officer/BIC [broker-in-charge]."). CMLS then requires companies applying to make two appearances at its offices, first to pick up the application,[13] then for an interview with their prospective competitors (a membership committee made up of CMLS Board members). Ex. C at Art. III, § 7. At that interview, the applicant must "be able to respond to questions concerning the nature of his/her business." *Id.* After collecting information on how the applicant might compete, the incumbent brokers on the CMLS Board decide whether they will allow the applicant to become a member and gain access to the market. *Id.* at Rule 5(c) (majority of the Board can reject an application).[14]

[13] CMLS President Jimmy Derrick explained that "the purpose of [this requirement] was if you lived in Russia that, you know, you would have to get an airplane ticket and fly over here and come to the Multiple Listing Service and pick up the application." Ex. G at 120:3-17 (Derrick Dep.).

[14] CMLS's Board also has the ability to discipline or expel members who compete in ways it does not like. Ex. C at Art. III, § 4 & Art. X, § 2(h).

C. CMLS HAS HARMED COMPETITION AND CONSUMERS

At least twenty brokers have testified that the CMLS rules either excluded them from the Columbia market entirely or impeded their competition.[15] CMLS has also taken choices away from consumers by denying them lower-cost options. Not surprisingly, market data shows that on average, consumers in Columbia pay more in commissions per home sale than consumers in other, less restrictive markets.

1. CMLS Has Excluded and Limited Competition.

CMLS's freedom-of-contract restriction, which outlaws all competition among Columbia-area brokers as to the contractual form they offer clients, has also specifically

[15] Ex. I at ¶¶ 6, 8 (Zimmerman Decl.) ("a la carte" broker deterred by initiation fee, home-office prohibition, prohibition on exclusive agency listings, active involvement requirement, and other restrictions); Ex. J at 20:7-22:8, 51:6-13, 54:10-55:16, 73:21-76:24, 80:12-81:10 (Brant Dep.) (broker's application delayed; broker "interrogated" during admissions interview); Ex. K at 13:1-14:6 (Wood Dep.) (broker "stopped in his tracks" by home-office prohibition); Ex. U at 42:8-46:1, 50:16-52:3, 59:14-60:17 (Jamison Dep.) (discount broker deterred by interview with prospective competitors and "nonrefundable" initiation fee); Ex. Y at 93:8-105:8 (Kees Dep.) (broker prevented from entering Columbia market by local-office requirement); Ex. Z at 116:15-119:23 (Mandel Dep.) (broker charges Columbia clients $500 more than other clients because CMLS requires "active involvement" in all aspects of each transaction); Ex. AA at 24:18-25:10, 29:23-30:21, 50:11-52:22 (Ashley Dep.) (broker deterred by initiation fee and home-office prohibition); Ex. BB at 14:17-15:10, 18:13-20:7 (Clary Dep.) (same); Ex. CC at 23:22-26:7 (Fabregat Dep.) (same); Ex. DD at 17:6-18:1 (Engwall Dep.) (same); Ex. EE at 17:21-19:5, 44:22-45:2 (Stockman Dep.) (same); Ex. FF at 10:5-12:24 (Knight Dep.) (same); Ex. GG at 7:25-8:9, 14:11-17:11 (Morrison Dep.) (fee-for-service broker deterred from by initiation fee and local-office requirement); Ex. HH at 8:13-13:2, 40:13-41:4 (DeGuzman Dep.) (broker deterred by obligation to attend closings); Ex. II at 13:4-18:24 (Holgate Dep.) (broker's entry delayed because application not processed for over two months); Ex. JJ at 6:6-7:9, 39:13-40:5, 43:16-25, 51:4-55:10 (Shepard Dep.) (fee-for-service broker deterred by local-office requirement and other CMLS restrictions); Ex. KK at 9:22-10:18, 24:7-20 (Graffeo Dep.) (non-traditional broker deterred by initiation fee); Ex. LL at 29:13-30:1, 45:24-47:25, 54:10-56:19 (Ninan Dep.) (same); Ex. MM at 8:11-15:2 (Britt Dep.) (fee-for-service broker's listings deleted from CMLS database without his knowledge); Ex. NN at 11:10-14:19 (Ayers Dep.) (fee-for-service broker's expansion to South Carolina deterred by local office requirement).

prevented brokers from offering exclusive agency contracts to Columbia-area consumers. Sonny Ninan, a Greenville-based discount broker excluded from the Columbia market by CMLS's rules, offers all of his clients outside Columbia the option of entering an exclusive agency contract. Almost ninety percent of his clients have chosen that option and thus have avoided paying a commission if they, and not Mr. Ninan, found buyers for their homes. Ex. LL at 29:13-30:1, 45:24-47:25, 54:10-56:19 (Ninan Dep.). In addition to Mr. Ninan, at least three more brokers, Bob Mandel, Dorothy Zimmerman and Phil Shepard, would have offered Columbia-area consumers exclusive agency agreements if CMLS's freedom-of-contract restriction had not stopped them from doing so. Ex. I at ¶ 6 (Zimmerman Decl.); Ex. Z at 73:8-15 (Mandel Dep.); Ex. JJ at 47:17-19, 52:14-53:10 (Shepard Dep.).

