

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

_____	)	
<b>UNITED STATES OF AMERICA,</b>	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3:08-CV-01786-SB
	)	
<b>CONSOLIDATED MULTIPLE</b>	)	
<b>LISTING SERVICE, INC.,</b>	)	
	)	
Defendant.	)	
_____	)	

**UNITED STATES' MOTIONS *IN LIMINE*  
AND MEMORANDUM IN SUPPORT**

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## **I. INTRODUCTION**

This is a law enforcement action to stop Consolidated Multiple Listing Service, Inc. (“CMLS”) from employing a broad array of anticompetitive conduct to ban innovative forms of competition, raise barriers to entry for new brokers, and injure consumers by limiting their choices and raising their commission fees. Unable to rebut the United States’ evidence of its anticompetitive conduct, CMLS has turned to irrelevant arguments in an attempt to distract from its illegal conduct. Namely, CMLS has argued, and the United States anticipates CMLS will argue at trial, that: (1) South Carolina real estate law can justify some (but not all) of its illegal conduct; (2) CMLS’s modification of some of its rules moots the United States’ challenge to those rules and allows CMLS to evade the repercussions of its anticompetitive conduct; and (3) CMLS has been reasonable in its settlement demands. Each of these arguments has been soundly rejected by controlling precedent as irrelevant, and with respect to settlement discussions, privileged. To streamline the presentation of facts at trial, the United States moves, *in limine*, to have argument and evidence regarding these irrelevant subjects excluded from trial.

## **II. MOTION IN LIMINE NO. 1 TO EXCLUDE ARGUMENT AND EVIDENCE REGARDING SOUTH CAROLINA REAL ESTATE LAW**

CMLS employs its interpretation of South Carolina real estate law as a defense for some of its anticompetitive conduct. It claims that certain of its rules are necessary to ensure compliance with state law and that CMLS is entitled to enforce its version of state law against competitors. For example, CMLS asserts its interpretation of, and quotes selected provisions of, South Carolina real estate law in its Answer and in its Opposition to the United States’ Motion for Summary Judgment. *See, e.g.*, Answer at ¶ 22 (Docket #6); Def.’s Mem. in Opp’n to Summ.

J. at 5-8, 10 (Docket #47). Similarly, CMLS witnesses have offered their interpretation of South Carolina real estate law in defending certain rules.<sup>1</sup>

Pursuant to Federal Rule of Evidence 402 and 403, the United States objects to all argument and evidence regarding CMLS's interpretation of South Carolina law because Supreme Court precedent renders such argument and evidence irrelevant. Under this precedent, CMLS cannot defend its anticompetitive conduct as necessary to comply with state law. "That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it." *Fed. Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 465 (1986); accord *Fashion Originators' Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457, 467-68 (1941) (rejecting defense that their "boycott and restraint of interstate trade . . . protect[ed] the manufacturer, laborer, retailer and consumer against" practices defendants believed violated the law (internal quote omitted)); see also *Am. Med. Ass'n v. United States*, 130 F.2d 233, 249 (D.C. Cir. 1942) (footnotes omitted) (rejecting AMA's attempt to justify its illegal conduct as necessary to ensure compliance with state law because it is irrelevant "that the conspiracy may be . . . designed to eliminate unfair, fraudulent and unlawful practices"), *aff'd* 317 U.S. 519 (1943).

Even if CMLS's interpretation of South Carolina real estate law were correct, it cannot appoint itself as the "real estate police"<sup>2</sup> and use anticompetitive conduct to mete out punishment

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<sup>1</sup> See, e.g., Ex. A at 107:10-21 (Rule 30(b)(6) Dep. of CMLS (Baucom Feb. 12, 2009)); Ex. B at 19:3-6 (Rule 30(b)(6) Dep. of CMLS (Derrick Aug. 22, 2008)); Ex. C at 34:19-35:9 (Rule 30(b)(6) Dep. of CMLS (Roe Aug. 22, 2008)). ("Ex. \_\_\_" refers to exhibits to the Declaration of Nathan P. Sutton submitted in support of these motions *in limine*.)

<sup>2</sup> See Ex. D (May 5, 2008 *The State* article).

based on its view of the law.<sup>3</sup> CMLS admits it has no authority to regulate real estate law because that obligation lies with the State of South Carolina. *See* Ex. E at 35:14-36:20 (Rule 30(b)(6) Dep. of CMLS (Baucom July 18, 2008)). Title 40, Chapter 57 of the South Carolina Code expressly creates and empowers the South Carolina Real Estate Commission to enforce South Carolina real estate law.<sup>4</sup> None of the other South Carolina multiple listing services have taken real estate law enforcement into their own hands by enacting rules similar to the CMLS rules challenged in this case. To the extent that CMLS believes that certain actions by real estate brokers violate South Carolina law, it should refer such brokers to the Real Estate Commission for disciplinary action.

Under the authorities discussed above, CMLS cannot assert that South Carolina law justifies any of its illegal behavior. Accordingly, the United States asks the Court to exclude as irrelevant any argument and evidence regarding CMLS's interpretation of South Carolina real estate law. *See, e.g., Fashion Originators' Guild of Am.*, 312 U.S. at 467-68 (affirming decision below not to hear evidence that state law justified defendant's conduct).

