

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
GAINESVILLE DIVISION

Heather Q. Bolinger, Paul A. Terry, )  
and Anne M. Terry, on behalf of themselves )  
and all others similarly situated, )

Plaintiffs, )

v. )

First Multiple Listing Service, Inc., )  
Gainesville-Hall County Board of )  
Realtors, Inc., Atlanta Board of Realtors, )  
Inc., Lanier Partners, LLC, d/b/a Keller )  
Williams Realty Lanier Partners, Heritage )  
Real Estate, Inc., d/b/a Coldwell Banker )  
Heritage Real Estate, Peggy Slappey )  
Properties, Inc., Atlanta Partners Realty, )  
LLC, d/b/a Keller Williams Realty Atlanta )  
Partners, Bueno and Finnick, Inc., d/b/a )  
Re/Max Center Dacula, Sue Edwards, )  
Mary Beth Smallen, Patricia Garner, )

and )

John Doe Members Comprising )  
Defendant Class of Residential Real Estate )  
Brokers Similarly Situated as Members )  
of FMLS, )

Defendants. )

CIVIL ACTION FILE NO.:  
2:10-cv-00211-RWS

---

**AMENDED COMPLAINT**

COME NOW, Heather Q. Bolinger, Paul A. Terry, and Anne M. Terry (hereinafter collectively referred to as the “Named Plaintiffs”), and file this First Amended Complaint against First Multiple Listing Service, Inc. (“FMLS”), Gainesville-Hall County Board of Realtors, Inc., Atlanta Board of Realtors, Inc., Lanier Partners, LLC, d/b/a Keller Williams Realty Lanier Partners, Heritage Real Estate, Inc., d/b/a Coldwell Banker Heritage Real Estate, Peggy Slappey Properties, Inc., Atlanta Partners Realty, LLC, d/b/a Keller Williams Realty Atlanta Partners, Bueno and Finnick, Inc., d/b/a Re/Max Center Dacula, Sue Edwards, Mary Beth Smallen, Patricia Garner and all Real Estate Brokers Similarly Situated as Members of FMLS, and show the Court, on knowledge, information, and belief, as follows:

1.

This is a class action complaint brought pursuant to the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2607, *et seq.*, the U.S. Department of Housing and Urban Development (“HUD”) regulations promulgated there under, 24 C.F.R. § 3500, *et seq.*, the Sherman Act, 15 U.S.C. § 1, *et seq.*, and Georgia law. See also the Expert Report of the former Assistant Counsel to HUD and Senior Counsel for RESPA. (Exhibit “A” hereto).

**PARTIES**

2.

Plaintiff Heather Q. Bolinger (“Bolinger”) is an individual residing at 6132 Bendcreek Lane, Braselton, Hall County, Georgia.

3.

Plaintiffs Paul A. Terry and Anne M. Terry (the “Terrys”) are individuals residing at 6514 Germantown Drive, Flowery Branch, Hall County, Georgia.

4.

FMLS is a for-profit corporation organized and existing under the laws of the State of Georgia with its principal office located at 5457 Roswell Road, Suite 208, Atlanta, Georgia 30342. Service of process upon FMLS may be made by serving its registered agent, Denise Gryder, at such address.

5.

Gainesville-Hall County Board of Realtors, Inc. (“Gainesville Hall County Board of Realtors”) is a Georgia not-for-profit corporation organized and existing under the laws of the State of Georgia with its principal office located at 623-A Green Street, Gainesville, Hall County, Georgia. Service of process upon Gainesville-Hall County Board of Realtors, Inc. was made by serving its registered agent, Judith M. White, at such address.

6.

Atlanta Board of Realtors, Inc. (“Atlanta Board of Realtors”) is a Georgia not-for-profit corporation organized and existing under the laws of the State of Georgia with its principal office located at 5784 Lake Forrest Drive NW, Atlanta, Fulton County, Georgia. Service of process upon Atlanta Board of Realtors, Inc. was made by serving its registered agent, Reggie McCrary, at such address.

7.

Gainesville-Hall County Board of Realtors, Inc., Atlanta Board of Realtors, Inc., and Georgia Association of Realtors, Inc. are sometimes hereinafter collectively referred to as the “Boards of Realtors.”

8.

Lanier Partners, LLC, d/b/a Keller Williams Realty Lanier Partners, is a for-profit limited liability company organized and existing under the laws of the State of Georgia with its principal office located at 631 Dawsonville Highway, Gainesville, Hall County, Georgia. Service of process upon Lanier Partners, LLC (hereinafter, “Keller Williams Realty Lanier Partners”) was made by serving its registered agent, Keith Cook, at such address.

9.

Heritage Real Estate, Inc., d/b/a Coldwell Banker Heritage Real Estate, is a for-profit corporation organized and existing under the laws of the State of Georgia with its principal office located at 675 East Butler Parkway, Suite C, Gainesville, Hall County, Georgia. Service of process upon Heritage Real Estate, Inc. (hereinafter, "Coldwell Banker Heritage Real Estate") was made by serving its registered agent, Janis Wilson, at such address.

10.

Peggy Slappey Properties, Inc. is a for-profit corporation organized and existing under the laws of the State of Georgia with its principal office located at 2160 Morningside Drive, Suite 250, Buford, Gwinnett County, Georgia. Service of process upon Peggy Slappey Properties, Inc. (hereinafter, "Peggy Slappey Properties") was made by serving its registered agent, Peggy Slappey, at such address.

11.

Atlanta Partners Realty, LLC, d/b/a Keller Williams Realty Atlanta Partners, is a for-profit limited liability company organized and existing under the laws of the State of Georgia with its principal office located at 2170 Satellite Boulevard, Suite 195, Duluth, Gwinnett County, Georgia. Service of process

upon Atlanta Partners Realty, LLC (hereinafter, “Keller Williams Realty Atlanta Partners”) was made by serving its registered agent, Bradley Carr, at One Sugarloaf Centre, 1960 Satellite Blvd. Suite 4000, Duluth, Gwinnett County, Georgia.

12.

Bueno and Finnick, Inc. d/b/a Re/Max Center Dacula is a for-profit corporation organized and existing under the laws of the State of Georgia with its principal office located at 2700 Braselton Highway, Suite 1, Dacula, Gwinnett County, Georgia. Service of process upon Bueno and Finnick, Inc. d/b/a Re/Max Center Dacula (hereinafter, “Re/Max Center Dacula”) made by serving its Chief Executive Officer and registered agent, Patrick Finnick, at 6438 Chestnut Hill Road, Flowery Branch, Hall County, Georgia.

13.

Sue Edwards is an individual residing in Jackson County, Georgia and was served with process at 165 Chestnut Chase, Hoschton, Jackson County, Georgia. Sue Edwards is a Georgia licensed real estate agent or broker with Peggy Slappey Properties.

14.

Mary Beth Smallen is an individual residing in Barrow County, Georgia

and served with process at 173 Buena Vista Street, Winder, Georgia. Mary Beth Smallen is a Georgia licensed real estate agent or broker with Coldwell Banker Heritage Real Estate.

15.

Patricia Garner is an individual residing in Hall County, Georgia and was served with process at 3709 Indian Springs Road, Gainesville, Georgia. Patricia Garner is a Georgia licensed real estate agent or broker with Coldwell Banker Heritage Real Estate.

16.

Sue Edwards, Mary Beth Smallen, and Patricia Garner are hereinafter collectively referred to as the “Defendant Agents.”

17.

Keller Williams Realty Lanier Partners is a real estate brokerage firm and is in the business of representing purchasers and sellers of real estate for a fee.

18.

Coldwell Banker Heritage Real Estate is a real estate brokerage firm and is in the business of representing purchasers and sellers of real estate for a fee.

19.

Peggy Slappey Properties is a real estate brokerage firm and is in the

business of representing purchasers and sellers of real estate for a fee.

20.

Keller Williams Realty Atlanta Partners is a real estate brokerage firm and is in the business of representing purchasers and sellers of real estate for a fee.

21.

Re/Max Center Dacula is a real estate brokerage firm and is in the business of representing purchasers and sellers of residential real estate for a fee.

22.

Keller Williams Realty Lanier Partners, Coldwell Banker Heritage Real Estate, Peggy Slappey Properties, Keller Williams Realty Atlanta Partners, and Re/Max Center Dacula (hereinafter collectively referred to as the “Defendant Class Representatives”), regularly list properties for sale on FMLS’ database, and paid or charged unearned hidden settlement fees and received kickbacks, all as described herein.

23.

John Doe Members are a class of Defendants comprised of all Members (as such term is defined, *infra*) that, through their brokers and agents licensed in Georgia, have listed real estate in Georgia for sale on the FMLS database and paid or charged unearned hidden settlement fees and received kickbacks upon



the settlement or the sale of such properties at any time within the applicable period(s) of limitation, as equitably tolled, for any of the claims alleged below (the “Defendant Class”). The Defendant Class is comprised of over 2,000 Members. The vast majority of the Defendant Class maintains their respective principal offices in Georgia. There are more than 42,000 Associate Members (as such item is define, *infra*) affiliated with the Members.

24.

The Defendant Class, including the Defendant Class Representatives and John Doe Members, is hereinafter collectively referred to as the “Defendant Brokers,” and FMLS, the Defendant Agents, the Boards of Realtors, and the Defendant Brokers are hereinafter collectively referred to as the “Defendants”.

25.

The putative Plaintiff Class (“Plaintiffs”) includes all purchasers and sellers of real estate who were represented by Defendant Brokers, or their brokers and agents, and who purchased or sold property listed on the FMLS database, and who will in the future purchase and sell property listed on the FMLS database.

**JURISDICTION AND VENUE**

26.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, RESPA and the Sherman Act, and has personal jurisdiction over all of the Defendants.

27.

Venue is proper in this Court because settlements in question, including those of the Named Plaintiffs that are described in this Amended Complaint, occurred in the Northern District of Georgia, Gainesville Division.

**BACKGROUND FACTS**

28.

The Defendant Brokers are Georgia real estate brokerage companies which, through their brokers and agents, assist purchasers and sellers of real estate. The Defendant Brokers and Agents are Members of FMLS. Pursuant to FMLS' Rules, the right to advertise listed properties is vested solely in the Members.

29.

The Defendant Brokers typically assign licensed real estate agents to fulfill their contractual and other legal obligations on specific transactions. For

example, a listing broker or agent lists a seller's property on a multiple listing service, assists the seller in determining the appropriate asking price of the property, markets the property to prospective buyers, and negotiates the terms of sale. Likewise, a selling broker or agent assists buyers by locating properties, evaluating prices, and negotiating the terms of sale.

30.

The brokers hold the licenses of these agents as required under Georgia law and, therefore, have substantial control over them.

31.

Consistent with the terminology described above, such agents are typically referred to as either the listing agent (for the seller) or the selling agent (for the buyer).

32.

The Georgia Real Estate Commission ("GREC") licenses and regulates real estate brokers and agents in Georgia.

33.

GREC's statutorily stated purpose is "to ensure professional competency among real estate licensees and . . . to promote a fair and honest market environment for practitioners and their customers and clients in real estate

transactions in Georgia.”

34.

The Defendant Boards were involved in the formation of GREC and in the promulgation of licensing rules and regulations applicable to realtors.

35.

The Defendant Boards keep their members informed about laws and regulations affecting the industry, and also shape the formulation of those policies through professional lobbying.

36.

FMLS was founded in 1957 by a group of Atlanta brokers as a joint venture to “operat[e]...a multiple listing service...for the benefit of licensed real estate brokers.” The Boards were aware of, supported and participated in the formation of FMLS.

37.

FMLS has approximately 24 stockholder-members.

38.

These stockholder members are among the largest and most successful brokers in Georgia.

39.

Brokers with the same large brokerage firms that own and control FMLS are members of and have significant influence upon, and in most cases control, the Defendant Boards.

40.

The Defendant Brokers and Agents and the Defendant Boards actively support and regularly use FMLS in the course of performing real estate brokerage services.

41.

FMLS provides an electronic database (the “FMLS database”) for the listing of thousands of properties for sale in Georgia and in the Southeastern United States. FMLS, as the operator of a MLS, is not an advertiser.

42.

According to the FMLS Rules and Regulations, Rule 1.15 therein (a true and correct copy of the FMLS Rules and Regulations is attached as Exhibit “B” and incorporated herein by reference), an “Associate Member” (hereinafter collectively referred to as the “Associate Members”) is defined as “any licensed real estate sales person actively working with a Principal Member.” “Associate Members” are commonly referred to as individual licensed real estate brokers or

agents.

43.

According to Rule 1.15 of the FMLS Rules and Regulations, the Principal Members include the stockholders and subscribing members of FMLS, as those terms are defined in its Bylaws (hereinafter collectively referred to as, respectively, the “Stockholder Principal Members” and the “Subscribing Principal Members”). The Stockholder Principal Members and the Subscribing Principal Members are hereinafter collectively referred to either as the “Members”, or the “broker members”.

44.

Only an Associate Member can list a property on the FMLS database. References herein to listing or selling Members are through their respective Associate Members. Brokers and agents can view listings on FMLS’ website.

45.

FMLS, like other real estate multiple listing services (hereinafter, a “MLS”), was created by real estate professionals to enable them to widely share information relating to properties they list for sale, and to research and present property-related information to their clients seeking to buy or sell real estate.

46.

Properties listed for sale on the FMLS database are not directly accessible for viewing by the public at the FMLS website.

47.

FMLS provides Members with a broker reciprocity program through a so-called internet data exchange (“IDX Display”). The IDX Display reciprocity program allows Members to list on their websites properties they are listing for sale on the FMLS database, display properties listed by other Members on their own websites as being for sale, and view listings from other Members. (See Ex. “B”, Rule 13, (IDX Internet Postings of Listings; Broker Reciprocity).

48.

Through the IDX program, a property that is listed for sale on any of the Georgia MLS Systems can be viewed via the internet by the public at broker websites.

49.

Multiple listing services doing business in Georgia include (using their common designations): Albany MLS, Athens MLS, Augusta MLS, Brunswick MLS, Chattanooga MLS, Columbus MLS, FMLS, Georgia MLS, Habersham White Stephens MLS, Lake Oconee MLS, Macon MLS, NE Georgia MLS,

Savannah MLS, SW Georgia MLS, Thomasville MLS, Valdosta MLS and West Metro MLS (hereinafter collectively referred to as the “Georgia MLS Systems”).

50.

Each of the Georgia MLS Systems provides an electronic database for the listing of real estate for sale by brokers and agents who are members of such system.