CMLS's active involvement requirement has blocked competition from brokers such as Steve DeGuzman, Jay Britt, Dorothy Zimmerman, and Robert Mandel. Ex. I at ¶ 8e (Zimmerman Decl.); Ex. Z at 116:15-119:23 (Mandel Dep.); Ex. HH at 8:13-13:2, 40:13-41:4 (DeGuzman Dep.); Ex. MM at 8:11-15:2 (Britt Dep.). In Steve DeGuzman's brokerage, the Rehava Real Estate Store, agents represent clients through the offer and negotiations stages of a real estate deal and hand off the client to a Rehava "closing concierge" who attends the property closing with the buyer. By reducing the time agents spend driving clients to properties and attending closings, Rehava can rebate half of its commission to its clients. Ex. HH at 40:13-41:4 (DeGuzman Dep.). However, consumers in the Columbia area cannot save money by working with Rehava because CMLS's "active involvement" requirement demands that agents attend property closings. *Id*. at 9:19-25.

After years of planning, Jay Britt launched an innovative brokerage in Columbia that allowed customers to choose the level of service they received. Ex. MM at 8:11-15:2 (Britt Dep.). Mr. Britt's plans to compete in Columbia ended abruptly when CMLS deleted his listings without notice. *Id*. His requests for an explanation from CMLS were ignored until he hired an attorney, at which point Mr. Britt learned that his business model was forbidden under the CMLS rules. *Id*.

Dorothy Zimmerman, another potential entrant into the Columbia market, planned to offer "a la carte" brokerage services to consumers who would pay for only the services they wanted. Ex. I at ¶ 6 (Zimmerman Decl.). She never entered the Columbia market because CMLS prohibits her business model. *Id*. at ¶ 8.

The CMLS business model restrictions have also affected existing competitors. Robert Mandel, for example, offers a "Menu of Services" that allows customers to pick and choose the brokerage services they wish to buy. In other parts of the state, Mr. Mandel offers a "flat fee limited service Multiple Listing program" for as low as $299, but because CMLS requires that he "be involved in every aspect" of each transaction, even if a seller would prefer otherwise, he is compelled to charge $500 more, or $799, in the Columbia area. Ex. Z at 116:15-119:23 (Mandel Dep.).

CMLS's commercial office requirement and high initiation fee have increased brokers' costs and excluded many competitors from the market. *See, supra,* note 15. These include brokers who planned to reduce costs by operating from home offices and to offer consumers lower commission fees. Ex. CC at 23:22-26:7 (Fabregat Dep.); Ex. U at 51:22-52:3, 59:14-60:17

(Jamison Dep.); Ex. GG at 7:25-8:9, 14:11-17:11 (Morrison Dep.); Ex. NN at 11:10-14:19 (Ayers Dep.).

CMLS's treatment of broker Dean Wood illustrates how incumbent brokers on the CMLS Board can prevent agents who work for them from starting a competing brokerage firm. Mr. Wood worked out of a home office for many years as an agent for the area's largest broker, Russell & Jeffcoat. Ex. K at 5:16-6:24, 13:1-14:6 (Wood Dep.). When Mr. Wood tried to start his own brokerage business, he requested an exemption from the commercial office requirement because his wife was severely ill. *See id*. at 13:1-14:6. The exemption would have allowed Mr. Wood to continue working from his home (as he had been doing at Russell & Jeffcoat) in order to care for his wife. *See id*. CMLS rejected Mr. Wood's request. In an audio recording of a Board meeting, CMLS's President, Ron Roe – the broker in charge at Russell & Jeffcoat – demonstrated his lack of sympathy for Mr. Wood by stating that he kept "two boxes of tissues" in his office for requests like Mr. Wood's. Ex. O at 117:5-119:5, 124:9-125:3 (Roe Dep.).

CMLS's out-of-area-broker prohibition has a similar anticompetitive effect. For example, Century 21 Clickit, Inc. uses the Internet to provide low-cost brokerage services to consumers across the country who are looking to buy or sell real estate in Georgia, North Carolina, Florida, New York, and Connecticut. *See* Ex. OO (Century 21 Clickit website). The CMLS rules have excluded Century 21 Clickit and others like it from the market because their business models do not support opening offices within the CMLS territory. Ex. NN at 11:10-14:19 (Ayers Dep.).

CMLS's prohibition on competition from out-of-town brokers even excludes traditional brokers located just outside of the CMLS service area. CMLS denied the membership request of Jeannine Kees of Century 21 The Moore Group, a traditional broker with a commercial office in

Orangeburg. Ex. Y at 93:8-105:8, Dep. Exs. 31-34 (Kees Dep.). Unable to compete in CMLS's territory, Ms. Kees now refers consumers interested in buying or selling a home in the Columbia area to large CMLS members, like Century 21 Bob Capes and Russell & Jeffcoat, with representatives on CMLS's Board. *Id*. at 130:17-131:9, 138:2-24. By restricting competition from brokers in other markets, CMLS Board members have secured additional business for themselves.

Finally, CMLS has used its restrictive membership procedures to stall or block entry by new competitors. For example, CMLS delayed for more than a month the application of one discount broker, Assist-2-Sell, "just to piss them off," as CMLS President Jimmy Derrick was recorded stating at a CMLS Board meeting. Ex. T at 155:19-156:24 (Derrick Dep.). CMLS's deliberate delay put Assist-2-Sell at a competitive disadvantage relative to other brokers and may have cost the firm some listings. Ex. J at 75:16-76:24 (Brant Dep.).

Some brokers who planned to compete in new ways were deterred from applying to CMLS by the prospect of having to describe their business models in a mandatory interview with CMLS's membership committee. *See, e.g.*, Ex. I at ¶ 8c (Zimmerman Dec.) ("The CMLS materials also stated that I would have to appear for an interview with CMLS representatives before I would be permitted to join. Because my departure from Century 21 was not on the best of terms and I knew that Century 21's president, Jimmy Derrick, was a member of CMLS's Board, I was concerned that I would not be treated fairly by those with the power to reject my membership application."); Ex. U at 51:3-10 (Jamison Dep.) ("I also understood that the interview process was about my business model and what my plans would be . . . . I found it none of their business how I run my business.").