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<sup>3</sup> *See Am. Med. Ass'n*, 130 F.2d at 249 (“Except for [the AMA’s] size, their prestige and their otherwise commendable activities, their conduct in the present case differs not at all from that of any other extra-governmental agency which assumes power to challenge alleged wrongdoing by taking the law into its own hands. Although extreme situations may seem sometimes to have required vigilante action . . . this is not the American way of life.”)

<sup>4</sup> *See* S.C. Code Ann. § 40-57-10 (2008) (“There is created the South Carolina Real Estate Commission under the administration of the Department of Labor, Licensing and Regulation. The purpose of this commission is to regulate the real estate industry so as to protect the public’s interest when involved in real estate transactions.”); *id.* § 40-57-60 (enumerating certain powers and duties of the Real Estate Commission).

**III. MOTION IN LIMINE NO. 2 TO EXCLUDE ARGUMENT AND EVIDENCE THAT CMLS HAS MOOTED ANY ISSUES BY MODIFYING SOME OF ITS RULES**

CMLS has argued that its changes to some of the rules challenged by the United States makes the United States' challenges to the former version of the rules moot. *See, e.g.*, Def.'s Mem. in Opp'n to Summ. J. at 11-12 (Docket #47). Consistent with this strategy, CMLS's real estate industry expert offered opinions only on CMLS's modified rules, and not on the versions of CMLS's rules at issue in this case. *See, e.g.*, Ex. F at 99:20-100:1, 153:9-20 (Allen Dep.).

Pursuant to Federal Rules of Evidence 402 and 403, the United States objects to argument and evidence that CMLS's rule changes moot any part of the United States' challenge to the CMLS rules as they existed when the United States completed its pre-complaint investigation and informed CMLS that it intended to bring this case. There is no legal basis for this argument and it is therefore irrelevant. Supreme Court precedent long ago foreclosed CMLS's anticipated defense. "Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)); *see also United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 307-10 (1897) (association's decision to dissolve did not prevent the Court from deciding whether its actions had illegally restrained trade); *Lyons P'ship. v. Morris Costumes, Inc.*, 243 F.3d 789, 800 (4th Cir. 2001) (reversing district court for accepting "defendants' bald assertions that they would cease" illegal activity and remanding for issuance of injunction).



*W.T. Grant, Concentrated Phosphate, and Trans-Missouri Freight* each involved antitrust enforcement actions brought by the United States, and in each case the Supreme Court rejected attempts to use voluntary cessation to avoid antitrust liability. Moreover, the Fifth Circuit specifically applied this precedent to reject a multiple listing service's attempt to moot issues by abandoning rules challenged by the United States. *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1388 (5th Cir. 1980). The court held that a multiple listing service's "abandonment of the practices . . . and its disclaimer of any intention to revive them cannot serve to moot the issues they present." *Id.*<sup>5</sup> "The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement." *W.T. Grant*, 345 U.S. at 632.

Accordingly, the United States asks the Court to exclude as irrelevant any argument and evidence that CMLS's modification of its rules moots consideration of the rules challenged in the United States' complaint.

#### **IV. MOTION IN LIMINE NO. 3 TO EXCLUDE ARGUMENT AND EVIDENCE REGARDING SETTLEMENT OFFERS AND NEGOTIATIONS**

The United States moves this Court to exclude any argument and evidence regarding settlement offers and statements made during settlement discussions or mediation proceedings. A number of federal and local rules proscribe use of such offers or statements. Settlement offers and statements made during settlement and mediation discussions are inadmissible under Federal Rule of Civil Procedure 68 and Federal Rule of Evidence 408. The parties are also prohibited

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<sup>5</sup> This Court, in *DuPre v. Columbia Bd. of Realtors, Inc. & The Consol. Multiple Listing Servs. of Greater Columbia, Inc.*, Case No. C.A. 78-670-0, at 5-7, 24 (D.S.C. June 2, 1987) (Glass Decl., Ex. A (Docket # 37)), also enjoined CMLS from future enforcement of its then-existing version of its home office prohibition because it determined that, although CMLS had admitted the plaintiff, "[i]t cannot be said that the conduct of which the plaintiff complains is incapable of repetition."

from disclosing settlement negotiations to the Court in a nonjury trial under Local Rule 26.05(F), and communications made in connection with or during the mediation process are inadmissible and are not to be shared with the presiding judge pursuant to this Court's *Standing Order to Conduct Mediation* (Jan. 29, 2001) (Blatt, J.) and Local Rule 16.08(C).

