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 Defendant Class of Residential Real Estate Brokers Similarly Situated as Members of FMLS, Defendants.	CIVIL ACTION FILE NO. 2:10-CV-211-RWS

DEFENDANTS' JOINT BRIEF IN SUPPORT OF
JOINT MOTION TO DISMISS AMENDED COMPLAINT

Plaintiffs' second attempt to state a claim against Defendants again falls woefully short of the mark. While adding even greater length and additional conclusory allegations, and even the supposed validation of an expert witness, Plaintiffs' Amended Complaint does nothing more than present inflammatory rhetoric and mere legal conclusions in an effort to transform a legitimate business model and competitive pricing structure into a multi-million dollar class action lawsuit premised on manufactured violations of federal and state law. Plaintiffs do not adequately allege the necessary elements of their asserted claims, and thus the Court should dismiss all such claims, with prejudice, in their entirety.

It is well-established that a complaint offering "labels and conclusions or a formulaic recitation of the elements of a cause of action" is insufficient as a matter of law. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Tacitly recognizing that their claims lack the necessary factual underpinnings, Plaintiffs' Amended Complaint is rife with allegations that are nothing more than "labels and conclusions" and thus insufficient to state any actionable claim.

First, Plaintiffs meticulously crafted numerous "labels" in an effort to recast Defendants' legitimate business practices as nefarious. Plaintiffs refer *ad nauseam* to "Hidden Settlement Fees" (Am. Compl. ¶¶ 22-23, *passim*), thus attempting to paint an utterly inaccurate and unsupportable picture of the fees that Defendant

First Multiple Listing Service, Inc. ("FMLS") charges in exchange for its services. Plaintiffs similarly attempt to pervert FMLS's long-standing and perfectly legitimate practice of paying Patronage Dividends to its Member-brokers by describing those payments as "Kickbacks." (*See*, *e.g.*, *id.* ¶ 126, *passim*). One can rarely succeed in sewing a silk purse from a sow's ear, however, and Plaintiffs' attempt to do so fails to pass muster under federal pleading standards. Plaintiffs simply do not allege sufficient ***facts*** to support their flagrant and inflammatory mischaracterizations, which amount to nothing more than an obvious attempt to divert the Court's attention from their failure to plead valid claims. *See Iqbal*, 129 S. Ct. at 1949.

Second, the Amended Complaint is replete with allegations that constitute nothing more than bare legal conclusions. As a few examples among many, Plaintiffs allege that "FMLS provides real estate settlement services within the meaning of 12 U.S.C. § 2607" (Am. Compl. ¶ 103),[1] and that "Defendants have

[1] Plaintiffs attached to the Amended Complaint a report from Grant E. Mitchell, Esq. offering purportedly "expert" opinions about the legality of Defendants' alleged conduct under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq*. (*See* Notice of Filing (Dkt. # 49-1), Am. Ex. A at 12 (Report at 3)). Plaintiffs do not incorporate or expressly rely on Mr. Mitchell's report to support their allegations, having made only passing reference to it in the first paragraph of their more than 120-page pleading. (Am. Compl. ¶ 1). More importantly, however, Mr. Mitchell's report presents nothing more than

engaged in a contract, combination, or conspiracy to restrain trade in violation of Section 1 of the Sherman Act" (*id.* ¶ 339). But merely citing a requirement or element of the purported cause of action and baldly alleging that the requirement is satisfied is not enough to sustain a claim against Defendants. *Iqbal*, 129 S. Ct. at 1949. These allegations are precisely the "defendant-unlawfully-harmed-me" accusations that cannot survive a motion to dismiss. *Id.*; *see also* Fed. R. Civ. P. 8.

Finally, Plaintiffs' claims fail as a matter of law because their allegations, stripped of rhetorical devices, are so internally inconsistent that they do not (and cannot) support any plausible theory of recovery against Defendants. Again to illustrate, Plaintiffs complain on the one hand that the Patronage Dividends the Brokers received from FMLS "caused the Plaintiffs to pay higher commissions." (Am. Compl. ¶ 340). Yet, Plaintiffs simultaneously allege that FMLS "Members that do ***not*** receive [Patronage Dividends] are impeded from reducing commissions." (*Id.* ¶ 140 (emphasis added)). If, as Plaintiffs allege, Member-brokers that do not receive Patronage Dividends are unable to reduce commissions,

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impermissible (albeit erroneous) legal conclusions regarding the applicability and scope of the RESPA statute. Not only does such a report attempt to usurp this Court's role as the proper interpreter of the laws at issue, *see*, *e.g.*, *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990), it is completely irrelevant to the issues at hand because this Court must disregard any legal or conclusory allegations in the Amended Complaint (and the attachments thereto) in deciding Defendants' motion to dismiss, *see Iqbal*, 129 S. Ct. at 1950.

then it follows that Patronage Dividends actually ***reduce***, not ***increase*** commissions, and thus benefit the individuals who pay those commissions.

In sum, despite using 123 pages (excluding exhibits) and 409 enumerated paragraphs, the Amended Complaint falls far short of stating any plausible claim and should be dismissed with prejudice.

I. SUMMARY OF THE AMENDED COMPLAINT

A. The FMLS Business Structure.

FMLS is one of many entities within the State of Georgia that provides an electronic database—known as a multiple listing service ("MLS")—"for the benefit of" licensed real estate professionals. (Am. Compl. ¶ 36; *see also* ¶¶ 41-50). Plaintiffs identify at least sixteen MLS providers that compete with FMLS, including Georgia MLS ("GAMLS"). (*Id.* ¶¶ 49, 55, 56).

An MLS system benefits licensed real estate professionals by "enabl[ing] 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." (*Id.* ¶ 45); *see also* FTC & DOJ, Competition in the Real Estate Brokerage Industry ("FTC/DOJ Report") 10-11 (2007), *available at* http://www.ftc.gov/reports/realestate/V050015.pdf. An MLS creates efficiencies in the real estate industry by offering a single source from which members can

gather property information they previously had to search for in numerous locations. FTC/DOJ Report at 12.

Like other MLS providers with which FMLS competes, FMLS grants its members, comprised of real estate brokerage firms and the licensed agents affiliated with them (collectively, "Members"),[2] exclusive access to its listing service; neither non-Member brokers and agents nor the general public can access the FMLS database. (*See* Am. Compl. ¶¶ 44, 46, 50-51). Also like other MLS providers, FMLS markets its services to brokers and agents, not to individual homebuyers or sellers like Plaintiffs. (*See generally id.*, Ex. G). Similarly, FMLS interacts directly with its Members, not the individuals that its Members represent. (*See*, *e.g.*, *id.* ¶¶ 36-51, 79); *see also* FTC/DOJ Report at 10.

1. The FMLS Fee Structure.

According to Plaintiffs, most MLS providers charge their members a flat rate membership fee (often on a monthly and/or per-user basis) in exchange for the right to access their listing databases. (Am. Compl. ¶¶ 55-59). FMLS, on the other hand, employs an alternative fee structure. FMLS calculates the fees charged to

[2] Member brokerage firms ("Brokers") and licensed agents ("Agents") named as Defendants shall be collectively referred to by the terms indicated here. The Amended Complaint provides a basic explanation of the difference between a "listing broker" and a "selling broker." (Am. Compl. ¶ 29).

each Member as $1.20 for each thousand dollars of the actual selling price of a listed property. (*Id.* ¶ 82, Ex. C at 1). Thus, instead of charging a flat monthly fee, FMLS charges a fee ("Fee") to its Members in the event that "a property listed for sale on the FMLS database is sold." (Am. Compl. ¶ 61). In other words, FMLS generally receives its Fee in cases where its MLS database plausibly contributed to the procurement of the sale of a listed property. Members are fully aware of the FMLS Fees and have agreed to pay them in exchange for access to the FMLS listing services. (*See id.* ¶ 69, Ex. B at 12 (Rule 16), Ex. C).