2. Consumers Have Fewer Choices and Pay More for Brokerage Services.

The United States' economic expert, Dr. John Mayo, analyzed data from ten MLSs in or near South Carolina to determine how frequently consumers outside Columbia choose exclusive agency contracts. Ex. L at ¶¶ 102-04 (Mayo Rep't). Dr. Mayo's analysis showed that between three and four percent of the homes for sale through those MLSs were exclusive agency listings. Based on this average, Dr. Mayo estimated that approximately 1,500 Columbia area home sellers were likely denied their preferred option – an exclusive agency listing – between 2005 and 2008. *Id*. CMLS's own expert admitted that its ban on exclusive agency listings would be anticompetitive if it prevented a single consumer from choosing an exclusive agency contract. Ex. N at 183:8-24 (Allen Dep.).

More generally, the prevalence of alternative service offerings in other MLSs makes it clear that consumers demand these offerings. The CMLS rules prohibit Columbia-area consumers from satisfying that demand. As a result, these consumers are forced to pay for less preferred, and often more expensive, brokerage services.

Not surprisingly, MLS and broker data confirm that Columbia-area consumers pay more, on average, for brokerage services than consumers in other markets. Dr. Mayo analyzed data supplied by Columbia brokerages that also do business elsewhere in the state and found that each of those brokerages collects more in commissions from Columbia-area consumers than it collects from consumers in other areas. On average, Columbia-area home sellers paid these brokers approximately $1,000 more per transaction than home sellers outside Columbia (combining payments to both the seller's broker and the buyer's broker). Ex. L at ¶¶ 123-24 (Mayo Rep't).[16]

[16] CMLS's expert, Dr. Allen, argues that the United States has failed to prove that the CMLS rules were the cause of the price difference, but he does not dispute that there is, in fact, a

D. THE CMLS RULES ARE UNNECESSARY AND WITHOUT PROCOMPETITIVE JUSTIFICATIONS

CMLS has not offered any procompetitive justifications for its rules. In response to an interrogatory from the United States, CMLS admitted that it "does not contend that any rule or bylaw is 'pro-competitive.'" Ex. V at 7 (CMLS Resps. to Interrogs.). Likewise, CMLS's expert witness, Dr. Allen, has not opined that any CMLS rule is procompetitive. *See* Ex. M (Allen Rep't); Ex. N at 305:13-310:7 (Allen Dep.).

The lack of procompetitive justifications for the CMLS rules is underscored by the unwillingness of CMLS's officers and directors to defend them. For instance, former CMLS President and current Board member David Ness testified that the "active involvement" requirement "could be scratched" because CMLS should not be judging whether a listing broker is "doing their job or not." Ex. QQ at 223:13-224:5 (Ness Dep.). Similarly, Ron Roe, another former President and current Board member, stated that he did not believe that CMLS should prohibit exclusive agency listings, that it is not unprofessional for brokers to use them, and that the use of an exclusive agency listing "should be between the [broker] and the consumer." Ex. O at 95:11-17 (Roe Dep.).

CMLS's Director of Operations, Bob Baucom, refused to defend CMLS's initiation fee or its requirement that brokers maintain a commercial office in CMLS's territory. As to the initiation fee, Mr. Baucom (testifying as CMLS's Rule 30(b)(6) designee) agreed that there was "absolutely no need" for CMLS to charge new entrants $5,000 to join. Ex. P at 57:14-22 (Rule 30(b)(6) Dep. of CMLS). As for the local and commercial office requirements, Mr. Baucom admitted that it "wouldn't be appropriate" for CMLS to deny consumers the opportunity to work

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price difference between Columbia and the other markets. *See* Ex. M at 37-46 (Allen Rep't).

with a low-cost broker who saved money by not maintaining an office in CMLS's territory. *Id.* at 173:15-174:4. He also stated that CMLS should not be allowed to deny a consumer the ability to save costs by working with a broker who works out of a home office. *Id.* at 176:5-14. CMLS's own expert witness agreed:

> Q. Allowing home offices is better for competition than banning them, correct?
>
> A. In terms of reducing their overhead, yes.
>
> Q. In other words, just to kind of put it in concrete terms, if a broker wants to come into the Columbia market, reduce his overhead by operating out of a home office and then charge a lower price to the consumer as a means of competing, that should be allowed?
>
> A. That's great. That's wonderful.

Ex. N at 101:10-19 (Allen Dep.).

As to the CMLS membership application process, Mr. Ness conceded that asking applicants questions about their business models is "a restrain[t] of trade" and "not my business." Ex. RR at 90:11-91:2 (Ness Dep.). Likewise, CMLS Board member Andy Walker admitted that such questions would be "inappropriate." Ex. S at 64:17-65:9 (Walker Dep.). Mr. Ness conceded that some "got carried away with the process" and "may have been more inquisitive and asked more questions than were necessary to do the job of getting these people processed." Ex. QQ at 221:16-222:11 (Ness Dep.).

No CMLS witness, including its own expert, testified that any of the CMLS rules is necessary for the MLS to function effectively. In fact, none of the other MLSs in South Carolina, and none of the 800 MLSs nationwide that are affiliated with the National Association of Realtors

("NAR"), have rules similar to those used by CMLS.[17] The challenged CMLS rules would violate NAR's policies for its MLSs, including NAR's MLS Antitrust Compliance Policy. Ex. TT at 135:17-138:19 (Kremydas Dep.).

