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

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

UNITED STATES' REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON LIABILITY

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I. INTRODUCTION

In its initial brief, the United States explained, with specific citations to the evidentiary record, how CMLS has required its members to agree to rules that ban innovative forms of competition, raise barriers to entry for new competitors, and injure consumers. The United States also cited antitrust cases establishing that this conduct violated Section 1 as a matter of law. In opposition, CMLS submitted an almost entirely nonresponsive brief that fails to address this evidence and does not discuss any relevant law.

CMLS has not produced any evidence that would raise a genuine issue as to any material fact. To a large degree, CMLS has not even attempted to defend its conduct (*e.g.*, home office prohibition, out-of-area broker prohibition, $5,000 initiation fee, interview requirement). In other instances, CMLS has offered only conclusory allegations without providing the evidentiary support necessary to raise a genuine issue of fact (*e.g.*, freedom-of-contract restriction, active involvement requirement). To the extent CMLS's opposition cites evidence at all, it quotes irrelevant deposition excerpts that do not contradict the facts relied upon by the United States.

As a result, CMLS's opposition confirms the facts establishing its liability:

- Columbia-area brokers have agreed to CMLS's rules and their activities affect interstate commerce.
- CMLS possesses market power and the ability to dictate how these brokers can compete with each other.
- CMLS has used this power to impose rules that limit how brokers can compete to provide services to home buyers and sellers.
- CMLS's rules have harmed competition and consumers in the Columbia area.
- CMLS's rules lack any procompetitive justifications.

CMLS has not addressed settled antitrust law establishing that, based on the foregoing facts, CMLS has violated Section 1. In fact, CMLS's opposition is devoid of citation to any case other than this Court's decision in *DuPre*, which held that CMLS violated Section 1 by engaging in some of the same conduct at issue in this lawsuit. CMLS does not challenge that holding, but rather suggests without any factual basis that the *DuPre* case may not be real and that CMLS may not have been a party. The official record from that case disproves this speculation. Thus, this Court's previous ruling in *DuPre* and the other antitrust cases ignored by CMLS establish that judgment as a matter of law is proper.

Unable to rebut the evidence of its anticompetitive conduct, CMLS has repeated the same irrelevant arguments anticipated in the United States' initial brief: (1) that some of CMLS's rules promote professionalism, (2) that South Carolina real estate law can justify some of its illegal conduct, and (3) that portions of the United States' claims are moot because CMLS modified some of its rules. The Supreme Court cases that dispose of each of these arguments were cited in the United States' initial brief. CMLS has failed even to mention these cases.

With no material factual dispute between the parties, a trial on liability is not necessary and summary disposition is warranted.

II. CMLS HAS FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT AS TO ANY ELEMENT OF THE UNITED STATES' CLAIM

To meet its burden of production and avoid summary judgment, CMLS must produce "evidentiary materials" to "designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)). "Unsupported speculation" will not suffice. *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987). Rather, a non-moving party can "survive the motion for summary

judgment only by adducing specific, non-speculative evidence". *Bouchat v. Baltimore Ravens Football Club, Inc*., 346 F.3d 514, 526 (4th Cir. 2003). CMLS has failed to meet this standard because it has not offered any evidence that would raise a genuine factual dispute as to any element of the United States' Section 1 claim.

A. CMLS'S ASSERTIONS REGARDING THE *DUPRE* CASE ARE MERITLESS.

This Court's decision in *DuPre* establishes that CMLS's members affect interstate commerce, that CMLS possesses market power, and that the home office prohibition – the specific rule at issue in *DuPre* – unreasonably restrains trade. *See* Initial Br. at 3, 22, 25-26. CMLS does not challenge this Court's decision in *DuPre*. Instead, it seeks to escape the preclusive effect of this Court's judgment by suggesting that *DuPre* may not be a real case and that CMLS may not have been a party to that case. CMLS Opp. at 11-12. Both suggestions, which are made without citing any evidence, are untrue.

Without explaining why the United States would use a fictitious decision to support its motion, CMLS claims that "[t]here is no record of the *DuPre* case in the clerk's office . . . ." CMLS Opp. at 12. This representation is inaccurate. Following instructions provided by the clerk's office, the United States obtained a certified copy of the *DuPre* decision from the federal records facility where this Court stores its older case files. This certified copy is identical to the copy submitted with the initial brief. *Compare* Ex. 1[1] *with* Glass Decl. Ex. A (Docket #37).

