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.	Case No. 3:08-CV-01786-SB **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

NATURE OF THE CASE

This civil action is one seeking an injunction against Defendant under Section One of the Sherman Antitrust Act.

STATEMENT OF FACTS

Beginning in July, 2006, the United States Department of Justice ("DOJ") commenced an investigation of Consolidated Multiple Listing Service, Inc., ("CMLS") under the Sherman Antitrust Act. The investigation culminated in the filing of a Civil Action in May, 2008. In answering the complaint, CMLS correctly informed DOJ that: **CMLS is a South Carolina not-for-profit corporation, the members of which have formed a multiple listing service to provide an orderly and cost effective market place for the CMLS service area. Joint venture status is denied.** (Answer to Complaint Paragraph 2). The service area comprises the counties of Richland, Lexington, Calhoun, Saluda, Newberry, Kershaw, and Fairfield. CMLS was formed in March, 1977, and remains in good standing with the State of South Carolina. (See the charter attached hereto.)

"Good Standing" is revealed by reference to the South Carolina Secretary of State's website, www.scsos.com. The record in this case is devoid of any facts which would tend to prove that CMLS is other than what it has consistently maintained itself to be, a corporate owner/operator of a real estate multiple listing service. Moreover, DOJ was further placed on notice by the Answer that CMLS maintained DOJ had failed to state a claim upon which relief could be granted. Answer paragraph 32.

ARGUMENT

In factually analogous cases, the Fourth Circuit has uniformly held that the doctrine, described from time to time as "intracorporate immunity doctrine" or "intracorporate conspiracy doctrine", bars actions under the Sherman Antitrust Act against corporations acting alone. Briefly, the doctrine holds that a corporation cannot conspire with itself or its agents. In this case, it bars DOJ's action against CMLS. A brief review of the case law demonstrates its applicability to this case.

American Chiropractic Association, Inc. v. Trigon Healthcare, Inc., 367 F.3d 212 (4th Cir. 2004) summarizes the law on this issue. The plaintiffs in Trigon were a chiropractic association and various members thereof who alleged that Trigon and a committee of doctors appointed by it created false guidelines to limit the usage of chiropractors in favor of medical doctors for low back pain in violation of Section One of the Sherman Antitrust Act. The alleged conspirators were Trigon and its committee of medical doctors. The Court applied the doctrine and ruled in favor of Trigon, dismissing the antitrust count. In the instant case, DOJ alleges that CMLS and its board have promulgated rules which favor traditional real estate brokerages over "new and innovative" discount brokers. CMLS vigorously disputes that allegation, but that conflict is not reached in this motion. The Rules of CMLS are promulgated by the Board of Trustees as duly constituted from time to time, and the By-laws flow from the membership assembled in an annual meeting. The current rules and by-laws are on file with the Court and attached to the Rule 68 Offer of Judgment heretofore filed

with the Court. The alleged conspiracy is thus squarely analogous to the one alleged in Trigon and falls within the ambit of the doctrine.

Proof of concerted action requires evidence of a relationship between at least two legally distinct persons or entities. Trigon citing Oksanen v. Page Memorial Hospital, 945 F.2d 696, 702 (4th Cir. 1991) (en banc). Oksanen involved an alleged conspiracy between a hospital and the doctors on its peer review committee who denied privileges to Dr. Oksanen. Substituting CMLS for hospital and "broker board members" for "doctors on the peer review committee" reveals that Oksanen is squarely on point in support of this motion. Proof of a relationship between at least two legally distinct persons or entities is absent in this case resulting in a lack of proof of concerted action.

"The Fourth Circuit has recognized two exceptions to the general rule that agents of a principal cannot conspire with one another or the principal: the so-called 'independent personal stake' exception, and where corporate agents are alleged to have acted outside the normal course of their corporate duties—the 'unauthorized acts' exception." United States v. Gwinn 2008 WL 867927 (S.D.W Va.) at p.26, (citations omitted.) The "unauthorized acts" exception is not at issue because there are no allegations of "unauthorized acts." It is believed that the "personal stake" exception will be argued in reply though not raised in the complaint because it provides the only avenue of escape from the clear holdings of the above-cited authorities. In passing, the District Court's decision in Gwinn contains an exhaustive review of the doctrine, its applications, and its limited exceptions.

Reliance on the "personal stake" exception in this case would be misplaced. "Personal stake" implies that the agent has a "wholly separable" interest in the illegal activity, independent of his relationship with the corporation. Gwinn, supra. CMLS's board is composed of nine broker members elected by the membership for staggered terms. Four of those members are from large companies to which DOJ has pointed in discovery as having an unfair competitive advantage served up by the rules DOJ finds objectionable. Five of those members—a majority—are drawn from

medium to small size brokerages about which there are no proofs in this record to even raise the issue of anti-competitiveness much less prove it or any "personal stake" for those board members. For example, a consistently involved board member is the Mungo Company, perhaps the state's largest homebuilder, who has no interest in paying more for real estate brokerage services than it absolutely has to. Other consistently involved board members are RE/MAX brokers, one of whom has been from time to time among the largest brokers, who have no say in what commissions their agents negotiate, collecting, instead, fees from those agents to keep the offices running and the brokers-in-charge in business. In any event, DOJ would have already had to identify and join those board members, if any, with a controlling personal stake and prove the personal stake exception, a task that is far too late to attempt in this case.

Moreover, the actual membership of CMLS is composed of over 370 members of every stripe from a large traditional broker with many agents who gets only one vote at the annual meeting to numerous firms containing but one member/broker with no agents who gets the same one vote. The board controls the rules, but the membership controls the by-laws which ultimately control CMLS.

Therefore, it is clear that the one possible exception to the rule does not apply in this case, and that CMLS is entitled to Summary Judgment as a matter of law predicated on the "intracorporate immunity/conspiracy doctrine."

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served the above document on opposing counsel by electronic means on February 17, 2009.

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