Faced with the difficulty of defending restrictions on competition that are unsupported by any procompetitive justifications, CMLS has abandoned a number of its worst rules in response to this lawsuit. *See, infra*, Part IV.B.3. CMLS's expert has also declined to offer any opinions about many of the CMLS rules in effect at the time the United States brought this case. Ex. N at 92:8-97:20 (Allen Dep.).

IV. THE COURT SHOULD GRANT SUMMARY JUDGMENT BECAUSE CMLS HAS HARMED COMPETITION AND VIOLATED THE SHERMAN ACT

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. To show that CMLS has violated Section 1, the United States must prove that (1) an agreement in the form of a contract, combination, or conspiracy that affects interstate commerce (2) imposes an unreasonable restraint on trade. *See Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991).

As discussed below, this Court already found in *DuPre* that CMLS's conduct – which it has repeated in disregard of this Court's decision in that case – violated Section 1 of the Sherman Act. CMLS should be estopped from relitigating issues necessary to the *DuPre* judgment. *See*

[17] NAR is a trade association that promulgates rules governing MLSs that are affiliated with it. Of the approximately 1,000 MLSs in the United States, approximately 800 are affiliated with NAR and are subject to its rules. Ex. SS at 17:20-18:7 (Niersbach Dep.). In South Carolina, twelve of the fourteen MLSs are affiliated with NAR; only CMLS and the Hilton Head MLS are not. Ex. TT at 33:7-15 (Kremydas Dep.). The Hilton Head MLS also maintained anticompetitive rules that the United States challenged under Section 1 of the Sherman Act. Unlike CMLS, the Hilton Head MLS agreed to a consent judgment that repealed its anticompetitive rules in May 2008. *See* Final Judgment in *U.S. v. Multiple Listing Serv. of Hilton Head Island, Inc.*, No. 9:07-CV-03435-SB (D.S.C. May 28, 2008).

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979).[18] As to all matters at issue in this case, however, the undisputed evidence independently compels a summary judgment that CMLS has again violated Section 1.[19]

A. CMLS IS A COMBINATION OF COMPETING REAL ESTATE BROKERS THAT AFFECTS INTERSTATE COMMERCE

1. CMLS's Rules Are Agreements Under Section 1 of the Sherman Act.

CMLS is a combination of competing real estate brokers in the Columbia area who have agreed to a set of rules to govern the operation of their MLS. This Court's holding in *DuPre* that CMLS violated Section 1 of the Sherman Act necessarily required a finding that CMLS's rules constituted actionable agreements under Section 1 of the Sherman Act. 15 U.S.C. § 1. CMLS should not be permitted to relitigate this issue.

[18] Offensive collateral estoppel "foreclose[s] the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." *Parklane Hosiery*, 439 U.S. at 326 n.4. In *Parklane Hosiery*, the Supreme Court identified four relevant factors, *id*. at 331-32, all of which support denying CMLS the opportunity to relitigate issues settled in *DuPre*. First, application of offensive collateral estoppel here would not "reward a private plaintiff who could have joined in the previous action." *See id.* at 332. The United States is not a private plaintiff. Second, CMLS had every incentive to litigate the *DuPre* case "fully and vigorously," because it exposed CMLS to an injunction, treble damages, and attorney's fees. *See id.* Third, the *DuPre* judgment is not inconsistent with any other decision. *See id. DuPre* is consistent with all of the significant decisions on which the United States bases its entitlement to summary judgment, including *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980) (interstate commerce), *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) (noncognizability of justifications unrelated to competitive concerns), and *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) (MLS rules must further the effective functioning of the MLS). And fourth, in this action, there will be no procedural opportunities available to CMLS that were unavailable in the *DuPre* action of a kind that might cause a different result. *See Parklane Hosiery*, 439 U.S. at 332.

[19] Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Even if collateral estoppel did not apply, the undisputed evidence here compels the same finding. At CMLS's Rule 30(b)(6) deposition, its representative testified that CMLS members have agreed to cooperate with each other to further the goals of CMLS and to abide by its rules. Ex. P at 34:6-35:7 (Rule 30(b)(6) Dep. of CMLS). These facts alone satisfy the agreement element. *See 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 the code of ethics and bylaws adopted by a realtor association to be an agreement governed by Section 1); *Realty Multi-List*, 629 F.2d at 1361 n.20 ("The concerted action necessary to establish a Section 1 violation exists in the agreement of [the MLS's] members to adopt and apply these rules and membership criteria.").

2. CMLS, Its Members, and Its Rules Affect Interstate Commerce.

DuPre conclusively establishes that CMLS's rules affect interstate commerce: "The defendants, through their members, have, throughout the period of this controversy and continue to promote and perform a substantial amount of activities which affect interstate commerce." *DuPre*, Case No. C.A. 78-670-0, at 10. Again, CMLS should be estopped from relitigating this issue.

