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.	

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDINGS

The United States brought this lawsuit against Defendant Consolidated Multiple Listing Service, Inc. ("CMLS") on May 2, 2008, to stop CMLS from violating Section 1 of the Sherman Act, 15 U.S.C. § 1, by excluding and restricting new forms of competition and harming consumers of real estate brokerage services throughout the Columbia, South Carolina area. CMLS is a joint venture of nearly all active residential real estate brokers in the Columbia area. It controls access to the Columbia real estate 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 effectively need to be members of CMLS to be in business, CMLS has the

power to dictate how brokers can compete and to exclude brokers who plan to compete in ways that traditional brokers do not like.

The United States' complaint alleged that CMLS used this power to adopt rules that disrupted the competitive process by impeding the ability of innovative brokers to enter the Columbia market and challenge the competitive methods of CMLS's existing members. CMLS required brokers to be actively involved in all aspects of each real estate transaction, even if their clients desired fewer services at a lower cost. It prohibited brokers from entering "exclusive agency" agreements with sellers under which the seller would owe no commission if he or she, rather than the broker, found a buyer. Brokers who hoped to lower their overhead by working from home offices or who were located in other areas but wanted to offer their services to home buyers and sellers in Columbia were denied membership in CMLS. CMLS charged applicants for membership a nonrefundable $5,000 initiation fee and demanded that they appear before a membership committee composed of the applicant's prospective competitors to discuss "the nature of [their] business[es]." If CMLS's board members did not like applicants or wanted to avoid competing with them, they could vote to reject the application.

As a result of these policies, consumers in Columbia were denied the benefits that innovative brokers have brought to real estate markets in other parts of South Carolina and around the country. Not only were Columbia-area home sellers unable to hire brokers with innovative business models – such as "fee-for-service" brokers who would provide only the services the sellers desired at a lower cost than full service brokers typically charged – consumers in Columbia paid more for brokerage services than consumers in other markets.

On May 4, 2009, the United States filed a Stipulation and proposed Final Judgment. The proposed Final Judgment, which is described more fully below, is designed to eliminate the harm to competition caused by CMLS's policies and restore competition to the real estate brokerage market in Columbia. It requires CMLS to repeal its offending rules and prohibits CMLS from adopting any rules or practices that exclude or otherwise disadvantage brokers who compete in innovative ways.

The United States and CMLS have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

A. Description of the Defendant and Its Activities

CMLS is owned by, and its membership consists of, real estate brokers who compete with each other to represent buyers and sellers of homes in the Columbia area. It operates the Columbia area's only MLS, a listing service that maintains a database of nearly all homes for sale through a broker. Brokers in Columbia regard membership in CMLS to be critical to their ability to compete effectively for buyers and sellers. By joining CMLS, brokers in Columbia can promise their seller clients that information about the seller's property will immediately be shared with virtually all other brokers in the area. Brokers who work with buyers can likewise promise their buyer customers access to the widest possible array of properties listed for sale through brokers.

CMLS is controlled by its Board of Trustees, which 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. The CMLS Board possessed the power to approve or deny membership applications, propose by-laws (subject to membership approval), and make rules for members. All CMLS member brokers must agree, in writing, to follow the CMLS rules as a condition of membership.

Like MLSs in other areas, CMLS possesses substantial market power. To compete successfully in Columbia, a broker must be a member of CMLS; to be a member, a broker must adhere to any restrictions that CMLS's Board imposes. Unlike most other MLSs, however, CMLS exercised this market power to regulate how brokers in Columbia were allowed to compete and to enact burdensome prerequisites to membership that prevented some real estate brokers, such as those who would likely compete aggressively on price, from becoming members of CMLS, ensuring that those brokers could not compete in the Columbia area.

B. Industry Background

The prices that Columbia-area consumers paid for brokerage services increased substantially from 2001 to 2007. Brokers who adhere to traditional methods of doing business typically charge a commission calculated as a percentage of the sales price of the home. As housing prices in Columbia (as in many other parts of the country) increased during that time period, commission fees that consumers paid traditional, full-service brokers also increased.

