



costs by its consultant, CMLS's \$2,500 initiation fee exceeds the costs of adding a new member by more than \$2,000. The United States requests that the Court order CMLS to reduce its excessive initiation fee and refund to recently admitted members the amount CMLS overcharged them.

### **BACKGROUND**

The United States brought this antitrust case against CMLS because CMLS maintained rules and practices that banned innovative real estate brokerage business models and raised barriers to entry for new brokers in the Columbia area, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Through its anticompetitive rules and practices, CMLS harmed Columbia-area home buyers and home sellers by limiting the variety of services available to them and raising the commissions those consumers paid for their brokers' services.

On May 4, 2009, the United States filed a Stipulation and proposed Final Judgment (D.E. 60), which set forth the terms on which the United States and CMLS agreed to settle this lawsuit. This Court entered the Final Judgment on August 27, 2009 (D.E. 68).

Among the several CMLS rules and practices challenged by the United States and addressed in the Final Judgment was the excessive initiation fee that CMLS imposed on new members. Before the United States brought this case, CMLS charged applicants for membership a \$5,000 initiation fee. CMLS lowered this initiation fee to \$2,500 in April 2008, after the United States informed CMLS that it intended to bring this lawsuit. *See* Ex. 1 at 45:8-18; 47:16-18 (Rule 30(b)(6) Dep. of CMLS). CMLS has maintained its initiation fee at this level since then. *See* Ex. 2 (CMLS website showing current initiation fee of \$2,500).

The United States challenged CMLS's initiation fee because excessive initiation fees can be a barrier to entry. *See United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1385-87 (5th Cir. 1980). Indeed, the United States was prepared to offer at trial the testimony of at least nine brokers who were deterred by CMLS's initiation fee from joining CMLS and competing in the Columbia area. *See Mem. in Supp. of the United States' Mot. for Summ. J. at 12 n.15 (D.E. 42).*

The Final Judgment addresses the barrier to entry imposed by CMLS's excessive initiation fee by prohibiting CMLS from imposing fees on new members that exceed the "cost incurred by CMLS in adding a new Member." Final J., ¶ IV.B. This provision ensures that CMLS charges applicants an initiation fee no greater than its costs in admitting a new member and that it cannot use its fee to keep unwanted competition out of the Columbia market. But instead of lowering its fee to a level equal to its costs promptly upon entry of the Final Judgment, CMLS has maintained its existing \$2,500 initiation fee,<sup>1</sup> a price that continues to deter entry. *See Ex. 3 (5/22/09 e-mail from iSaveRealty to Ethan Glass ("2500 is still a large barrier for*

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<sup>1</sup> CMLS has taken a generally unserious approach to its obligations under the Final Judgment. The Final Judgment, for instance, required CMLS to make a number of specific modifications to its bylaws and operating rules, Final J., ¶ V.B, and, by September 3, 2009 (five business days after the Court entered the Final Judgment), to distribute copies of the modified bylaws and rules to each of its members and to each person who requested an application for membership in the past five years. *Id.*, ¶ V.H. CMLS did not convene a meeting of its board to make the required modifications to its rules until September 15th, *see Ex. 4 (9/11/09 e-mail from Edward Woodward to Ethan Glass ("As to the rules, we are formally approving them on Tuesday at the regularly scheduled board meeting . . . ."))*, and CMLS's membership did not formally approve the required modifications to its bylaws until October 5th. *See Ex. 5 (10/5/09 e-mail from Edward Woodward to Ethan Glass)*. CMLS's apparent indifference to the Court's Final Judgment is consistent with its approach to a prior order. After this Court ordered CMLS in 1987 not to exclude a broker who worked from his home, *see DuPre v. Columbia Bd. 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), CMLS later adopted a new rule (also challenged by the United States in this case) that again prohibited brokers from working from home offices. *See Mem. in Supp. of the United States' Mot. for Summ. J. at 8-9 (D.E. 42).*

us.”)). The United States has asked CMLS to lower its initiation fee to comply with the Final Judgment, but CMLS has refused to do so, necessitating this motion.<sup>2</sup>

