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
CONSOLIDATED MULTIPLE LISTING SERVICE, INC.,	)	
Defendant.	)	

RULE 26(f) JOINT CASE MANAGEMENT STATEMENT

Pursuant to Federal Rule of Civil Procedure 26(f), the Court's July 7, 2008 Consent Amended Scheduling Order, and Local Rule 26.03, the parties to the above-entitled action jointly submit this Case Management Statement.

I. A Short Statement of the Facts of the Case

A. Statement by the United States

The United States brings this action to prevent defendant CMLS from enforcing rules, regulations, by-laws, policies, and procedures (collectively "Rules") that violate Section 1 of the Sherman Act, 15 U.S.C. § 1, by unreasonably restraining competition among real estate brokers in Columbia, South Carolina and the surrounding areas ("Columbia Area").

CMLS is a joint venture comprised of real estate brokers who compete with each other to sell brokerage services in the Columbia Area. CMLS, its Board of Trustees ("Board"), and its members have adopted Rules that have unreasonably inhibited competition over the method of providing brokerage services to consumers in the Columbia Area and have stabilized the price those consumers pay for brokerage services. For example, CMLS's Rules prevent members

from providing a set of brokerage services that includes less than the full array of services that brokers traditionally have provided – even if a consumer prefers to save money by purchasing less than all of such services. Additionally, CMLS's Rules require members to use a standard, pre-approved contract that, among other things, prevents its members from offering to a home seller the option of avoiding paying the broker a commission if the seller finds the buyer on her own. CMLS's Rules also contain subjective standards for admission to membership that allow CMLS representatives to deny membership to brokers who might be expected to compete more aggressively or in more innovative ways than CMLS's members would prefer. Additionally, CMLS imposes unreasonable objective criteria for membership, such as a large entrance fee and a requirement that all members have commercial offices in the Columbia Area.

CMLS's references below to state law and safety are merely attempts to distract from its anticompetitive behavior. As the United States will show at the appropriate time, the challenged Rules are not required by South Carolina state law and are not related to the physical safety of consumers in the Columbia Area.

B. Statement by CMLS

CMLS is a not-for-profit South Carolina Corporation formed in the 1970's to replace two separate multiple listing services then existing. It has operated beneficially for its members and the public since that time. The full-time staff of CMLS is largely clerical and information technology oriented. It's operations are directed by a part time licensed real estate professional appointed by a board of directors, elected by the membership at an annual meeting in December of each year which board consists of four members from brokerages having more than 600

listings annually, three members from brokerages having between 126 and 599 annual listings, and two members from firms having fewer than 126 annual listings.

CMLS was first contacted by the Department of Justice ("DOJ") in July 2006. It produced reams of documents and several members of its board were deposed. CMLS emphatically denies it has or is violating Section 1 of the Sherman Antitrust Act or any other statute laws of the United States or the State of South Carolina.

The primary function of CMLS is to provide its members and their affiliates secure keyed access to homes of the members' clients for the purpose of effecting the efficient but security conscious sale of those homes. Put simply, the CMLS provides access to more than 7000 family homes at any one time. As such, CMLS is security conscious in the extreme. It requires members to carry errors and omissions insurance. It requires all but a handful of "grand fathered" members to maintain a commercial office in the CMLS service area consisting of Richland, Lexington, Kershaw, Calhoun, Saluda, Fairfield, and Newberry counties. It requires its members to remain actively involved in the closing and sale of a home which "active involvement" is more specifically expressed in the statute law of South Carolina.

It has charged as much as $5000.00 to join the CMLS which fee was recently reduced to $2500.00 in an attempt to mollify DOJ. This reduction was made possible by the fact that sufficient sums are generated from membership dues to annually rebate excess sums to CMLS's members on a per dues paying licensee basis. CMLS believes the fair market value of a membership far exceeds the sum charged to join. Though the listing form on which properties are entered into the CMLS data base is, on its face, an exclusive right to sell, members are free to and do enter into any lawful contract with their clients as to what, if any, compensation will be

paid to the listing broker. CMLS does insist that a binding offer of compensation be published for potential selling brokers to be informed of the compensation they will be paid if they successfully procure a buyer for the listing of another member. That offer flows from the listing broker to the selling broker, not from the consumer. Within the above context, fierce competition occurs between the members of the CMLS tempered only by an overriding concern for the security of the listing public's persons and properties.

II. The Names of Fact Witnesses Likely to Be Called by the Party and a Brief Summary of Their Expected Testimony

The parties incorporate herein their initial disclosures under Federal Rule of Civil Procedure 26(a)(1), which are to be exchanged on July 21, 2008. As ordered by this Court in its Consent Amended Scheduling Order, the parties will exchange the required pre-trial disclosures under Federal Rule of Civil Procedure 26(a)(3) on March 3, 2009.