51.

The public is not permitted to directly list properties for sale on the Georgia MLS Systems.

52.

FMLS claims on its website, at [www.fmls.com](http://www.fmls.com), the following:

“FMLS is the premier data services provider for real estate professionals in Georgia. FMLS was founded by a handful of real estate brokers in Atlanta in 1957. Today, membership is growing quickly and is spreading in every direction throughout Georgia and the Southeast. Currently, FMLS has over 2,260 offices and serves more than 36,000 real estate agents. The FMLS listing database contains more than 68,000 active listings located all over Georgia and the Southeast.”

53.

Elsewhere on FMLS’ website it claims to have more than 42,000 Associate Members.



54.

Besides FMLS, the MLS most widely used by residential real estate brokers and agents for properties in North Georgia, is the Georgia Multiple Listing Service, Inc. (“GAMLS”).

55.

Multiple listing services similar in fee structure to GAMLS also compete with FMLS in Georgia and the Southeast, including in areas where GAMLS may not be doing business.

56.

GAMLS and other multiple listing services with which FMLS competes receive nominal membership and other similar fees from members that cover their direct and indirect costs, plus a profit.

57.

“Georgia MLS is a flat monthly fee service to real estate brokers and their sales agents. Startup fees include a \$500 initiation fee, along with the first month’s membership dues of \$100. The monthly fees are \$100 a month to the office, and \$20 a month per licensee within the office.” (See, GAMLS website at [www.gamls.com/membership](http://www.gamls.com/membership)). GAMLS does not charge a separate listing fee.

58.

These startup fees and monthly membership fees cover all of GAMLS' costs, plus a profit.

59.

Likewise, one of the largest MLS in the nation, Metropolitan Regional Information Systems, Inc. ("MRIS"), which operates in Maryland and Washington, D.C., has a similar fee structure to GAMLS and the other MLS with which FMLS competes. MRIS operates as members of and under the rules of the National Association of Realtors. Individual membership fees are \$660 per year paid quarterly.

60.

Similarly, FMLS charges Members a \$500 application fee. (See Exhibit "C".)

61.

FMLS charges Members a fee when a property listed for sale on the FMLS database is sold. (Exhibit "B", Rule 16.) This settlement fee is not disclosed to purchasers and sellers and is referred to herein as the "Hidden Settlement Fee."

62.

FMLS also charges Members between \$1,500 and \$3,000 as a security deposit against which Hidden Settlement Fees are charged on all listings pending if a Broker Member withdraws. (See Exhibit "C".)

63.

In January of each year, FMLS charges each of its Members a \$1,500 Minimum Annual Fee, less the Hidden Settlement Fees paid by such Member to FMLS in the preceding year. (See Exhibit "C".)

64.

FMLS also charges Members fixed fees of \$35 for duplicate listings in multiple categories, \$25 for removing unsold properties from the database, and \$7 for a rental listing. (See Exhibit "C".)

65.

The Minimum Annual Fees and other fixed fees pay all of FMLS' direct and indirect costs, plus a profit.

66.

Neither GAMLS nor any other multiple listing service in the United States splits a fee with or charges its members a settlement fee comparable to the Hidden Settlement Fee when a listed property is sold.

67.

The sole reason for the creation the Hidden Settlement Fee structure was to split fees and enable FMLS to provide the Defendant Brokers with kickbacks in exchange for referrals.

68.

No other MLS in the United States splits fees with, or pays its member brokers kickbacks, in exchange for referrals.

69.

Members are contractually obligated to comply with the FMLS Rules and Regulations, including in connection with the listings and sales of properties.

70.

FMLS requires Members to have their brokers and agents list on the FMLS database any property for sale that is located in a defined geographic area (the "Compulsory Area") (See Rule 6, Exhibit "B").

71.

The Compulsory Area is described on the map attached hereto as Exhibit "D" and covers the following twenty-one counties: Barrow, Bartow, Cherokee, Chatooga, Cobb, Dawson, DeKalb, Douglas, Floyd, Forsyth, Fulton, Gordon, Gwinnett, Hall, Haralson, Jackson, Lumpkin, Paulding, Pickens, Polk, and

Walton. A list of all counties and states served by FMLS is also described in Exhibit "D".

72.

FMLS' Rules and practices make FMLS dominant in the Compulsory Area, where most of the more expensive properties in metro Atlanta are located, including communities such as Alpharetta, Buckhead, Brookhaven, Dunwoody, Marietta, Roswell, Sandy Springs, as well as resort communities in parts of North Georgia.

73.

Due to FMLS' Rules and practices, in the past five years the Compulsory Area has expanded from fourteen counties to twenty-one and FMLS has grown from 1,800 broker Members to 2,260, and from 27,000 member agents to 42,000.

74.

Currently, FMLS adds fifty new broker offices per month.

75.

The FMLS database now contains more than 68,000 active listings of properties located all over Georgia and the Southeast. FMLS is the largest MLS in Georgia.

76.

The area served by GAMLS overlaps the Compulsory Area. A map and list of counties served by GAMLS is attached hereto as Exhibit "E".

77.

FMLS imposes deadlines on its Members for entering listings in the database:

“All listings to be filed with FMLS must be on the prescribed forms and signed by a Member and by the owner. . . . All FMLS listings must be entered into the FMLS computer system within forty-eight (48) hours after the effective date of the listing contract. Signed copies of each FMLS listing must reach the FMLS office within seven (7) business days after the effective date of the FMLS listing contract. Failure to submit signed copies to the FMLS office within this time period may result in a fine being imposed.”

(See Rule 7.1)

78.

The FMLS Rules and Regulations are not published on its website or otherwise made publicly available.

79.

In order for a broker or agent to list a property for sale on the FMLS database or research existing FMLS listings, the broker or agent must have a FMLS user name and password. To obtain and maintain such a user name and password, Members and Associate Members must agree to abide by the FMLS

Rules, including the compulsory listing requirement of Rule 6 and the fee schedule imposed by FMLS.

80.

Historically, FMLS charged a Hidden Settlement Fee of 4% of the total commission charged in the sale. If both a listing and selling broker Member participated in the settlement, 4% of the commission was paid to FMLS, and the two brokers split the remainder of the commission. (See Exhibit "F", Article VI, Section 4, FMLS By-Laws).

81.

Although FMLS characterizes the fee as due upon settlement, FMLS provides no services to sellers or purchasers in exchange for the Hidden Settlement Fee.

82.

The Hidden Settlement Fee FMLS currently charges is calculated by multiplying .0012 times the selling price of the property shown on the HUD-1 Settlement Statement (i.e., .0012 times the sales price of the property, or \$240 on the sale of a residence for \$200,000) if the listing Associate Member (who represents the seller) and the selling Associate Member (who represents the buyer) are affiliated with the same Member.

83.

If the listing Associate Member and the selling Associate Member are affiliated with different Members, the fee due FMLS as established by the Board during all times relevant to the Amended Complaint is doubled, and is calculated by multiplying .0024 times the selling price of the property shown on the HUD-1 Settlement Statement (i.e., .0024 multiplied times of the actual sales price of the property, or \$480 on the sale of a house for \$200,000). The fee described in this paragraph is hereafter referred to as the “Hidden Settlement Fee”.

84.

FMLS changed its method of calculating the Hidden Settlement Fee to fix its fee and preserve its share of revenue if commissions on a particular transaction fell below 6%.

85.

For broker Members charging a 6% commission, FMLS’ current method of calculating the Hidden Settlement Fee achieves the same result as the original method, in that 4% of a 6% commission is .0024, or twice .0012.

86.

Brokers and agents often split commissions with their agents 50/50, and



correspondingly fund payment of the Hidden Settlement Fee.

87.

However, some Brokers give their agents a more generous split. But that more generous split results in the agents funding a greater portion of the Hidden Settlement Fees.

88.

Broker Members pay the Hidden Settlement Fee to FMLS before they split commissions with their agents on a given transaction or pay other expenses.

89.

FMLS is not, and has never been, a licensed real estate broker or agent in the State of Georgia or elsewhere in the United States.

90.

Due to the Hidden Settlement Fee, the profits generated by FMLS are far in excess of those generated by GAMLS or other similarly situated MLS around the country.

91.

FMLS receives a direct benefit from Plaintiffs and the other members of the Plaintiff Class through its receipt of the Hidden Settlement Fee. Alternatively, FMLS receives an indirect benefit from Plaintiffs and other

members of the Plaintiff Class through its receipt of the Hidden Settlement Fee.

92.

The Hidden Settlement Fee establishes a “floor” or minimum commission rate for residential real estate settlements involving FMLS in Georgia and the Southeast.

93.

Any services rendered by FMLS in connection with the listing, sale, and/or purchase of any real estate on the FMLS database is not for advertising.

94.

FMLS does not apply the Hidden Settlement Fee towards expenses incurred by FMLS, the listing or selling brokers, agents or affiliated listing or selling Members, with respect to a given transaction and settlement. In fact, a hidden Settlement Fee is due upon sale whether or not FMLS ever listed the property on its database. (See Rule 18, Exhibit “B”.)

95.

The Hidden Settlement Fee represents the split of a real estate commission between FMLS and its Members and Associate Members, which is not disclosed by those members to their clients, the purchasers and sellers of real estate, even though it is paid from settlement proceeds.

96.

The Hidden Settlement Fee is presumably charged for the rendering of a service, but FMLS provides no service in exchange for the Hidden Settlement Fee.

97.

The expenses incurred by FMLS in connection with the listing, sale, and/or purchase of any real estate on the FMLS database are not related to or otherwise affected by the selling price of such property, or whether or not the listed property sells. FMLS does nothing more for a listing that sells than it does for one that doesn't sell.

98.

The expenses incurred by FMLS in connection with the listing, sale, and/or purchase of any real estate on the FMLS database are not doubled or even increased because the selling and listing brokers or agents are associated with different Members.

99.

A technology vendor such as CoreLogic MarketLinx, Inc. ("MarketLinx") supplies information technology services, including software, to MLS' for the management and maintenance of the electronic database that is the core business

of MLS' around the country. As with other MLS', FMLS contracts with MarketLinx or a similar vendor for such services.

100.

As with other MLS', FMLS compensates MarketLinx or such other technology vendor for its services only on a "listing entry" basis based on services actually rendered, and not on a "closed sale basis" (i.e., only if and when a listed property sells), or on the selling price of the property.

101.

The expenses incurred by FMLS for the management and maintenance of the FMLS electronic database are incurred on a "listing entry" basis, as information is added or deleted from its database, and not based on the selling price of the property.

102.

The Hidden Settlement Fee is paid from settlement proceeds based solely on the actual selling price of the property as described herein.

103.

FMLS provides real estate settlement services within the meaning of 12 U.S.C. § 2607.

104.

Alternatively, FMLS provides services or business incident to real estate settlement services, or is a person, within the meaning of 12 U.S.C. § 2607.

105.

Even if FMLS does not provide settlement services or does not provide services incident to a real estate settlement under RESPA, the Hidden Settlement Fee represents a split of commissions purportedly in exchange for settlement services.

106.

The Defendant Brokers remit the Hidden Settlement Fees to FMLS out of settlement proceeds once the sale of a listing on the FMLS database has closed.

107.

FMLS requires that any listing Member report to FMLS, by fax or email, the execution of any purchase and sale agreement for any property listed for sale on the FMLS database within three (3) days after execution of such contract. (Rule 14).

108.

FMLS requires **both** the listing and selling Members to (a) report the closing of the sale of a property listed on the FMLS database within 72 hours from the closing, (b) submit a copy of the first two (2) pages of the HUD-1

Settlement Statement to FMLS within 72 hours and (c) remit payment of the Hidden Settlement Fees to FMLS within ten (10) days from the closing date. (Rule 16, Exhibit “B”.)

109.

FMLS requires both the listing and selling Members to submit to FMLS a completed FMLS “Notice of Closing” Form #118, a signed HUD-1 Settlement Statement, and a check for the Hidden Settlement Fee. (Rule 16, Exhibit “B”.)

110.

Members that violate Rule 6, Rule 7, Rule 14, Rule 16, or any of the other FMLS Rules and Regulations are subject to fines, sanctions, and possible loss of FMLS privileges. For example, if the Hidden Settlement Fee is not timely paid in accordance with Rule 16, the amount of the Hidden Settlement Fee is doubled. (Rule 21(g), Exhibit “B”.)

111.

In any residential real estate transaction involving a federal mortgage loan, the purchaser and seller of the real estate must be provided with a HUD-1 Settlement Statement.

112.

The HUD-1 Settlement Statement is a two-page form to be used as a statement of all charges and adjustments paid in connection with a residential real estate settlement and to be given to the parties in connection with the settlement.

113.

The HUD-1 Settlement Statement is intended to itemize all charges imposed upon the borrower and the seller, including all sales commissions, whether to be paid at settlement or outside of settlement.

114.

Brokers and agents are required to disclose to their principals (i.e., buyers and sellers) on the HUD-1 Settlement Statement the true amount and basis of calculating their compensation.

115.

Defendant Brokers and agents failed to disclose the true amount and basis of calculating their compensation by failing to disclose the Hidden Settlement Fees and Kickbacks, and the Defendant Brokers understated the amount of their compensation by the amount of the Kickbacks paid on account of individual settlements.

116.

FMLS requires Member Brokers to submit both pages of the HUD-1 Settlement Statement within 72 hours of closing to FMLS.

117.

FMLS' receipt of page 2 of HUD-1 Settlement Statements enables it to collect commission information on closed sales.

118.

Commission information is not redacted from HUD-1 Settlement Statements before they are submitted to FMLS. FMLS utilizes this commission information to assist the Defendant Brokers and Agents, in combination with each other, in stabilizing and maintaining inflated commission rates.

119.

FMLS provides its Member Brokers with access to the commission information it compiles.

120.

Defendants colluded on commission rates during the relevant time period.

121.

Charges paid outside of settlement by the borrower, seller, loan originator, real estate agent, or any other person participating in the settlement must be included on the HUD-1 Settlement Statement in a box designated "P.O.C."



(“Paid Outside of Closing”).

122.

The Hidden Settlement Fee is calculated based on the sales price reported on the HUD-1 Settlement Statement.

123.

The Hidden Settlement Fee is funded from the commissions paid by the affected consumers to the listing and selling Members at the closing of the sale of the property.

124.

Despite being funded by settlement proceeds disbursed at closing, the Hidden Settlement Fees are remitted to FMLS after closing and are not disclosed to purchasers and sellers of residential real estate on the HUD-1 Settlement Statement or otherwise.

