

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 3:08-CV-01786-SB
)	Date filed: 02/04/2010
CONSOLIDATED MULTIPLE LISTING SERVICE, INC.,)	
)	
Defendant.)	
)	

**UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO
ENFORCE THE FINAL JUDGMENT**

The Final Judgment prohibits CMLS from using its initiation fee to keep new real estate brokers out of Columbia by requiring CMLS to charge applicants no more than the cost it “incur[s] . . . in adding a new Member.” This provision was meant to remedy CMLS’s use of excessive initiation fees to deter entry of new competitors. Under the Final Judgment, a cost that CMLS incurs whether or not it adds a new member may not be included in its initiation fee. Everyday costs are already charged to all members through ongoing membership and other fees that exceed CMLS’s actual expenses,¹ but only costs CMLS incurs in adding a new member may be included in its initiation fee. CMLS’s brief ignores this simple test and focuses instead on irrelevant issues such as the hiring process for its consultant, Matthew Cohen, his qualifications, and various criticisms of the United States. Similarly, Mr. Cohen’s “expert report” adopts an unrelated test – “one-time” vs. “ongoing” costs – to identify costs that he recommends CMLS

¹ CMLS has not disputed this fact, nor the fact that it pays the surplus funds to its members at the end of each year under a formula that disproportionately favors Columbia’s largest brokers. *See* Initial Br. at 4 n.3.

impose on new broker members. Mr. Cohen’s report fails to respond to the relevant question and thus does not overcome the showing by the United States that CMLS has violated the Final Judgment by charging initiation fees far in excess of the cost of adding a member.

When the United States brought this case in 2008, CMLS charged new brokers an initiation fee of \$2,500. CMLS representatives testified during the litigation that its \$2,500 initiation fee exceeds the costs it incurs in adding a new member. *See* Initial Br. at 4 (D.E. 70). To resolve the United States’ antitrust challenge to its \$2,500 fee, CMLS agreed to set a fee that did not exceed its cost. Evidently dissatisfied with the testimony of its witnesses and the standard set forth in the Final Judgment, CMLS subsequently hired a consultant who contradicted the CMLS fact witnesses and generated a \$3,504.75 proposed initiation fee by packing into his calculation everyday costs that CMLS incurs regardless of whether it adds a new member.² As a result, CMLS maintains the same \$2,500 initiation fee that it charged at the time the United States initiated this action. Thus, CMLS continues to deter entry by low-cost and innovative brokers by charging new members substantially more than any other MLS in South Carolina (which charge between \$0 and \$1000, except the MLS in Hilton Head, which is currently under investigation by the United States).

The United States identified in its initial brief the many cost categories that Mr. Cohen incorrectly attributed to new members. The United States also calculated the actual cost of

² CMLS also produced with its opposition brief a letter from its accountant, Richard A Gregory, generally supporting the reasonableness of Mr. Cohen’s “cost analysis methodology and overall calculations,” but concluding that Mr. Cohen had overstated CMLS’s facilities costs by over 300 percent (reducing Mr. Cohen’s \$202,379.47 estimate to \$62,319.10). Gregory Letter at 2 (D.E. 71-2). Because CMLS does not incur facilities costs in adding a new member, *see, infra*, § I.B, Mr. Gregory’s cost calculations are irrelevant to the issues before the Court.

adding a new member, based on the testimony of CMLS office manager Robin Ellis, whom CMLS identified as the person who could best speak about the activities it performs when a new member joins, and on Mr. Cohen’s valuations of those activities, which the United States accepts as accurate. That calculation yielded a initiation fee of \$105.10.

CMLS consented to the entry of a judgment that requires it to stop using its initiation fee to keep new broker competitors out of Columbia. The Court should enforce that judgment and require CMLS to reduce its initiation fee to \$105.10 and refund to recent broker applicants the amount it overcharged them.

I. Mr. Cohen’s Analysis Includes Costs Not Incurred in Adding a New Member.

As discussed in the United States’ initial brief and in Section II, below, Ms. Ellis’ testimony renders Mr. Cohen’s report irrelevant. Nevertheless, even if there were no clear evidence of the actual costs CMLS incurs “in adding a new Member,” Mr. Cohen’s initiation fee calculation would contradict the Final Judgment.