CMLS also claims without citing evidence that "[n]o person has been found who has any illuminating memory of the litigation to include Dupre and the lawyers who tried the case."

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[1] "Ex. __" refers to an exhibit to the Declaration of Timothy Finley submitted in support of this reply. The United States will submit an original, certified copy of this decision with the courtesy copy it will deliver to chambers.

CMLS Opp. at 12. CMLS overlooks the testimony of Jimmy Derrick, its former president and a Board member since 1977, who does remember the lawsuit. *See* Ex. 2 at 96:4-21, 98:3-100:6.

Next, CMLS uses an error in the *DuPre* caption to suggest that it may not have been the defendant in that case. But CMLS ignores the trial transcript, which establishes that the caption was erroneous and that the correct defendant was CMLS. *See* Ex. 3 at 11:10-13:16 (Aug. 27, 1981 Trial Tr.) (moving to correct error in caption),[2] 57:9-12 (CMLS counsel: "Mr. DuPre, as you know, I represent Consolidated Multiple Listing Service, Inc."); Ex. 4 at 35:12-36:2 (Jan. 11, 1982 Trial Tr.) (CMLS counsel reiterating that his client was called "Consolidated Multiple Listing Service, Incorporated" and that "Greater Columbia, Incorporated" was not part of its name). The Clerk's Minutes confirm that the Court granted plaintiff's motion "to correct the caption . . . to read 'The Consolidated Multiple Listing Service, Inc.' instead of The Consolidated Multiple Listing Service of Greater Columbia, Inc." Ex. 5.

In addition to sharing the same name, other facts prove that the defendant in *DuPre* and in the present case are the same corporation. At the *DuPre* trial, CMLS's custodian of records testified that she worked for "Consolidated Multiple Listing Service," authenticated the company's incorporation papers, and confirmed that the company was incorporated on March 15, 1977. Ex. 4 at 83:6-84:13. The certificate of incorporation filed by CMLS in the present case bears the same name and date. Docket #36. And as CMLS is well aware, it has operated

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[2] In its initial brief, the United States incorrectly quoted CMLS counsel as stating, "I represent Consolidated Multiple Listing Service, Inc." Initial Br. at 3 n.2. In fact, in this section of the transcript CMLS counsel omitted the word "Multiple" from the company's name, but on many subsequent occasions he referred to CMLS by its full name. The transcript pages quoted above leave no doubt that the correct name of the defendant in *DuPre* was the same as the defendant in this case: Consolidated Multiple Listing Service, Inc.

the only MLS in the Columbia area since 1980 – there was no other "CMLS" that could have been the subject of this Court's 1987 judgment. Ex. 6 at 25:12-19 (May 10, 2007 Derrick Dep.); Ex. 2 at 99:18-100:6 (Nov. 3, 2008 Derrick Dep.).

Apart from these mistaken arguments, CMLS offers no factual or legal basis for disregarding this Court's decision in *DuPre*.[3] CMLS does not address the *Parklane Hosiery* factors or argue that it should not be estopped from relitigating issues decided against it in *DuPre*. *See* Initial Br. at 20-21 & n.18. Furthermore, CMLS does not suggest that *DuPre* was wrongly decided. Accordingly, *DuPre* establishes that CMLS affects interstate commerce, that CMLS possesses market power, and that its home-office prohibition violates the antitrust laws.

B. CMLS HAS FAILED TO DISPUTE THAT ITS RULES ARE AGREEMENTS UNDER SECTION 1 OF THE SHERMAN ACT.

CMLS does not dispute that competitor brokers created its rules and agreed to be bound by them. *See id.* at 22. These facts alone establish the collective action requirement of Section 1. *See United States v. Realty Multi-List, Inc.*, 629 F.3d 1351, 1361 n.20 (5th Cir. 1980) ("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.").

Although CMLS agrees with these facts, it contests their legal effect, asserting that it is immune from Section 1 merely because it is a corporation. CMLS Opp. at 1-2. CMLS is incorrect. As the United States explained in its opposition to CMLS's motion for summary judgment, Section 1 applies when "separate economic actors . . . bring together economic

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[3] CMLS erroneously argues that *DuPre* "illustrate[s] the applicability of the intracorporate immunity doctrine." CMLS Opp. at 11. That doctrine was not raised or mentioned in *DuPre* and is inapplicable here. *See infra* § II.B; United States' Opp'n to CMLS's Mot. for Summ. J. at 4-8 (Docket # 48).

power." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984). The formal organizational structure in which they combine is immaterial. *See* United States' Opp'n to CMLS's Mot. for Summ. J. at 4-8 (Docket # 48). CMLS raises a pure question of law; there is no dispute between the parties as to the relevant facts.