125.

FMLS does not pay dividends to its Stockholder Members, as this practice is forbidden by FMLS’ By-Laws. (See Exhibit “F”, Article VII, Section 1, FMLS By-Laws).

126.

However, in addition to receiving payment of the Hidden Settlement Fees, FMLS pays kickbacks to Members of all or some portion of the Hidden Settlement Fees (hereinafter, and previously, referred to as a “Kickback” or the “Kickbacks”).

127.

The Kickbacks (called “Patronage Dividends” by FMLS) are paid outside of closing, after the sale is closed, after all real estate settlement services of Members have been rendered to purchasers or sellers of real estate, and after the Hidden Settlement Fees are remitted to FMLS by Members.

128.

The Kickbacks are funded by settlement proceeds but are not disclosed to purchasers and sellers of 1 real estate on the HUD-1 Settlement Statement or otherwise.

129.

FMLS pays the Kickbacks as referral fees based on the volume of business provided by the broker Members to FMLS. (See Exhibit “F”, Article VII, Section 2, FMLS By-Laws).

130.

The largest and most successful broker Members – the Stockholder Members – received the most Kickbacks.

131.

FMLS pays Kickbacks to a Member at least annually after the broker Member has paid FMLS at least \$1,500 (the Minimum Annual Amount) in Hidden Settlement Fees for that year.

132.

Once the Minimum Annual Amount is reached, FMLS splits the Hidden Settlement Fees with and pays Kickbacks to a Member from settlement proceeds in an amount equal to at least all of the Hidden Settlement Fees paid by the Member. However, Members are required to continue paying Hidden Settlement Fees after the Minimum Annual Amount has been met. (Rule 16, Exhibit “B”.)

133.

As such, the Kickbacks are based not on any services provided, or as a distribution of profits or dividends to shareholders, but rather on the volume or quantity of Hidden Settlement Fees the Member has paid to FMLS.

134.

If a Member does not reach the Minimum Annual Amount in Hidden Settlement Fees in a year, that Member does not receive a Kickback. As a result, FMLS shares any Hidden Settlement Fees paid by that Member with other Members.

135.

Although Members (brokers) and Associate Members (agents) both contribute to funding a Hidden Settlement Fee through commissions, only the broker Members receive Kickbacks.

136.

FMLS actively promotes the existence of Kickbacks or “Patronage Dividends” in recruiting new Members. (See Exhibit “G”, entitled “Why ‘FMLS’ Testimonials” Sheet.)

137.

Further, FMLS commingles all or some portion of the Hidden Settlement Fees received from multiple settlements to fund the Kickbacks.

138.

By accepting the Kickbacks, the Members are sharing Hidden Settlement Fees on settlements in which the Members or their Associate Members are not the broker or agent of record and are unaffiliated with the settlement.

139.

Further, by accepting the Kickbacks, Members are sharing in Hidden Settlement Fees paid by Members on the opposite side of the same settlement.

140.

Broker Members that do not receive Kickbacks are impeded from reducing commissions.

141.

In no event, however, are the Kickbacks disclosed or returned to the purchasers or sellers who funded them.

142.

The documents that FMLS requires sellers of residential real estate listed for sale on the FMLS database to execute include (a) the FMLS Residential Data Input form ("Listing Form"), (b) an Addendum to FMLS Exclusive Right to Sell contract (FMLS Form 116) and (c) a Termination of Existing Exclusive Listing Agreement (FMLS Form 110). (See Exhibit "H".)

143.

In the Listing Form, which contains a description of the property, the seller certifies that the description is accurate, and agrees to indemnify FMLS if the description is inaccurate.

144.

The Listing Form does not disclose the Hidden Settlement Fee or the Kickback.

145.

The Listing Form creates a contractual relationship between FMLS and the seller, but neither it nor the other two forms FMLS requires the seller to submit, identifies or discloses the Hidden Settlement Fees or the Kickbacks.

146.

No document that FMLS or the Defendant Brokers provides to purchasers or sellers of real estate discloses or mentions Rules 6, 7, 14, 16, the Hidden Settlement Fees or the Kickbacks.

147.

The By-Laws and Rules and Regulations of FMLS from 1974 to the present have neither directed nor even encouraged the Members to disclose the Hidden Settlement Fees or Kickbacks to their clients.

148.

To the contrary, FMLS and the Defendant Brokers agreed not to disclose the Kickbacks to their clients (purchasers and sellers) or even to their agents.

149.

In this fashion, FMLS and the Defendant Brokers, with the complicity of the other Defendants, kept the Hidden Fees and Kickbacks secret from Plaintiffs and the other members of the Plaintiff Class.

150.

The Boards were aware of, and complicit in, this pact of secrecy between FMLS and the Defendant Brokers.

151.

In all settlements relevant to the claims at issue, the real estate commissions paid by purchasers and sellers and received by the Defendant Brokers were paid in connection with a settlement involving federally related mortgage loans within the meaning of 12 U.S.C. § 2607, *et seq.* (“federally related mortgage loans”).

152.

The Kickbacks paid by FMLS and accepted by the Defendant Brokers are not paid in exchange for any actual settlement services provided by the Defendant Brokers to the affected purchasers or sellers.

153.

The Defendant Brokers systematically and routinely misrepresented and understated the true amount and basis for calculation of the compensation

arising from a given settlement of real estate that was listed on the FMLS database in that they failed to disclose the Kickback.

154.

The Kickbacks bear no relation to the value of the real estate settlement services the affected purchasers or sellers received from the Defendant Brokers prior to and at the time of settlement.

155.

During all times relevant to the allegations in this Amended Complaint, FMLS paid Kickbacks to the Defendant Brokers.

156.

During all times relevant to the allegations in this Amended Complaint, the Defendant Brokers knowingly accepted the Kickbacks.

157.

Rule 6 requires, and the Kickbacks induce and encourage, Members to require their Associate Members to list properties for sale on the FMLS database rather than on the GAMLS database.

158.

The Kickbacks caused Members and their Associate Members to list properties for sale on the FMLS database.



159.

The Kickbacks had the effect of securing future listings, increasing the number of listings on the FMLS database, increasing the compensation of the Defendant Brokers, and increasing the Hidden Settlement Fees paid to FMLS, all from settlement proceeds and without the knowledge or consent of the affected purchasers and sellers.

160.

The penalties levied or threatened by FMLS upon Members for breach of Rules 6, 7, 14, and 16 and other FMLS Rules and Regulations are with the intent, and continue to have the effect of, causing the Defendant Brokers and the Agents to comply with all such rules and regulations, including but not limited to Rules 6, 7, 14 and 16.

161.

Additional and future listings on the FMLS database by the Defendant Brokers, and their compliance with Rules 6, 7, 14 and 16, will occur in whole or in part because of the Kickbacks.

162.

The Kickbacks are funded by the Hidden Settlement Fees paid from settlement proceeds paid by purchasers and sellers of real estate, and,

accordingly, should be repaid to, and are the property of, the affected purchasers and sellers.

163.

Rules 6, 7, 14 and 16, the Hidden Settlement Fees, and the Kickbacks create a likelihood of confusion or misunderstanding as to the true amount and basis for calculating the Defendant Brokers' compensation arising from a given settlement of real estate that was listed on the FMLS database.

164.

The Hidden Settlement Fees and Kickbacks harm consumer welfare.

165.

The Brokers, Agents, Defendant Boards and FMLS are members of or otherwise affiliated with the National Association of Realtors and are aware of its rules and policies.

166.

The Brokers, Agents, Defendant Boards and FMLS were and are aware of the "MLS Antitrust Compliance Policy" of the National Association of REALTORS® ("NAR"), a copy of which is attached hereto as Exhibit "I".

167.

The Defendant Boards and the Georgia Association of Realtors (“GAR”) are charged with training their members regarding ethical and professional standards, enforcing the code of ethics applicable to real estate brokers and agents, and enhancing the public’s awareness and confidence in real estate brokers and agents. (See website, [www.garealtors.com](http://www.garealtors.com), Mission and Vision Statements.)

168.

The Defendants are all members of or otherwise affiliated with GAR and are therefore subject to its rules and policies.

169.

GAR publishes and licenses form contracts that are routinely used, at the direction of real estate brokers and agents, by purchasers and sellers of real estate in Georgia, including in the Compulsory Area.

170.

The Defendant Brokers regularly use, and recommend that their clients, including Plaintiffs, use, various GAR Forms which do not disclose the existence of Rules 6, 7, 14, 16, the Hidden Settlement Fees, or the Kickbacks.

171.

The Defendant Boards knew or should have known that the GAR Forms are routinely used in settlements where Hidden Settlement Fees and Kickbacks are paid.

172.

The Defendant Boards have not sought to amend the GAR Forms to disclose the existence of the Hidden Fees or the Kickbacks.

173.

FMLS is an associate member or sponsor of each of the Defendant Boards and each of the Defendant Boards operates within the Compulsory Area.

174.

The Atlanta Board of Realtors is the largest board of realtors operating within Metro Atlanta and in the Compulsory Area.

175.

Most, if not all, of the Defendant Brokers are or were during the relevant period of time, members of the Atlanta Board of Realtors.

176.

Brokers employed by the Stockholder Principal Members of FMLS have executive positions with and exert control over the Atlanta Board of Realtors.

177.

The Gainesville-Hall County Board of Realtors operates in Hall County, Georgia, where the above-described settlements specific to the Named Plaintiffs took place. Each of the Defendant Brokers and the Defendant Agents is or was during the relevant period of time a member of the Gainesville-Hall County Board of Realtors.

178.

The Defendant Boards were and are fully aware of, and have supported, condoned, and acquiesced in, Rules 6, 7, 14, and 16, the Hidden Settlement Fees, and the Kickbacks.

179.

The Brokerage Relationships in Real Estate Transactions Act (“BRETТА”), O.C.G.A. § 10-6A-1, *et seq.*, requires full disclosure of the relationship and legal obligations between brokers and consumers. Pursuant to BRETТА, a licensed broker in Georgia is required to disclose to a buyer or seller all material facts of which it has knowledge concerning the transaction, timely account for all money or property in which the buyer or seller has an interest, and disclose to the buyer or seller the basis of calculating the broker’s compensation, and the actual amount of the broker’s compensation from the transaction.

180.

The Defendant Brokers violated BRETTA by failing to disclose to Plaintiff class the Hidden Settlement Fees, the Kickbacks, and understated the true amount and basis of calculation of Defendant Brokers' compensation, all of which are material to the transaction, to any accounting of money, and to the basis of calculating the Defendant Broker's compensation.

181.

The Hidden Settlement Fees and the Kickbacks harm purchasers and sellers of real estate by requiring the Members and their Associate Members to incur additional costs, which additional costs establish a minimum floor for commissions and are passed along to such purchasers and sellers in the form of higher fees and commissions, or impede or prevent some sales that would have occurred but for such additional settlement costs, or both.

182.

Further, such higher commissions paid by sellers effectively reduce or "strip" equity from the seller's property to the extent of such higher settlement costs.

**FACTS SPECIFIC TO THE CLAIMS OF THE NAMED PLAINTIFFS**

**The Bendcreek Lane Settlement**

183.

Bolinger retained Peggy Slappey Properties to represent her in connection with the purchase of a home located at 6132 Bendcreek Lane, Braselton, Georgia (the “Bendcreek Lane Residence”). In this capacity, Peggy Slappey Properties acted as the “buyer's broker” and Sue Edwards, an agent with Peggy Slappey Properties, acted as the “buyer's agent” and represented Bolinger in the purchase of the Bendcreek Lane Residence.

184.

Bolinger and Peggy Slappey Properties entered into written contracts in connection with the purchase and sale of real estate, including but not limited to purchase and sale agreements and brokerage engagement agreements. In such agreements, Bolinger and Peggy Slappey Properties expressly agreed upon the amount and basis of calculation of compensation each broker was to receive at closing from each such settlement.

185.

The Bendcreek Lane Residence is located in the Compulsory Area and in the GAMLS Boundary Area. On or about July 14, 2009, the Bendcreek Lane Residence was listed for sale on both the FMLS and the GAMLS databases by

Keller Williams Realty Atlanta Partners, which had an exclusive listing agreement with the seller of the Bendcreek Lane Residence.

186.

As a result of Keller Williams Realty Atlanta Partners being a Member, it was able and required to list the Bendcreek Lane Residence for sale on the FMLS database.

187.

On or about November 6, 2009, Bolinger closed the purchase of the Bendcreek Lane Residence (the "Bendcreek Lane Settlement"). Bolinger financed a portion of the purchase price with federally related mortgage loans.

188.

The HUD-1 Settlement Statement provided to Bolinger at closing (a true and correct copy of which, as redacted, is attached as Exhibit "J") states that Keller Williams Realty Atlanta Partners received \$4,798, and that Peggy Slappey Properties received \$7,197, as real estate commissions on the closing date for brokerage services in connection with the Bendcreek Lane Settlement. The HUD-1 Settlement Statement did not disclose any payment out of settlement proceeds made or to be made to FMLS.

189.



Rules 6, 7, 14 and 16 were not disclosed to Bolinger or to the seller of the Bendcreek Lane Residence.

190.

The real estate commissions paid to Keller Williams Realty Atlanta Partners and Peggy Slappey Properties as part of the Bendcreek Lane Settlement were paid in connection with federally related mortgage loans.

191.

Pursuant to Rule 16, within ten (10) days following the closing of the Bendcreek Lane Settlement, Keller Williams Realty Atlanta Partners and Peggy Slappey Properties, split their commission with, and paid collectively a Hidden Settlement Fee to FMLS in the amount of \$575.76 ( $\$239,900 \times .0024$ .)

192.

The Hidden Settlement Fees paid by Keller Williams Realty Atlanta Partners and Peggy Slappey Properties to FMLS on account of the Bendcreek Lane Settlement were in connection with federally related mortgage loans.

193.

Sue Edwards received real estate commissions from the Bendcreek Lane Settlement.

194.

All or some portion of the Hidden Settlement Fees paid by Peggy Slappey Properties to FMLS was charged to Sue Edwards, with her knowledge and consent.

195.

Despite being paid from settlement proceeds, the Hidden Settlement Fees were without the consent of or disclosed to Bolinger, either on the HUD-1 Settlement Statement in connection with the Bendcreek Lane Settlement, or otherwise.

196.