CMLS has already placed before the Court (the finder of fact in this nonjury case) inadmissible evidence regarding settlement offers and negotiations. It filed with the Court two unaccepted offers of judgment in violation of Rule 68.<sup>6</sup> *See* Docket #s 33, 43. It also made arguments relying on settlement offers and negotiations in its Memorandum in Opposition to [the United States'] Motion for Summary Judgment. *See* Docket #47 at 4, 6, 11, 19.<sup>7</sup>

Because parties would be reluctant to enter into settlement talks if their negotiation positions could influence the finder of fact, Federal Rule of Evidence 408 makes inadmissible offers, conduct, and statements made in connection with settlement negotiations. *Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 654 (4th Cir. 1988) ("The public policy favoring and encouraging settlement makes necessary the inadmissibility of settlement negotiations in order to foster frank discussions"; affirming exclusions under Rule 408). Federal Rule of Civil

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<sup>6</sup> Only if a Rule 68 offer of judgment is accepted does the rule permit the offer to be filed. "By strong negative inference, that latter reference to filing if and when the offer is accepted confirms the plain meaning of Rule 68's first sentence that no filing is permitted at the time of tender." *Kason v. Amphenol Corp.*, 132 F.R.D. 197, 197 (N.D. Ill. 1990) (striking offer of judgment from court's file). Instead of filing its offer with the Court, CMLS should have done no more than "serve on an opposing party" its settlement offer. Fed. R. Civ. P. 68(a).

<sup>7</sup> In addition to proffers by counsel, CMLS itself raised settlement offers and discussions when the government deposed it pursuant to Rule 30(b)(6). *See* Rule 30(b)(6) Dep. of CMLS (Baucom) at 57:19-60:21, 121:5-122:11, 127:2-10 (July 18, 2008); Rule 30(b)(6) Dep. of CMLS (Baucom) at 23:20-24:20, 99:7-100:20, 110:5-111:8, 121:15-122:6 (Feb. 12, 2009). In the interests of not presenting additional settlement discussions before the Court, the deposition excerpts are not attached, but referenced for the benefit of opposing counsel.

Procedure 68 also makes inadmissible unaccepted offers of judgment. *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294-95 (6th Cir. 1989) (Rule 68 “contemplates that whether jury or judge tries the case the decisionmaker will be unaware of the extraneous fact that an offer of judgment has been made. This ensures that the trier of fact will not be influenced in its evaluation of the case by any knowledge of a rejected offer or the consequences thereof.”). Moreover, to ensure that the Court is not influenced by inadmissible evidence when presiding over a nonjury trial, Local Rule 26.05(F) prohibits parties from disclosing settlement negotiations in their trial briefs. Permitting CMLS to discuss settlement and mediation negotiations at hearings, at trial, or in court filings would render Local Rule 26.05(F) meaningless.

In order to ensure frank, good-faith negotiations during the mediation process, both parties and their counsel signed an Agreement to Mediate in which the parties agreed that “[a]ll statements made during the course of mediation are privileged, are made without prejudice to any party’s legal position, and are non-discoverable and inadmissible for any purpose in any legal proceeding.” Ex. G at ¶¶ 1, 3. CMLS expressly agreed not to seek to admit statements made by either party in the course of the mediation process. *Id.* It should be held to its word.

Based upon the foregoing, the United States respectfully requests that this Court exclude any evidence or argument of settlement offers and statements made during settlement and mediation proceedings.

## **V. CONCLUSION**

For the reasons set forth above, the United States requests that the motions *in limine* be granted.

Respectfully submitted,

FOR PLAINTIFF  
THE UNITED STATES OF AMERICA

s/Jennifer J. Aldrich

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United States Attorney  
District of South Carolina

By:  
JENNIFER J. ALDRICH (#6035)  
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Dated: March 18, 2009

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

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

**CERTIFICATE OF SERVICE**

I, Jennifer J. Aldrich, certify that on this 18th day of March, 2009, I caused a copy of UNITED STATES' MOTIONS IN LIMINE AND MEMORANDUM IN SUPPORT 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

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

---

**UNITED STATES OF AMERICA,**

Plaintiff,

v.

**CONSOLIDATED MULTIPLE  
LISTING SERVICE, INC.,**

Defendant.

---

Civil Action No. 3:08-cv-01786-SB

**DECLARATION OF NATHAN P. SUTTON IN SUPPORT OF  
THE UNITED STATES' MOTIONS *IN LIMINE* AND MEMORANDUM IN SUPPORT**

Nathan P. Sutton hereby declares:

1. I am a Trial Attorney for the United States Department of Justice, Antitrust Division, Litigation III Section and I represent the United States in the above-captioned matter. I am over 18 years of age and I have personal knowledge of the facts set forth in this declaration.
2. Attached hereto as Exhibit A is a true and correct copy of the cover page, pages 106-07, and the court reporter's certification of the Rule 30(b)(6) Deposition of CMLS (Robert Baucom), dated February 12, 2009.
3. Attached hereto as Exhibit B is a true and correct copy of the cover page, page 19, and the court reporter's certification of the Rule 30(b)(6) Deposition of CMLS (James Derrick), dated August 22, 2008.

4. Attached hereto as Exhibit C is a true and correct copy of the cover page, pages 34-35, and the court reporter's certification of the Rule 30(b)(6) Deposition of CMLS (Ron Roe) dated, August 22, 2008.

5. Attached hereto as Exhibit D is a true and correct copy of of the article from the May 5, 2008 edition of *The State* with the headline "Real estate group facing scrutiny; Government suing listing service that allegedly limits competition."

6. Attached hereto as Exhibit E is a true and correct copy of the cover page, pages 35-36, and the court reporter's certification of the Rule 30(b)(6) Deposition of CMLS (Robert Baucom), dated July 18, 2008.