Even absent collateral estoppel, *DuPre*'s interstate commerce finding applies with greater force under the undisputed facts here. To satisfy this element, the United States need only show that CMLS's activity "has an effect on some other appreciable activity demonstrably in interstate commerce." *McLain*, 444 U.S. at 242. In response to requests for admission from the United States, CMLS agreed that "some of its members" have an effect on interstate commerce. Ex. UU at 2 (CMLS Resps. to Reqs. for Adm.). CMLS's members also have provided and continue to provide residential brokerage services to out-of-state residents seeking to buy or sell real estate in

the Columbia Area. *See* Ex. I at ¶ 4 (Zimmerman Decl.) (several large Columbia area brokers frequently are involved in the purchase or sale of homes owned by out-of-state corporations); Ex. VV at 99:3-15 (Wilder Dep.) (describing involvement in interstate relocation programs); Ex. WW (Russell & Jeffcoat website) (largest Columbia-area broker "help[s] families move throughout the world" and is affiliated with Bank of America, headquartered in North Carolina). CMLS's rules have also deterred brokers from other states from competing in Columbia. *See, e.g.*, Ex. GG at 4:14-17, 7:25-8:9 (Morrison Dep.) (North Carolina-based broker deterred from entering Columbia market by CMLS's rules).

B. CMLS'S RULES UNREASONABLY RESTRAIN TRADE

Section 1 of the Sherman Act has long been construed to prohibit only "unreasonable" restraints. *See Standard Oil Co. v. United States*, 221 U.S. 1, 60-70 (1911). A restraint of trade is unreasonable if it harms competition under the "rule of reason," which "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2713 (2007).[20]

In cases like this one, involving restraints that plainly outlaw particular forms of competition and deter the entry of innovative competitors, courts have used a "quick" analysis of the likely effects and asserted procompetitive virtues of the challenged restraints to reach a "confident conclusion" under the rule of reason that the restraints violated Section 1. *California*

[20] Some agreements – such as agreements among competitors to fix prices, limit output, or allocate markets or customers – are per se unreasonable because they always, or almost always, harm consumers. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 (1984). The United States does not allege that CMLS's rules constitute per se antitrust violations.

Dental Ass'n v. Federal Trade Comm'n, 526 U.S. 756, 780-81 (1999) (citation omitted). Given this Court's previous evaluation of the effects on competition from CMLS's conduct in *DuPre*, there is no doubt that CMLS's rules have restrained competition and will continue to do so until declared illegal. Because CMLS has offered no cognizable procompetitive justification for its rules, *see, infra*, Part IV.B.3, this Court can determine the unreasonableness of CMLS's rules "without a thorough analysis of [their] net effects on competition in the relevant market." *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002). As discussed below, such a "quick" analysis demonstrates that the United States is entitled to summary judgment on liability.

In other cases, where the likely effects of a restraint on competition are "particularly difficult to determine," courts have asked for a "full" analysis of the net effects on competition under the rule of reason. *Continental Airlines*, 277 F.3d at 508-09. Even after a more comprehensive, "full" analysis, summary judgment it still appropriate here. The undisputed evidence demonstrates that CMLS possesses the ability to control competition among brokers in Columbia – *i.e.*, "market power" – and that its rules have harmed competition in Columbia. *See Fed. Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986). CMLS also cannot meet its burden of establishing an offsetting procompetitive justification for its rules. *See Thompson v. Metropolitan Multi-list, Inc.*, 934 F.2d 1566, 1581 (11th Cir. 1991) ("The burden of proof [on procompetitive justifications] is on the multilist service.").

1. CMLS Possesses the Power to Control Access to the Columbia-Area Market for Brokerage Services.

The *DuPre* case conclusively establishes that CMLS possesses the ability – or "market power" – to exclude undesired competition from the Columbia area. *DuPre*, Case No. C.A. 78-670-0, at 11-12, 16 (finding that CMLS "possessed the dominant position in the Greater Columbia area which constitutes the relevant market" and that "the exclusion of a real estate broker from the multiple listing services restricts his (her) ability to effectively compete.").[21] CMLS should not be allowed to relitigate this issue here.

This Court's market power finding in *DuPre* is supported by the undisputed evidence here. The parties' experts agree that CMLS has market power because it is the only MLS in the Columbia area and access to CMLS is essential to effective competition. *See, supra*, Part III.A. The experts are correct in both respects.

For brokers in the Columbia area, there are no alternative sources for the services that CMLS provides. *See id.* Brokers seeking to compete in local real estate brokerage markets regard membership in their local MLS to be "a competitive necessity." *Realty Multi-List*, 629 F.2d at 1373-74; *see also DuPre*, Case No. C.A. 78-670-0, at 11 ("Membership in and access to multiple listing services are valuable aids to real estate brokers."). As set forth previously, virtually all Columbia-area brokers actively involved in the brokerage of residential real estate are members of CMLS. *See, supra*, Part III.A. Broker testimony, including from CMLS's own

[21] This Court further found the "Greater Columbia area [to] constitute[] the relevant market." Case No. C.A. 78-670-0, at 16. CMLS does not dispute that, consistent with *DuPre*, the relevant market here is the provision of brokerage services to buyers and sellers of homes in the Columbia area. Ex. L at ¶¶ 51-57 (Mayo Rep't) (defining the market); Ex. N at 302:12-25 (Allen Dep.) (agreeing with Dr. Mayo's market definition).

witnesses, confirms that brokers need to be in CMLS to compete effectively. *See id.* There is no dispute between the parties as to CMLS's market power.

2. CMLS's Rules Are Anticompetitive.

a. CMLS Should Be Estopped from Relitigating the Reasonableness of Its Home-Office Prohibition.

The plaintiff in *DuPre* was denied membership in CMLS and the local Board of Realtors because he maintained his office at his residence. Case No. C.A. 78-670-0, at 7-8. Because CMLS possessed a "dominant position" in the Columbia-area brokerage market and CMLS could not demonstrate "that the requirement of office location is reasonably necessary to a procompetitive accomplishment of the benefits derived from membership in [its] multiple listing service[]," this Court found that the home-office prohibition violated the antitrust laws. *Id.* at 16, 19, 22. CMLS should not be permitted to relitigate the legality of its home-office prohibition.

b. The Anticompetitive Nature of CMLS's Rules Is Self-Evident.