A. Mr. Cohen Incorrectly Allocates Deactivation Costs to New Members.

Mr. Cohen’s analysis recommends charging new members for the costs associated with deactivating them from CMLS’s systems in the event they leave CMLS in the future. *See* “Consolidated MLS Initiation Fee Calculation” worksheet, lines 28-31 (Ex. 9 to Initial Br. (D.E. 70-10)). He recognizes that these are not costs incurred in adding a new member, but argues, nonetheless, that these are “one-time cost[s]” that are “logical to collect . . . when the relationship is initiated.” Cohen Report at 12 (D.E. 71-1). Whether collecting up front one-time costs that might be incurred years from now is logical or not, it is not the test that this Court imposed in the Final Judgment.

B. Mr. Cohen Incorrectly Allocates Training Room Costs to New Members.

CMLS does not dispute that it incurs costs to maintain its facilities, including the room it uses for training, regardless of whether a new member joins. Accordingly, this \$1440.01 cost – the largest single component of Mr. Cohen’s calculation – cannot be part of the initiation fee under the plain terms of the Final Judgment.

Mr. Cohen offers his opinion that it is appropriate for CMLS to ask new members alone to bear the cost of maintaining CMLS’s training space because CMLS would move to a smaller building or use the space for a different purpose if it had no new members to train. Cohen Report at 8-10 (D.E. 71-1). This assumption ignores the fact that people other than new “Members,” including new agents supervised by incumbent broker “Members,” must attend the same class. Ex. 1 at 20:10-12 (Ellis Dep.).

Even assuming that training room costs could somehow be included consistently with the Final Judgment, those Mr. Cohen attributes to new members are grossly inflated. According to Mr. Cohen’s calculations, CMLS uses the training space for only 62.5 hours per year. *See* “Consolidated MLS Initiation Fee Calculation” worksheet, lines 14, 17 (Ex. 9 to Initial Br. (D.E. 70-10)) (25 classes; 2.5 hours per class). Yet, Mr. Cohen allocates a share of costs to new members as if they occupied the training space at all times. A new member’s share of the training room maintenance cost for the 2.5 hour class would be \$58, not \$1440.01. *See id.* line 18.

Moreover, the costs that Mr. Cohen would allocate to new members go well beyond the expense of using the room. He allocates 18.5 percent of *all* CMLS facilities expenses to broker trainees, including plumbing bills and yard maintenance expenses. *See id.* (18.5 percent of

“[t]otal facilities cost”); *see also* Gregory Letter at 2 (D.E. 71-2) (identifying CMLS facilities cost categories). CMLS obviously pays these everyday facilities costs as part of its business, and does not incur these costs “in adding a new Member.”

C. Mr. Cohen Improperly Allocates Other Costs to New Members.

Mr. Cohen also defends charging new members for several additional costs that CMLS does not incur “in adding a new Member.” Cohen Report at 10-11 (D.E. 71-1). None is permissible under the Final Judgment.

- *Security Hardware and Lockboxes* (for which Mr. Cohen recommends charging new brokers \$407.68). CMLS member brokers and agents pay CMLS for use of its authorized security hardware and lockboxes. Each pays a fee to CMLS to receive a security token and pays an additional fee for each lockbox he or she uses. *See* Ex. 2 (“Broker/Agent Price List . . . \$35 token fee due at time of issue . . . The initial lease per lockbox is \$15 and if returned to the CMLS office, an amount of \$10 is refunded per lockbox.”); Ex. 1 at 68:22-70:7 (Ellis Dep.). Including these fees in its initiation fee calculation would mean that new brokers would pay twice for this equipment. Moreover, because the number of lockboxes used by each CMLS member varies depending on the member’s business activity and on the number of agents in his or her office, these costs are particularly unsuitable for assessment through a uniform upfront fee.
- *Website Feed* (\$219.30). Mr. Cohen includes in his calculation costs CMLS incurs in delivering information to brokers for display on the brokers’ Internet websites. By including these in its initiation fee calculation, CMLS is attempting to charge all new brokers for a cost incurred only by brokers who elect to operate a website. It only incurs website feed costs for brokers who operate websites and only those brokers should pay CMLS for this service.
- *Customer Support* (\$675). CMLS staff members receive and respond to phone calls from members as part of their regular job responsibilities. *See* Ex. 3 at 101:25-102:21 (Baucom Dep.) (CMLS office manager regularly responds to questions from members); *id.* at 284:23-286:16 (CMLS information technology employee regularly assists members with computer problems). These are everyday costs for which CMLS members pay ongoing membership fees. They are not costs that CMLS incurs in adding a new member.

Mr. Cohen’s customer support figures also suffer from another flaw. Rather than calculate the actual cost incurred by CMLS for the estimated time its staff members would spend on support calls, he inexplicably recommends charging new members an

“industry average” fee of \$3 per minute (\$180 per hour). *See* “Consolidated MLS Initiation Fee Calculation” worksheet, line 26 (Ex. 9 to Initial Br. (D.E. 70-10)). Even if incremental support calls were permissible to allocate to new members through CMLS’s initiation fee, the appropriate cost, based on Mr. Cohen’s \$29.24 hourly cost per CMLS employee, would be only \$109.65, not \$675 as suggested by Mr. Cohen.