7. Attached hereto as Exhibit F is a true and correct copy of the cover pages, pages 99-100 and 153, and the court reporter's certification of the Deposition of Marcus T. Allen, Ph.D., dated January 29, 2009.

8. Attached hereto as Exhibit G is a true and correct copy of the Agreement to Mediate signed by the parties and counsel, dated February 13, 2009.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 18, 2009 in  
Washington, D.C.

  
NATHAN P. SUTTON

**Original Transcript**

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

United States of America,

Plaintiff,

Case No: 3:08-CV-01786-SB

-vs-

Consolidated Multiple  
Listing Services,  
Incorporated,

Defendant.

**DEPOSITION OF**

**Robert Baucom**

February 12, 2009  
9:35 a.m.

Woodward, Cothran & Herndon  
440 Knox Abbott Drive, Suite 200  
Cayce, South Carolina

REPORTED BY: Missy Graczyk, Court Reporter

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U.S. DEPT. OF JUSTICE



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1 to comport with other CMLS rules?

2 A Just to be sure that, yeah that says it, there's a  
3 possibility that the State form could actually be in  
4 conflict with something that's in our rules, if you  
5 actually, I don't know what that would be, because  
6 I'm not really, that would be the reason.

7 Q But you haven't had any problems with people using  
8 the South Carolina Association of Realtors EA Form?

9 A No, and I only went to, you know, we have -- no.

10 Q CMLS still requires that all offers be submitted to  
11 listing brokers, correct?

12 A Yes, that's what the Rule says.

13 Q And there's no modification of that Rule with respect  
14 to, with an agency listing?

15 A You mean that you would have to do ERTS and not EA?

16 Q No, I'm saying, there's no exception where the  
17 listing agreement is an Exclusive Agency that would  
18 allow offers to go directly to the home seller?

19 A No.

20 Q Why is it that even if the seller wants to receive  
21 offers directly, CMLS prohibits them from doing so?

22 A I don't think it's a prohibition as such, and you  
23 know, I think if you read the State Statute, that's a  
24 gray area as to whether or not, how it gets. It says  
25 that you have to prepare and present to the seller



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1 any and all offers, you know, and to sit down and  
2 just interpret legally, not being a lawyer, you know,  
3 what that means versus what our rules mean. I don't  
4 have any idea. I mean, does it say that it can't,  
5 that South Carolina law doesn't say it has to be, as  
6 I recall it, doesn't say that it has to be presented,  
7 or can be presented directly to the seller. It says  
8 that the listing agent or the agent for the seller  
9 has to prepare and present all offers to the seller.

10 Q So you believe that requirement, you believe that  
11 South Carolina law requires offers to go to the  
12 broker and that they cannot be given directly to a  
13 home seller?

14 A I think that was the consensus of everybody on the  
15 Board when this issue first came up. I mean,  
16 recalling the conversations that we've had about  
17 that, that that's what everybody thought.

18 Q Based on its interpretation of South Carolina law?

19 A Yeah.

20 Q But you acknowledge that it's sort of a gray area?

21 A I do.

22 Q Did CMLS recently make changes with respect to its  
23 requirement on signage?

24 A I don't think that's been recent. Well yeah, there  
25 was a change in signage that I've been pushing for



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CERTIFICATE OF REPORTER

1  
2  
3  
4 I, Missy A. Graczyk, Court Reporter and  
Notary Public for the State of South Carolina at  
Large, do hereby certify:

5  
6 That the foregoing deposition was taken  
before me on the date and at the time and location  
7 stated on page 1 of this transcript; that the  
deponent was duly sworn to testify to the truth,  
the whole truth and nothing but the truth; that the  
8 testimony of the deponent and all objections made  
at the time of the examination were recorded  
9 stenographically by me and were thereafter  
transcribed; that the foregoing deposition as typed  
10 is a true, accurate and complete record of the  
testimony of the deponent and of all objections  
11 made at the time of the examination to the best of  
my ability.

12  
13 I further certify that I am neither  
related to nor counsel for any party to the cause  
pending or interested in the events thereof.

14  
15 Witness my hand, I have hereunto  
affixed my official seal this 16th day of February,  
2009, at Columbia, Lexington County, South  
16 Carolina.

17  
18  
19  
20 *Missy A. Graczyk*  
Missy A. Graczyk, Court Reporter  
21 Notary Public  
State of South Carolina  
22 My Commission Expires:  
January 18, 2010



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**James W. Derrick, Jr.**

Page 1

1 UNITED STATES DISTRICT COURT  
 2 FOR THE DISTRICT OF SOUTH CAROLINA  
 3 COLUMBIA DIVISION

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 v.

7 CONSOLIDATED MULTIPLE LISTING  
 8 SERVICE, INC.,

9 Defendant.

CA: 3:08cv1786 SB

**ORIGINAL**

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30(b)(6) DEPOSITION

OF

JAMES W. DERRICK, JR.