In this case, CMLS has employed a variety of methods, in addition to returning to its already rejected home-office prohibition, to restrict entry by and competition from undesired innovative competitors. Courts have repeatedly invalidated restrictions similar to those adopted by CMLS without undertaking an elaborate economic analysis. For example, CMLS's freedom-of-contract restriction and "active involvement" requirement blocked brokers from competing by offering consumers alternative contracts or lower-cost service packages. *See, supra*, Part III.B.[22]

[22] Although the freedom-of-contract restriction and active involvement requirement already prevented sellers from benefitting financially by taking on some activities typically performed by brokers, CMLS went a step further and directly prohibited some methods by which a seller might participate in the marketing of his or her home. CMLS prohibited brokers and sellers from including a seller's phone number on a yard sign, effectively requiring all inquiries concerning the home to bypass the seller and go instead to the broker. Ex. C at Rule 3. It also prohibited sellers, who have hired a broker to market their property, from advertising their

Yet, the Supreme Court has held that "[a] refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs [competition]." *Indiana Fed'n of Dentists*, 476 U.S. at 459. Accordingly, it has repeatedly condemned contractual restraints similar to those at issue here. *See, e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 803 (1993) ("[C]oncerted agreement on contract terms are as unlawful as boycotts."); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648-50 (1980) (finding agreement to fix credit terms in contracts per se illegal because they are "plainly anticompetitive" and "lack any 'redeeming virtue'").[23]

To further protect itself from unauthorized forms of competition, CMLS demanded that applicants for membership appear for an interview with CMLS's membership committee, comprised of competitor brokers, and "be able to respond to question concerning the nature of his/her business." CMLS's Board also reserved for itself the right to reject membership applications and to expel competitors. These restrictions also violate Section 1. *See Associated Press v. United States*, 326 U.S. 1, 10-12 (condemning agreement permitting existing competitors to veto new entrants); *see also Realty Multi-List, Inc.*, 629 F.2d at 1381 (finding subjective membership admission criteria for an MLS an unreasonable restraint on trade because such rules are subject to abuse and "not narrowly tailored"); Areeda, *Antitrust Law*, ¶ 2223b3 (Supp. 2008)

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homes on "for sale by owner" or "FSBO" websites. *Id*. at Rule 7.

[23] *See also Nat'l Macaroni Mfrs. Ass'n v. Fed. Trade Comm'n*, 345 F.2d 421, 423-26 (7th Cir. 1965) (finding agreement to limit percentage of durum wheat in pasta per se illegal because it "eliminate[d] quality competition in macaroni products."); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 186-87, 207 (3d Cir. 1970) (upholding conviction of producers of plumbing fixtures for agreeing to cease production of lower-quality fixtures).

(explaining how consumers are harmed and Section 1 violated when an MLS selectively excludes lower-priced competitors from membership).

CMLS also adopted a series of rules and practices that make joining and participating in CMLS unnecessarily costly and inconvenient for brokers without an established presence in the Columbia area. In addition to the home-office prohibition previously invalidated in *DuPre*, CMLS's out-of-area broker prohibition excludes brokers from competing from afar.[24] This is improper. *See United States v. Sealy, Inc.*, 388 U.S. 350, 352, 357-58 (1967) (condemning horizontal agreement to place territorial restrictions on competitors). CMLS imposed additional costs on applicants by charging an initiation fee that vastly exceeds fees charged by other South Carolina MLSs and its own costs. Court have stricken similar competitive barriers. *See Realty Multi-List*, 629 F.2d at 1385-87 (enjoining MLS's excessive initiation fee when it "bears no relation to the cost" and set at a level "greater than its legitimate needs").[25]

In *Federal Trade Commission v. Indiana Federation of Dentists*, the Supreme Court found "no elaborate industry analysis" was necessary to determine that an agreement among competing dentists "to withhold from their customers a particular service that they desire" violated the

[24] Mandating a local office is not the only cost CMLS imposes on out-of-area brokers. CMLS requires an in-person visit to CMLS's offices to obtain an application. Ex. Q (CMLS website). Applicants must then return to CMLS for their interview. Ex. C at Art. III, § 7. After admission, CMLS requires members to pick up CMLS-approved keyboxes (which contain a set of keys brokers can use to obtain physical access to homes for sale) and prohibits a seller, who might hope to save money by avoiding this trip by his or her broker, from installing keyboxes available from most hardware stores. *Id*. at Rule 20(21).

[25] CMLS's Robin Hood-in-Reverse scheme, *see, supra,* Part III.B, also discriminates unreasonably against small brokers who receive a disproportionately small share of CMLS's distribution of excess funds, and, in effect, pay more than large brokers for CMLS's services. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500, 509-11 (1988) (finding Section 1 violation when incumbent competitors used power of industry standard-setting group to benefit themselves and disadvantage low-cost members of the group).

antitrust laws. 476 U.S. at 459 (quoting *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692). Here, an elaborate economic analysis is not needed to predict how CMLS's web of restrictions harms competition. 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 face higher costs. With these agreements – rules that brokers must follow in order to access CMLS's essential services – CMLS has denied consumers the benefits of competition from brokers who would compete in unauthorized ways.

c. CMLS's Rules Have Produced Actual Anticompetitive Effects.