A. Statement by CMLS

As of July 16, 2008, DOJ has revealed only two fact witnesses who are said to have complained of the conduct of CMLS. It is CMLS's contention that one of those witnesses will be found to be operating his chosen business model under the present rules and that the other witness will be found to be a shill for the mortgage banking industry, merely using its membership to refer potential buyers to mortgage bankers. This second witness has never listed or sold a home since joining the CMLS in 2004. CMLS will not know the identity or number of its fact witnesses until confronted by DOJ with more than these two known witnesses.

B. Statement by the United States

The United States responds to CMLS's statement as follows: CMLS served the United States with an interrogatory asking for "the names, addresses, and phone number of any persons or entities who have complained to you about CMLS." CMLS subsequently clarified that it intended the term "complained" to mean making unsolicited complaints or providing unsolicited information about CMLS to the United States. On July 7, 2008, the United States responded, identifying the two companies that "complained." The United States disagrees with CMLS's characterization of these two companies and will correct any misimpression at an appropriate time.

The United States also takes issue with the suggestion that its case rests wholly on witnesses from these two companies. The United States intends to prove its case through evidence drawn from a variety of other sources, including the testimony of a number of witnesses who are not affiliated with these two companies. On July 21, 2008, as ordered by this Court in its Consent Amended Scheduling Order, the United States will make its Federal Rule of Civil Procedure 26(a)(1)(A) initial disclosures, identifying the name and, if known, the address and telephone number of these witnesses (i.e., those the United States currently knows of and believes may be used to support its claims, unless the use would be solely for impeachment).

III. The Names and Subject Matter of Expert Witnesses (If No Witnesses Have Been Identified, the Subject Matter and Field of Expertise Should Be Given as to Experts Likely to Be Offered)

No expert witnesses have been identified. As ordered by this Court in its Consent Amended Scheduling Order, the United States will serve the required expert disclosures under Federal Rule of Civil Procedure 26(a)(2) on November 15, 2008. The United States anticipates

that it will offer an expert or experts in the field of economics. CMLS will serve the required expert disclosures under Federal Rule of Civil Procedure 26(a)(2) on December 15, 2008. CMLS anticipates that it will offer an expert or experts in the fields of real estate, economics, and, possibly, law from an expert real estate closing attorney.

IV. A Summary of the Claims or Defenses with Statutory And/or Case Citations Supporting the Same

The parties refer the Court to Section I, above, which is incorporated herein.

V. Absent Special Instructions from the Assigned Judge, the Parties Shall Propose Dates for the Following Deadlines Listed in Local Civil Rule 16.02: (A) Exchange of Fed. R. Civ. P. 26(a)(2) Expert Disclosures; and (B) Completion of Discovery

Due to the nature of this case and the need for additional time to identify and prepare testifying experts, the parties respectfully requested that the Court amend its Conference and Scheduling Order dated June 17, 2008, setting forth the deadlines listed in Local Civil Rule 16.02. The Court granted that request by its Consent Amended Scheduling Order.

VI. The Parties Shall Inform the Court Whether There Are Any Special Circumstances Which Would Affect the Time Frames Applied in Preparing the Scheduling Order. See Generally Local Civil Rule 16.02 (c) (Content of Scheduling Order)

The parties do not know of any such special circumstances.

VII. The Parties Shall Provide Any Additional Information Requested in the Pre-scheduling Order (Local Civil Rule 16.01) or Otherwise Requested by the Assigned Judge

The Court has not requested any additional information.

VIII. Discovery Plan

A. Changes That Should Be Made in the Timing, Form, or Requirement for Disclosures under Rule 26(a), Including a Statement of When Initial Disclosures Were Made or Will Be Made

The parties refer the Court to Section V, above, which is incorporated herein. As ordered by this Court in its Consent Amended Scheduling Order, the parties will exchange initial disclosures under Federal Rule of Civil Procedure 26(a)(1) on July 21, 2008, the United States will serve expert disclosures under Federal Rule of Civil Procedure 26(a)(2) on November 15, 2008, CMLS will serve expert disclosures under Federal Rule of Civil Procedure 26(a)(2) on December 15, 2008, and the parties will exchange pre-trial disclosures under Federal Rule of Civil Procedure 26(a)(3) on March 3, 2009.

B. The Subjects on Which Discovery May Be Needed, When Discovery Should Be Completed, and Whether Discovery Should Be Conducted in Phases or Be Limited to or Focused on Particular Issues

The parties anticipate that discovery may be needed on the following subject: whether CMLS violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by unreasonably restraining competition among real estate brokers in the Columbia Area.