No settlement services were performed by FMLS on behalf of Bolinger or her seller in connection with the Bendcreek Lane Settlement, at the time of or in exchange for, the payment of the Hidden Settlement Fees.

197.

Without the knowledge or consent of Bolinger, after the closing of the Bendcreek Lane Settlement and receipt of Hidden Settlement Fees from the settlement, FMLS paid Kickbacks to Keller Williams Realty Atlanta Partners and/or Peggy Slappey Properties on account of the Bendcreek Lane Settlement. These Kickbacks were not disclosed on the HUD-1 Settlement Statement.

198.

FMLS paid Kickbacks from settlement proceeds to Keller Williams Realty Atlanta Partners and Peggy Slappey Properties on account of the Bendcreek Lane Settlement because Keller Williams Realty Atlanta Partners and Peggy Slappey Properties had, respectively, already paid Hidden Settlement Fees from prior settlements in excess of the Minimum Annual Amount.

199.

No services were performed by Keller Williams Realty Atlanta Partners on behalf of the seller of the Bendcreek Lane Settlement, at the time of or in exchange for, the payment by FMLS of the Kickbacks using settlement proceeds.

200.

No services were performed by Peggy Slappey Properties or Sue Edwards on behalf of Bolinger in connection with the Bendcreek Lane Settlement, at the time of or in exchange for, the payment by FMLS of the Kickbacks.

201.

The Kickbacks paid by FMLS to Keller Williams Realty Atlanta Partners and Peggy Slappey Properties on account of the Bendcreek Lane Settlement were paid from settlement proceeds in connection with a federally related mortgage loan, but were not for settlement services rendered.

**The Newberry Point Drive Settlement**

202.

The Terrys retained Coldwell Banker Heritage Real Estate to represent them in connection with the sale of their home located at 5760 Newberry Point Drive, Flowery Branch, Georgia (the “Newberry Point Drive Residence”). In this capacity, Coldwell Banker Heritage Real Estate acted as the “listing broker” and Mary Beth Smallen, an agent with Coldwell Banker Heritage Real Estate, acted as the “listing agent” and had an exclusive right to sell the Newberry Point Drive Residence.

203.

The Terrys and Coldwell Banker Heritage Real Estate entered into written contracts in connection with the purchase and sale of real estate, including but not limited to purchase and sale agreements and brokerage engagement agreements. In such agreements, the Terrys and Coldwell Banker Heritage Real Estate expressly agreed upon the amount and basis of calculation of compensation each broker was to receive at closing from each such settlement.

204.

The Newberry Point Drive Residence is located in the Compulsory Area and in the GAMLS Boundary Area. On or about August 19, 2009, the

Newberry Point Drive Residence was listed for sale on both the FMLS and the GMLS databases by Coldwell Banker Heritage Real Estate, which had an exclusive listing agreement with the Terrys.

205.

As a result of Coldwell Banker Heritage Real Estate being a Member, it was able and required to list the Newberry Point Drive Residence for sale on the FMLS database.

206.

On or about October 26, 2009, the Terrys closed the sale of the Newberry Point Drive Residence (the “Newberry Point Drive Settlement”). The purchasers of the Newberry Point Drive Residence were represented by Re/Max Center Dacula, and a portion of the purchase price was financed with a federally related mortgage loan.

207.

The HUD-1 Settlement Statement provided to the Terrys at closing (a true and correct copy of which, as redacted, is attached as Exhibit “K”) states that Coldwell Banker Heritage Real Estate received \$5,670, and that Re/Max Center Dacula received \$5,310 (less a \$360 Home Warranty), as real estate commissions on the closing date for brokerage services in connection with the

Newberry Point Drive Settlement. The HUD-1 Settlement Statement did not disclose any payment out of settlement proceeds made or to be made to FMLS.

208.

Rules 6, 7, 14 and 16 were not disclosed to the Terrys or to the purchaser of the Newberry Point Drive Residence.

209.

The real estate commissions paid to Coldwell Banker Heritage Real Estate and Re/Max Center Dacula as part of the Newberry Point Drive Settlement were paid in connection with a federally related mortgage loan.

210.

Pursuant to Rule 16, within ten (10) days following the closing of the Newberry Point Drive Settlement, Coldwell Banker Heritage Real Estate and Re/Max Center Dacula, respectively, split their commission with, and paid, collectively, a Hidden Settlement Fee to, FMLS in the amount of \$468.00 (.0024 x \$195,000.)

211.

The Hidden Settlement Fees paid by Coldwell Banker Heritage Real Estate and Re/Max Center Dacula to FMLS on account of the Newberry Point Drive Settlement were in connection with a federally related mortgage loan.

212.

Mary Beth Smallen received real estate commissions from the Newberry Point Drive Settlement.

213.

All or some portion of the Hidden Settlement Fees paid by Coldwell Banker Real Estate to FMLS was charged to Mary Beth Smallen, with her knowledge and consent.

214.

No settlement services were performed by FMLS on behalf of the Terrys in connection with the Newberry Point Drive Settlement, at the time of or in exchange for, the payment of Hidden Settlement Fees.

215.

The Hidden Settlement Fees were without the consent of and not disclosed to the Terrys, either on the HUD-1 Settlement Statement in connection with the Newberry Point Drive Settlement, or otherwise.

216.

Without the knowledge or consent of the Terrys, after the closing of the Newberry Point Drive Settlement and receipt of Hidden Settlement Fees from the settlement associated with such settlement, FMLS paid Kickbacks to

Coldwell Banker Heritage Real Estate and/or Re/Max Center Dacula consisting of on account of the Newberry Point Drive Settlement. These Kickbacks were not disclosed on the HUD-1 Settlement Statement.

217.

FMLS paid the Kickbacks from settlement proceeds to Coldwell Banker Heritage Real Estate and/or Re/Max Center Dacula on account of the Newberry Point Drive Settlement because Coldwell Banker Heritage Real Estate and/or Re/Max Center Dacula had, respectively, already paid Hidden Settlement Fees from prior settlements in excess of the Minimum Annual Amount.

218.

No services were performed by Coldwell Banker Heritage Real Estate or Mary Beth Smallen on behalf of the Terrys in connection with the Newberry Point Drive Settlement, at the time of or in exchange for, the payment by FMLS of the Kickbacks using settlement proceeds.

219.

No services were performed by Re/Max Center Dacula on behalf of the purchasers in connection with the Newberry Point Drive Settlement, at the time of or in exchange for, the payment by FMLS of the Kickbacks.

220.



The Kickbacks paid by FMLS to Coldwell Banker Heritage Real Estate and/or Re/Max Center Dacula on account of the Newberry Point Drive Settlement were paid from settlement proceeds in connection with a federally related mortgage loan.

**The Germantown Drive Settlement**

221.

The Terrys retained Coldwell Banker Heritage Real Estate to represent them in connection with the purchase of a home located at 6514 Germantown Drive, Flowery Branch, Hall County, Georgia (the “Germantown Drive Residence”). In this capacity, Coldwell Banker Heritage Real Estate acted as the “buyer's broker” and Patricia Garner, an associate broker and agent with Coldwell Banker Heritage Real Estate, acted as the “buyer's agent” in connection with the purchase of the Germantown Drive Residence (the “Germantown Drive Settlement”).

222.

The Terrys and Coldwell Banker Heritage Real Estate entered into written contracts in connection with the purchase and sale of real estate, including but not limited to purchase and sale agreements and brokerage engagement agreements. In such agreements, the Terrys and Coldwell Banker Heritage Real

Estate expressly agreed upon the amount and basis of calculation of compensation each broker was to receive at closing from each such settlement.

223.

The Germantown Drive Residence is located in the Compulsory Area and in the GAMLS Boundary Area. On or about February 2, 2009, the Germantown Drive Residence was listed for sale on both the FMLS and the GAMLS databases by Keller Williams Realty Lanier Partners, which had an exclusive listing agreement with the seller of the Germantown Drive Residence.

224.

As a result of Keller Williams Realty Lanier Partners being a Member, it was able and required to list the Germantown Drive Residence for sale on the FMLS database and system.

225.

On or about October 26, 2009, the Terrys closed the purchase of the Germantown Drive Residence (the "Germantown Drive Settlement"). The Terrys financed a portion of the purchase price with a federally related mortgage loan.

226.

The HUD-1 Settlement Statement provided to the Terrys at closing (a true and correct copy of which, as redacted, is attached as Exhibit "L") states that Coldwell Banker Heritage Real Estate received \$4,620, and that Keller Williams Realty Lanier Partners received \$3,850, as real estate commissions on the closing date for brokerage services in connection with the Germantown Drive Settlement. The HUD-1 Settlement Statement did not disclose any payment out of settlement proceeds made or to be made to FMLS.

227.

Rules 6, 7, 14 and 16 were not disclosed to the Terrys or to the seller of the Germantown Drive Residence.

228.

All or some portion of the real estate commissions paid to Coldwell Banker Heritage Real Estate and Keller Williams Realty Lanier Partners as part of the Germantown Drive Settlement were paid in connection with federally related mortgage loans.

229.

Patricia Garner received real estate commissions from the Germantown Drive Settlement.

230.

All or some portion of the Hidden Settlement Fees paid by Coldwell Banker Real Estate to FMLS was charged to Patricia Garner, with her knowledge and consent.

231.

No settlement services were performed by FMLS on behalf of the Terrys or the seller in connection with the Germantown Drive Settlement, at the time of or in exchange for, the payment of the Hidden Settlement Fees.

232.

Pursuant to Rule 16, within ten (10) days following the closing of the Germantown Drive Settlement, Coldwell Banker Heritage Real Estate and Keller Williams Realty Lanier Partners split their commissions with, and paid, collectively, a Hidden Settlement Fee to, FMLS in the amount of \$369.60 (\$154,000 X .0024.)

233.

The Hidden Settlement Fees paid by Coldwell Banker Heritage Real Estate and Keller Williams Realty Lanier Partners to FMLS on account of the Germantown Drive Settlement were in connection with a federally related mortgage loan.

234.

Despite being paid from settlement proceeds, the Hidden Settlement Fees were without the consent of and not disclosed to the Terrys, either on the HUD-1 Settlement Statement in connection with the Germantown Drive Settlement, or otherwise.

235.

No settlement services were performed by FMLS on behalf of the Terrys or their seller in connection with the Germantown Drive Settlement, at the time of or in exchange for, the payment of the Hidden Settlement Fees.

236.

Without the knowledge or consent of the Terrys, after the closing of the Germantown Drive Settlement and receipt of the Hidden Settlement Fees from the settlement associated with such settlement, FMLS paid Kickbacks to Coldwell Banker Heritage Real Estate and Keller Williams Realty Lanier Partners on account of the Germantown Drive Settlement. These Kickbacks were not disclosed on the HUD-1 Settlement Statement.

237.

FMLS paid the Kickbacks from settlement proceeds to Coldwell Banker Heritage Real Estate and Keller Williams Realty Lanier Partners on account of the Germantown Drive Settlement because Coldwell Banker Heritage Real

Estate and Keller Williams Realty Lanier Partners had already paid Hidden Settlement Fees from prior settlements in excess of the Minimum Annual Amount.

238.

No services were performed by Coldwell Banker Heritage Real Estate or Patricia Garner on behalf of the Terrys in connection with the Germantown Drive Settlement, at the time of or in exchange for, the payment by FMLS of the Kickbacks using settlement proceeds.

239.

No services were performed by Keller Williams Realty Lanier Partners on behalf of the sellers in connection with the Germantown Drive Settlement, at the time of or in exchange for, the payment by FMLS of the Kickbacks.

240.

The Kickbacks paid by FMLS to Coldwell Banker Heritage Real Estate and Keller Williams Realty Lanier Partners on account of the Germantown Drive Settlement were paid from settlement proceeds in connection with a federally related mortgage loan, but such kickbacks were not for services rendered.

**EQUITABLE TOLLING**

241.

Rules 6, 7, 14, 16, the Hidden Settlement Fees, the commingling and sharing of Hidden Settlement Fees by FMLS and the Defendant Brokers, the Kickbacks, and the true amount and basis of calculation of the Defendant Brokers' compensation from the settlements at issue are material to the real estate transactions and agreements discussed herein, but they were not disclosed to the Plaintiffs by the Defendants on the HUD-1 Settlement Statements or otherwise.

242.

The Plaintiffs were not on actual or constructive notice of the existence of Rules 6, 7, 14, 16, the Hidden Settlement Fees, the Kickbacks or the true amount and basis of calculation of the Defendant Brokers' compensation from the settlements at issue.

243.

The Plaintiffs exercised due diligence and did not sleep on their rights with respect to the claims alleged herein.

244.

The Plaintiffs reasonably believed that all disbursements from settlement proceeds from the settlements at issue would be disclosed to the Plaintiffs on the

HUD-1 Settlement Statement.

245.

The Plaintiffs reasonably believed that the true amount and basis of calculation of the Defendant Brokers' compensation from the settlements at issue would be disclosed to the Plaintiffs on the HUD-1 Settlement Statement, and that the Defendant Brokers would not understate the compensation they received on account of a given settlement.

246.

The Plaintiffs reasonably relied on the brokerage engagement agreements, purchase and sale agreements, and the HUD-1 Settlement Statements as fully disclosing all charges, adjustments, fees, commissions and other forms of compensation the Defendant Brokers and any other person performing settlement services, or services incident to a settlement (including FMLS) were receiving in connection with the settlements at issue.

247.

The existence of both the Hidden Settlement Fees and the Kickbacks were "self concealing" in that the Defendants funded Hidden Settlement Fees and the Kickbacks through real estate sales commissions after closing so as to conceal



their very existence, thereby misleading the Plaintiffs. Likewise, Rules 6, 7, 14 and 16 were kept hidden from the Plaintiffs by the Defendants.

248.

The Defendants engaged in a course of conduct designed to conceal from the Plaintiffs any evidence of Rules 6, 7, 14, 16, the Hidden Settlement Fees, the Kickbacks and the true amount and basis of calculation of the Defendant Brokers' compensation from the settlements at issue.

249.

Based on the foregoing, any applicable statute of limitations for the claims alleged herein should be equitably tolled for a period of not less than four (4) years as to each Plaintiff until he or she discovered or should have discovered that Hidden Settlement Fees or Kickbacks were paid from the settlements at issue. For the Plaintiffs other than the Named Plaintiffs, this equitable tolling period should extend at least until the date of filing of the original class action Complaint.