FMLS reviews its Members' accounts at the end of each calendar year and charges a minimum annual fee ("Annual Charge") at the beginning of the following year to compensate FMLS for that Member-broker's access to its services during the previous year. (*Id.* ¶ 63, Ex. C at 2). The Annual Charge is $1,500, but is reduced by the total amount of Fees the Member-broker paid to FMLS during the previous year. (*Id.*, Ex. C at 2). Thus, FMLS essentially charges each Member-broker a $1,500 minimum annual fee in exchange for granting MLS access to an unlimited number of agents affiliated with that Member-broker.[3]

[3] The Annual Charge only applies to FMLS Member-brokers, not to each individual agent affiliated with that broker. (Am. Compl. ¶¶ 42-43 (distinguishing Principal and Associate Members), Ex. C at 2).

FMLS also charges miscellaneous fees for certain ancillary services. (*Id.* ¶¶ 60, 62, 64, 110).

GAMLS charges its members a monthly fee in exchange for access to its database.[4] (*Id.* ¶ 57). The GAMLS monthly fee is $100 to each broker, plus $20 per licensed agent working out of the broker's office. (*Id.*). Under this structure, the minimum annual fee to a GAMLS member-broker who employs a single licensed agent amounts to $1,440—*i.e.*, only $60 less than the effective minimum annual fee FMLS charges its Member-brokers. Each additional affiliated agent would increase the annual fee owed to GAMLS by $240. Thus, in many instances where a broker has more than one affiliated agent, the GAMLS annual fees are greater than the FMLS Annual Charge.

Plaintiffs allege that the FMLS fee structure results in profits that "are far in excess of those generated by GAMLS or other similarly situated MLS [providers]." (*Id.* ¶ 90). But, the totality of their allegations refutes this assertion. Plaintiffs acknowledge that FMLS returns a significant portion of the collected

[4] Like FMLS, GAMLS also charges initiation and miscellaneous fees for certain ancillary services and assesses fines for failure to comply with its rules. (*Id.* ¶¶ 56-57); *see also* Listing Policies & Procedures on the GAMLS website, http://www.gamls.com/help/gamlspolicy.cfm (noting the fine for noncompliance).

Fees to Member-brokers ("Patronage Dividends").[5] (*Id.* ¶¶ 126-32; *but see* ¶ 125, Ex. F at art. VII, § 2 (disputing characterization as "dividends")).[6] Plaintiffs

[5] Plaintiffs' pejorative labeling of the Patronage Dividends as "kickbacks" reflects their fundamental misunderstanding of the FMLS fee structure, and the fact that patronage dividends are well-recognized as legal and appropriate. *See Chamber of Commerce of Minneapolis v. F.T.C.*, 13 F.2d 673, 675 (8th Cir. 1926) (defining "patronage dividends" simply as the "division of net profits among its patrons in proportion to patronage"). Courts and legislatures alike have long recognized that a corporation is free to "distribute[] to its members in the form of patronage dividends, based upon the members' purchases, all funds accumulated less operating expenses." *Central-Retailer-Owned Grocers, Inc. v. F.T.C.*, 319 F.2d 410, 413, 415 (7th Cir. 1963) (recognizing such corporation as "an inherently legitimate enterprise"); *see also Langston Corp. v. Standard Register Co.*, 553 F. Supp. 632, 635 (D. Ga. 1982) (implicitly recognizing propriety of patronage dividends paid after deduction of expenses); 26 U.S.C. § 1382(b) (setting forth tax implications of paying patronage dividends); Donald A. Frederick, *Income Tax Treatment of Cooperative: Distributions, Retains, Redemptions, and Patrons' Taxation*, Cooperative Information Report 44, Part 3 at 4 (2005), *available at* http://www.rurdev.usda.gov/rbs/pub/cir443.pdf ("The linchpin of cooperative equity accumulation is the patronage refund. A patronage refund is a distribution from a cooperative to a patron, based on the amount of business done with or for that patron, out of net earnings from business with or for all patrons."). Moreover, any organization is eligible to participate as a cooperative and issue patronage dividends. *See generally* Donald A. Frederick, *Income Tax Treatment of Cooperative: Background*, Cooperative Information Report 44, Part 1 at 42 (2005), *available at* http://www.rurdev.usda.gov/rbs/pub/cir441.pdf ("Cooperatives are not limited to marketing and purchasing, they may also perform services as their primary activity."). Thus, despite Plaintiffs' derogatory mischaracterization, returning corporate profits in proportion to patronage is not a "kickback"; it is a patronage dividend.

[6] Plaintiffs inexplicably attached to the Amended Complaint what they implicitly acknowledge is an inoperable, decades-old version of the FMLS bylaws. (Am. Compl., Ex. F (dated 1974), ¶¶ 80, 84 (citing Ex. F as an "historic" document yet acknowledging change in practice from what appears in that document)). Because

allege that FMLS pays Patronage Dividends "in an amount equal to at least all of the [Fees] paid by the Member" based on "the volume or quantity of [Fees] the Member has paid to FMLS." (*Id.* ¶¶ 132-133). Thus, Plaintiffs acknowledge that FMLS returns Patronage Dividends to its Member-brokers, thereby reducing their overall cost for using FMLS's services.

Plaintiffs' supposed "comparison" of the GAMLS and FMLS fee structures is incomplete, and it inaccurately portrays FMLS's competitive pricing structure. By ignoring the effect of the Patronage Dividends and the fact that many brokerage companies employ more than a single agent, Plaintiffs necessarily over-state the fees that FMLS retains and its profits in comparison to those of GAMLS. *See supra* Part I.A.1. at 6-9. Notwithstanding Plaintiffs' mischaracterization and internally inconsistent factual statements, any difference in the charges is legally inconsequential: the consumers of MLS services—brokers and agents—are free to use either GAMLS or FMLS, or both, regardless of any difference in cost. (*See*, *e.g.*, Am. Compl. ¶¶ 185, 204, 223).

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the FMLS bylaws are incorporated by reference in the Amended Complaint and are central to Plaintiffs' claims, Defendants have attached the bylaws in operation at the time each of the three properties relevant to Plaintiffs' claims was listed with FMLS. (Defs.' Mot. to Dismiss, Ex. A ("Mot. Ex. A")). The Court may consider these updated bylaws without converting this motion to one for summary judgment. *See SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010) (citing *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005)).

2. The FMLS Rules.

Each FMLS Member contractually agrees to comply with a set of Rules and Regulations ("Rules") established by FMLS. (*Id.* ¶ 69, Ex. B). Notably, the Rules do not limit the manner in which Members are permitted to compete with each other, and Plaintiffs do not allege that the Rules are exclusionary. To ensure that its database provides value, FMLS, like other MLS providers, requires Members to list properties located within a specified geographic area (the "Compulsory Area") on the FMLS database.[7] (*Id.* ¶¶ 70-71, Ex. B at 4 (Rule 6), Ex. D). Members are permitted to list properties located outside the Compulsory Area on the FMLS database (*id.*, Ex. B at 4 (Rule 6.1(b)), and nothing in the Rules prohibits a Member from simultaneously listing a property with FMLS ***and*** another MLS provider; in fact, each of the three properties that form the basis for Plaintiffs' claims were listed for sale in both the FMLS and GAMLS databases. (*Id.* ¶¶ 185, 204, 223).

When a Member contracts to provide brokerage services to a prospective property seller, the FMLS Rules require the Member to provide FMLS with a copy of the listing agreement entered with its client. (*Id.* ¶ 77, 335, Ex. B at 4 (Rule 7)).

[7] GAMLS also requires its members to list properties located within a specific geographic area. (*See*, *e.g.*, Am. Compl. ¶ 76, Ex. E).

The listing agreement provides FMLS with a means of verifying both (1) the Member's authority to list the homeowner's property for sale, and (2) the accuracy of the information to be presented to other Members through the online listing. FMLS's online listings (like those of other MLS providers) include, among other information, the commission being offered to any selling broker who assists in procuring a sale of the property. (*See id.* ¶¶ 77, 335, Ex. H at 2); *see also* Listing Policies and Procedures on the GAMLS website, http://www.gamls.com/tools/compliance/policies_procedures.cfm (instructing members to enter the commission offered to the selling broker); FTC/DOJ Report at 10, 12-13. Other than vaguely stating that FMLS provides Member-brokers with "access" to "commission information" (Am. Compl. ¶ 119), there is no specific allegation that FMLS shares any commission information other than the commission being offered to a selling broker, if any. (*See id.*, Ex. H at 2).