Outside Columbia, brokers responded to the higher home prices and increasing fees by competing in new ways. Many brokers outside Columbia have adopted fee-for-service business models under which home sellers pay a flat fee for specific services they want their broker to

perform. Home sellers who choose fee-for-service brokers and who, for instance, take responsibility for marketing their own homes, negotiating their own contracts, or attending closing without broker assistance can substantially reduce the fees they pay their brokers. Many home sellers in markets outside of Columbia have opted to purchase only a single brokerage service: having the broker submit information about the seller's property to the MLS. Some brokers offer an MLS-entry-only service for only a few hundred dollars (with an additional fee to be paid to any MLS member who finds a buyer for the property). Home sellers who elect to work with these brokers forego important services provided by full-service brokers, but can save thousands of dollars.

Other brokers outside Columbia deliver some brokerage services over the Internet, reducing their costs by automating some time-intensive tasks and passing cost savings onto consumers in the form of lower commissions. The ease of sharing information over the Internet has also allowed some brokers to serve a larger geographic area than they were able to when face-to-face communication was expected. Some brokers from other parts of South Carolina and neighboring states have expressed interest in competing with existing Columbia-area brokers and offering brokerage services to buyers and sellers in Columbia.

C. Description of the Alleged Violation

CMLS unreasonably restrained competition by impeding the competitive process through its adoption and enforcement of rules that banned innovative forms of competition and raised barriers to entry for new competitors. These rules, which were agreed to by CMLS's member brokers, injured consumers by limiting the variety of services available from Columbia-area brokers and raising the commissions that consumers must pay them. As none of these rules

enhanced the efficiency or effectiveness of its MLS, CLMS's rules violate Section 1 of the Sherman Act, 15 U.S.C. § 1.[1]

As alleged in the complaint, CMLS harmed competition through the following rules.

1. *Freedom-of-contract restriction*

CMLS prohibited brokers and their clients from entering into any agreement other than the single form contract dictated by CMLS. The single contract allowed by CMLS – an "exclusive right to sell" agreement – required the seller to pay a commission to the broker even if the seller, and not the broker, was responsible for finding a buyer for the home. In other markets, clients can negotiate an "exclusive agency" agreement under which the seller owes no commission to the broker if the seller finds a buyer. Exclusive agency agreements are favored by sellers who want to market their own properties, even after hiring a broker, and preserving the option of paying no commission. CMLS outlawed these agreements and any other deviations from its mandatory form contract.

2. *"Active involvement" requirement*

CMLS required brokers to be "active[ly] involve[d]" in the marketing, sale, and closing of each property. This prevented Columbia-area consumers from saving money by working with fee-for-service brokers who charged only for the specific services the consumers desired. This rule caused one Columbia-area broker who also operates in other parts of South Carolina to

[1] CMLS's rules harmed competition in the provision of real estate brokerage services to buyers and sellers. The relevant geographic market in which these brokers compete is the greater Columbia area served by CMLS. As discussed above, CMLS possesses substantial market power in this market because virtually all Columbia-area brokers regard membership in CMLS and access to its MLS to be essential to their ability to compete effectively to serve Columbia-area buyers and sellers.

charge Columbia-area consumers $500 more than he charges consumers in other markets, where he is not obligated to provide services consumers may not want.

3. *Home office prohibition*

CMLS required all new members to maintain commercial offices and prohibited them from operating out of their homes. This prevented entry into the Columbia market by many brokers who hoped to reduce their overhead by using home offices and passing on their cost savings to their clients in the form of lower fees.

4. *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 Columbia area. Discount brokers operating outside Columbia found they could not offer their services to Columbia-area consumers because their low-margin business models did not support opening offices within the CMLS territory.

5. *Restrictive membership requirements*

CMLS charged applicants a nonrefundable initiation fee of $5,000, greater than its costs in adding new members and substantially higher than similar entry fees charged by any other MLSs in South Carolina. CMLS, which maintains a million-dollar-surplus annually – in part based on these higher-than-necessary initiation fees – distributes a portion of its surplus each year to existing members, effectively taxing new competition to enrich incumbents. CMLS also required applicants for membership to appear for an interview with a membership committee consisting of the traditional, full-service brokers that dominated CMLS's Board, at which applicants were expected to discuss the nature of their businesses. This interview requirement deterred applications from several nontraditional, low-priced brokers who were fearful of losing

their nonrefundable initiation fee if the interview committee opposed their business model and declined to approve their application. These brokers' fears were well founded, as CMLS's Board also possessed the power to deny membership to brokers who they feared would compete too aggressively.