**COUNT ONE**  
**(AGAINST FMLS, THE DEFENDANT BROKERS, AND THE**

**DEFENDANT AGENTS)**

**VIOLATION OF THE REAL ESTATE SETTLEMENT  
PROCEDURES ACT 12 U.S.C. § 2607  
(FEE SPLITTING AND PAYMENT OF UNEARNED FEES)**

250.

The Named Plaintiffs repeat verbatim and incorporate herein all previously pled averments.

251.

RESPA was enacted in 1974 to provide consumers with greater and timelier disclosure of the nature and costs of the real estate settlement process and to protect them from abusive practices.

252.

The fundamental premise underlying RESPA is that complete disclosure of information would preclude illegal kickbacks, fee splits, unearned fees, and compensated referrals, and thereby empower the consumer to get the same or better services at a lower cost.

253.

RESPA confers on the Secretary of HUD authority to prescribe rules and regulations to achieve the purposes of RESPA. The regulation adopted by HUD to fulfill its mandate is known as Regulation X, 24 C.F.R. § 3500, *et seq.*

254.

RESPA achieves its goals in a twofold manner: by imposing disclosure requirements in connection with settlement services and by prohibiting certain practices in connection with settlements.

255.

The term "settlement services" includes any service provided in connection with a real estate settlement, including but not limited to providing brokerage services.

256.

Congress has determined through its enactment of RESPA that kickbacks, fee splits, and referral fees in connection with residential real estate sales are anticompetitive, result in harm to consumers, and thus illegal.

257.

HUD has determined in its regulations that kickbacks, fee splits, and referral fees in connection with residential real estate sales are anticompetitive, result in harm to consumers, and thus illegal.

258.

12 U.S.C. § 2607 provides in part: "No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to an agreement or

understanding, oral or otherwise, that business incident to or part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a).

259.

12 U.S.C. § 2607 also provides in part: "No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. §2607(b).

260.

24 C.F.R §3500.14 further explains the prohibitions in 12 U.S.C. § 2607 as follows:

(b) No referral fees. No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service, except as set forth in Sec. 3500.14(g)(1). A business entity (whether or not in an affiliate relationship) may not pay any other business entity or the employees of any other business entity for the referral of settlement service business.

(c) No split of charges except for actual services performed. No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a

settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

(d) Thing of value. This term is broadly defined in section 3(2) of RESPA (12 U.S.C. 2602(2)). It includes, without limitation, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation. The term "payment" is used throughout Secs. 3500.14 and 3500.15 as synonymous with the giving or receiving any "thing of value" and does not require transfer of money.

261.

The Plaintiffs' settlements of residential real estate purchases and sales were financed in whole or in part by federally related mortgage loans.

262.

The Defendant Brokers and Agents are real estate settlement services providers that provided real estate settlement services involving federally related

mortgage loans within the meaning of 12 U.S.C. §2602(2) and § 2607(a) for the settlements at issue.

263.

FMLS is an undisclosed settlement service provider that ostensibly provided real estate settlement services involving federally related mortgage loans and received settlement fees, within the meaning of 12 U.S.C. §§ 2602(2) and 2607(a) from the settlements at issue.

264.

In the alternative to the preceding allegation, FMLS is subject to RESPA because it ostensibly “provides business incident to or part of” a real estate settlement service and received settlement fees in connection therewith, within the meaning of 24 C.F.R. §§ 3500.2 and 3500.14, *et seq.*

265.

In the alternative to the preceding allegation, FMLS is also a person who received a split of commissions (other than for services performed) that were paid for the rendering of a settlement service in transactions involving federally related mortgage loans, within the meaning of 12 U.S.C. § 2607(a) and (b).

266.

The Hidden Settlement Fees were paid to FMLS by the Defendant Brokers as settlement service providers using settlement proceeds within the meaning of 12 U.S.C. §§ 2602(2) and 2607(a) and 24 C.F.R. §§ 3500.2 and 3500.14, *et seq.*

267.

As a result of Rule 6, consumers who engage any of the Defendant Brokers to sell property located in the Compulsory Area are required to list the property on the FMLS database.

268.

The Members also required or encourage their brokers and agents to list other properties in Georgia on the FMLS database.

269.

Membership in FMLS, and the attendant required use by the Defendant Brokers of FMLS pursuant to Rule 6, constitutes an illegal affiliated business arrangement for the referral of business under RESPA. 12 U.S.C. §§ 2607(a) and (b), and 24 C.F.R. § 3500.14(f)(2).

270.

The Defendant Brokers paid the Hidden Settlement Fees from settlement proceeds in connection with real estate settlements involving federally related

mortgage loans.

271.

The Defendant Agents who received real estate commissions from the subject settlements acquiesced in splitting those commissions with FMLS by paying the Hidden Settlement Fees in connection with real estate settlements involving federally related mortgage loans.

272.

FMLS accepted the Hidden Settlement Fees either as a settlement services provider, a purported provider of services incident to or part of a real estate settlement service, or a person within the meaning of 12 U.S.C. § 2607, *et seq.*

273.

Payment and receipt of the Hidden Settlement Fees violated 12 U.S.C. § 2607(b) in that it represents a split of commissions paid without rendering any settlement services in connection with a federally related mortgage loan.

274.

By paying unearned Hidden Settlement Fees, the Defendant Brokers and their brokers and agents shared a portion, split, or percentage of real estate commissions received from a real estate settlement with a third party, FMLS, that performed no real estate settlement services for either purchasers or sellers in



exchange for such payments, in a manner proscribed by 12 U.S.C. § 2607(b).

275.

The portion of the Hidden Settlement Fees used to pay Kickbacks is a payment of a thing of value that has no relationship whatsoever to the market value of any goods or services provided, in that the payment is not for services or goods actually performed or provided within the meaning of 24 C.F.R. § 3500.14(g)(2).

276.

FMLS paid Kickbacks to the Defendant Brokers using settlement proceeds in connection with federally related mortgage loans.

277.

The Defendant Brokers accepted Kickbacks in connection with real estate settlements involving federally related mortgage loans.

278.

The Defendant Brokers shared in Kickbacks for which they performed no settlement services.

279.

The payment and receipt of Kickbacks violated 12 U.S.C. § 2607(a) in that they were a fee, kickback, or thing of value for referral of business incident

to real estate settlement services involving federally related mortgage loans and were paid pursuant to an agreement of understanding that the Hidden Settlement Fees would be paid by the Defendant Brokers to FMLS from settlement proceeds.

280.

By paying unearned Kickbacks, FMLS shared a portion, split, or percentage of compensation received from a real estate settlement with third parties - the Defendant Brokers - that performed no real estate settlement services, in a manner proscribed by 12 U.S.C. § 2607(b).

281.

In 2001, HUD issued Statement of Policy 2001-1, 66 Fed. Reg. 53053 (October 18, 2001), which states: “Payments that are unearned fees occur in, but are not limited to, cases where...(3) one settlement service provider charges the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or services provided for the services actually performed.”

282.

Section 8(b) provides: “No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the

rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually provided.” 12 U.S.C. § 2607(b).

283.

Section 8(b), and 24 C.F.R. § 3500.14(c) prohibit any fee that is unearned.

284.

HUD Statement of Policy 2001-1, also states that Section 8 prohibits any person from giving or accepting any fees other than payments for goods and facilities provided or services actually performed, whether the entire charge is divided or split among more than one person or is retained by a single person.

285.

FMLS collects the unearned Hidden Settlement Fee from settlement proceeds only when a listed property sells.

286.

The unearned Hidden Settlement Fee is not collected if a property is listed on FMLS for years and does not sell, but is collected from settlement proceeds even if that property sells before it is listed on the FMLS database.

287.

The unearned Hidden Settlement Fee is paid from settlement proceeds after all real estate settlement services have been rendered, serves no legitimate purpose, and is an illegal fee for which FMLS and the Defendant Brokers perform no services.

288.

There is no legitimate basis for FMLS and the Defendant Brokers to double the amount of the unearned Hidden Settlement Fee to be paid from a settlement simply because the listing and selling Associate Members are associated with different Members.

289.

The sole basis for doubling the unearned Hidden Settlement Fee in this circumstance is to assure both of the Defendant Brokers receive Kickbacks from commission proceeds.

290.

The unearned Hidden Settlement Fees, Kickbacks, and Rule 6 are illegal under RESPA Section 8(c) and the regulations promulgated thereunder.

291.

FMLS, the Defendant Brokers, and the Defendant Agents (hereinafter sometimes collectively referred to as the “RESPA Defendants”) are each jointly

and severally liable to the Plaintiffs pursuant to 12 U.S.C. § 2607(d)(2).

292.

Further, the Defendant Brokers are liable to the Plaintiffs for the acts and omissions of the Defendant Agents and all other brokers and agents who have been involved in the settlements at issue.

293.

FMLS provides things of value (i.e., Kickbacks) to real estate brokers for requiring the use of FMLS in the Compulsory Area.

294.

Under the FMLS “Agent Owner Listing,” real estate brokers and agents do not have to pay the Hidden Settlement Fee if they list their own personal properties for sale on the FMLS database, which is another illegal incentive for the referral or future referral of business.

295.

The Named Plaintiffs, on behalf of themselves and the other Plaintiffs, seek to have the foregoing practices enjoined.

296.

Pursuant to 12 U.S.C. § 2607(d)(2), the Plaintiffs are entitled to recover, and they hereby seek to collect, from the RESPA Defendants damages in an

amount equal to three (3) times the amount of any and all fees split as well as of any and all other amounts or damages allowed to be recovered by RESPA.

297.

Pursuant to 12 U.S.C. § 2607(d)(5), the Plaintiffs are entitled to recover, and they hereby seek to collect, from the RESPA Defendants the court costs of this action together with their reasonable attorney's fees and costs.

298.

The illegal fee splits, Kickbacks and unearned fees paid and received from settlements in connection with federally related mortgage loans involving the purchase and/or sale of residential real property violate Section 8 of RESPA, 12 U.S.C. § 2607, and the regulations promulgated there under, and the Named Plaintiffs are entitled to bring this action, on behalf of themselves and the other Plaintiffs, to recover three (3) times the amount of any and all such fees split, Kickbacks, and unearned fees, costs and attorneys' fees, as well as to obtain appropriate injunctive and declaratory relief, against FMLS, the Defendant Brokers and the Defendant Agents.

**COUNT TWO**  
**(AGAINST FMLS, THE DEFENDANT BROKERS, AND THE**

**DEFENDANT AGENTS)**

**VIOLATION OF THE REAL ESTATE SETTLEMENT  
PROCEDURES ACT 12 U.S.C. 2608  
(UNDISCLOSED REQUIRED USE OF AN  
AFFILIATED BUSINESS ARRANGEMENT)**

299.

The Named Plaintiffs repeat verbatim and incorporate herein all previously pled averments in paragraphs 1 through 298.

300.

Congress has determined through its enactment of RESPA that undisclosed business referral arrangements in connection with residential real estate sales are anticompetitive, result in harm to consumers, and thus illegal.

301.

HUD has determined in its regulations that undisclosed business referral arrangements in connection with residential real estate sales are anticompetitive, result in harm to consumers, and thus illegal.

302.

FMLS and the Defendant Brokers are part of an “Affiliated Business Arrangement” as defined in Section 8(c)(4)(A)-(C) of RESPA, 12 U.S.C. §2602(7), and 24 C.F.R. §3500.15(b).

303.

Under § 3(7) of RESPA, 12 U.S.C. § 2602(7), the term "Affiliated Business Arrangement" is an arrangement in which (A) a person who is in a position to refer business incident to or as part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent in a provider of settlement services; and (B) either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider.

304.

RESPA, as amended by Section 2103(a) of the Omnibus Appropriations Act of 1996, requires disclosure of any Affiliated Business Arrangement at the time of the referral when made face-to-face or in writing and within three (3) business days when made by telephone.

305.

“Affiliate relationship” under 24 C.F.R. § 3500.15(c)(2) means the relationship among business entities where one entity has effective control over the other by virtue of a partnership or other agreement, or is under common control with the other by a third entity, or where an entity is a corporation related to another corporation as parent to subsidiary by an identity of stock



ownership.

306.

FMLS is owned by 24 of the Defendant Brokers who are the Stockholder Members.

307.

The Members require their brokers and agents, including the Defendant Agents, to list property in the Compulsory Area on the FMLS database.

308.

Those brokers and agents listed properties throughout Georgia on the FMLS database, thereby causing the Plaintiffs to pay the unearned Hidden Settlement Fees, either directly or indirectly, without disclosing such fees to the Plaintiffs.

309.

As a result, the Plaintiffs were not given the opportunity to “opt-out” of using the affiliated business arrangement between FMLS and the Defendant Brokers.

310.

Under 24 C.F.R. § 3500.15, an affiliated business arrangement violates section 8 of RESPA (12 U.S.C. § 2607) and 24 C.F.R. § 3500.14-.15 if prior to

the referral of business, the person making a referral has not provided to each person whose business is referred a written disclosure, in the form of the Controlled Business Arrangement Disclosure Statement set forth in appendix D of 24 C.F.R. § 3500, specifying the nature of the relationship (explaining the ownership and financial interest) between the person performing settlement services (or business incident thereto) and the person making the referral, and shall describe the estimated charge or range of charges generally made by the provider of settlement services (the “HUD Disclosure Statement”).

311.

Under 24 C.F.R. § 3500.15, an affiliated business arrangement also violates section 8 of RESPA, 12 U.S.C. §2607, and of 24 C.F.R. § 3500.14 if the things of value received from the arrangement are things other than a return on an ownership interest or franchise relationship.

312.

In such an arrangement, a return on an ownership interest does not include: any payment which has as a basis of calculation no apparent business motive other than distinguishing among recipients of payments on the basis of the amount of their actual, estimated or anticipated referrals; any payment which varies according to the relative amount of referrals by the different recipients of

similar payments; or any payment based on an ownership, partnership or joint venture share which has been adjusted on the basis of previous relative referrals by recipients of similar payments.

313.

In 1996, HUD issued Statement of Policy 1996-2, 61 Fed. Reg. 29258-29264 (June 7, 1996), which states: "In cases where the percent of ownership interest or the amount of payment varies by the amount of business the real estate agent or broker refers, such payments are not bona fide returns on ownership interest, but instead, are an indirect method of paying a kickback based on the amount of business referred. 24 C.F.R. 3500.15(b)(3).

314.

The Defendant Brokers receive all or some portion of the Kickbacks in the form of illegal "Patronage Dividends" in violation of 12 U.S.C. § 2607, 24 C.F.R. § 3500.14 24 and C.F.R. 3500.15(b)(3).