- *Advanced Training* (\$97.72). The Final Judgment would permit CMLS to allocate the cost of new members’ initial, mandatory training to those new members through their initiation fees. *See* Initial Br. at 6 (D.E. 70). But CMLS does not incur the cost of *advanced* training, not mandated under CMLS’s rules, in adding a new member and it cannot add those costs to its initiation fee.

II. The Actual Cost of Adding a Member, According to CMLS’s Own Representatives, Is \$105.10.

To identify the activities that CMLS performs “in adding a new Member,” the United States relied on the deposition testimony of Ms. Ellis, the CMLS employee responsible for and most knowledgeable about CMLS’s application process. *See* Initial Br. at 6 & n.4 (D.E. 70). For purposes of this motion, the United States accepts Mr. Cohen’s valuation of the costs of those activities. *See id.* at 7-8.

The parties dispute whether the Final Judgment allows CMLS to charge new brokers for costs other than those Ms. Ellis testified that CMLS incurs in adding a new member. CMLS produced no evidence from any other CMLS employee rebutting Ms. Ellis’ prior testimony. It instead proposes supplanting Ms. Ellis’ testimony with the assumptions of Mr. Cohen, suggesting that only “qualified cost accounting support from someone qualified to do so” could be sufficient to identify the “cost incurred by CMLS in adding a new Member.” *See* CMLS Opp. at 6 (D.E. 71).

Mr. Cohen cannot contradict the testimony of a fact witness, nor can he change the plain meaning of the Final Judgment. Based on her direct involvement in this process, Ms. Ellis possesses the greatest possible expertise over the only question in dispute: what activities does

CMLS perform in adding a new member? No “qualified cost accounting support” or other technical or specialized expertise is necessary to address this limited issue.³ Moreover, because Mr. Cohen’s report has not been tested by cross examination, it is inadmissible as hearsay and also cannot be accepted as reliable under Rule 702.

CMLS asserts that the United States’ initial fee calculation is “facetiously low.” CMLS Opp. at 2 (D.E. 71). But it is significantly closer to the initiation fees charged by all other MLSs in South Carolina (except the Hilton Head MLS) than is CMLS’s \$2,500 fee. The highest initiation fee charged by MLSs outside of Columbia or Hilton Head is \$1,000. Other MLSs charge much less. For instance, the Western Upstate Association of Realtors in Anderson, South Carolina, does not charge any fee for brokers to join its MLS. The MLSs in Greenville and Florence (operated by the Realtor Association of the Greater Pee Dee) each charge a fee of only \$300. *See* Ex. 8 to Expert Report of John W. Mayo (D.E. 37-13) (Ex. L. to Decl. of Ethan Glass in Supp. of United States Mot. for Summ. J.); Initial Br. at 10 (D.E. 70) (noting the reduction of Beaufort MLS’s fee to \$500). The \$105.10 fee calculation not only accurately captures the cost that CMLS incurs “in adding a new Member,” it is also consistent with the amounts that other MLS have found to be sufficient.

III. Conclusion

CMLS has ignored the Court’s order requiring an initiation fee that covers only the cost CMLS incurs “in adding a new Member.” It has instead sought to shift many of its everyday expenses from the general membership to new members. One of the core charges in the United

³ Mr. Cohen purported to produce an “expert report,” but no “scientific, technical, or other specialized knowledge” is necessary to assist the Court in evaluating the matters at issue in this motion. *See* Fed. R. Evid. 702.

States' case against CMLS was the allegation that CMLS used excessive new member fees to deter entry and stifle competition. The Final Judgment, to which CMLS consented, imposed a rigorous remedial rule to prevent such conduct. Ignoring its duty to the Court, CMLS has maintained an initiation fee that violates the express letter of and is contrary to the purposes of the Final Judgment. The United States requests that the Court order CMLS to abide by the Final Judgment and to lower its initiation fee to \$105.10.

Respectfully submitted,

FOR PLAINTIFF
THE UNITED STATES OF AMERICA

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CERTIFICATE OF SERVICE

I, Jennifer J. Aldrich, certify that on this 4th day of February, 2010, I caused a copy of UNITED STATES' MOTION TO ENFORCE THE FINAL JUDGMENT AND MEMORANDUM IN SUPPORT to be served on the person listed below by ECF.

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