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SEP 8 - 2008

LITIGATION III, ANTITRUST DIV.  
U.S. DEPT. OF JUSTICE

Taken at:

Woodward, Cothran & Herndon  
 440 Knox Abbott Drive, Suite 200  
 Cayce, South Carolina 29033

On Friday, August 22, 2008

REPORTER: GINA M. SMITH, CSR, RPR

JOB NO. 204901a

**ESQUIRE DEPOSITION SERVICES, LLC.**

**1-800-944-9454**

**James W. Derrick, Jr.**

Page 19

1 Q. Did you have input into it?

2 A. I did.

3 Q. Whose idea was it to put this requirement into the  
4 CMLS bylaws?

5 A. I would assume it was a -- ideas of the members of the  
6 board of directors, because it was state law.

7 Q. Did it occur to all of them simultaneously or was it  
8 one person? Two people?

9 A. I couldn't answer that question. I don't know.

10 Q. Turn to Rule 1A, please. When did Rule 1A come about?

11 A. I believe that's been there for ten to 15 years.

12 Q. Whose idea was it to put Rule 1A into the CMLS rules?

13 A. It would have been the board of directors.

14 Q. Did that idea occur to any particular person first?

15 A. Not that I know of.

16 Q. Who wrote this rule?

17 A. I don't know.

18 Q. Did you give your input --

19 A. I did.

20 Q. Just let me get the whole question out. The record's  
21 not going to be clear otherwise.

22 Did you give input into Rule 1A?

23 A. Yes.

24 Q. Take a look at Rule 2, please. When was that rule  
25 enacted?

**James W. Derrick, Jr.**

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1 STATE OF SOUTH CAROLINA

2 COUNTY OF LEXINGTON

3

4

## CERTIFICATE OF REPORTER

5

6

I, GINA M. SMITH, CSR, RPR, Notary Public, do

7 hereby certify that JAMES W. DERRICK, JR., was duly sworn by

8 me on August 22, 2008, prior to the taking of the foregoing

9 deposition; that said deposition was taken and transcribed

10 under my supervision and direction; that the parties were

11 present as stated; and that I am not of counsel for or in

12 the employment of any of the parties to this action, nor am

13 I interested in the outcome of this action.

14

I do further certify that the foregoing 125 pages

15 constitute a true and accurate transcript of the testimony.

16

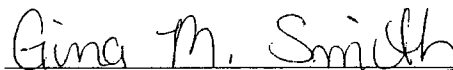
IN WITNESS WHEREOF, I hereunto subscribe my name this

17 the 4th day of September 2008.

18

19

20



GINA M. SMITH, CSR, RPR

21

Notary Public

22

23 My Commission Expires:

24

25 July 23, 2013

**Ron Roe**

Page 1

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2  
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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CONSOLIDATED MULTIPLE LISTING  
SERVICE, INC.,

Defendant.

CA: 3:08cv1786 SB

**ORIGINAL**

30 (b) (6) DEPOSITION  
OF  
RON ROE

Taken at:

Woodward, Cothran & Herndon  
440 Knox Abbott Drive, Suite 200  
Cayce, South Carolina 29033

On Friday, August 22, 2008

REPORTER: GINA M. SMITH, CSR, RPR

JOB NO. 204901c

**Ron Roe**

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1 Q. Did the \$5,000 fee have anything to do with state law?

2 A. No, nor does the 2,500 fee.

3 Q. Does the commercial office requirement, is that  
4 required by state law?

5 A. The term "commercial" is not. And previous state law,  
6 they said "comply with the municipal zoning laws," but  
7 that was left off the last time or last two times the  
8 law was revised.

9 Q. Is the -- so is the current version of the South  
10 Carolina Real Estate Law, is that something that  
11 requires licensees to have commercial offices?

12 A. It does not.

13 Q. If you look at Article 4, that's the active  
14 involvement requirement?

15 A. Right.

16 Q. That's at the bottom of page 2 of Government  
17 Exhibit 9.

18 A. That's correct.

19 Q. What are the reasons for the -- what are the CMLS'  
20 reasons for the active involvement requirement?

21 A. I probably can speak to that as well as anybody on the  
22 MLS board.

23 When we were rewriting or updating the rules and  
24 regulations, we looked at state law, and state law  
25 requires a broker, I don't know, probably to do a



**Ron Roe**

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1 hundred different things.

2 We wanted to protect the consumer and, my belief,  
3 to improve the professionalism of our industry.

4 Coming from a military background, I thought  
5 professionalism and ethics was very, very important.

6 And we looked at state law, and we thought that,  
7 at a minimum, the agent or company had an obligation,  
8 legal obligation, to market, sell and close the  
9 property.

10 **Q. Are there any other reasons?**

11 A. No. The reason was to improve the professionalism and  
12 to abide by state law.

13 I mean, it's my belief -- and you can correct me  
14 if I'm wrong -- that NAR and DOJ has already agreed  
15 that it's okay to have that verbiage in MLS agreements  
16 now that the MLS member be actively involved.

17 So I believe that's really not an issue anymore,  
18 if DOJ and NAR has already agreed to that. And I may  
19 be wrong. I just read things off a web site.

20 **Q. What web site are you talking about?**

21 A. It's one of those real estate web sites. I'm not sure  
22 whether it's RIS Media or, you know, Real Trends,  
23 or -- there's several web sites to report real estate  
24 information.