C. UNDISPUTED EVIDENCE DEMONSTRATES THAT CMLS AFFECTS INTERSTATE COMMERCE.

CMLS does not deny that it is owned and controlled by brokers who engage in interstate commerce. *See* Initial Br. at 22-23. By adopting rules that affect its members' activities, CMLS affects interstate commerce. *See McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980) (interstate commerce element met where defendant has "an effect on some . . . appreciable activity demonstrably in interstate commerce"). CMLS argues, however, that the United States offers no evidence that CMLS is itself involved in interstate commerce. CMLS Opp. at 2. Under *McLain*, such a showing is unnecessary. Nevertheless, the United States showed, and CMLS does not contest, that its rules have deterred brokers from other states from entering the Columbia market. Initial Br. at 23. There is no genuine dispute as to this issue.

D. CMLS HAS FAILED TO DISPUTE THAT IT POSSESSES MARKET POWER.

CMLS does not address the evidence offered by the United States on the question of CMLS's market power in the Columbia area or even mention this issue. Initial Br. at 25-26. There is no dispute as to CMLS's market power.[4]

[4] The United States also provided evidence in its initial brief that the relevant market consists of the provision of brokerage services to buyers and sellers of homes in the Columbia area. Initial Br. at 25 n.21. CMLS does not dispute this market definition.

E. UNDISPUTED EVIDENCE DEMONSTRATES THE ANTICOMPETITIVE NATURE OF CMLS'S RULES.

1. CMLS has failed to dispute that its freedom-of-contract restriction forbids brokers from using any contract other than the one permitted by CMLS.

CMLS has not disputed that it required its members to use a single form contract and prohibited brokers from modifying that contract or offering sellers "exclusive agency" contracts, under which a seller would pay no commission if he or she found a buyer. *See* Initial Br. at 7. CMLS also has not addressed the evidence that brokers Sonny Ninan, Bob Mandel, Dorothy Zimmerman and Phil Shepard could not use exclusive agency agreements in Columbia because of this restriction. *Id*. at 12-13.[5]

Instead, CMLS's opposition claims that no broker seeks to "practice true exclusive agency" and cites the testimony of two other brokers – Dean Wood and Jeff Clary – who were excluded from the CMLS market by rules other than the freedom-of-contract restriction. CMLS Opp. at 4-5. This evidence does not address the testimony of the four brokers listed above who were actually affected by CMLS's freedom-of-contract restriction. Thus, there is no genuine dispute as to the anticompetitive nature of CMLS's freedom-of-contract restriction.

[5] CMLS suggests that it properly blocked competition from Mr. Mandel and Ms. Zimmerman because they planned to enter "customer" relationships with some sellers under S.C. Code § 40-57-137(O), arguing with no factual support that such arrangements might cause unspecified harm to home buyers. *See* CMLS Opp. at 7-10. CMLS's unsupported beliefs about how market participants ought to compete are irrelevant in a Section 1 case. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695-96 (1978) (justifying a restraint "on the basis of the potential threat that competition poses to the public safety and ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act."). CMLS's views are also irrelevant because its sweeping freedom-of-contract restriction goes well beyond barring "customer" relationships – it prohibits exclusive agency and any other arrangement that differs from CMLS's mandatory form contract. *See* Initial Br. At 7, 12-13.

2. Undisputed evidence shows that CMLS's "active involvement" and related restrictions prevent sellers from purchasing only the services they desire.

CMLS's "active involvement" requirement prevented brokers from offering home sellers in Columbia the opportunity to purchase only the services they want, at a lower price than they might pay to traditional full-service brokers. *See* Initial Br. at 8. CMLS also adopted other rules that prevented home sellers from assuming responsibility for some home selling activities and from participating in the marketing and sale of their own homes. *See id.* The United States demonstrated that the active involvement requirement blocked some brokers from offering home sellers a fee-for-service or *a la carte* menu of services as planned. *Id.* at 13-14.