As ordered by the Court in its Consent Amended Scheduling Order, fact discovery should be completed by December 3, 2008 and expert discovery should be completed by February 1, 2009. The parties do not believe that discovery should be conducted in phases or be limited to or focused on particular issues.

C. Any Issues about Disclosure or Discovery of Electronically Stored Information, Including the Form or Forms in Which it Should Be Produced

The parties do not know of any issues regarding disclosure and discovery of electronically stored information, including the form or forms in which it should be produced. If any such issues arise, the parties will work with each other in good faith to resolve them.

D. Any Issues about Claims of Privilege or of Protection as Trial-Preparation Materials, Including — If the Parties Agree on a Procedure to Assert These Claims after Production — Whether to Ask the Court to Include Their Agreement in an Order

The parties have agreed to the following procedure for claims of privilege and protection:

Based on the request by CMLS, in lieu of a privilege log under Federal Rule of Civil Procedure 26(b)(5), the parties have agreed that CMLS will provide the United States with reasonable access to the documents CMLS has withheld as privileged or otherwise protected. The United States will be entitled to take notes of the documents, but will not be allowed to make copies. If the United States believes that CMLS has withheld a discoverable document, it will notify CMLS of its position in writing. CMLS will have five (5) days to produce the document or provide a response to the United States' position. If the United States is not satisfied with CMLS's response, Local Rule 7.02 shall be satisfied and the United States may bring a motion to compel under Federal Rule of Civil Procedure 37.

Notwithstanding the parties' agreement with regard to the documents withheld by CMLS, the United States will not provide CMLS with access to the documents that the United States has withheld as privileged or otherwise protected. Instead, the United States will identify any documents it withholds from discovery based on a claim of privilege or other protection on a privilege log, as required by Federal Rule of Civil Procedure 26(b)(5).

The parties respectfully request that the Court include this agreement in an order.

E. What Changes Should Be Made in the Limitations on Discovery Imposed under These Rules or by Local Rule, and What Other Limitations Should Be Imposed

The parties have met and conferred, including pursuant to Local Rule 7.02, and are unable to agree on the number of depositions necessary.

1. Statement by the United States

The United States believes that ten depositions per side would be insufficient to provide full discovery in this case. The United States notes that it is important that the parties to this litigation have an opportunity to thoroughly develop a complete record through discovery and be able to identify the most knowledgeable witnesses. Not only will this allow the parties to present a case before the Court at trial as completely and efficiently as possible, it will narrow the issues and may increase the likelihood that this dispute will be resolved short of trial.

To achieve these general goals, the United States believes that the specifics of this case require 25 substantive fact depositions per side. This is a significant antitrust lawsuit that could affect every person who may buy or sell real estate in the Columbia Area. A large number of third parties possess discoverable information, including real estate brokers in and around the Columbia Area and other parts of South Carolina, other multiple listing services, and consumers. CMLS itself also is comprised of numerous persons possessing discoverable information. These persons include real estate brokers and those persons who participated in the adoption and enforcement of CMLS's anticompetitive rules, such as the nine current CMLS Board members, some of the former CMLS Board members, and CMLS's current (and possibly former) employees.

Therefore, the United States respectfully requests that the Court order that, absent good cause shown, and notwithstanding Federal Rule of Civil Procedure 30(a)(2)(A)(i), the parties may take up to, but no more than, 25 depositions per side (excluding experts). For the purpose of this request, and pursuant to Local Rule 30.01, a deposition of a party or non-party taken pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure shall count as one deposition, regardless of the number of witnesses presented to address the matters set forth in the notice. Additionally, depositions taken for the sole purpose of establishing the authenticity and admissibility of documents shall not count against the 25 deposition limit. Finally, the United States believes that each party should have an opportunity to take the deposition of any individual who appears on the other party's Federal Rule of Civil Procedure 26(a)(3) pretrial disclosures, without regard to whether the allotted depositions have been exhausted, so long as the deposing party did not have reasonable notice that the person might be a trial witness and so long as the person was not previously deposed.

2. Statement by CMLS

CMLS cannot, at this time, make an intelligent representation as to the number of depositions which will need to be taken. Two years of investigation by DOJ have resulted, to date, in the disclosure of two complaining witnesses. Until such time as DOJ reveals its known fact witnesses, CMLS does not know whether the ten deposition limit needs to be expanded and would respectfully request that the Court hold in abeyance any expansion of the ten deposition limit until DOJ discloses more fact witnesses.

F. Any Other Orders That the Court Should Issue under Rule 26(c) or under Rule 16(b) and (c)

The parties refer the Court to Section VIII.D, above, which is incorporated herein.

FOR PLAINTIFF
UNITED STATES OF AMERICA

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