### ARGUMENT

#### **I. CMLS Has Acknowledged that Its \$2,500 Initiation Fee Exceeds the Costs it Incurs in Adding a New Member**

CMLS previously conceded that its \$2,500 initiation fee exceeds its costs in adding a new member and includes other expenses. CMLS’s Director of Operations, Robert Baucom, testifying as a Rule 30(b)(6) designee of CMLS, stated that only “some portion” of CMLS’s \$2,500 initiation fee is related to CMLS’s cost of adding an additional member. He added that CMLS’s \$2,500 fee is not related on a “dollar for dollar” basis to CMLS’s costs of adding a new member, such as the “cost of the paper, the cost of the staff, the cost of the heating and air-conditioning, those type of things.” *See* Ex. 1 at 54:2-55:4 (Rule 30(b)(6) Dep. of CMLS). In response to a request for admission from the United States, CMLS also admitted that its initiation fee relates not only to the cost in adding a new member, but also “to other expenses” it incurs. *See* Ex. 6 (CMLS Resp. to Req. for Admis. 9). But under paragraph IV.B of the Final Judgment, CMLS is not permitted to charge applicants for membership for such “other expenses” in its initiation fee; CMLS can cover those expenses through ongoing fees charged to all of its members.<sup>3</sup>

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<sup>2</sup> As required by Local Rule 7.02, the United States and CMLS have conferred on a number of occasions – including, most recently, in an e-mail exchange on January 7th and January 8th – about CMLS’s initiation fee in an attempt to resolve the matter without bringing it before this Court.

<sup>3</sup> CMLS’s \$2,500 initiation fee not only exceeds the costs it incurs in adding a new member – the only relevant question for purposes of evaluating its fee under the Final Judgment – it also does not need the funds it collects from new members to support its operations. CMLS

## II. CMLS's Initiation Fee Exceeds Its Costs by Over \$2,000

CMLS's office manager, Robin Ellis, is responsible for adding new members to CMLS's systems. In her deposition, Ms. Ellis described each of the activities CMLS performs when a new member applies for and is admitted to membership. The costs "incurred by CMLS in adding a new member" are the costs associated with those activities.

After settlement of this lawsuit, CMLS retained a consultant, Matthew Cohen of Clarity Consulting, to assist it in setting its initiation fee. As discussed below, Mr. Cohen's analysis includes a variety of unrelated costs – including, remarkably, the future costs of deactivating the new member from the system if he or she later leaves CMLS – and produces a \$3,504.75 suggested initiation fee. Mr. Cohen's analysis cannot support either a \$3,504.75 fee or CMLS's existing initiation fee under the Final Judgment.

Based on Mr. Cohen's estimates, CMLS appears to incur only \$105.10 in costs when it adds a new member. Pursuant to paragraph IV.B of the Final Judgment, it should set its initiation fee at that level.

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collects more in fees than it needs to operate its business, returning the surplus to its members at the end of each year under a formula that favors the Columbia area's largest brokers. *See* United States' Mem. in Supp. of its Mot. for Summ. J. at 10-11 & 28 n.25 (D.E. 42).

A. By its own estimates, CMLS incurs costs of \$105.10 in adding a new member

1. CMLS's office manager testified to all steps CMLS must take to add a new member

During her deposition, Ms. Ellis described each activity she must perform before a new member can use CMLS's systems and estimated that she devotes a total of 25 minutes to these activities.<sup>4</sup>

- “[I input initial information] when they’ve come and applied”: *ten minutes*. Ex. 7 at 17:12-25 (Ellis Dep.).
- “[T]hey come in and see me, and I give them a packet of information to let them know all of the rules of MLS, and I give them forms that they will need to enter listings. I explain . . . all the workings of CMLS, as far as . . . when they need technical support or if they have any questions, and how do they get their key pad and what they need to do to get it, and that they need to attend class also”: *ten minutes*. *Id.* at 15:19-16:15.
- “[If they want a keypad], I give them a company representative form and a key lease agreement, and they pretty much fill it out and give it to me, and I go process the key in their name”: *five minutes*. *Id.* at 16:16-17:11.

Ms. Ellis also explained that new members are required to attend a two-and-a-half hour training class taught by outside contractors. *Id.* at 18:1-19:6; *see also* Final J., ¶ V.B.17, V.E (training required only for members who are unfamiliar with CMLS's systems).

According to Ms. Ellis' testimony, CMLS engages in no further activities nor incurs any additional costs before a broker is admitted to membership and granted access to CMLS's systems. *See* Ex. 7 at 19:7-12 (Ellis Dep.).<sup>5</sup>

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<sup>4</sup> CMLS's Director of Operations, Robert Baucom, identified Ms. Ellis as the person who could best speak for CMLS about its application process. *See* Ex. 1 at 146:17-147:7 (30(b)(6) Deposition of CMLS).