FMLS also requires its Members to report the execution of any contract to sell or purchase a listed property. (*Id.*, Ex. B at 11 (Rule 14)). But, Rule 14 expressly establishes that "FMLS shall in no way be involved in determining compensation charged by real estate brokerage firms or the commission split between cooperating real estate brokerage firms." (*Id.*). After closing, if any, in order to verify the Fees owed by its Members and to double-check the accuracy of

the sales data, FMLS requires a Member involved in the transaction to provide FMLS with a "Notice of Closing" form, the HUD-1 Settlement Statement, and the Fees owed for that transaction. (*Id.* ¶¶ 61, 108-109, Ex. B at 12 (Rule 16)). Notably, FMLS does not charge Fees to individual consumers (*i.e.*, homebuyers or sellers), and it does not receive any Fees directly from them. (*See*, *e.g.*, *id.* ¶¶ 88, 106, 108, Exs. B at 12 (Rule 16), J, K, & L).

B. Relevant Contracts and Allegations Specific to the Named Plaintiffs.

Plaintiffs are consumers who bought and/or sold homes through the named Brokers and Agents in three separate transactions in 2009. (*Id.* ¶¶ 183-240 (collectively, the "Three Transactions")). Plaintiffs' individual claims—the only claims relevant to Defendants' motion[8]—all arise out of facts and circumstances related to the Three Transactions.

The Three Transactions involve many of the documents identified *supra*, Part I.A., including: (1) the listing agreements between the sellers and their Brokers (*see*, *e.g.*, *id.* ¶¶ 185, 202, 204, 223); (2) the brokerage agreements between the buyers and their Brokers (*id.* ¶¶ 184, 222); (3) the purchase and sale

[8] Although Plaintiffs have alleged claims on behalf of a putative class of plaintiffs (Am. Compl. ¶ 25), dismissing Plaintiffs' individual claims would deprive them of standing to pursue the putative class claims.

agreements (*id.* ¶¶ 184, 203, 222); and (4) the HUD-1 settlement statements (*id.* ¶¶ 188, 207, 226).[9] A brief overview of these documents is provided below.

1. Brokerage Agreements.

Plaintiffs allege that all of the parties to the Three Transactions engaged the services of a Broker. On the buying side, Plaintiffs allege each individual entered into a written contract with a selling Broker to assist with locating properties suitable for purchase. (*See id.* ¶¶ 183-184, 206, 221-222). On the selling side, each individual homeowner executed an "exclusive listing agreement" with a listing Broker to assist with the sale. (*See id.* ¶¶ 202-203; Defs.' Mot. to Dismiss, Exs. B ("Mot. Ex. B"), C ("Mot. Ex. C"), & D ("Mot. Ex. D")).

Each of the three listing agreements outlined the commissions to be paid to the Brokers in the event of a sale. Specifically, each seller agreed to pay a specified commission to the listing Broker (Mot. Ex. B ¶ 6(A)-(B); Mot. Ex. C ¶ 6(A)-(B), Special Stipulations; Mot. Ex. D ¶ 7(A)-(B)), and each listing agreement

[9] Although each of these documents is identified in the Amended Complaint and is central to Plaintiffs' claims, the HUD-1s are the only items actually attached to that pleading. (*Id.*, Exs. J, K, & L). However, because the Amended Complaint also incorporates by reference many of the other critical documents identified above, Defendants have attached Exhibits B through G to their motion to dismiss. *SFM Holdings, Ltd.*, 600 F.3d at 1337 (citing *Day*, 400 F.3d at 1276); *see also Ware v. Polk Cnty. Bd. of Comm'rs*, 394 F. App'x 606, 608 (11th Cir. 2010); *Horne v. Potter*, 392 F. App'x 800, 802 (11th Cir. 2010).

further provided that the listing Broker would "share this commission with a cooperating broker, if any, who procures the buyer of Property" (*id.*).

Each listing agreement also authorized the listing Broker to "advertise [the] Property for sale" and "distribute listing and sales information (including the sales price) to . . . members of the multiple listing service(s)." (Mot. Ex. B ¶ 5(A); Mot. Ex. C ¶ 5(A); Mot. Ex. D ¶ 5(A)). All three sellers "acknowledge[d] that by virtue of listing the Property in MLS(s), all MLS(s) members and their affiliated licensees, w[ould] have access to Seller's listing information for the purpose of assisting Seller in the sale of the Property." (Mot. Ex. B ¶ 5(C); Mot. Ex. C ¶ 5(C); Mot. Ex. D ¶ 5(B)). However, each seller also specifically "acknowledge[d] that the MLS(s) is/are not a party to this [listing a]greement." (*Id.*).

For each of the Three Transactions, the listing Broker and seller "agree[d] to file this listing" in two MLS databases—GAMLS and FMLS. (Mot. Ex. B ¶ 5(C); Mot. Ex. C ¶ 5(C); Mot. Ex. D ¶ 5(B); *see also* Am. Compl. ¶¶ 185, 204, 223). All three listing agreements identified a different commission to be paid to the listing Broker, but each provided that any selling broker would be offered a 3% commission.[10] (Mot. Ex. B ¶ 6(B); Mot. Ex. C ¶ 6(B); Mot. Ex. D ¶ 7(B)).

[10] Notably, the commissions stated in the listing agreements were often different than the commissions ultimately paid to the Brokers at closing. *See infra* Part I.C.

2. Purchase and Sale Agreements.

The buyers and sellers of the Three Transactions also executed purchase and sale agreements outlining the agreed terms for closing those sales. (Defs.' Mot. to Dismiss, Exs. E ("Mot. Ex. E"), F ("Mot. Ex. F"), & G ("Mot. Ex. G")). All three contracts identified the costs the buyer and seller were obligated to pay at settlement (*i.e.*, the closing of the transaction). (Mot. Ex. E ¶ 5; Mot. Ex. F ¶ 5; Mot. Ex. G ¶ 5). The real estate commissions were among the closing costs addressed, and all three contracts specifically incorporated the listing agreement. (Mot. Ex. E ¶ 13(B); Mot. Ex. F ¶ 13(B); Mot. Ex. G ¶ 13(B)). The contracts also authorized the closing attorneys to pay the listing and selling Brokers directly out of the settlement proceeds. (*Id.*).

3. HUD-1 Settlement Statements.

Plaintiffs ultimately closed on the Three Transactions (Am. Compl. ¶¶ 187, 206, 225), at which time the buyers and sellers each received a copy of the HUD-1 Settlement Statement (*id.* ¶¶188, 207, 226, Exs. J, K, & L). Among other things, the HUD-1s provided an accounting of the amounts due to and owed from buyer and seller at "settlement." (*See id.*, Exs. J, K, & L); *see also* Instructions for

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at 17 (chart). Notwithstanding Plaintiffs' contrary allegations, this fact reflects that the Brokers' commissions (along with other aspects of the Three Transactions) were, in fact, negotiated among the parties.

Completing HUD-1 and HUD-1a Settlement Statements, 24 C.F.R. 3500 App. A (2009). Under the heading "settlement charges," each HUD-1 specifically identified the amounts paid as "broker's commission," along with other settlement charges such as loan origination fee, appraisal fee, credit report, lender's inspection fee, title examination fee, and others. (*See*, *e.g.*, Am. Compl., Ex. J at 2 (lines 700-1400)). None of the HUD-1 statements listed any fee paid to GAMLS, FMLS, or any other MLS provider among the "settlement charges." (*Id.*, Exs. J, K, & L). Each HUD-1 also reflected that the property sellers—not the buyers—paid the charges designated as real estate "[c]omission[s] paid at settlement."[11] (*Id.*, Ex. J at 2 (line 703); Ex. K at 2 (same); Ex. L at 2 (same)).