D. Harm from the Alleged Violation

Taken together, CMLS's rules – established through the exercise of market power by CMLS's broker members – impeded competition among brokers in Columbia, denying Columbia-area consumers choices that are available outside of Columbia and increasing the fees they paid for brokerage services. The prevalence of nontraditional service offerings in markets outside Columbia makes it clear that consumers demand these offerings. The CMLS rules prohibited Columbia-area brokers from competing to satisfy that demand. One study conducted in connection with this case estimated, based on experiences in other markets, that approximately 1,500 Columbia-area home sellers were denied their preferred option – an exclusive agency listing – between 2005 and 2008.

Not surprisingly, data collected and analyzed in connection with this case also revealed that Columbia-area consumers paid more, on average, for brokerage services than consumers in other markets. Data supplied by four Columbia-area brokers that also do business elsewhere in South Carolina revealed that each broker collected more in commission fees from Columbia-area consumers than it did for the same service provided to consumers in other areas. On average, Columbia-area home sellers paid these brokers approximately $1,000 more per transaction than home sellers outside Columbia.

In sum, by disrupting the competitive process, CMLS's rules forced Columbia-area consumers to pay for less preferred and often more expensive brokerage services.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment will restore competition to the Columbia-area brokerage market by eliminating the anticompetitive CMLS rules and imposing additional restrictions to ensure that CMLS does not adopt new methods to continue to impede competition. It requires CMLS to repeal its freedom-of-contract restriction,[2] its "active involvement" requirement,[3] and its requirement that brokers maintain an office in the Columbia area.[4] CMLS repealed its home-office prohibition during the course of the litigation. The proposed Final Judgment prohibits it from reinstating the rule.[5]

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[2] *See* proposed Final Judgment, ¶ V.B.7. Sellers who enter exclusive agency agreements with their brokers, under which they owe no commission if they find buyers for their properties, may seek to market their homes themselves and not rely on their brokers for marketing services. The proposed Final Judgment also prohibits CMLS from interfering in the marketing efforts of home sellers who enter these exclusive agency agreements. *See id*. at ¶¶ IV.A.4, V.B. 11, V.B.12 & V.B.16.

[3] *See id*., ¶ V.B.3. The proposed Final Judgment also requires CMLS to eliminate a related rule that required that offers to purchase a property be submitted only to the seller's broker, and not directly to the seller, regardless of the seller's wishes. *See id*., ¶ V.B.10.

[4] *See id*., ¶ V.B.13. CMLS also unnecessarily burdened brokers from other markets who sought to compete in Columbia by requiring that its members use CMLS-supplied keyboxes (devices installed on homes for sale that store a key that CMLS members can use to access the home to show to potential buyers). This requirement necessitated two trips to Columbia: one to pick up the keybox from CMLS and install it on the seller's home and another to remove and return the keybox to CMLS. The proposed Final Judgment alleviates this burden by allowing home sellers to pick up a keybox from CMLS and by requiring CMLS to maintain a list of local brokers available to remove and return keyboxes. *See id*., ¶ V.B.18.

[5] *See id*., ¶¶ IV.A.1 & IV.A.2.

CMLS will also no longer be able to prevent the entry of innovative brokers. Under the proposed Final Judgment, applicants for membership will no longer be forced to submit to a potentially intimidating interview with existing CMLS members,[6] and CMLS's Board will no longer possess the discretion to deny applications for admission.[7] In fact, under the proposed Final Judgment, CMLS must admit any broker who is duly licensed in South Carolina.[8] The proposed Final Judgment also prohibits CMLS from charging application or initiation fees that exceed its "reasonably estimated cost" in adding new members.[9] This will ensure that applicants will not face an unnecessarily high entry fee and will end the practice of incumbent members enriching themselves at the expense of potential entrants.

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[6] *See id*. ¶ V.B.14. Applicants will be required to complete an introductory class in the use of CMLS's system (unless they are already familiar with the system) and an orientation with a CMLS staff member. CMLS will provide the introductory training class and orientation no less frequently than once every two weeks. *See id* ¶¶ V.B.17 & V.E.

[7] *See id*., ¶ V.B.14. CMLS collects copies of some agreements between brokers and their seller clients to ensure that a home seller has actually selected the broker to provide brokerage services in the sale of the seller's property or that the broker has complied with CMLS's reasonable requirement that brokers promptly submit information about the property to CMLS. These agreements, however, also identify the commission fee the seller agrees to pay his or her broker. To ensure that no CMLS member broker is able to learn about competitors' pricing practices from these agreements, the proposed Final Judgment requires CMLS to prevent any CMLS member from seeing the agreements it collects and permits brokers who are selected for CLMS's audit of their agreements to substantially redact the agreement to remove any competitively sensitive information. *See id*., ¶¶ V.B.9 & V.F.