<sup>5</sup> CMLS previously required applicants for membership to appear for an interview with members of CMLS's membership committee. CMLS's board also formerly reviewed and

2. CMLS's consultant estimated the costs associated with the activities identified by CMLS's office manager

After the United States and CMLS settled this lawsuit, CMLS hired Mr. Cohen to help it estimate its costs and bring it into compliance with the Final Judgment. Although, as discussed below, Mr. Cohen's analysis includes costs associated with a number of activities plainly unrelated to "adding a new member," the United States accepts his estimates of the costs associated with the specific activities Ms. Ellis identified.

Based on an interview with Ms. Ellis, Mr. Cohen found the cost of CMLS staff time to be \$29.24 per hour. *See* Ex. 8 (Cohen "Staff Cost" worksheet). CMLS thus incurs a cost of \$12.18 for the twenty-five minutes that Ms. Ellis spends adding a new member. Mr. Cohen also estimated that CMLS incurs a per-applicant cost of \$27.99 in preparation of the information packet furnished by Ms. Ellis to each applicant, and a per-applicant cost of \$25 for CMLS's mandatory training. *See* Ex. 9, lines 6, 14 (Cohen "Consolidated MLS Initiation Fee Calculation" worksheet). Based on Mr. Cohen's estimates, the total cost that CMLS incurs in completing the activities about which Ms. Ellis testified is \$65.17.<sup>6</sup>

Mr. Cohen, however, also identified additional activities performed by CMLS employees when it adds a new member. He estimated that CMLS incurs a cost of \$13 per applicant on background checks that CMLS performs on each applicant, *id.*, line 7, \$19.62 preparing CMLS's

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approved each application for membership. While CMLS likely incurred some costs in connection with these activities, the Final Judgment prohibits CMLS from continuing to perform them. *See* Final J., ¶ V.14; *see also id.*, ¶ IV.A.1 (requiring CMLS to admit into membership any broker who is duly licensed in South Carolina).

<sup>6</sup> \$12.18 (for Ms. Ellis' time) + \$27.99 (for the information packet) + \$25 (for training) = \$65.17.

physical file of information about each member, *id.*, line 12, and \$7.31 for invoicing of each new broker entrant, *id.*, line 9. While Ms. Ellis did not identify these activities during her deposition, the United States assumes that this omission was inadvertent. Adding these costs to Mr. Cohen's calculation of the costs of the activities about which Ms. Ellis testified yields a total cost to CMLS of approximately \$105.10 when it adds a new member.

B. CMLS's consultant included costs not incurred by CMLS in adding a new member

CMLS retained Mr. Cohen to help it evaluate its costs for purposes of setting its initiation fee. However, instead of determining costs incurred by CMLS when it adds a new member – the appropriate question under the Final Judgment – Mr. Cohen's analysis assigns to new members a share of a variety of unrelated expenses. By doing so, Mr. Cohen determined that CMLS should set its initiation fee at \$3,504.75. Ex. 9, line 3 (Cohen "Consolidated MLS Initiation Fee Calculation" worksheet). The fundamental flaw in Mr. Cohen's approach is that it includes expenses that CMLS incurs even if no new members join CMLS. These costs obviously are not "incurred by CMLS in adding a new Member." Final J., ¶ IV.B. The Final Judgment allows CMLS to collect fees from existing members to cover these unrelated costs but prohibits imposing them on new applicants as the price for admission.

Mr. Cohen's analysis, for instance, assigns to each new member a \$1,440.01 charge for his or her share of the maintenance cost of the 18.5 percent of CMLS's building that it uses for its training room. Ex. 9, line 18 (Cohen "Consolidated MLS Initiation Fee Calculation" worksheet). Because CMLS would incur this ongoing cost even if no new members joined, it

cannot constitute a cost “incurred by CMLS in adding a new Member.”<sup>7</sup> Under the Final Judgment, CMLS must recoup such ongoing costs through membership fees, not through its entry fee.<sup>8</sup>

Mr. Cohen’s analysis includes other expense categories obviously unrelated to CMLS’s costs in adding a new member. It recommends charging new members for the costs associated with deactivating them from the CMLS systems in the event they leave CMLS in the future. *Id.*, lines 28-31. And it assesses to new members costs associated with adding *agents* to CMLS’s systems, *id.*, line 10, costs that are not incurred by CMLS when *brokers* join CMLS.