C. <u>The Three Transactions.</u>

Pursuant to the allegations in the Amended Complaint, including the documents incorporated therein, the following provides a summary description of the amounts the Brokers and FMLS received as a result of the Three Transactions:[12]

[11] Pursuant to its brokerage agreement, the selling Broker for the Germantown Drive Transaction also received a $195 flat fee from its buyer-clients. (Am Compl., Ex. L at 2 (line 704)).

[12] Plaintiffs do not allege that the Boards received any monetary compensation (or any other benefit) from the Three Transactions.

	SALES PRICE[13]	**BROKER COMPENSATION** (*Proposed Rate*[14] */ Actual Rate*[15])	**FMLS FEES**[16]
BENDCREEK LANE	**$239,900**	Listing Broker: $4,798 (3% / 2%) Selling Broker: $7,197 (3% / 3%) TOTAL: **$11,995** (6% / 5%)	**$575.76**
GERMANTOWN DRIVE[17]	**$154,000**	Listing Broker: $3,850 (2.5% / 2.5%) Selling Broker: $4,620 (3% / 3%) TOTAL: **$8,470** (5.5% / 5.5%)	**$369.60**
NEWBERRY POINT DRIVE[18]	**$195,000**	Listing Broker: $5,670 (2.75% / 2.91%) Selling Broker: $5,310 (3% / 2.72%) TOTAL: **$10,980** (5.75% / 5.63%)	**$468.00**

[13] The Sales Price and Broker Compensation are from the HUD-1 statements attached to the Amended Complaint. (Am. Compl., Exs. J, K, & L).

[14] The Proposed Rates are from the listing agreements. (Mot. Exs. B, C, & D).

[15] The Actual Rates are calculated by dividing the Broker Compensation by the Sales Price identified in the HUD-1 statements.

[16] The Fees are from the Amended Complaint. (Am. Compl. ¶¶ 191, 210, 232).

[17] The listing agreement provided for the listing Broker to receive either 4% or 2.5% commissions, depending on whether the buyer engaged a selling broker. (Mot. Ex. C ¶ 6(A)-(B), Special Stipulations). The selling Broker's compensation does not include the $195 fee reflected in the HUD-1. *See supra* at 16 n.11.

[18] The listing agreement provided for the seller to pay an additional $195 fee to the listing Broker (Mot. Ex. D ¶ 7(A)), but this additional fee does not appear as a separate charge anywhere on the HUD-1 and Plaintiffs do not allege that it was ever paid. Plaintiffs do allege that the selling Broker's commission was reduced as a result of a $360 payment for a home warranty, which appeared on the HUD-1. (Am. Compl. ¶ 207, Ex. K at 2 (line 701)).

II. STANDARD FOR DISMISSAL[19]

Pursuant to Rule 12(b)(6), the Court must take all well-pleaded facts as true and must construe the reasonable inferences in the light most favorable to the non-moving party. *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1273 n.1 (11th Cir. 1999). But if the complaint fails to state a legally cognizable claim, it must be dismissed under Rule 12(b)(6). *Id.*

Under Rule 8, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557). The Supreme Court in *Iqbal* outlined a two-step approach to determine the

[19] Defendants also move to dismiss the Amended Complaint under Fed. R. Civ. P. 12(b)(1) based upon Plaintiffs' lack of standing to assert various causes of action. Where appropriate, Defendants will address the standing arguments as they relate to each individual claim asserted.

sufficiency of alleged claims. First, a court should identify and reject any conclusory allegations which, "because they are no more than conclusions, are not entitled to the assumption of truth." 129 S. Ct. at 1950. Second, considering only the "well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id*. A claim is facially plausible when "the plaintiff pleads ***factual*** content that allows the court to draw the ***reasonable inference*** that defendant is liable for the misconduct alleged." *Id.* at 1949 (emphasis added). Following *Iqbal*'s two-step approach, it is clear the Amended Complaint fails to state any cognizable claim.

When a complaint does not satisfy all material elements of the claims asserted therein, it should be dismissed, and the dismissal should be with prejudice when amendment would be futile. *See Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (per curiam); *Valet Apartment Servs., Inc. v. Atlanta J. & Const.*, 865 F. Supp. 828, 834 (N.D. Ga. 1994) (denying leave to amend).

III. ARGUMENT AND CITATION OF AUTHORITY

A. Summary of Arguments.

Counts One and Two of the Amended Complaint, alleging violations of RESPA Sections 8(a) and 8(b), both fail as a matter of law. Plaintiffs' RESPA allegations center on Defendants' failure to disclose the FMLS Fees and Patronage

Dividends to Plaintiffs. Specifically, Plaintiffs rely on the legal conclusion that FMLS provides a "settlement service." But this claim fails as a matter of law because: (1) FMLS does not provide any "settlement service" within the meaning of RESPA; and (2) as Plaintiffs' allegations make clear, they did not pay for the FMLS services. These simple facts alone provide a sufficient basis on which this Court can and should dismiss the RESPA claims. Moreover, RESPA does not provide Plaintiffs with a private right of action to remedy any lack of disclosure.

Plaintiffs also assert that Defendants violated the prohibition against "referrals" found in RESPA Section 8(a). But there can be no RESPA "referral" where, as here, the party allegedly referred did not pay for the "settlement service." *See* 24 C.F.R. § 3500.14(b). Thus, Plaintiffs' own allegations belie their "referral" claim: Plaintiffs never allege that they paid any fee or charge to FMLS. This fact also disqualifies Plaintiffs from recovering damages under RESPA Section 8(d)(2), which expressly limits the availability of damages "to the person or persons ***charged*** for the settlement service involved in the violation." 12 U.S.C. § 2607(d)(2) (emphasis added). Finally, to the extent Plaintiffs assert that FMLS failed to provide any service in exchange for the Fees, such claim fails because the allegations clearly indicate that FMLS provided access to the listing database.

Count Three alleges a price-fixing claim under Section 1 of the Sherman Act, 15 U.S.C. § 1. This claim, too, fails as a matter of law. Plaintiffs attempt to hold Defendants liable for the alleged price-fixing of broker commissions based merely upon the fact that FMLS Members agree to pay the Fees and abide by the Rules. But Plaintiffs do not allege any concerted action in setting the FMLS Fees. Moreover, even if the Fees technically set a floor for Member-broker commissions (much like the price of eggs technically sets a floor to the price of an omelet), such allegations, standing alone, do not state a price-fixing claim. Furthermore, as indirect purchasers, Plaintiffs cannot recover for the alleged pass-down of the FMLS Fees via broker commissions. Similarly, there is nothing about the FMLS Rules, either on their face or as alleged in practice, that restricts competition among brokers or establishes or fixes broker commissions. Because the Rules are part of a larger, procompetitive venture, they should be judged under the rule of reason. Plaintiffs' failure to define the relevant geographic and product markets requires dismissal of this claim. Finally, Plaintiffs make no attempt to allege any facts showing that the Boards participated in any alleged conspiracy, but instead rely instead on their failure to take action against the other Defendants. Such allegations are wholly insufficient to hold the Boards liable as co-conspirators to the alleged price-fixing.

The Amended Complaint likewise fails to state any claim arising under Georgia state law. Plaintiffs' unfair competition claim (Count Four) essentially fails for the same reasons Plaintiffs have failed to state a claim under federal antitrust law. Count Five purports to state a claim against the Brokers for violations of the Georgia Uniform Deceptive Trade Practices Act ("UDTPA"), O.C.G.A. § 10-1-371 *et seq*. However, Plaintiffs do not have standing to pursue their requested injunctive relief and, in any event, have not pled facts sufficient to support any alleged violation of the UDTPA. Count Six fails to state a claim for unjust enrichment because Plaintiffs do not (and cannot) allege that FMLS was enriched in any way that was manifestly unjust, particularly because Plaintiffs do not allege that they conferred any direct benefit on FMLS. Although Count Seven alleges negligent misrepresentation against the Brokers and Agents, Plaintiffs have failed to plead facts supporting the essential elements of the claim. Lastly, Count Eight fails to state a claim for civil conspiracy because Plaintiffs do not sufficiently allege any agreement among Defendants or the essential elements of any underlying tortious conduct.