315.

FMLS pays kickbacks to Defendant Brokers based on the amount of business Defendant Brokers' agents and brokers refer to FMLS in violation of 12 U.S.C. § 2607, and 24 C.F.R. 3500.15 (b)(3).

316.

The RESPA Defendants have violated RESPA by not providing to each person whose business is referred to FMLS the HUD Disclosure Statement specifying the nature of the relationship between FMLS and the Members, including the fact that the Hidden Settlement Fees are split or charged, and that Kickbacks are paid, from settlement proceeds after closing.

317.

Further, buyers and sellers of real estate that is listed on the FMLS database are not informed that all or some portion of the required Hidden Settlement Fees paid from settlements are retained by FMLS.

318.

The Hidden Settlement Fees are a split of a real estate commission, even though FMLS is not a broker or agent licensed to collect a real estate commission under the law of the State of Georgia.

319.

Further, the Hidden Transaction Fee is an unearned fee because it does not pay for marketing, advertising, or other FMLS costs.

320.

FMLS has also violated § 8 of RESPA and 24 C.F.R. §3500.15 by paying referral fees and things of value which vary according to the relative amount of

referrals by the Defendant Brokers.

321.

FMLS pays referral fees which have as a basis of calculation the amount of the actual, estimated or anticipated referrals and no other business motive.

322.

The referral fees FMLS pays are unearned.

323.

Although the RESPA Defendants constitute an “Affiliated Business Arrangement” under RESPA, the Hidden Fees, Kickbacks, and Rule 6 do not meet the safe harbor conditions of 12 U.S.C. § 2607(c).

324.

The unearned Hidden Settlement Fees, Kickbacks, failure to provide a HUD Disclosure Statement, required use of an affiliate, and the existence of Rule 6 do not meet the safe harbor conditions of 12 U.S.C. § 2607(c).

325.

Pursuant to 12 U.S.C. § 2607(d)(2), the Plaintiffs are entitled to recover, and they hereby seek to collect, from the RESPA Defendants their actual damages equal to three (3) times the amount of any and all “things of value” paid to the Defendant Brokers for the referral of business, as well as any and all

other amounts or damages allowed to be recovered by RESPA.

326.

Pursuant to 12 U.S.C. § 2607(d)(5), the Plaintiffs are entitled to recover, and they hereby seek to collect, from the RESPA Defendants the court costs of this action together with their reasonable attorney's fees and costs.

327.

As a result of the illegal Hidden Settlement Fees and Kickbacks, referral fees and things of value paid or given from settlements in violation of Section 8 of RESPA, 12 U.S.C. § 2607, the Named Plaintiffs, on behalf of themselves and the other Plaintiffs, are entitled to bring this action to recover three (3) times the amount of any and all such fees split, Hidden Settlement Fees, Kickbacks, referral fees, and things of value, costs and attorneys' fees, as well as to obtain appropriate injunctive and declaratory relief against FMLS, the Defendant Brokers and the Defendant Agents.

**COUNT THREE**  
**(AGAINST ALL DEFENDANTS)**

**VIOLATION OF THE SHERMAN ACT**

328.

The Named Plaintiffs repeat verbatim and incorporate herein all previously pled averments in paragraphs 1 through 249.

329.

The “MLS Antitrust Compliance Policy” of the National Association of REALTORS® (“NAR”), a copy of which is attached hereto as Exhibit “I”, states in part as follows:

The purpose of multiple listing is the orderly correlation and dissemination of listing information to participants so they may better serve the buying and selling public. Boards and associations of REALTORS® and their multiple listing services shall not enact or enforce any rule which restricts, limits, or interferes with participants in their relations with each other, in their broker/client relationships, or in the conduct of their business in the following areas.

Boards and associations of REALTORS® and their MLSs shall not:

1. Fix, control, recommend, or suggest the commissions or fees charged for real estate brokerage services (Interpretation 14).
2. Fix, control, recommend, or suggest the cooperative compensation offered by listing brokers to potential cooperating brokers.
3. Base dues, fees, or charges on commissions, listed prices, or sales prices. Initial participation fees and charges should directly relate to the costs incurred in bringing services to new participants.

330.

Thus, the “MLS Antitrust Compliance Policy” of NAR expressly states that boards and associations of Realtors® and their MLS’ “shall not,” among other things, “[b]ase dues, fees, or charges on . . . sales prices.”

331.

Further, as NAR has cautioned, “[a] per se illegal price fixing conspiracy can involve not only the prices a [real estate brokerage] firm charges customers or clients, but also the fees it pays for goods and services.” (See NAR publication, “Antitrust and the Real Estate Brokerage Firm”, a copy of which is attached hereto as Exhibit “M”.)

332.

NAR also warns against any practice that tends to “fix, control, recommend, or suggest the commissions or fees charged for real estate brokerage services” or that tends to “fix, control, recommend or suggest the cooperative compensation offered by listing brokers to potential cooperating brokers.” (See NAR publication, “MLS Antitrust Compliance Policy”, Exhibit “I” hereto.)

333.

In line with NAR’s “MLS Antitrust Compliance Policy,” MLS’ such as GAMLIS and MRIS do not require that listing brokers or agents report information regarding the listing commission payable for a particular listing to the MLS.

334.



As members of NAR, the Defendants were aware of and subject to its Handbook and the MLS Antitrust Compliance Policy.

335.

Because under Rule 7.1 all listing agreements must be sent to FMLS, which agreements report the listing commission payable for a particular listing, and Rule 16 requires that the first page of the HUD-1 Settlement Statement be sent to FMLS, that includes the commission actually paid in connection with the transaction, Rules 7.1 and 16 invite, encourage, and facilitate collusion among the Members, as competitors, with respect to commissions on residential real estate within at least the Compulsory Area.

336.

The change in the method of calculating the Hidden Settlement Fee from a percentage of commissions to a percentage of the sales price of a property had the effect of fixing, stabilizing and maintaining the price of FMLS' fees and real estate commissions, at least in the Compulsory area.

337.

In a comprehensive report by the Federal Trade Commission and the U.S. Department of Justice in April, 2007 (the "FTC/DOJ Report") studying competition within the residential real estate industry, the role of the internet in

real estate brokerage, the role of multiple listing services and the use of multiple listing service rules to disadvantage competition and harm consumers, were all examined. The FTC/DOJ report included empirical evidence that, despite the advent of the internet and its effect in reducing fees to consumers in other areas, average commission rates have fallen only from 6.1% percent in 1991 to 5.02% in 2005, and average commission fees have increased. According to the American Bankers Association (the “Association”), in public comment to the FTC/DOJ Report, “by any standard, the real estate brokerage market is considerably less competitive than it should be and commissions are artificially high”.

338.

The activities of the Defendants alleged herein were in and had a substantial effect on interstate commerce.

339.

Beginning at a time presently unknown to the Named Plaintiffs, and continuing to date, the Defendants have engaged in a contract, combination, or conspiracy to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

340.

In particular, through the adoption and enforcement of Rules 6, 7, 14, and 16, the Hidden Settlement Fees, and the Kickbacks, the Defendants (a) agreed to and did fix, raise, maintain, and stabilize the commissions paid from settlements by purchasers and sellers of real estate listed on the FMLS database by at least the amount of the Hidden Settlement Fees, and (b) thereby caused the Plaintiffs to pay higher commissions in connection with the settlements at issue than they would have paid absent the Defendants' illegal contract, combination, or conspiracy.

341.

The Hidden Settlement Fees are based solely on the actual sales price of the listed property. As NAR® recognizes by its above-quoted prohibition, the Hidden Settlement Fees are therefore in violation of federal antitrust law.

342.

The Boards were and are fully aware of NAR's® Handbook on Multiple Listing Policy and MLS Antitrust Compliance Policy but failed to take action against FMLS, the Defendant Brokers, or the Defendant Agents to protect the public, including the Plaintiffs, against Rules 6, 7, 14, and 16, the Hidden Settlement Fees, and the Kickbacks.

343.

The above alleged contract, combination, and conspiracy of the Defendants has injured the Plaintiffs in their business and property and substantially suppressed, restrained, and limited competition among the Defendant Brokers in offering and providing residential real estate brokerage services in at least Georgia .

344.

The price-fixing, engaged in by the Defendants is per se illegal or, under the rule of reason, otherwise violates Section 1 of the Sherman Act, 15 U.S.C. § 1.

345.

The foregoing illegal conduct of the Defendants proximately caused the Plaintiffs to suffer damages in amounts to be proven at trial, including the recovery of compensatory damages, treble damages and attorney's fees.

**COUNT FOUR**  
**(AGAINST ALL DEFENDANTS)**

**UNFAIR COMPETITION**

346.

The Named Plaintiffs repeat verbatim and incorporate herein all previously pled averments in paragraphs 1 through 249 and paragraphs 328 through 345.

347.

The Defendants' practices with respect to charging, paying, retaining, and failing to disclose the Hidden Settlement Fees and the Kickbacks to the Plaintiffs, including through the adoption and enforcement of Rules 6, 7, 14, and 16, are intended to and have the effect of defeating or lessening competition, or encouraging a monopoly, in offering and providing residential real estate brokerage services in violation of Georgia law.

348.

In addition, the Defendants' practices of charging, paying, retaining, and failing to disclose the Hidden Settlement Fees and Kickbacks to the Plaintiffs constitute an illegal conspiracy in restraint of trade in violation of Georgia law.

349.

The contracts and agreements through which the Defendants engage in this unfair competition are consequently unlawful and void, and the Defendants should be enjoined from abiding by or entering into such contracts and agreements. Plaintiffs are entitled to recover compensatory damages, attorney's fees and all other damages allowed at law.

350.

This unfair competition by the Defendants proximately caused the Plaintiffs to suffer damages in amounts to be proven at trial.

**COUNT FIVE**  
**(AGAINST THE DEFENDANT BROKERS)**

**VIOLATION OF THE GEORGIA UNIFORM DECEPTIVE TRADE**  
**PRACTICES ACT (the “UDTPA”)**

351.

The Named Plaintiffs repeat verbatim and incorporate herein all previously pled averments in paragraphs 1 through 249.

352.

The Plaintiffs entered into written agreements in connection with the purchase and sale of real estate, whether as a purchaser or a seller of such real estate.

353.

The purchase and sale agreements, brokerage engagement agreements, FMLS Listing Form, and other closing documents prepared for such settlements expressly provide for the payment of a commission in an agreed manner and amount between the Plaintiffs and the Defendant Brokers upon the settlement of the transaction.

354.

At the settlement of every transaction participated in by the Plaintiffs, various settlement documents, including the HUD-1 Settlement Statement, prepared for such settlements purportedly disclosed to the purchaser and seller (and any lender involved) the true compensation being paid to the buyer's and seller's brokers out of the subject settlement.

355.

Through their compliance with Rule 16, which requires submission of HUD-1 Settlement Statements to FMLS, the Defendant Brokers are submitting private and confidential information to an unauthorized third party without the knowledge or consent of the affected buyers and sellers.

356.

The Defendant Brokers had actual or constructive knowledge of Rule 6, the Hidden Settlement Fees, and the Kickbacks.

357.

The Defendant Brokers knew or should have known that they were not in compliance with federal and state law by failing to disclose to the Plaintiffs the true amount and basis of calculation of compensation they received or were to receive from a given settlement.

358.

Pursuant to O.C.G.A. § 43-40-1, *et seq.*, the Georgia Real Estate Commission (“GREC”) is authorized to promulgate rules and regulations governing practices in the real estate brokerage industry. Rule 520-1-06 of the GREC provides that “real estate licensees shall not pay a fee or commission to a licensee representing another party to a transaction without the knowledge and written consent of all parties.” Further, Georgia law provides that licensed real estate brokers and agents shall not split commissions with unlicensed third parties. O.C.G.A. § 43-40-25(b)(17).

359.

By paying Hidden Settlement Fees to FMLS, the Defendant Brokers and Agents violated O.C.G.A. § 43-40-25(b)(17). By accepting the Kickbacks, the Members are sharing in Hidden Settlement Fees on transactions in which their Associate Members are not indicated as a broker or agent of record and are completely unaffiliated with the transaction. Further, by accepting Kickbacks from Hidden Settlement Fees commingled by FMLS, Members are sharing in Hidden Settlement Fees paid by Members on the opposite side of the same transaction.

360.



Rules 6, 7, 14, 16, the Hidden Settlement Fees, the sharing in the Hidden Settlement Fees and the Kickbacks were not disclosed by the Defendant Brokers in the purchase and sale agreements, the brokerage engagement agreements, any good faith estimate of closing costs, the HUD-1 Settlement Statement, the FMLS Listing Form, or any other document provided to the Plaintiffs before or at the time of closing, or at any other time.

361.

Further, Rule 520-10-1(6)(a) enacted by the GREC provide as follows:

(a) Settlement Statements and Settlement Documents. Any fee, charge, rebate, profit, commission, referral fee, or other valuable consideration that is related to a purchase, sale or exchange transaction of real property shall be disclosed on the Settlement Statement for that transaction or on a supplemental document given to the licensee's principal at or before the closing of the transaction.

362.

As a result of the failure of the Defendant Brokers to disclose to the Plaintiffs on the Settlement Statement or in a supplemental document at the time of settlement, the existence of Rules 6, 7, 14, 16, and/or the Hidden Settlement Fees, and the Kickbacks, the Defendant Brokers violated Rule 520-10-1(6)(a).

363.

After the closing of the subject transactions, the Defendant Brokers paid Hidden Settlement Fees from the commissions received from such closing and

thereafter received Kickbacks on account of such settlements from FMLS. The Defendant Brokers understated their compensation reported on HUD-1 Settlement Statements by the amount of the Kickbacks.

364.

Through these actions, the Defendant Brokers created a likelihood of confusion or misunderstanding as to the true amount and basis of calculation of the Defendant Brokers' commissions in violation of O.C.G.A. § 10-1-372.

365.

Accordingly, pursuant to O.C.G.A. § 10-1-373, the Plaintiffs request that the Court issue an injunction imposing reasonable restrictions upon the future activities of the Defendant Brokers. Specifically, the Plaintiffs request that the Defendant Brokers be prohibited from engaging in the acts as described above which deprive the Plaintiffs and future purchasers and sellers of real estate of their personal property, such that:

(a) The Defendant Brokers are prohibited from paying the Hidden Settlement Fees and accepting Kickbacks or refunds of or sharing in any portion of those Hidden Settlement Fees;

(b) FMLS is prohibited from accepting the Hidden Settlement Fees and paying Kickbacks or refunding any portion of those Hidden Settlement Fees to

the Defendant Brokers; and

(c) FMLS is prohibited from enforcing, and the Defendant Brokers are prohibited from complying with, Rules 6, 7, 14 and 16.