While proof of actual anticompetitive effects is not necessary to establish CMLS's liability,[26] here, the undisputed evidence compels a finding that CMLS's exercise of market power has harmed competition and consumers in Columbia. The United States' economic expert, Dr. Mayo, testified that CMLS's rules are facially anticompetitive and that they have produced anticompetitive effects. Ex. L at ¶¶ 9-10 (Mayo Rep't). CMLS offered no expert testimony to rebut Dr. Mayo's opinions that, in the absence of the challenged rules, the Columbia-area brokerage market would be more competitive than it is today. On the contrary, CMLS's real estate expert, Dr. Allen, agreed that CMLS's recent repeal due to this litigation of some of its challenged rules was good for consumers in Columbia. *See* Ex. N at 113:15-114:7 (Allen Dep.)

[26] To meet its burden, the United States need only prove that the CMLS rules have a likely anticompetitive effect. *Indiana Fed'n of Dentists*, 476 U.S. at 461-62; *see also Realty Multi-List*, 629 F.2d at 1375 (finding that, if an MLS possessed market power, its rules "may be condemned on [their] face, without proof of past effect."). As set forth in the previous sections, the United States has met that burden. Nevertheless, the evidence of actual harm to competition creates an even more compelling case for CMLS's liability.

(elimination of prohibition on exclusive agency listings is "better for the market and better for consumers"); *id*. at 119:15-120:2 (elimination of the home-office prohibition was good for consumers).

At least twenty brokers have testified that CMLS's rules have excluded them from the market or placed restrictions on how they sought to compete. *See, supra,* Part III.C.1 & n.15. Moreover, an estimated 1,500 Columbia area home sellers were likely denied their preferred choice of an exclusive agency contract over the 2005 to 2008 period, according to Dr. Mayo's data analysis. *See, supra,* Part III.C.2. CMLS's own expert admitted that the CMLS ban on exclusive agency listings would be anticompetitive even if it prevented a single consumer from choosing such a contract. *See id.*

It is undisputed that consumers in CMLS's territory pay higher fees for brokerage services than consumers in other markets. Robert Mandel, a Columbia-area broker who also operates in other parts of South Carolina, testified that his lowest-priced service package is $500 more expensive in Columbia than in other markets because he must be "active[ly] involve[d]" in all aspects of each transaction in Columbia and must attend property closings. Ex. Z at 118:10-119:23 (Mandel Dep.); Ex. XX (July 19, 2005 CMLS Board meeting) ("[Mr. Mandel] has not always attended the closings but in the future he will be present due to the Bylaws stating that he must attend all closings."). Dr. Mayo also testified that four of the largest Columbia brokers – who together represent 45 percent of all CMLS transactions – charge more to consumers in the CMLS area than they charge consumers in other, more competitive markets. *See, supra,* Part III.C.2.

3. CMLS Offers No Cognizable Justification for its Rules.

In its responses to the United States' interrogatories, CMLS has agreed with the United States that the rules do not have "a positive effect on competition among real estate brokers to the benefit of consumers." Ex. V at 7 (CMLS Resps. to Interrogs.). Similarly, its expert Dr. Allen offers no opinions as to the procompetitive benefits of CMLS's rules, including whether those rules are necessary to allow CMLS to operate effectively. Ex. N at 305:13-310:7 (Allen Dep.). CMLS cannot claim that its challenged rules are necessary to permit its MLS to function effectively, because the approximately 800 NAR-affiliated MLSs across the country, including twelve in South Carolina, operate effectively without the CMLS rules. *See, supra*, Part III.D.

Instead of proffering justifications related to competition, CMLS has attempted to defend its rules in various other ways, none of which save them from summary condemnation. *See Realty Multi-List*, 629 F.2d at 1375 (MLS restrictions must "have legitimate justifications in the competitive needs of the [MLS]"). First, CMLS has alleged, without supporting evidence, that its rules "protect the selling and buying public and . . . assure a fair and efficient market place in which . . . members . . . can ethically practice their profession in compliance with [state law]." Ex. V at 7 (CMLS Resps. to Interrogs.). But again, as a matter of law, CMLS cannot defend its restrictions on competition by suggesting it would be unfair, unethical, or unprofessional for brokers to compete in the ways the CMLS rules prohibit. The Supreme Court characterized such arguments as "nothing less than a frontal assault on the basic policy of the Sherman Act." *See Nat'l Soc'y of Prof'l Engrs*, 435 U.S. at 695-96 (rejecting justifications based on "the potential threat that competition poses to the public safety and the ethics of its profession . . . . [W]e may assume that competition is not entirely conducive to ethical behavior, but that is not a reason,

cognizable under the Sherman Act, for doing away with competition."); *see also Realty Multi-List*, 629 F.2d at 1376 ("[A] multiple listing service may not validly assert a generalized concern with the competency and professionalism of real estate brokers as a rationale for exclusion.").

Second, CMLS has defended isolated portions of its rules as enforcing compliance with South Carolina real estate law. It has, in the words of its Director of Operations, appointed itself the "real estate police." *See* Ex. YY (May 5, 2008 *The State* article). As a matter of law, CMLS cannot rely on state law to save its anticompetitive rules. The United States Supreme Court stated: "That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it. Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the State." *Indiana Fed'n of Dentists*, 476 U.S. at 465. As in *Indiana Federation of Dentists*, CMLS does not claim that representatives of the state of South Carolina have actively supervised CMLS's interpretation of its laws.