In short, Plaintiffs have alleged a set of "square peg facts" that do not come close to fitting into the "round legal holes" that they posit. Because Plaintiffs have failed to state any viable claims, even after having the opportunity to cure the

defects in their initial pleading, Defendants move this Court to dismiss the Amended Complaint, with prejudice, pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

B. Plaintiffs Fail To State A RESPA Cause of Action.

Counts One and Two of the Amended Complaint, asserted against FMLS and the Brokers and Agents, purport to allege RESPA violations premised upon Defendants' allegedly unlawful referrals and fee splitting. The Amended Complaint is littered with allegations that none of Defendants disclosed the FMLS Fees or Patronage Dividends to Plaintiffs (*see*, *e.g.*, Am. Compl. ¶¶ 95, 115, 124, 141, 144-150, 195, 197, 206, 215-216, 226, 234, 236), which Plaintiffs contend violated RESPA Section 8(a) and 8(b) (*id.* ¶¶ 250-298).[20] RESPA, however, neither requires such disclosures nor provides any private right of action through which Plaintiffs may pursue their claims.

1. RESPA Does Not Provide Any Private Right of Action for a Consumer to Recover Fees Allegedly Omitted From a HUD-1 Settlement Statement.

For reasons discussed below, RESPA does not apply to the FMLS Fees and thus does not impose on Defendants any legal duty to disclose the FMLS Fees to

[20] The heading of Count Two erroneously refers to 12 U.S.C. § 2608 (*i.e.*, RESPA Section 9), which prohibits a seller from requiring a homebuyer purchasing title insurance to use a specified title company. This provision simply does not apply to Plaintiffs' RESPA claims, all of which purportedly arise under Sections 8(a) or (b).

Plaintiffs. *See infra* Parts III.B.2. to 6. But, even assuming, *arguendo*, that RESPA required such disclosure, the statute does not provide Plaintiffs with the right to redress any failure to do so. RESPA does not provide ***any*** private right of action for a consumer to sue to redress an alleged HUD-1 omission, or any other alleged failure to disclose information, because there is no private right of action for violation of the disclosure requirements.[21] The only relevant provisions of the RESPA statute under which consumers are entitled to sue are the following two subsections of Section 8:

> **§ 2607. Prohibition against kickbacks and unearned fees**
>
> (a) Business referrals
>
> No person shall give and no person shall accept any fee, kickback, or **thing of value** pursuant to any ***agreement or understanding***, oral or otherwise, that business incident to or a part of a ***real estate settlement service*** involving a **federally related mortgage loan** shall be ***referred*** to any person.
>
> (b) Splitting charges
>
> 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***

[21] *See Collins v. FMHA-USDA*, 105 F.3d 1366, 1368 (11th Cir. 1997); *Frazile v. EMC Mortg. Corp*., 382 F. App'x 833, 836 (11th Cir. 2010) (affirming dismissal of RESPA claims on this basis); *Lingad v. Indymac Fed. Bank*, 682 F. Supp. 2d 1142, 1151 (E.D. Cal. 2010) (nothing in RESPA indicates congressional intent to create private cause of action); *Morrison v. Brookstone Mortg. Co.,* 415 F. Supp. 2d 801, 806 (S.D. Ohio 2005) (same).

> ***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(a) & (b) (emphasis added).[22] As to these provisions, as explained in more detail below, Plaintiffs' RESPA allegations amount to nothing more than a formulaic recitation of the statutory requirements and do not state ***facts*** sufficient to support the requisite elements of any cause of action. *Twombly*, 550 U.S. at 555 ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

2. RESPA Does Not Govern the FMLS Fees or Patronage Dividends Because FMLS Is Not a Settlement Service Provider.

Pursuant to the plain language of RESPA, stating a viable claim under Section 8(a) or (b) requires a plaintiff to allege either (1) payment made in exchange for the referral of a "settlement service," or (2) a fee paid for a "settlement service" that was never actually provided to the plaintiff. *See* 12 U.S.C. § 2607(a) & (b). Here, Plaintiffs challenge the Fees that the Brokers paid to FMLS, and the Patronage Dividends FMLS returned to the Brokers, by baldly alleging that the services FMLS provides to its Members constitute "settlement

[22] Emphasized terms are further defined in the HUD regulations, *see* 24 C.F.R. § 3500 *et seq*., and case law, *see* cases cited generally *infra* Part III.B.

services." (Am. Compl. ¶ 103). Not a single allegation supports the assertion that MLS listing services, generally, and those provided by FMLS, in particular, are "settlement services."

a. FMLS does not provide "settlement services."

As the Eleventh Circuit recently noted, courts "are necessarily limited in [their] interpretation of 'settlement service' by the statutory definition and the regulations interpreting it." *Wooten v. Quicken Loans, Inc.*, 626 F.3d 1187, 1192 (11th Cir. 2010). RESPA expressly defines the term "settlement service" as "any service provided in connection with a real estate settlement [*i.e.*, closing] including, but not limited to, the following:

> title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement.

12 U.S.C. § 2602(3). HUD's regulation enacting RESPA, Regulation X,[23] sets forth an even more detailed definition of "settlement service" to mean any service provided in connection with a prospective or actual settlement, including but not

[23] Neither Regulation X nor the RESPA statute expressly defines the term "settlement service provider."

limited to fourteen specific categories,[24] as well as a catch-all that applies to the "[p]rovision of any other services for which a settlement service provider ***requires a borrower or seller to pay***."[25] 24 C.F.R. § 3500.2(15) (emphasis added).

Taking these definitions together and reviewing all their terms, it is apparent that a "settlement service" is one provided in connection with a real estate settlement (*i.e.*, closing) for which the service provider requires payment from the buyer or seller. The FMLS listing services simply do not fit this definition. MLS database services are not included within the enumerated services listed in RESPA or the HUD regulations; they are not essential to or required as part of the settlement; and, most importantly, neither the buyer nor the seller was ever charged a single penny for the FMLS listing services. (*See* Am. Compl., Exs. J, K, & L).

Brokers pay Fees to FMLS in exchange for obtaining the right to access the electronic listing database, both as a tool for listing a client's property for sale and to view properties available for sale for clients looking to purchase. The Fees are similar to those that brokers and agents pay to other vendors (*e.g.*, newspapers,

[24] Title 24 of the Code of Federal Regulations, § 3500.2, identifies fourteen categories of "settlement services," none of which include MLS database services—the only service that FMLS is alleged to provide.

[25] Plaintiffs cannot rely on the "catch-all" provision for the simple reasons that, as explained below, FMLS is not a "settlement service provider" and Plaintiffs do not (and cannot) allege that FMLS "requires [Plaintiffs] to pay" for its services.

television stations, and printing companies) who provide services that are ancillary to and enhance their own brokerage services. RESPA's definition of "settlement service" was not meant to (and does not) encompass ancillary services that brokers and agents use to create the package of "brokerage services" they provide to their clients. Accessing a listing service is ancillary to brokerage services, as is providing advertisements, promotional materials, and yard signs, hosting an open house, staging the decor, and dozens of others. Brokers and agents simply absorb the expenses associated with each facet of their services as a cost of doing business, and so long as the parties to a settlement are not required to pay for such services, they are not "settlement services" within the meaning of RESPA.[26]

Indeed, the case law makes clear that even some services for which consumers ***are charged*** as part of the real estate purchase and finance process are ***not*** settlement services. In *Wooten*, the Eleventh Circuit narrowed the scope of what constitutes a "settlement service" and determined that loan discount points paid at closing do not qualify as charges made in exchange for the "rendering of a real estate settlement service" within the meaning of Section 8(b). *See Wooten*,

[26] Plaintiffs pointlessly allege that "[a]ny 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." (Am. Compl. ¶ 93). Regardless of whether listing services constitute "advertising," marketing, or promotion, they do not fall within the definition of "settlement services" governed by the RESPA statute.