25 I believe that was also told to me by the

**Ron Roe**

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CERTIFICATE OF REPORTER

I, GINA M. SMITH, CSR, RPR, Notary Public, do hereby certify that RON ROE was duly sworn by me on August 22, 2008, prior to the taking of the foregoing deposition; that said deposition was taken and transcribed under my supervision and direction; that the parties were present as stated; and that I am not of counsel for or in the employment of any of the parties to this action, nor am I interested in the outcome of this action.

I do further certify that the foregoing 79 pages constitute a true and accurate transcript of the testimony.

IN WITNESS WHEREOF, I hereunto subscribe my name this the 4th day of September 2008.

*Gina M. Smith* \_\_\_\_\_

GINA M. SMITH, CSR, RPR

Notary Public

My Commission Expires:

July 23, 2013

9 of 644 DOCUMENTS

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Found on TheState.com

The State (Columbia, South Carolina)

May 6, 2008 Tuesday

**SECTION:** B; Pg. 7**LENGTH:** 667 words**HEADLINE:** Real estate group facing scrutiny;  
Government suing listing service that allegedly limits competition**BYLINE:** KRISTY EPPLEY RUPON, krupon@thestate.com**BODY:**

The U.S. government is suing the group that oversees real estate listings in the Columbia region to make sure home sellers have access to agencies that charge less than the typical 6 percent commission.

The Columbia-area Consolidated Multiple Listing Service denies the government's claims, saying at least three discount real estate firms already are members and have access to the region's real estate database.

One listing service leader called the reasoning behind the charges "mysterious."

Still, the U.S. Department of Justice wants to make sure the group won't change their rules in the future to limit competition.

The suit says the service's rules are set up to deny membership to "brokers who might be expected to compete more aggressively or in more innovative ways than (service) members would prefer."

The lawsuit is one in a string of antitrust suits filed against similar organizations throughout the country over the past few years, including one in Hilton Head.

Most of them are settled without a trial, according to a U.S. Department of Justice spokeswoman. The Hilton Head listing service agreed last year to open access to low-cost or Internet-based agencies and not adopt new rules that would prevent their membership, the department said.

No one on the Columbia-area listings service board of directors can recall any applicant denied membership, said Bob Baucom, the service's director of operations.

"I don't know how you get anti-competitive out of that," said Baucom, a former FBI agent who described himself as "like the real estate police" in Columbia.



Real estate group facing scrutiny; Government suing listing service that allegedly limits competition The State  
(Columbia, South Carolina) May 6, 2008 Tuesday

The service maintains a database of homes for sale in the area and records of sales that help real estate agents set prices. The group is made up of 370 brokers who represent more than 3,100 real estate agents in seven Midlands counties: Richland, Lexington, Kershaw, Saluda, Fairfield, Calhoun and Newberry.

The government's lawsuit accuses the Columbia service of depriving customers access to fee-for-service agencies and exclusive-agency listings.

Exclusive-agency listings allow sellers to pay no commission or fee to a broker if the sellers find a buyer on their own. Baucom said the service agreed to allow those listings last month.

Fee-for-service allows home-sellers to purchase specific services they want from a broker, such as paying a flat fee to have a home listed on the listing service.

Baucom said Assist 2 Sell, which charges a flat fee, has been a member of CMLS for two years. He said two other low-cost agencies that charge 4 percent commission are members.

Baucom said the U.S. Department of Justice started investigating the service in 2006 and investigators spoke with officials and copied documents in Columbia about a year later.

He said the service didn't hear from the department again until March, when he and CMLS attorney Ed Woodward flew to Washington and met with 15 attorneys who gave them a "last chance" to comply.

"We don't have anything to hide," Baucom said.

In addition to allowing exclusive agency listings, the board voted last month to cut its one-time membership fee in half to \$2,500 to attract smaller agencies, Baucom said.

But the service chose not to address other concerns raised by the government attorneys.

The government wanted the service to end criminal background checks, Baucom said. The board declined, citing public safety concerns.

And the government wanted the service to open membership to agents without a local storefront, but that would violate state law, Baucom said.

Nick Kremydas, chief executive of the S.C. Realtors trade group, would not comment about the local case but said he's angry about the government's allegations against the industry.

"They constantly are claiming that our organization is anti-competitive, and it is not," Kremydas said. "Membership has quadrupled in last 10-15 years, and that's not a sign of an anti-competitive industry.

"It upsets me that our federal government is using our tax dollars to do these kinds of things."

Reach Rupon at (803) 771-8308.

**LOAD-DATE:** May 6, 2008

**Robert Baucom**

Page 1

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

CONSOLIDATED MULTIPLE LISTING  
SERVICE, INC.,

Defendant.

**ORIGINAL**

DEPOSITION  
OF  
ROBERT BAUCOM

Taken at:

Woodward Cothran & Herndon  
440 Knox Abbott Drive, Suite 200  
Cayce, South Carolina 29033

On Friday, July 18, 2008

REPORTER: GINA M. SMITH, CSR, RPR

**Robert Baucom**

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1 A. That's approximate. I could be off a couple, but  
2 that's a -- that's a fair number, yes.