(d) In the alternative to the injunctive relief sought in sections (a), (b) and (c), that the Defendant Brokers be required to disclose to their brokers and agents and to all purchasers and sellers of real estate at the time of settlement the existence of Rules 6, 7, 14, 16, the Hidden Settlement Fees, the commingling and sharing in settlement proceeds in the form of the Hidden Settlement Fees by FMLS and the Defendant Brokers, the Kickbacks and the true amount and basis for calculating the brokers' compensation from sales involving listings on FMLS, including the amount and basis of calculating the FMLS rebates and refunds which comprise the Kickbacks.

**COUNT SIX**  
**(AGAINST FMLS)**

**UNJUST ENRICHMENT AND MONEY HAD AND RECEIVED**

366.

The Named Plaintiffs repeat verbatim and incorporate herein all previously pled averments in paragraphs 1 through 249.

367.

FMLS had actual knowledge that real estate commissions paid by the Plaintiffs to the Defendant Brokers from settlement proceeds funded the payment of Hidden Settlement Fees and Kickbacks, and yet failed to disclose these matters to the Plaintiffs at the time of settlement.

368.

Specifically, within 10 days after closing, FMLS received a benefit from the Plaintiffs in the form of the Hidden Settlement Fees from the Defendant Brokers that was funded entirely by the commission paid by the Plaintiffs.

369.

The Plaintiffs were contractually obligated to pay a commission to the Defendant Brokers, but were not contractually obligated, in the FMLS Listing Form or otherwise, to pay any portion of the commission to FMLS. There is no contract concerning the payment of Hidden Settlement Fees or Kickbacks between the Plaintiffs and FMLS.

370.

FMLS designed, implemented, and enforced a scheme utilizing Rules 6, 7, 14 and 16, the Hidden Settlement Fees, and the Kickbacks to misappropriate from the Plaintiffs, without their knowledge or consent, a payment from each settlement at issue to which FMLS is not entitled.

371.

FMLS obtained money to which it was not entitled and was unjustly enriched to the extent of those undisclosed additional payments in an amount to be proven at trial.

372.

Further, the exact amount of money had and received by FMLS and due to the Plaintiffs from the Defendants is currently unknown to the Plaintiffs and cannot be determined without an accounting of all payments made by the Defendant Brokers to FMLS and by FMLS to all of the Defendant Brokers in or with respect to each of the settlements at issue.

373.

This accounting may be unusually complicated, and any alternate remedy at law is likely to be inadequate to the Plaintiffs.

374.

The Plaintiffs are therefore entitled to an equitable accounting of all payments made by the Defendant Brokers to FMLS and by FMLS to the Defendant Brokers in or with respect to each of the settlements at issue.

375.

In addition, a constructive trust should immediately be imposed, for the benefit of the Plaintiffs, on all Hidden Settlement Fees and other funds had and received and in the possession, custody, or control of FMLS or that are henceforth received by FMLS from or on account of settlements, whether or not such Hidden Settlement Fees or other funds would be used to pay Kickbacks.

**COUNT SEVEN**  
**(AGAINST THE DEFENDANT BROKERS AND THE DEFENDANT AGENTS)**

**NEGLIGENT MISREPRESENTATION**

376.

The Named Plaintiffs repeat verbatim and incorporate herein all previously pled averments in paragraphs 1 through 249.

377.

Pursuant to BRETTA, O.C.G.A. § 10-6A-1, *et seq.*, a broker or agent licensed in the State of Georgia and engaged by a buyer or seller is obligated to promote the interests of the buyer or seller by, *inter alia*, disclosing to the buyer or seller adverse material facts of which the broker or agent has actual knowledge concerning the transaction, timely accounting for all money and property received in which the buyer or seller has or may have an interest, disclosing to the buyer or seller the true amount and basis of calculation of the

brokers' compensation, exercising ordinary skill and care in performing the duties of the broker, and complying with all applicable statutes and regulations.

378.

BRETTA requires that a written brokerage engagement agreement be signed by the broker and his or her client to establish a client relationship. Among other things, the brokerage engagement agreement must describe the types of agency relationships available through the broker and the terms under which the broker will receive a commission.

379.

The brokerage relationship among the Defendant Brokers, the Defendant Agents and the Plaintiffs imposed duties of trust, confidence, loyalty, obedience, full disclosure, skill, care, diligence and accountability on the Defendant Brokers and the Defendant Agents to the Plaintiffs with respect to the transactions at issue.

380.

The Defendant Brokers are responsible for the acts and omissions of the Defendant Agents and of all other brokers and agents who were involved in the transactions in issue.

381.

Each of the Defendant Brokers had a duty to disclose Rules 6, 7, 14, 16, the Hidden Settlement Fees, the existence and amount of the Hidden Settlement Fees and the Kickbacks, and the true amount and basis of calculation of their compensation to their clients who are the Plaintiffs herein, in writing and at the time of the settlements at issue.

382.

Each of the Defendant Agents had a duty to disclose Rules 6, 7, 14, 16, and the existence and amount of the Hidden Settlement Fees to the Plaintiffs, who were their respective clients, in writing and prior to or at the time of the settlements at issue.

383.

By failing to disclose Rules 6, 7, 14, 16, the existence and amount of the Hidden Settlement Fees, and/or the existence and amount of the Kickbacks to the Plaintiffs, who were their respective clients, the Defendant Brokers and the Defendant Agents did not timely and properly inform the Plaintiffs of the true amount and basis of calculation of their compensation, and did not timely and properly account for all money and property received in which the Plaintiffs had an interest with respect to the settlements at issue.

384.



The existence of Rules 6, 7, 14, 16, the Hidden Settlement Fees, the sharing of the Hidden Settlement Fees, the Kickbacks, the amount of any fee, charge, rebate, profit, commission, referral fee, or other valuable consideration that is related to a purchase, sale or exchange settlement of real property, and the true amount and basis of calculation of the compensation of the Defendant Brokers, which was understated, were adverse material facts concerning the settlements at issue that the Plaintiffs did not know, could not reasonably discover, and would reasonably want to know.

385.

By failing to disclose the existence of Rules 6, 7, 14, 16, the Hidden Settlement Fees, the commingling and sharing of the Hidden Settlement Fees, and the Kickbacks to the Plaintiffs from the settlements at issue, and by understating their actual compensation from the settlements at issue, the Defendant Brokers acted negligently in providing false or materially misleading information to the Plaintiffs in connection with the settlements at issue.

386.

By failing to disclose the existence of Rules 6, 7, 14, 16 and the Hidden Settlement Fees to the Plaintiffs from the settlements at issue, the Defendant Agents acted negligently in providing false or materially misleading information

to the Named Plaintiffs in connection with the settlements at issue.

387.

The Plaintiffs reasonably relied on the brokerage engagement agreement and HUD-1 Settlement Statement as accurately stating that a commission would be paid to the Defendant Brokers and had no basis for discovering that, in fact, a portion of the commission would be paid to FMLS within 10 days after closing.

388.

The Hidden Settlement Fees were paid by the Defendant Brokers to FMLS within 10 days after closing without disclosing that payment to the Plaintiffs. Moreover, Kickbacks were paid by FMLS to the Defendant Brokers on account of and after the individual settlements at issue and were not disclosed to Plaintiffs.

389.

It was foreseeable to the Defendant Brokers and the Defendant Agents that the Plaintiffs would rely on this false and materially misleading information.

390.

The Plaintiffs did justifiably and reasonably rely on this false and misleading information to their detriment.

391.

The negligent misrepresentations by the Defendant Brokers and the Defendant Agents as to the correct amount of commission the Plaintiffs would pay them proximately caused the Plaintiffs to suffer damages in amounts to be proven at trial.

**COUNT EIGHT**  
**(AGAINST ALL DEFENDANTS)**

**CIVIL CONSPIRACY**

392.

The Named Plaintiffs repeat verbatim and incorporate herein all previously pled averments in paragraphs 1 through 249.

393.

The Defendants each had a duty to inform the Plaintiffs of the existence of Rules 6, 7, 14, 16, the Hidden Settlement Fees, and the commingling and sharing of the Hidden Settlement Fees and/or the Kickbacks.

394.

The Defendants have agreed to actively suppress the existence of Rules 6, 7, 14, 16, the Hidden Settlement Fees, and the commingling and sharing of the Hidden Settlement Fees and/or the Kickbacks from the knowledge of the Plaintiffs.

395.

The foregoing combination of two or more persons was formed for the purpose of injuring the Plaintiffs.

396.

The foregoing conspiracy proximately caused the Plaintiffs to suffer damages in amounts to be proven at trial.

### **CLASS ACTION ALLEGATIONS**

This action is brought by the Named Plaintiffs pursuant, in part, to Rules 23(a) and 23(b)(1), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure, on behalf of themselves and all other persons similarly situated as purchasers or sellers of real estate in Georgia listed for sale on the FMLS database for which Hidden Settlement Fees and Kickbacks were paid at any time during the applicable period(s) of limitations, as equitably tolled, for any of the claims alleged herein (all such purchasers and sellers of real estate are hereinafter collectively referred to as the "Plaintiff Class") (the Named Plaintiffs and the Plaintiff Class are hereinafter and before collectively referred to as the "Plaintiffs"). Excluded from the Plaintiff Class are any current or former officers, directors, members, shareholders, agents, or employees of the Defendants.

397.

There are thousands of members of the Plaintiff Class making joinder impracticable. The names and addresses of members of the Plaintiff Class are readily identifiable from the records of the Defendants.

398.

There are over 2,200 members of the class comprised of the Defendant Brokers making joinder impracticable. The names and addresses of members of the Defendant Class are readily available from the records of the Defendants. A listing published by FMLS purporting to identify the current Members, most (if not all) of whom are in the Defendant Class, is available from the FMLS website. Excluded from the Defendant Class are any Defendant Brokers that, during the limitations period equitably tolled, disclosed Rules 6, 7, 14 and 16 in writing to Plaintiffs on a HUD Disclosure Statement and refunded to Plaintiffs, within thirty (30) days of receipt of same, any Kickbacks received from settlements in which Hidden Settlement Fees were paid.

399.

The Named Plaintiffs will fairly and adequately represent and protect the interests of the members of the Plaintiff Class. The Named Plaintiffs, in the course of proving their claims, will prove (in whole or in part) the claims of all members of the Plaintiff Class.

400.

The Named Plaintiffs have retained competent counsel with extensive experience in class action litigation to further insure such representation and protection of the Plaintiff Class. The Named Plaintiffs, and their counsel, intend to vigorously prosecute this action.

401.

The Defendant Class Representatives will fairly and adequately represent and protect the interests of the members of the Defendant Class. The Defendant Class Representatives, in the course of pursuing their defenses, will pursue the defenses of all members of the Defendant Class.

402.

The claims of the Named Plaintiffs are typical of the claims of the other members of the Plaintiff Class, because all class members paid a commission using settlement proceeds that, unbeknownst to them, was inflated by the Hidden Settlement Fees and the Kickbacks, and such fees were shared by FMLS and the Defendant Brokers without the knowledge of the Named Plaintiffs. The Named Plaintiffs do not have interests antagonistic to or in conflict with the other members of the Plaintiff Class.

403.

The defenses of the Defendant Class Representatives are typical of the defenses of the other members of the Defendant Class. The Defendant Class Representatives do not have interests antagonistic to or in conflict with the other members of the Defendant Class.

404.

The damages suffered by the Named Plaintiffs and all other members of the Plaintiff Class arise from and were caused by the actions of the Defendants.

405.

A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The expense and burden of individual litigation are impediments to individual members of the Plaintiff Class seeking redress for the wrongful conduct alleged. Further, prosecution of separate actions against the Defendant Class Representatives or other members of the Defendant Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Plaintiff Class and/or the Plaintiff Class, which would establish incompatible standards of conduct for the Defendants. The Defendants' practices are generally applicable to all members of the Plaintiff Class and all members of the Defendant Class, thereby making the relief sought herein applicable to both the Plaintiff Class and the Defendant

Class as a whole.

406.

There is no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action. Furthermore, a class action will promote judicial economy by enabling the Court to determine the rights of all members of each of the Plaintiff Class and the Defendant Class.

407.

The claims of the Plaintiff Class against the Defendants arise out of the same settlements, occurrences, or series of settlements or occurrences. Each of the Defendant Brokers is a Member and has paid Hidden Settlement Fees to FMLS and received Kickbacks from FMLS without the knowledge or consent of the members of the Plaintiff Class.

408.

The claims of every member of the Plaintiff Class arise out of a business practice set out in common or form documents which have been uniformly adhered to by every member of the Defendant Class. Other core written documents are available to establish the claims herein, including but not limited to, the HUD-1 Settlement Statements, the FMLS Rules and Regulations, brokerage agreements, and others.



409.