626 F.3d at 1189. Relying on the Sixth Circuit's analysis in *United States v. Graham Mortgage Corp.*, 740 F.2d 414 (6th Cir. 1984),[27] the Court observed that discount points and improved loan terms were not among the enumerated settlement services defined in RESPA, and that the negotiation of advance interest terms is not a service directly related or necessary to concluding a settlement. *Wooten*, 626 F.3d at 1193-95. Likewise, here, the listing services that FMLS provides are not included within the enumerated list of defined settlement services and, unlike the loan discount points at issue in *Wooten*, the FMLS listing services were not even provided to Plaintiffs, but rather to their Brokers and Agents.

[27] The *Graham Mortgage* opinion is widely considered to be the seminal case on interpreting the statutory definition of "settlement service." In that case, the Sixth Circuit considered whether the making of a mortgage loan—which, at that time, was not among the services enumerated in RESPA's definition of settlement services—nonetheless fit the definition by virtue of the catch-all provision: "any service provided in connection with a real estate settlement." 740 F.2d at 415, 417-18. The Sixth Circuit held that the catch-all portion of the definition did not cover the making of mortgage loans because, at best, the RESPA statute was ambiguous with respect to whether mortgage financing constituted a settlement service, and thus the statutory definition should be construed in favor of the defendants according to the rule of lenity. *Id.* at 417, 423. The rule of lenity calls for construing an ambiguous statute in favor of the party potentially subject to liability, and while primarily a criminal statute, it applies with equal force where, as here, the underlying statute (*i.e.*, RESPA Section 8) has the same standard for imposing civil and criminal liability. *See United States v. Bass*, 404 U.S. 336, 348 (1971); *see also Clark v. Martinez*, 543 U.S. 371, 380 (2005); *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992). As such, the rule of lenity, if applied to this case, provides an additional ground on which this Court could dismiss Plaintiffs' RESPA claims.

Indeed, the sole purpose of the FMLS database is to facilitate the communication of information about properties among and between brokers and agents; it permits a homeowner's broker to list an available property and a selling broker to search for properties suitable to a client's needs.

If MLS services not charged to consumers are nevertheless regarded as settlement services, then every other expense that a broker incurs in the course of providing brokerage services likewise would be a "settlement service." Yet both the express statutory language of Section 8 and *Wooten* make clear that Congress never intended such a result in enacting the RESPA statute.

b. The FMLS services do not comprise a "business incident to settlement services."

In an apparent effort to circumvent the fact that FMLS does not provide any "settlement service," Plaintiffs present the theory that the FMLS services constitute "business incident to settlement services." (Am. Compl. ¶¶ 104, 264). Neither the RESPA statute, HUD's regulations, nor the relevant case law provides any support for this theory. *Accord Wooten*, 626 F.3d at 1193 ("[T]he service referred to by RESPA includes any act undertaken to bring about the execution of a mortgage and note."). The "business incident to" a settlement service language of Section 8(a) is not intended to cast an all-encompassing net, but simply to subsume ***direct charges to consumers for components of settlement services***.

The following example is instructive. If a settlement service provider engages a courier to deliver documents to closing, and if the settlement service provider directly charges a separate fee to the consumer for doing so, then the delivery service may become a "business incident to settlement service" for which the settlement service provider "requires a borrower or seller to pay," and the charge to the consumer for this delivery service may then be subject to RESPA. *See* 24 C.F.R. § 3500.2 (quoting from the definition of settlement service); *see also Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 984 (11th Cir. 2003) (adjudicating lender's mark-up of and charge for a courier fee to a class of consumers under Section 8(b) of RESPA, but finding no violation where lender actually performed services to justify the mark-up). By contrast, if the settlement service provider delivers the documents itself, or through a third party delivery service ***without*** a separate charge to the consumer, the delivery is not a "business incident to settlement service" that can be challenged under RESPA, because the charge constitutes nothing more than a cost of doing business absorbed by the settlement service provider. The latter is precisely what occurred when the Brokers here paid Fees to FMLS.

There is no allegation, nor could there be, that the Brokers charged Plaintiffs for the Fees that the Brokers paid to FMLS; to the contrary, the allegations show

that the Brokers were obligated to pay the FMLS Fees regardless of whether Plaintiffs fulfilled their independent contractual obligations to pay the Brokers for their brokerage services. (Am. Compl. ¶¶ 61, 82, Ex. C). Although Plaintiffs assert that the Brokers paid the Fees "from settlement proceeds" (*id.* ¶ 102), the rest of the Amended Complaint belies this legal conclusion. The FMLS Rules simply required the Brokers to pay FMLS .0012% of the sales price within ten days following settlement; they did not require the Brokers to use the specific commissions earned in connection with the Three Transactions to do so. (*See id.*, Ex. B at 12 (Rule 16)). In other words, Plaintiffs do not (and cannot) allege that a Broker's obligation to pay Fees to FMLS is in any way contingent upon that Broker receiving a commission. In fact, because these are wholly independent contractual obligations arising from wholly separate contractual arrangements,[28] a Member-broker remains obligated to pay the FMLS Fee even if that broker does not collect a commission.

[28] A broker's right to collect a commission arises, if at all, from that broker's contract with its client or from the purchase and sale agreement for the underlying property, or in the absence of a contract, from *quantum meruit* or procuring cause. *See*, *e.g.*, *Killearn Partners, Inc. v. Se. Props., Inc.*, 611 S.E.2d 26, 29 (Ga. 2005). On the other hand, a broker's obligation to pay the FMLS Fees arises from that broker's separate agreement entered into with FMLS.

Moreover, even if the Brokers actually paid all or part of the Fee using commission income from the Three Transactions, this fact would not transform a mere business expense of the Brokers into a "settlement service" charged to and paid by Plaintiffs. Brokers and agents undoubtedly use their commission income to pay expenses such as rent, utilities, advertising, salaries, technology, and the like, and doing so does not convert the items paid for into "settlement services," or make the payments subject to RESPA. In fact, Plaintiffs' assessment of RESPA would subject brokers and agents (and their service providers) to civil and criminal penalties for merely using their business income (*i.e.*, their commissions) to pay regular business expenses—including, among others, fees paid to newspapers that advertise homes for sale, rent, employee salaries, professional association dues, and, of course, the fees charged by ***any*** MLS provider. Thus, to allow Plaintiffs' RESPA claims would result in an unintended, unprecedented, and unsupportable expansion of the statute's scope.[29] *Cf. Wooten*, 626 F.3d at 1194 ("We can find

[29] Recognizing the weakness of their settlement service arguments, Plaintiffs allege that, "[e]ven if FMLS does not provide settlement services or does not provide services incident to a real estate settlement under RESPA, the [Fee] represents a split of commissions purportedly in exchange for settlement services." (Am. Compl. ¶ 105; *see also* ¶ 265). This additional allegation fails to state a claim for several reasons. First, the FMLS Rules simply require Member-brokers to pay .0012% of the sales price without in any way dictating which funds the Member must use to pay the Fee. (*Id.*, Ex. B at 12 (Rule 16)). There is no plausible basis

nothing in the legislative history surrounding Congress's 1992 amendments to RESPA . . . , to suggest a broader definition of 'settlement services.'").

3. Plaintiffs Were Not Referred to FMLS Within the Meaning of RESPA Section 8(a).

In addition to the fact that FMLS does not provide any "settlement services," the Amended Complaint does not present any factual allegations to support the claim that the Brokers "referred" Plaintiffs to FMLS in violation of Section 8(a). Inherent in the concept of a RESPA referral is that the person being referred is or will be charged a fee for the service provided.[30] HUD defines a "referral" as:

> [A]ny oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service ***when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business***.

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for characterizing the FMLS requirement for payment as a split of broker or agent commissions. Second, under RESPA, even if the payment requirement somehow could be viewed as a split of fees or commissions, it is not a "split . . . in exchange for settlement services" because the MLS services do not fall within the definition of that term. *See supra* Pt. III.B.2.a.

[30] Indeed, as shown *infra*, Part III.B.5., Plaintiffs may not recover damages because they were not charged for the alleged settlement service. 12 U.S.C. § 2607(d)(2).