3 Q. Are the members of CML competitors?

4 A. Yes, sir.

5 Q. And have the members of CMLS agreed to cooperate with  
6 each other to further the goals of CMLS?

7 A. Yes.

8 Q. They've agreed to cooperate with each other and  
9 compensate one another, for example?

10 A. Yes.

11 Q. And they've agreed to share information about  
12 listings, correct?

13 A. Correct.

14 Q. Is CMLS part of the government of South Carolina?

15 A. No.

16 Q. Has it been charged with creating or enforcing any  
17 rules by the government of South Carolina?

18 A. No.

19 Q. The legislature is not -- the South Carolina  
20 legislature, for example, has not appointed them to  
21 create rules and regulations?

22 A. No.

23 Q. And the governor or any other part of the South  
24 Carolina government has not asked CMLS to do that,  
25 right?

**Robert Baucom**

Page 36

1 A. No.

2 Q. The voters of South Carolina have not asked CMLS to  
3 make regulations, correct?

4 A. No.

5 Q. So CMLS is different from the South Carolina Real  
6 Estate Commission in that respect?

7 A. Yes.

8 Q. The South Carolina Real Estate Commission was created  
9 by the South Carolina legislature to create  
10 regulations regarding real estate. Is that right?

11 A. I would assume. I have no -- I can't really speak to  
12 that.

13 Q. But is that your understanding based on having been in  
14 this market and having been involved in real estate  
15 for decades now?

16 A. You refer to the South Carolina Real Estate  
17 Commission, and you may be technically right. We  
18 refer to it as LLR. So, I mean, they're one and the  
19 same for all practical purposes, but I think the  
20 overall authority is LLR.

21 Q. Do you keep a copy of the real estate law that's  
22 issued by LLR?

23 MR. WOODWARD: Object to the form. Your  
24 question assumes a fact that could never be in  
25 evidence. LLR does not pass laws.

**Robert Baucom**

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STATE OF SOUTH CAROLINA

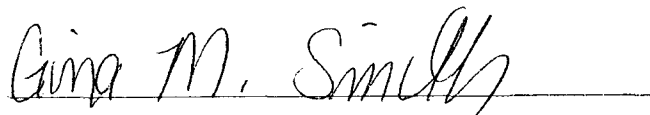
COUNTY OF LEXINGTON

## CERTIFICATE OF REPORTER

I, GINA M. SMITH, CSR, RPR, Notary Public, do hereby certify that ROBERT BAUCOM was duly sworn by me on July 18, 2008, prior to the taking of the foregoing deposition; that said deposition was taken and transcribed under my supervision and direction; that the parties were present as stated; and that I am not of counsel for or in the employment of any of the parties to this action, nor am I interested in the outcome of this action.

I do further certify that the foregoing 209 pages constitute a true and accurate transcript of the testimony.

IN WITNESS WHEREOF, I hereunto subscribe my name this the 29th day of July 2008.



GINA M. SMITH, CSR, RPR

Notary Public

My Commission Expires:

July 23, 2013



**Original Transcript**

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

UNITED STATES OF AMERICA,

Plaintiff(s),

vs.

Case No.: 3:08cv1786SB

CONSOLIDATED MULTIPLE LISTING SERVICE,

Defendant(s).

---

**VIDEOTAPED DEPOSITION OF**

**MARCUS T. ALLEN, PH.D.**

Thursday, January 29, 2009  
9:02 a.m.

U.S. Attorney's Office  
1441 Main Street  
Columbia, South Carolina

SHERI L. BYERS, Registered Professional Reporter

  
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99

1 Q. Isn't the judge going to decide whether it  
2 should still be an issue?

3 A. Oh, absolutely. That's why I'm saying I'm  
4 happy to talk about it, but I think the judge would  
5 say, "Oh, well, this is what they filed suit against  
6 you for doing wrong, now you don't do that anymore, so  
7 why are we here to talk about this today?"

8 And I don't know how courts work, but my  
9 logic as a --

10 Q. Okay.

11 A. -- an educator, I wouldn't teach unless I was  
12 trying to teach the lesson of history compared to today  
13 and the evolution of thought. There wouldn't be a lot  
14 of use to challenge someone and say you're doing  
15 something wrong based on things they were doing before  
16 that they no longer do.

17 Q. But you agree, you're not a legal expert,  
18 you're not a lawyer?

19 A. Absolutely.

20 Q. And you agree that this issue about whether  
21 or not the old rules are still relevant, that's a legal  
22 issue?

23 A. It is to the judge. It's not relevant to me  
24 in the forming of my opinion because I formed my  
25 opinion based on the rules that I understood to be in



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1 place as of the date I signed my report.

2 Q. Are you aware that there's a line of cases  
3 that address the voluntary cessation of wrongful  
4 conduct and all of that?

5 A. As you said, I'm not an attorney, I have no  
6 legal training. All of that is far above my head. I'm  
7 not trying to convince you or anyone else that my  
8 position is right. I'm just trying to tell you the  
9 truth, that my position and my opinion was formed based  
10 on this set of rules that was in place at the time.