CMLS does not dispute these facts.[6] CMLS instead responds that its active involvement requirement "is nothing more than a broad paraphrase of State law," CMLS Opp. at 5, but CMLS does not explain the significance of this assertion to the relief sought by the United States' motion. To the extent that CMLS seeks to justify its active involvement requirement as necessary to prevent brokers from violating state law, such a justification is invalid. *See* Initial Br. at 32 (citing *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 465 (1986) ("That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among

[6] CMLS asserts, again with no supporting evidence, that brokers need not attend closings to comply with its active involvement requirement (or any other rule). CMLS Opp. at 12. CMLS's own records disprove this assertion: "[CMLS member Bob 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." Initial Br. at 30 (quoting minutes of July 19, 2005 CMLS Board meeting and citing Glass Decl. Ex. XX (Docket #37)). This requirement caused Mr. Mandel to charge Columbia-area consumers $500 more than he charges in all other markets, where MLS rules do not require him to attend closings. *See* Initial Br. at 30. It has also deterred Charleston-area broker Steve DeGuzman from joining CMLS and competing in Columbia. *See id.* at 13. CMLS's bare denial of the obligation to attend closing does not create a genuine factual dispute.

competitors to prevent it.")); United States' Mots. in Limine at 1-3 (Docket # 52). No other MLS in South Carolina imposes similar rules. Initial Br. at 19-20, 31. If CMLS believes brokers are violating state law, it should notify the South Carolina Real Estate Commission and not usurp the state's role in law enforcement. *See Am. Med. Ass'n v. United States*, 130 F.2d 233, 249 (D.C. Cir. 1942) (characterizing defendant's anticompetitive boycott, defended as necessary to ensure compliance with the law, as improper "extra-governmental . . . vigilante action"), *aff'd* 317 U.S. 519 (1943). There is no genuine dispute as to the anticompetitive nature of CMLS's active involvement requirement and related restrictions.

3. CMLS has failed to dispute that its home office prohibition restricts competition from low-overhead brokers.

CMLS's home-office prohibition blocks brokers from lowering their costs by avoiding the expense of a commercial office. *See* Initial Br. at 8-9. The United States presented evidence that this rule excluded brokers who planned to pass savings, realized by operating from a home office, onto consumers in the form of lower commissions. *See id.* at 14-15.

CMLS does not dispute that this rule imposes unnecessary costs upon brokers who would prefer to work from their homes or that the home office prohibition deterred entry into Columbia by brokers who planned to work from their homes.[7] CMLS instead notes that it has abandoned

[7] CMLS argues that the unnecessary costs it imposed were relatively small, based on the claim of its real estate industry expert, Dr. Allen, that he was able to obtain an office in Columbia at a price of $85 per month. CMLS Opp. at 11. CMLS omits that to actually use the office Dr. Allen would have had to pay an additional $10 per hour. *See* Allen Report at 30 (Docket # 47-3). If Dr. Allen worked a forty-hour week, he would pay approximately $1,685 per month to use the office. It is not surprising that this amount of unnecessary expense would deter some brokers from entering the Columbia market. *See* Initial Br. at 14-15. In any event, the actual amount of the unnecessary costs is irrelevant if it excludes competition, as is the case here.

the home office prohibition. CMLS Opp. at 11.[8] There is no dispute between the parties as to the anticompetitive nature of the home-office prohibition.

4. Undisputed evidence shows that CMLS's out-of-area broker prohibition and related restrictions insulate CMLS members from competition.

CMLS's out-of-area broker prohibition has excluded brokers from other areas who do not maintain an office in Columbia. *See* Initial Br. at 9. Other CMLS restrictions further impede competition from brokers outside Columbia by imposing additional unnecessary costs upon them. *See id.* at 9 n.8.[9]

CMLS again does not dispute the United States' evidence as to the nature of the out-of-area broker prohibition. As with the home office prohibition, CMLS merely suggests that it is prepared to abandon it. CMLS Opp. at 11. The parties have no dispute as to the anticompetitive nature of CMLS's restrictions on out-of-area brokers.

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[8] CMLS explained that it did so "in recognition of the calamity that had befallen the real estate industry." CMLS Opp. at 11. As explained in the initial brief, CMLS's "voluntary" modifications to some of the challenged rules do not make the United States' claims moot because CMLS is "free to return to [its] old ways." *See* Initial Br. at 32-33 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). By tying its abandonment of the home-office prohibition to current market conditions, CMLS confirms its ability, absent an injunction, to "return to its old ways" when market conditions improve.