[8] *See id.*, ¶ IV.A.1.

[9] *Id*., ¶ IV.B. CMLS had also raised entry costs by requiring that applicants obtain at least $500,000 in errors and omissions insurance coverage. This requirement forced a number of CMLS members who were unable to obtain insurance coverage to terminate their memberships in CMLS. The proposed Final Judgment requires CMLS to repeal its insurance requirement, but allows CMLS to insist that uninsured brokers disclose their lack of insurance coverage to clients and other brokers. *Id*., ¶ V.B.20. This disclosure requirement will ensure that sellers and other brokers are fully informed about a broker's insurance coverage and will allow the marketplace to dictate the need for such coverage.

The proposed Final Judgment also broadly prohibits CMLS from excluding any licensed broker (who does not possess a criminal record[10]) from membership and from discriminating against or disadvantaging any broker based on the services the broker provides his or her clients, the contractual forms the broker uses, the broker's pricing or commission rates, or the broker's office location.[11]

Finally, the proposed Final Judgment, applicable for ten years after its entry by this Court,[12] establishes an antitrust compliance program under which CMLS must furnish to the United States minutes of each meeting of CMLS's Board or its committees and copies of its rules following any rule changes.[13] After entry of the proposed Final Judgment, CMLS is also required to provide copies of the Final Judgment and of its rules, modified to conform to the Final Judgment, to each of its members and to each person CMLS knows to have inquired about membership in the past five years.[14] The proposed Final Judgment expressly places no limitation on the United States' ability to investigate or bring an antitrust enforcement action in the future to prevent harm to competition caused by any rule adopted or enforced by CMLS.[15]

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[10] *See id.*, ¶ VI.A.

[11] *Id.*, ¶¶ IV.A.1 & IV.A.2.

[12] *Id.*, ¶ X.

[13] *Id.*, ¶ V.G.

[14] *Id.*, ¶ V.H.

[15] *Id.*, ¶ IX.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against CMLS.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and CMLS have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and

the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

John R. Read
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW; Suite 4000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.[16]

VI. ALTERNATIVES TO THE PROPOSED AMENDED FINAL JUDGMENT

At several points during the litigation, the United States received from defendant CMLS proposals or suggestions that would have provided less relief than is contained in the proposed Final Judgment. These proposals and suggestions were rejected.

The United States considered, as an alternative to the proposed Final Judgment, proceeding with a full trial on the merits against CMLS. The United States is satisfied that the relief contained in the proposed Final Judgment will quickly establish, preserve, and ensure that Columbia-area consumers can benefit from unfettered competition in the Columbia market.

[16] *Id.*, ¶ VIII.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the United States is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act).[17]

[17] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[18] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the

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[18] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in

the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id*. at 1459-60. As the United States District Court for the District of Columbia recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[19]

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[19] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that the United States considered in formulating the proposed Final Judgment.

Respectfully submitted,

FOR PLAINTIFF
THE UNITED STATES OF AMERICA

s/Jennifer J. Aldrich

WILLIAM WALTER WILKINS, III
United States Attorney
District of South Carolina

By:
JENNIFER J. ALDRICH (#6035)
Assistant United States Attorney
1441 Main Street, Suite 500
Columbia, SC 29201
Telephone: (803) 343-3176

DAVID C. KULLY
TIMOTHY T. FINLEY
ETHAN C. GLASS
LISA SCANLON
NATHAN SUTTON
OWEN M. KENDLER

United States Department of Justice
Antitrust Division, Litigation III Section
450 5th Street, N.W., Suite 400
Washington, DC 20530
Telephone: (202) 305-9969

Dated: May 8, 2009

explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

CERTIFICATE OF SERVICE

I, Jennifer J. Aldrich, certify that on this 8th day of May, 2009, I caused a copy of the COMPETITIVE IMPACT STATEMENT to be served on the person listed below by ECF.

Edward M. Woodward, Jr.
Woodward, Cothran & Herndon
P.O. Box 12399
Columbia, SC 29211
e-mail: emwoodward@wchlaw.com

Counsel for Defendant Consolidated Multiple Listing Service, Inc.

s/Jennifer J. Aldrich
Jennifer J. Aldrich