24 C.F.R. § 3500.14(f)(1) (emphasis added).[31] The regulation explicitly requires that a person "pay for [the] settlement service or business incident thereto or pay a charge attributable in whole or in part to the settlement service." *Id.* Again, the only payments Plaintiffs allegedly made were for the brokerage services provided by the Brokers and Agents pursuant to their listing and/or brokerage agreements (Mot. Exs. B, C, & D), as modified by the purchase and sale agreements (Mot. Exs. E, F, & G), for each of the Three Transactions. Notwithstanding the assertion that "FMLS receive[d] a direct benefit from Plainitffs" (Am. Compl. ¶ 91), Plaintiffs simply do not and cannot allege that any Plaintiff paid any Fee to FMLS.

While RESPA also refers to paying a charge "attributable in part" to a settlement service, this phrase can only be interpreted in the context of RESPA's "required use" and "referral" definitions.[32] It does not apply to situations where a

[31] *See also* 24 C.F.R. § 3500.14(f)(2) ("A referral also occurs whenever a person ***paying for a settlement service or business incident thereto*** is required to use . . . a particular provider . . . .") (emphasis added).

[32] The "attributable in part" language was intended to cover situations where buyers and sellers each pay part of a settlement service charge, such as title insurance (where in many states one party pays for the lender policy and the other pays for the owner's policy), or where the parties split the closing fee. *See generally* New RESPA Rule FAQs 42 (2010), http://www.hud.gov/offices/hsg/ramh/res/resparulefaqs.pdf (answering that if the seller is paying for a borrower's service, the charge must be listed in the ***borrower's*** column on the HUD-1 Settlement Statement, and "[a] credit from the seller to the borrower to

broker's fee must be "attributable" to that broker's expenses. Indeed, were courts to accept such an interpretation, it would mean that consumers are likewise "referred" to providers of yard signs and newspaper ads, among other services, despite the fact that such services (like MLS database services) are merely those that brokers and agents regularly use in the course of their business and were never intended to be subject to RESPA unless directly charged to the consumers.

4. Plaintiffs Fail to State a Claim Under RESPA Section 8(b).

Relying on the HUD Section 8(b) Policy Statement, 66 Fed. Reg. 53,052, 53,057 (Oct 18, 2001), Plaintiffs also claim that the FMLS Fee is "unearned" because it is paid after the real estate settlement services have been rendered, serves no legitimate purpose, and is, in Plaintiffs' view, unusual and unnecessary. (*See*, *e.g.*, Am. Compl. ¶¶ 281-290).

Yet even ignoring that FMLS is not a settlement service provider, that an MLS is not a "settlement service," and that Plaintiffs did not pay and were not charged any Fee for the FMLS services, Plaintiffs' Section 8(b) claim, that the "unearned" fee is unlawful, fails for at least two additional reasons. First, Plaintiffs improperly rely on language from HUD's 2001 Policy Statement

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offset the charge should be listed on the first page of the HUD-1 in Lines 204-209 and Lines 506-509 respectively").

outlining examples of "unearned fees" (*id.* ¶ 281), ignoring Eleventh Circuit precedent indicating that this Court need not defer to HUD's Section 8(b) pronouncements. *See Sosa*, 348 F.3d at 984; *Friedman v. Mkt. St. Mortg. Corp*. ("*Friedman II*"), 520 F.3d 1289, 1298 (11th Cir. 2008). Second, and importantly, the hallmark of a Section 8(b) claim in the Eleventh Circuit is that ***no*** service was performed in exchange for the charged fee. *See Busby v. JRHBW Realty Inc*., 513 F.3d 1314, 1321 (11th Cir. 2008); *Sosa*, 348 F.3d at 983-84. Here, the Amended Complaint asserts that the Brokers and Agents actually received the services for which they paid Fees to FMLS—*i.e.*, access to the MLS database. (Am. Compl. ¶¶ 185, 204, 223). At most, Plaintiffs can claim that the services FMLS provided were not sufficient to justify the size of the Fee, but any such claim is not cognizable under RESPA Section 8(b).

The Courts of Appeal that have considered the issue have held, without exception, that Section 8(b) was never intended to be a price-setting statute, and thus does not prohibit any alleged overcharges or excessive pricing of settlement services.[33] For example, in *Friedman II*, the Eleventh Circuit firmly rejected the

[33] *See Santiago v. GMAC Mortg. Grp. Inc.*, 417 F.3d 384, 387 & n.3 (3d Cir. 2005); *Kruse v. Wells Fargo Home Mortg. Inc.*, 383 F.3d 49, 56 (2d Cir. 2004); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003); *Boulware v.*

notion that Section 8(b) imposes any liability "for charging a fee that is excessive in relation to services or goods actually rendered," notwithstanding the contrary language in the HUD 8(b) Policy Statement. 520 F.3d at 1296-97. The Court concluded: "As with the Second, Third, Fourth, Seventh, and Eighth Circuits, we hold that subsection 8(b) does not govern excessive fees because it is not a price control provision." *Id.* at 1296. In reaching its decision, the Court relied on the plain language of the statute, which prohibits charging fees for services not performed. Thus, the Court refused to divide a charge into reasonable or unreasonable components. *See id.* at 1298.

In this instance, where it is plain from Plaintiffs' allegations that FMLS actually provided the services at issue and that Plaintiffs simply complain that the FMLS Fees charged to the Brokers (not to Plaintiffs themselves) were too high, Plaintiffs fail to state a claim under Section 8(b) of RESPA.

5. Plaintiffs Cannot Recover RESPA Damages Because They Were Not Charged for the Services Provided.

Plaintiffs seek treble damages (but no other relief) for the alleged violations of RESPA Section 8. But Plaintiffs are not entitled to recover RESPA damages

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Crossland Mortg. Corp., 291 F.3d 261, 268 (4th Cir. 2002); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 881 (7th Cir. 2002).

because, as stated, Plaintiffs were never charged for the services that FMLS provides. RESPA's damages provision states:

> Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable ***to the person or persons charged for the settlement service*** involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

12 U.S.C. § 2607(d)(2) (emphasis added). Even assuming, *arguendo*, that FMLS actually provides a settlement service (which it does not), Plaintiffs never allege that they were charged for such service, at closing or otherwise. (*See* Am. Compl., Exs. J, K, & L). For this simple reason, Plaintiffs do not meet the requirements for the recovery of RESPA damages and their claims should be dismissed.

6. Plaintiffs Do Not State a Claim for Any Violation of the Affiliated Business Arrangement Exemption.

In Count Two of the Amended Complaint, Plaintiffs erroneously assert that RESPA imposes an enforceable obligation for a party to disclose its use of any affiliated business arrangement. (*See* Am. Compl. ¶¶ 310-11). Based on this erroneous belief, Plaintiffs continue to try to stretch the reach of RESPA to lengths neither permitted nor envisioned. *See* 24 C.F.R. § 3500.2.

Plaintiffs mistakenly assume that FMLS and its Members are engaged in an "affiliated business arrangement" ("ABA"). An ABA requires (1) a referral (2) of settlement service business or business incident thereto (3) among entities who are

affiliates or who are in a cross ownership situation. *See Gardner v. First Am. Title Ins. Co*., 296 F. Supp. 2d 1011, 1018 n.9 (D. Minn. 2003) ("[A]n [ABA] involves only two parties, 'a person who is in a position to refer [settlement] business' and 'a provider of settlement services,' in which either party 'directly or indirectly refers such business to ***that*** provider or affirmatively influences the selection of that provider.'" (quoting 12 U.S.C. § 2602)). Here, Plaintiffs have not adequately alleged any referral, or that FMLS provides settlement services, *see supra*, Parts III.B.2. & 3., and thus have not alleged the existence of an ABA.