[9] These restrictions include a requirement that brokers who install a lockbox on a seller client's house can only use the lockboxes supplied by CMLS. *See* Initial Br. at 9 n.8. Without elaboration, CMLS characterizes the United States' challenge to this restriction as "ridiculous." CMLS Opp. at 18. But CMLS does not dispute that this requirement imposes costs on out-of-area brokers who must travel to Columbia to install and retrieve the lockboxes. It also offers no procompetitive justification for denying home sellers the right to save money by choosing a lockbox that their brokers need not travel to Columbia to install and retrieve. *See infra* § II.G.

5. CMLS has failed to dispute that its $5,000 initiation fee inhibits entry and bears no relation to CMLS's costs.

CMLS has not disputed that its "non-refundable" $5,000 initiation fee deterred brokers from entering the Columbia market. Initial Br. at 9-10.[10] CMLS does not dispute that its initiation fee is higher than necessary for it to cover any costs it incurs when it adds a new member or that the law requires that an MLS's fees relate to its costs and be no "greater than its legitimate needs." *See Realty Multi-List*, 629 F.2d at 1385-87.[11] CMLS notes only that it has lowered its fee and would not object to an injunction concerning its initiation fee. CMLS Opp. at 11. There is no dispute as to the anticompetitive nature of CMLS's $5,000 initiation fee.

6. Undisputed evidence shows that CMLS's membership procedures restrict entry and allow it to identify brokers who might compete in new ways.

CMLS has not denied that its membership procedures empower incumbent brokers to identify and prevent challenges to the established way of doing business by requiring applicants to submit a detailed resume and to appear for an interview to "respond to questions concerning the nature of [their] business[es]." *See* Initial Br. at 11. CMLS also does not contest that

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[10] The United States also showed that CMLS collects, in initiation and other fees, substantially more money than it needs, and that it disburses these excess funds in annual payments to its broker members according to a formula that disproportionately favors CMLS's largest brokers. These large brokers receive more money from CMLS through these payments than they pay to CMLS each year in fees. Initial Br. at 10-11 & nn.10-12. CMLS does not dispute the existence of this Robin Hood-in-Reverse scheme or that it creates an uneven playing field.

[11] CMLS also imposes additional unnecessary costs on members by requiring that they obtain $500,000 in errors and omissions insurance. Initial Br. at 10 n.9. The United States presented evidence that this requirement forced a number of CMLS members to terminate their memberships in CMLS. *Id.* CMLS does not dispute that the rule has had this effect, but insists that CMLS maintains it because it is a "good idea[ ]." CMLS Opp. at 19. There is no "good idea" antitrust defense. *See Realty Multi-List*, 629 F.2d at 1375 (MLS restrictions on competition must "have legitimate justifications in the competitive needs of the [MLS]").

incumbent brokers on CMLS's Board can veto any application for membership. *Id.* Nor does CMLS address the evidence that some brokers were deterred from applying by the prospect of having to discuss their business models with their competitors and that CMLS has abused these subjective procedures. *See id.* at 16. There is no dispute between the parties as to the anticompetitive nature of CMLS's restrictive membership procedures.

F. UNDISPUTED EVIDENCE DEMONSTRATES THAT CMLS'S RULES HAVE HARMED COMPETITION AND CONSUMERS.

As the United States explained in its initial brief, to prevail in this case it need not demonstrate that CMLS's rules have caused actual harm to competition and consumers in Columbia. Particularly given CMLS's undisputed power to dictate the terms of competition in the Columbia area, the United States' burden is to establish that CMLS's rules are *likely* to harm competition. *See* Initial Br. at 29 n.26 (citing *Indiana Fed'n of Dentists*, 476 U.S. at 461-62; *Realty Multi-List*, 629 F.3d at 1375 (finding that, if an MLS possessed market power, it rules "may be condemned on [their] face, without proof of past effect.")). The plainly anticompetitive nature of CMLS's rules leaves no doubt as to their effects on competition and consumers in Columbia. *See* Initial Br. at 26-29. CMLS itself refuses to defend many of the challenged practices. *See id.* at 18-19; *supra* §§ II.D.3 (home office prohibition), II.D.4 (out-of-area broker prohibition), II.D.5 ($5,000 initiation fee), & II.D.6 (restrictive membership procedures).