Mr. Cohen’s conclusions are inconsistent with the Final Judgment and CMLS cannot rely on his analysis to support its \$2,500 fee.

C. Initiation fees established by other MLSs are not relevant to costs incurred by CMLS

CMLS also justifies its \$2,500 initiation fee by referring to similarly high entry fees charged by MLSs in Hilton Head and Beaufort. *See* Ex. 10 (7/1/09 e-mail from Ed Woodward to Ethan Glass). The activities and rules of those MLSs, however, have no bearing on the costs that

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<sup>7</sup> In ratemaking or other regulatory proceedings, infrastructure costs are often shared with future customers, not imposed entirely on a first user. Here, however, CMLS agreed to and this Court ordered a different approach, as set forth in paragraph IV.B of the Final Judgment, which prohibits imposing on new members anything more than the cost CMLS incurs in adding them.

<sup>8</sup> Mr. Cohen’s analysis also applied other impermissible ongoing costs to its recommended \$3,504.75 initiation fee. It recommends charging new members for the costs of the training room computers and maintenance, *see* Ex. 9, lines 15-17 (Cohen “Consolidated MLS Initiation Fee Calculation” worksheet), for security hardware and lockboxes, *id.*, lines 22-23, and for customer support. *Id.*, line 26. It also includes charges for optional services that CMLS does not incur in adding a new member and for which interested members could be charged separately. *Id.*, line 19 (advanced training) & line 24 (website data feed).

CMLS incurs in adding a new member and do not excuse its violation of the Final Judgment.

Even if they did, the Beaufort MLS charges brokers an entry fee of only \$500. *See* Ex. 11

(Beaufort Multiple Listing Service, Inc., “Company MLS Application” (“Please remit herewith a check in the amount of \$500.00 . . . in payment of the initial participation fee.”)); Ex. 12

(Minutes of Oct. 22, 2009 meeting of the board of the Beaufort County Association of Realtors (“Effective December 1, 2009, the MLS participation fee shall be reduced to \$500 . . . .”)).<sup>9</sup>

And as the United States previously disclosed, *see* United States’ Mot. for Entry of the Proposed Final J. & Mem. in Supp. at 3-4 n.1 (D.E. 67), the United States is investigating whether the Hilton Head MLS has imposed an impermissibly high initiation fee under its Final Judgment.<sup>10</sup>

### **III. CMLS Should Lower its Initiation Fee and Refund to New Members the Amount it Overcharged Them**

When the United States and CMLS agreed, on April 28, 2009, to settle this case, CMLS committed to comply with the terms of the then-proposed Final Judgment pending its entry by this Court. *See* Stipulation and [Proposed] Final Judgment (“WHEREAS, CMLS agrees to be bound by the provisions of this Final Judgment pending its approval by the Court.”) (D.E. 60). CMLS has maintained its \$2,500 initiation fee, in violation of paragraph IV.B of the Final

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<sup>9</sup> Other MLSs in South Carolina also maintain initiation fees substantially lower than those currently charged by CMLS and the MLS in Hilton Head. The Western Upstate Association of Realtors in Anderson, South Carolina, for example, does not charge a fee to brokers to join its MLS. The MLSs in Greenville and Florence (operated by the Realtor Association of the Greater Pee Dee) charge 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.).

<sup>10</sup> *See* Final Judgment in *United States v. Multiple Listing Serv. of Hilton Head Island, Inc.*, No. 9:07-CV-3435-SB (D.S.C. May 28, 2008), ¶¶ V.A.1 (requiring the Hilton Head MLS to admit all brokers properly licensed in South Carolina) & VI.A.1 (permitting the MLS to charge new applicants “a fee equal to the reasonable set-up costs of preparing to make [the MLS’s] services available”).

Judgment, since it made that commitment. CMLS should be required to refund \$2,394.90 – the difference between CMLS’s fee and the \$105.10 it incurs in adding each new member – to each broker who joined CMLS after April 28th and paid CMLS’s excessive initiation fee.

**CONCLUSION**

The United States requests, pursuant to paragraph VIII of the Final Judgment, that the Court find that CMLS’s \$2,500 initiation fee violates paragraph IV.B of the Final Judgment and that it direct CMLS to reduce its initiation fee to \$105.10 and to refund to recent broker applicants the amount it overcharged them.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Jennifer J. Aldrich, certify that on this 8th day of January, 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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