Finally, CMLS has argued that some of the United States' claims are moot because CMLS abandoned certain of its practices in response to the United States' law enforcement efforts. CMLS cannot evade responsibility for its conduct so easily. Its rules have already caused harm to competition and consumers. CMLS has repeated the conduct previously found in *DuPre* to violate Section 1, and, in the face of that judgment, it continues to deny that it has violated the antitrust laws. Its recent rule changes further demonstrate that it can easily modify its current rules to restore the anticompetitive versions it may have suspended only temporarily. As the Supreme Court has held, "voluntary cessation of allegedly illegal conduct does not . . . make the

case moot. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (citations and footnote omitted). CMLS's "voluntary cessation" of some of its illegal conduct does not moot the United States' challenge to the CMLS rules in effect during the investigation that preceded this lawsuit.

V. CONCLUSION

For the reasons set forth above, the United States requests that this Court grant the United States' motion for summary judgment on liability and enter judgment in favor of the United States that the rules at issue in this case violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

Respectfully submitted,

FOR PLAINTIFF
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APPENDIX A: TABLE OF ANTICOMPETITIVE RULES

Rule 1(a) (*entire rule*)	Each listing submitted by a Member shall be in writing on the Exclusive Right to Sell Form as approved by the Board from time to time. No alteration of any kind to the provisions of the Listing Agreement shall be allowed. No material shall be included in the "Special Stipulations" section of the Listing Agreement which is inconsistent with or which modifies the printed portion of the Listing Agreement or which is inconsistent with the By-Laws or Rules and Regulations of CMLS. No Member or representative thereof shall make any agreement with an Owner, whether verbally or in writing, which varies, in any way, the provisions of the Listing Agreement provided herein.
Rule 2 (*portion of rule*)	Offers on properties included in the CMLS shall be made in written form to the Selling Company and not directly to the Owner.
Rule 3 (*entire rule*)	During the listing period only the Listing Company shall place signage of any kind on listed properties. There will be no owner's names or phone numbers on any signage. . . . All signage placed on the listed property must be signage approved by CMLS. No "For Sale By Owner" (FSBO) sign may be placed on the property nor may the property be advertised in print media as a FSBO or electronically on FSBO sites. The penalty for violation is the immediate withdrawal of the listing from CMLS.
Rule 5(b) (*portion of rule*)	For *each* individual (acting as a sole proprietorship) or *each* organized entity represented by an individual (whether partnership, corporation, limited liability company or partnership or other legal entity) there shall be an initial fee of $5,000. . . . In order to maintain the highest professional standards and meet the requirements of Article II Item 3, all Members must have a commercial place of business. The pocket license must show an office address. Members who were approved for CMLS membership prior to January 2001 with a home office, will be required to have a commercial place of business should the Member move.
Rule 5(c) (*entire rule*)	Upon approval of a prospective Member by the Membership Committee, the remaining Board members shall be notified of approval by e-mail, letter or facsimile. The Member is approved unless objected to by a majority of the Board members with 48 hours of notification.
Rule 7 (*portion of rule*)	No property may be advertised in print media as a FSBO or electronically on FSBO sites nor can a FSBO sign be placed on the property. The penalty for violation is the immediate withdrawal of the listing from CMLS.

Rule 20(21) (*entire rule*)	All keyboxes must be approved by the CMLS. Another type of keybox may be placed on the listing but must be accompanied by a keybox approved by the CMLS (within the primary service area). . . . Listings having unauthorized keyboxes will be removed from the CMLS system without notice.
Rule 21 (*entire rule*)	Each member shall provide evidence to the Board annually that it maintains Errors and Omissions insurance in an amount of $500,000.00 or greater. Failure to maintain such insurance shall result in loss of membership if not corrected within 90 days after notice.
By-laws, Art. III, § 1 (*portion of by-law*)	Those eligible for membership in CMLS shall consist of entities and/or individuals holding a license to engage in the real estate business within the Midlands of South Carolina which are primarily in the real estate business within primary areas served by the CMLS shall qualify for membership.
By-laws, Art. III, § 4 (*entire by-law*)	Any and all members are subject to expulsion or other disciplinary action for cause by an affirmative vote of two-thirds of the total full membership of CMLS or by action of the Board of Trustees pursuant to the Rules and Regulations established by the Board of Trustees.
By-laws, Art. III, § 6 (*portion of by-law*)	Every applicant for membership shall make an appropriate application as approved by the membership committee of the Board of Trustees. This application will include a thorough resume of the new Member's Broker-in-Charge and owner.
By-laws, Art. III, § 7 (*portion of by-law*)	A representative of the prospective Member must personally appear before the membership committee of CMLS Board at a regularly scheduled meeting and be able to respond to questions concerning the nature of his/her business.
By-laws, Art. IV (*portion of by-law*)	**RECOGNIZING THAT PROFESSIONAL REPRESENTATION OF BOTH A BUYER AND A SELLER IS CRITICALLY IMPORTANT IN ANY REAL ESTATE TRANSACTION, NO PROPERTY SHALL BE LISTED WITH THE CMLS UNLESS THE AGREEMENT BETWEEN THE SELLER AND LISTING AGENT EXPRESSLY REQUIRES ACTIVE INVOLVEMENT BY THAT AGENT IN THE MARKETING, SALE, AND CLOSING OF THE PROPERTY. FAILURE TO ABIDE BY THIS PRECEPT SHALL CAUSE A PROPERTY TO BE DE-LISTED AND MAY SUBJECT THE LISTING AGENT TO EXPULSION FROM CMLS.**
By-laws, Art. X, § 2(h) (*entire by-law*)	The Board of Trustees shall have the following powers: . . . To authorize the President to remove any listing that does not conform to the rules of the CMLS.