The United States nevertheless provided evidence of actual harm to competition that CMLS does not dispute. This included twenty brokers who testified that CMLS's rules have excluded them from the market or placed restrictions on how they sought to compete. *See* Initial Br. at 12 n.15, 30. CMLS questions the readiness of two of these twenty brokers to enter the Columbia market, *see* CMLS Opp. at 13-14, but does not dispute that its rules deterred entry or

restricted competition from the remaining eighteen, denying consumers the benefits of this competition.

The United States also explained that because CMLS requires broker Bob Mandel to be involved in all aspects of each transaction, his lowest-priced service package in Columbia is $500 higher than it is in other areas in South Carolina where consumers can choose the services they want him to perform. Initial Br. at 30. CMLS does not attempt to rebut this evidence.[12]

As additional evidence of harm to competition, the United States showed that CMLS's rules denied a substantial number of Columbia-area consumers their preferred choice of an exclusive agency contract. *See id.* at 30. CMLS does not dispute this evidence. In fact, its own expert, Dr. Allen, admitted that CMLS's ban on exclusive agency listings would be anticompetitive if it prevented even a single consumer from making that choice. *See id.*

Finally, the United States demonstrates, based on the testimony of its economic expert, Dr. John Mayo, that the Columbia market for brokerage services would be more competitive in the absence of CMLS's rules. CMLS claims that it permits "different business models," *see*

[12] The United States also cited testimony from its economic expert, Dr. John Mayo, showing that four of the largest brokers in Columbia (collectively accounting for nearly fifty percent of all CMLS transactions) charge more to consumers in the CMLS area than they charge consumers in other, more competitive markets. Initial Br. at 17, 30. CMLS does not dispute that these brokers charge Columbia-area consumers more than consumers in other markets, but disputes that its rules are the reason for this price premium. *See* CMLS Opp. at 2-4. Without supplying any evidence of an alternative cause, CMLS speculates that Columbia's four largest brokers do not have to compete as hard in Columbia as they do elsewhere – a theory that actually supports a finding that CMLS has suppressed competition. Even assuming that CMLS's theory is sufficient to create a question of fact, the issue is not material because CMLS's liability does not hinge upon proof of a market-wide price increase, especially where, as here, there is undisputed evidence of harm to competition and consumers. *Supra* 12.

CMLS Opp. at 10-11,[13] but it does not dispute Dr. Mayo's conclusion. *See* Ex. 9 at 3-4 (Mayo Rebuttal Report) ("Dr. Allen does not even attempt to address the fundamental question of whether CMLS's rules harm competition or consumers.").

Undisputed evidence compels a finding that CMLS's rules have produced anticompetitive effects.

G. CMLS OFFERS NO PROCOMPETITIVE JUSTIFICATIONS FOR ITS RULES.

CMLS does not contend in its opposition that it rules are procompetitive or that they are necessary to allow CMLS to function effectively. *See* Initial Br. at 18-20, 31-32. There is no dispute that CMLS's rules offer no procompetitive benefits.

III. CONCLUSION

In response to the United States' detailed recitation of the factual and legal bases for a finding of liability, CMLS raises no dispute as to any material fact. Accordingly, the Court should grant the United States' motion for summary judgment on liability.

[13] Two of the three brokers that CMLS identifies, John Coleman and Todd Ballentine, operate their brokerages out of home offices that they established prior to CMLS's adoption of the home office prohibition. If either moved, he would have to obtain a commercial office. *See* Glass Decl. Ex. C at Rule 5(b) (Docket #37). Both testified that avoiding the costs associated with commercial offices contributed to their ability to offer discounted commissions to their clients. Ex. 7 at 21:11-23:2 (Ballentine Dep.); Ex. 8 at 51:13-20, 54:3-24 (Coleman Dep.). These witnesses demonstrate how consumers would benefit if all Columbia-area brokers were free to operate from home offices. Contrary to CMLS's suggestion that it welcomes nontraditional business models, the United States showed in its initial brief that CMLS delayed the application of the third broker CMLS identified, Rick Brant of Assist-2-Sell, "just to piss them off." *See* Initial Br. at 16.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jennifer J. Aldrich, certify that on this 19th day of March, 2009, I caused a copy of UNITES STATES' REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON LIABILITY to be served on the person listed below by ECF.

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