Common questions of law and fact exist as to all members of the Plaintiff Class and all members of the Defendant Class, and predominate over individual questions or issues. These common and predominant questions of law and fact include:

- A. Whether the relationship among the RESPA Defendants is an “Affiliated Business Arrangement” within the meaning of 12 U.S.C. § 2607;
- B. Whether the Affiliated Business Arrangement among the RESPA Defendants was disclosed to members of the Plaintiff Class in the manner required by 12 U.S.C. § 2607;
- C. Whether FMLS is a real estate settlement services provider within the meaning of 12 U.S.C. § 2607;
- D. Whether FMLS provided services in connection with a real estate settlement;
- E. Whether FMLS is a person within the meaning of 12 U.S.C. § 2607;
- F. Whether the Defendant Brokers and/or the Defendant Agents are real estate settlement services providers within the meaning of 12

U.S.C. § 2607;

- G. Whether Rules 6, 7, 14 or 16 were properly and timely disclosed to members of the Plaintiff Class;
- H. Whether Hidden Settlement Fees were paid from settlement proceeds after closing of the settlements at issue;
- I. Whether Hidden Settlement Fees were paid from settlement proceeds in connection with real estate settlement services involving federally related mortgage loans;
- J. Whether the Hidden Settlement Fees were disclosed to members of the Plaintiff Class;
- K. Whether all or some portion of the Hidden Settlement Fees paid from settlement proceeds were commingled and/or shared among the Defendant Brokers who were either not affiliated with the subject settlement and/ or were shared with Defendant Brokers on the opposite side of the same settlement;
- L. Whether real estate settlement services were performed by FMLS substantially contemporaneous with, and in exchange for, the Hidden Settlement Fees;
- M. Whether by payment of the Hidden Settlement Fees, the

Defendant Brokers shared a portion, split, or percentage of any real estate commissions received from real estate settlements with a third party not licensed as a real estate broker or agent, FMLS, that performed no additional real estate settlement services in exchange for such payment, in a manner proscribed by 12 U.S.C. § 2607;

- N. Whether FMLS paid Kickbacks to the Defendant Brokers;
- O. Whether the Kickbacks were disclosed to members of the Plaintiff Class;
- P. Whether the Defendant Agents acquiesced in splitting the Hidden Settlement Fees;
- Q. Whether the Defendant Brokers accepted Kickbacks;
- R. Whether the Kickbacks induced the Defendant Brokers to refer business to FMLS;
- S. Whether the Kickbacks induced the Defendant Brokers to agree to and comply with Rules 6, 7, 14 and/or 16;
- T. Whether by payment of the Kickbacks, FMLS shared a portion, split, or percentage of the Hidden Settlement Fees paid from settlements with third-parties, the Defendant Brokers, that

performed no additional real estate settlement services in exchange for such payment, in a manner proscribed by 12 U.S.C. § 2607;

- U. Whether any real estate settlement services were performed by the Defendant Brokers substantially contemporaneous with, and in exchange for, the Kickbacks;
- V. Whether the damages recoverable by the Plaintiffs are to be measured by the gross commissions paid at settlement, the Hidden Settlement Fees paid from settlement proceeds, or the Kickbacks associated with the settlements at issue;
- W. Whether the Kickbacks rightfully belong to the Plaintiffs because the refunds or rebates comprising the Kickbacks were funded by Hidden Settlement Fees from real estate commissions paid by the Plaintiffs at settlement and from settlement proceeds;
- X. Whether the Defendants violated RESPA as alleged herein;
- Y. Whether the Defendants violated the Sherman Act by fixing or stabilizing real estate commissions, the Hidden Settlement Fee, or otherwise as alleged herein;
- Z. Whether the Defendants engaged in unfair competition as alleged

herein;

- AA. Whether the Defendant Brokers and the Defendant Agents violated BRRETA as alleged herein;
- BB. Whether the Defendant Brokers and the Defendant Agents negligently misrepresented or failed to disclose material facts to the Plaintiffs in connection with the settlements at issue, as alleged herein;
- CC. Whether the Defendant Brokers violated the UDTPA as alleged herein;
- DD. Whether FMLS was unjustly enriched and had and received funds and at the expense of the Plaintiffs in connection with the settlements at issue as alleged herein;
- EE. Whether the Defendants engaged in a civil conspiracy as alleged herein; and
- FF. Whether the Plaintiffs are entitled to an equitable accounting and/or a constructive trust as alleged herein.

**WHEREFORE**, the Named Plaintiffs pray that the Plaintiff Class and the Defendant Class be certified and that the Plaintiffs be awarded the following relief:

**FIRST PRAYER FOR RELIEF**  
**(Against FMLS)**

1. As to Counts One and Two, an award of compensatory damages in an amount equal to the total commissions paid by the Plaintiffs with respect to settlements of residential real estate listed for sale on the FMLS database in connection with federally related mortgage loans for a period of not less than the previous four (4) years pursuant to 12 U.S.C. §§ 2607(a) or (b);

2. As to Counts One and Two, an award of compensatory damages, in the alternative to the relief prayed for in the preceding paragraph, in an amount equal to the total Hidden Settlement Fees paid by the Defendant Brokers to FMLS from commissions paid by the Plaintiffs with respect to settlements of residential real estate listed for sale on the FMLS database in connection with federally related mortgage loans for a period not less than the previous four (4) years pursuant to 12 U.S.C. §§2607(a) or (b);

3. As to Count One and Two, an award of compensatory damages, in the alternative to the relief prayed for in the preceding two paragraphs, in an amount equal to the total Kickbacks paid by FMLS to the Defendant Brokers with respect to settlements of residential real estate listed for sale on the FMLS database in connection with federally related mortgage loans for a period not less than the previous four (4) years pursuant to 12 U.S.C. §§2607(a) or (b);

4. As to Counts One and Two, that the compensatory damages awarded to the Plaintiffs be trebled pursuant to 12 U.S.C. §2607, *et seq.*;

5. As to Count Six, an award of compensatory damages in an amount to be proven at trial;

6. As to Count Six, an equitable accounting of all payments made by the Defendant Brokers to FMLS and by FMLS to the Defendant Brokers in or with respect to each of the settlements at issue;

7. As to Count Six, a constructive trust should immediately be imposed, for the benefit of the Plaintiffs, on all Hidden Settlement Fees and other funds in the possession, custody, or control of FMLS; and

8. The relief prayed for in the Fourth Prayer for Relief.

**SECOND PRAYER FOR RELIEF**  
**(Against the Defendant Brokers)**

9. As to Counts One and Two, an award of compensatory damages in an amount equal to the total commissions paid by the Plaintiffs with respect to settlements of residential real estate listed for sale on the FMLS database in connection with federally related mortgage loans for a period of not less than the previous four (4) years pursuant to 12 U.S.C. §§ 2607(a) or (b);

10. As to Counts One and Two, an award of compensatory damages, in the alternative to the relief prayed for in the preceding paragraph, in an amount

equal to the total Hidden Settlement Fees paid by the Defendant Brokers to FMLS from commissions paid by the Plaintiffs with respect to settlements of residential real estate listed for sale on the FMLS database in connection with federally related mortgage loans for a period not less than the previous four (4) years pursuant to 12 U.S.C. §§2607(a) or (b);

11. As to Count One and Two, an award of compensatory damages, in the alternative to the relief prayed for in the preceding two paragraphs, in an amount equal to the total Kickbacks paid by FMLS to the Defendant Brokers with respect to settlements of residential real estate listed for sale on the FMLS database in connection with federally related mortgage loans for a period not less than the previous four (4) years pursuant to 12 U.S.C. §§2607(a) or (b); and

12. As to Counts One and Two, that the compensatory damages awarded to the Plaintiffs be trebled pursuant to 12 U.S.C. §2607, *et seq.*

13. As to Count Five, the injunctive relief requested herein;

14. As to Count Seven, an award of compensatory damages in an amount to be proven at trial;

15. An equitable accounting of all payments made by the Defendant Brokers to FMLS and by FMLS to the Defendant Brokers in or with respect to each of the settlements at issue; and



16. The relief prayed for in the Fourth Prayer for Relief.

**THIRD PRAYER FOR RELIEF  
(Against the Defendant Agents)**

17. As to Counts One and Two, an award of compensatory damages in an amount equal to the total commissions paid by the Plaintiffs with respect to settlements of residential real estate listed for sale on the FMLS database in connection with federally related mortgage loans for a period of not less than the previous four (4) years pursuant to 12 U.S.C. §§2607(a) or (b);

18. As to Counts One and Two, an award of compensatory damages, in the alternative to the relief prayed for in the preceding paragraph, in an amount equal to the total Hidden Settlement Fees paid by the Defendant Brokers to FMLS from commissions paid by the Plaintiffs with respect to settlements of residential real estate listed for sale on the FMLS database in connection with federally related mortgage loans for a period not less than the previous four (4) years pursuant to 12 U.S.C. §§ 2607(a) or (b);

19. As to Count One and Two, an award of compensatory damages, in the alternative to the relief prayed for in the preceding two paragraphs, in an amount equal to the total Kickbacks paid by FMLS to the Defendant Brokers with respect to settlements of residential real estate listed for sale on the FMLS database in connection with federally related mortgage loans for a period not

less than the previous four (4) years pursuant to 12 U.S.C. §§2607(a) or (b);

20. As to Counts One and Two, that the compensatory damages awarded to the Plaintiffs be trebled pursuant to 12 U.S.C. §2607, *et seq.*;

21. As to Count Seven, an award of compensatory damages in an amount to be proven at trial; and

22. The relief prayed for in the Fourth Prayer for Relief.

**FOURTH PRAYER FOR RELIEF**  
**(Against all Defendants)**

23. As to Count Three, an award of compensatory damages in an amount to be proven at trial;

24. As to Count Three, that the compensatory damages awarded to the Plaintiffs be trebled pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15;

25. As to Count Four, an award of compensatory damages in an amount to be proven at trial;

26. As to Count Eight, an award of compensatory damages in an amount to be proven at trial;

27. An award equal to the amount of the Named Plaintiffs' reasonable attorney's fees, along with all other and further costs of this action, as provided by 12 U.S.C. § 2601 *et seq.*, 15 U.S.C. § 15, and/or otherwise by law;

28. For a trial by a jury of peers of the Named Plaintiffs and the other

members of the Plaintiff Class; and

29. That the Named Plaintiffs and the other members of the Plaintiff Class have such other and further relief as the Court deems necessary and appropriate to effectuate the relief sought herein and as justice requires.

Respectfully submitted this 14<sup>th</sup> day of February, 2011.

**TAYLOR ENGLISH DUMA LLP**

s/ Gregory G. Schultz

Foy R. Devine

Georgia Bar No. 219905

Gregory G. Schultz

Georgia Bar No. 630260

William A. Clineburg, Jr.

Georgia Bar No. 170550

Michael Eric Ross

Georgia Bar No. 615190

1600 Parkwood Circle, Suite 400

Atlanta, Georgia 30339

Telephone: (770) 434-6868

Facsimile: (770) 434-4819

[fdevine@taylorenghish.com](mailto:fdevine@taylorenghish.com)

[gschultz@taylorenghish.com](mailto:gschultz@taylorenghish.com)

[bclineburg@taylorenghish.com](mailto:bclineburg@taylorenghish.com)

[mross@taylorenghish.com](mailto:mross@taylorenghish.com)

**POPE, MCGLAMRY, KILPATRICK,  
MORRISON & NORWOOD, LLP**

Jay F. Hirsch  
Georgia Bar No. 357185  
3455 Peachtree Road, N.E., Suite 925  
Atlanta, Georgia 30326-3243  
Phone: (404) 523-7706  
Fax: (404) 524-1648  
[jayhirsch@pmkm.com](mailto:jayhirsch@pmkm.com)

**THE STERBCOW LAW GROUP, LLC**

Marx David Sterbcow  
Louisiana Bar No. 28425  
1734 Prytania St.  
New Orleans, LA 70130  
Phone: (504) 523-4930  
Fax: (888) 241-6248  
[marx@sterbcowlaw.com](mailto:marx@sterbcowlaw.com).

PHV application granted

*Counsel for Plaintiffs Heather Q.  
Bolinger, Paul A. Terry and Anne M.  
Terry, on behalf of themselves and as  
representatives of the Plaintiff Class*

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
GAINESVILLE DIVISION

Heather Q. Bolinger, Paul A. Terry, )  
and Anne M. Terry, on behalf of themselves )  
and all others similarly situated, )

Plaintiffs, )

v. )

CIVIL ACTION FILE NO.:  
2:10-cv-00211-RWS

First Multiple Listing Service, Inc., )  
Gainesville-Hall County Board of )  
Realtors, Inc., Atlanta Board of Realtors, )  
Inc., Lanier Partners, LLC, d/b/a Keller )  
Williams Realty Lanier Partners, Heritage )  
Real Estate, Inc., d/b/a Coldwell Banker )  
Heritage Real Estate, Peggy Slappey )  
Properties, Inc., Atlanta Partners Realty, )  
LLC, d/b/a Keller Williams Realty Atlanta )  
Partners, Bueno and Finnick, Inc., d/b/a )  
Re/Max Center Dacula, Sue Edwards, )  
Mary Beth Smallen, Patricia Garner, )

and )

John Doe Members Comprising )  
Defendant Class of Residential Real Estate )  
Brokers Similarly Situated as Members )  
of FMLS, )

Defendants. )

\_\_\_\_\_ )

**CERTIFICATE OF SERVICE**

This is to certify that on this day I electronically filed a copy of the foregoing **AMENDED COMPLAINT** using the CM/ECF system, which will automatically send e-mail notification to the following attorneys of record:

<p>Teresa T. Bonder, Esq.                  A. McCampbell Gibson, Esq.                  Allison S. Thompson, Esq.                  Jason D. Popp, Esq.                  Melissa Whitehead, Esq.                  ALSTON &amp; BIRD LLP                  1201 West Peachtree Street                  Atlanta, Georgia 30309-3424                  Tel: (404) 881-7000                  Fax: (404) 881-7777  <a href="mailto:teresa.bonder@alston.com">teresa.bonder@alston.com</a>  <a href="mailto:mac.gibson@alston.com">mac.gibson@alston.com</a>  <a href="mailto:allison.thompson@alston.com">allison.thompson@alston.com</a>  <a href="mailto:jason.popp@alston.com">jason.popp@alston.com</a></p>	<p>Jay N. Varon, Esq.                  FOLEY &amp; LARDNER LLP                  3000 K Street, N.W.                  Suite 600                  Washington, DC 20007-5109                  202.672.5380  <a href="mailto:jvaron@foley.com">jvaron@foley.com</a></p>
<p>Frederick G. Boynton, Esq.                  MORRIS HARDWICK SCHNEIDER                  7000 Central Parkway, Suite 300                  Atlanta, Georgia 30328                  Phone: 678-298-2100                  Fax: 770-804-9643  <a href="mailto:fboynton@Closingsource.net">fboynton@Closingsource.net</a></p>	<p>Ned Blumenthal, Esq.                  Julie L. Sellers, Esq.                  WEISSMAN, NOWACK, CURRY &amp;                  WILCO, P.C.                  One Alliance Center, 4th Floor                  3500 Lenox Road, NE                  Atlanta, Georgia 30326                  404.926-4588   F 4788  <a href="mailto:nedblumenthal@wncwlaw.com">nedblumenthal@wncwlaw.com</a></p>
<p>Gary Beelen, Esq.                  Joseph C. Chancey, Esq.</p>	

<p>DREW ECKL &amp; FARNHAM, LLP 880 West Peachtree Street Post Office Box 7600 Atlanta, Georgia 30357-0600 Telephone: 404-885-1400 Facsimile: 404-876-0992 JChancey@deflaw.com gbeelen@deflaw.com</p>	
---	--

This 14<sup>th</sup> day of February, 2011.

/s/ Gregory G. Schultz  
Gregory G. Schultz  
Georgia Bar No. 630260