11 So I didn't find it productive for me to go  
12 back to rules that I knew were no longer in place to  
13 evaluate those rules in terms of their  
14 anticompetitiveness.

15 Q. So you mentioned -- we were on the subject of  
16 the changes that you thought were good. One of the  
17 ones you mentioned specifically is the rule change that  
18 allows brokers now to operate out of their home  
19 offices?

20 A. That's right.

21 Q. Were you aware that the old rule or the rule  
22 in effect at the time of the lawsuit banned broker  
23 members from operating out of home offices?

24 A. Yes. And I was aware of that when I went  
25 through the membership application process, and I took



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1 transfer of information between brokers. At the same  
2 time, the MLS creates a property rights system that may  
3 or may not give or that does give individual brokers  
4 power over their contractual relationships with their  
5 customers.

6 So, yes, the rules of the MLS have to impact  
7 the level of competition and the type of competition  
8 that occurs between member firms.

9 Q. In the answer that you just gave, were you  
10 talking about the rules that are in effect at the time  
11 of our complaint or are you talking about another  
12 set --

13 A. The time of my familiarity, which is as of  
14 December 15th.

15 Q. Can you answer the question as to the rules  
16 that are in effect at the time of the complaint?

17 A. No, I don't feel comfortable doing that.  
18 That wasn't the way I prepared for my report nor for  
19 the deposition, so I don't want to give anything that's  
20 misleading.

21 Q. That's fine.

22 What about the commercial office requirement  
23 that was in effect at the time of the complaint, does  
24 that affect a broker's decision about whether or not to  
25 use a commercial office?



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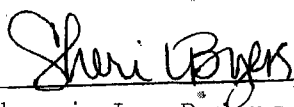
CERTIFICATE OF REPORTER

I, Sheri L. Byers, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing deposition was taken before me on the date and at the time and location stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is a true, accurate and complete record of the testimony of the deponent and of all objections made at the time of the examination to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 2nd day of February, 2009, at Columbia, Richland County, South Carolina.



-----  
Sheri L. Byers,  
Registered Professional Reporter,  
Notary Public  
State of South Carolina at Large  
My Commission expires:  
January 5, 2014



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**Exhibit G**

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

UNITED STATES OF AMERICA,	)	Civil Action No.
	)	
Plaintiffs,	)	
	)	
vs.	)	<b>AGREEMENT TO MEDIATE</b>
	)	
CONSOLIDATED MULTIPLE LISTING	)	
SERVICES, INC.	)	
	)	
Defendants.	)	

THE UNDERSIGNED PARTIES and their attorneys hereby agree that the above matter shall be submitted to mediation pursuant to the applicable rules, guidelines, and Order of the Court having jurisdiction over this matter, and further agree that:

1. All statements made during the course of mediation are privileged, are made without prejudice to any party's legal position, and are non-discoverable and inadmissible for any purpose in any legal proceeding.
2. The privileged character of any information is not altered by disclosure to the mediator. Disclosure of any records, reports, or other documents received or prepared by the mediator cannot be compelled. The mediator shall not be compelled to disclose or to testify in any proceeding about (i) any records, reports, or other documents received or prepared by the mediator or (ii) information disclosed or representations made in the course of the mediation or otherwise communicated to the mediator in confidence. The mediator will not retain any exhibits, briefs or materials following the conclusion of the mediation. Any party may retrieve such documentation delivered to the mediator within seven (7) days of the conclusion of the mediation. Any documentation not retrieved within that time will be discarded by the mediator.
3. Evidence of anything said or any admission made in the course of mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.
4. Unless a document provides otherwise, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled in any civil action in which pursuant to law, testimony can be compelled to be given.

5. Nothing in this Agreement to Mediate shall limit the admissibility of any particular evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

6. The parties understand that the mediator does not represent any party, and does not provide legal or financial advice. Parties not represented by counsel are urged to seek legal advice from an attorney and to obtain financial advice as needed from qualified professionals. The parties agree that the mediator shall have no liability for any act or omission in connection with the mediation.

7. The parties further understand and agree that the mediator's fee and expenses will be paid in equal shares by all parties unless other arrangements are made at the time of the mediation. In addition, the parties agree that the attorney(s) representing each party will bear the responsibility and pay its respective share within ten (10) days of receipt of the mediator's bill for services rendered.

8. In the event the mediation is canceled or postponed, the parties agree that my office will be notified not later than fifteen (15) working days prior to the mediation. If the mediation is canceled or postponed with less than fifteen (15) working days' notice, a \$1,200 cancellation fee will be charged, equally divided among the parties. The only exception will be if a case actually settles prior to the scheduled mediation, the cancellation fee will be waived.

Dated 2/13, 2009, and signed before commencement of the mediation by each of the persons whose signatures appear below.

[Signature]  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Plaintiff

[Signature]  
[Signature]  
[Signature]  
\_\_\_\_\_

Attorney for Plaintiff

[Signature] James W. Deneck Jr.  
[Signature]  
Robert W. Brown  
Michels  
\_\_\_\_\_

Defendant

[Signature]  
\_\_\_\_\_  
\_\_\_\_\_

Attorneys for Defendants