Even if an ABA existed, however, RESPA imposes no independent obligation upon the parties to disclose an ABA. To the contrary, Section 8(c)(4) of RESPA simply provides a safe harbor for a provider that refers settlement service business to another affiliated provider if: (1) there is a disclosure of the affiliated business arrangement and the fees that the consumer will be charged; (2) the referring party does not require the use of its affiliate; and (3) the only thing of value obtained from the ABA is a return on an ownership or franchise interest, or a payment otherwise permitted under RESPA. *See* 12 U.S.C. § 2607(c)(4). In this regard, two salient facts stand out. First, Section 8(c)(4) is an ***exemption*** from RESPA liability rather than an affirmative disclosure requirement. If a party does not qualify for the exemption, it simply means that the exemption may not be used,

but the failure to qualify for an exemption does not itself constitute a RESPA violation. *See*, *e.g.*, *McCullough v. Howard Hanna Co*., No. 1:09CV2858, 2010 WL 1258112, at *3 (N.D. Ohio Mar. 26, 2010) (dismissing complaint "[b]ecause the statute and regulations promulgated thereunder do not create a cause of action for failing to comply with the § 2607(c)(4) ABA requirements").[34] Second, there is no obligation to disclose the so-called "required use." Rather, RESPA prohibits requiring the consumer to use the party being referred and, just like a referral, the required use prohibition is only applicable to a consumer who pays for some or all of the referred settlement service. *See* 24 C.F.R. § 3500.2 (to show a required use, the person must "pay for the settlement service of the particular provider or . . . pay a charge attributable . . . to the settlement service"). Because no such facts are alleged in the Amended Complaint, Count Two fails to state a RESPA claim.

C. Plaintiffs Fail To State A Section 1 Price-Fixing Claim.

In addition to their RESPA counts, Plaintiffs purport to allege a federal antitrust claim based on purported price-fixing of broker commissions. Yet they

[34] S*ee also Gardner*, 296 F. Supp. 2d at 1017 n.7 ("[B]ecause the section 8(c) exceptions are expressed in the disjunctive, a transaction between affiliated entities that does not satisfy the [ABA] exemption is not an automatic RESPA violation."); *Capell v. Pulte Mortg. LLC*, No. 07-1901, 2007 WL 3342389, at *5 (E.D. Pa. Nov. 7, 2007) (failure to establish the ABA exemption is not a *per se* RESPA violation; all elements of a RESPA violation must be alleged and proven).

do not allege any particular agreement on the level of broker commissions. Plaintiffs do not allege that any employees or officers of any Member-broker got together and reached an agreement on broker commissions, much less that FMLS or any members of the Boards did so. In fact, they do not allege any communications among the Member-brokers at all. Instead, Plaintiffs rely solely on the fact of membership in FMLS—a procompetitive joint venture that provides a beneficial service that none of its Members could obtain alone—and the Member-brokers' use of the shared MLS service. Plaintiffs' entire antitrust claim is built on its conclusory allegation that "through the adoption and enforcement of Rules 6, 7, 14, and 16, the [Fees], and the [Dividends], the Defendants . . . agreed to and did fix, raise, maintain, and stabilize the commissions paid by purchasers and sellers of residential real estate listed on the FMLS database by at least the amount of the [Fees]." (Am. Compl. ¶ 340). But allegations that Member-brokers agreed to abide by the FMLS Rules and pay a common cost for a valuable service simply do not state a plausible claim for collusion on downstream pricing. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) ("[M]erely charging, adopting or following the fees set by a Consortium is insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act."); *see also Twombly*, 550 U.S. at 555. Plaintiffs suggest several implausible theories of how

the operation of FMLS could result in stabilizing broker commissions. But they do not even allege that commissions are parallel, much less that the Member-brokers reached some agreement to fix commissions. The facts alleged—that Member-brokers participate in and pay for a shared service provided by a joint venture that plays no role in setting broker commissions—are merely speculative. Moreover, such facts are more consistent with independent and pro-competitive economic self-interest than with antitrust conspiracy. The leap of logic that Plaintiffs would require the Court to take in order to sustain their antitrust claim is simply too great.

1. Plaintiffs Do Not Sufficiently Allege a Conspiracy to Fix Broker Commissions.

Because Plaintiffs never allege the existence of any agreement regarding the fixing of broker commissions, they have failed to state a claim under Section 1 of the Sherman Act. To establish a Section 1 price-fixing claim, a plaintiff must plead and ultimately prove (1) concerted action (2) that unreasonably restrains competition. *Jacobs v. Tempur-Pedic Int'l Inc.*, 626 F.3d 1327, 1333 (11th Cir. 2010). To avoid saddling defendants with the crushing burden of litigating vague or frivolous antitrust claims, the Supreme Court has held that a Section 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. These "[f]actual allegations

must be enough to raise a right to relief above the speculative level." *Id.* at 555; *see also Tempur-Pedic*, 626 F.3d at 1332-33.

Under *Twombly*, it is not sufficient for a complaint to assert conclusory allegations, labels, conclusions, formulaic recitations, or naked assertions of conspiracy, none of which are entitled to a presumption of truth. 550 U.S. at 555-56; s*ee also Iqbal*, 129 S. Ct. at 1949. Instead, the complaint must provide sufficient "context"—factual averments as to "'specific time, place, or person involved in the alleged conspiracies.'" *See Twombly*, 550 U.S. at 548-49, 565 n.9; s*ee also Kendall*, 518 F.3d at 1047; *In re LTL Shipping Servs. Antitrust Litig.*, No. 1:08-MD-01895, 2009 WL 323219, at *10 (N.D. Ga. Jan. 28, 2009). A plaintiff must "allege sufficient facts plausibly suggesting (not merely consistent with) an agreement in violation of § 1." *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 908 (6th Cir. 2009); *see also Tempur-Pedic*, 626 F. 3d at 1333.

"To state a claim against ***each*** Defendant" in an antitrust conspiracy case, the complaint "must make allegations that plausibly suggest that ***each*** Defendant participated in the alleged conspiracy." *Hinds Cnty. v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499, 513 (S.D.N.Y. 2009) (quotation marks omitted; emphasis added). More specifically, the plaintiff "must allege that 'each individual defendant joined the conspiracy and played some role in it' because, 'at the heart of an antitrust

conspiracy is an agreement and a conscious decision by each defendant to join it.'" *In re Elec. Carbon Prods. Antitrust Litig.*, 333 F. Supp. 2d 303, 311-12 (D.N.J. 2004) (quoting *Jung v. Ass'n of Am. Med. Colls.*, 300 F. Supp. 2d 119, 163-64 (D.D.C. 2004)). Thus, while a plaintiff is entitled to have its allegations as to individual defendants considered "in the context of the larger conspiracy alleged," it retains the "burden of adequately alleging that a conspiracy to restrain trade existed in the first instance and that ***each*** defendant knowingly joined or agreed to participate." *Jung*, 300 F. Supp. 2d at 160-61 (emphasis added).

Here, however, Plaintiffs' allegations regarding membership in and the payment of Fees to FMLS amount to nothing more than "conclusory allegation[s] of agreement at some unidentified point," which "do[] not supply facts adequate to show illegality." *Twombly*, 550 U.S. at 557. The Amended Complaint is full of conclusory allegations such as Defendants "colluded on," and "fix[ed], raised[ed], maintain[ed], and stabiliz[ed] the commissions." (Am. Compl. ¶¶ 120, 340). Plaintiffs heavily rely on pejorative and unfounded labels and legal conclusions devoid of factual support,[35] and such formulaic allegations are insufficient to

[35] For example, Plaintiffs devote approximately four pages of Count Three to quoting an Antitrust Compliance Policy adopted by the National Association of Realtors ("NAR") and an FTC/DOJ Report regarding the residential real estate industry. (Am. Compl. ¶¶ 329-334, 337, 341). Despite Plaintiffs' suggestion to

establish a price-fixing conspiracy. "[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support a § 1 claim." *Twombly*, 550 U.S. at 559 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). Here, the conspiracy Plaintiffs seek to manufacture (allegedly involving over 2,260 Member-brokers and 42,000 Member-agents (Am. Compl. ¶ 73)) is simply implausible. *See In re ATM Fee Antitrust Litig.*, No. C 04-02676, 2010 WL 3701912, at *10 (N.D. Cal. Sept. 16, 2010) (concluding it implausible to infer that 4,100 member banks conspired, even though they agreed to pay allegedly fixed interchange fees). Plaintiffs' vague, scattershot allegations do not satisfy these pleading standards and the claim must be dismissed.

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the contrary (*id.* ¶ 341), the NAR policy is not a statement of applicable law regarding Sherman Act violations, and as mere third-party advice given to NAR members, should be given no weight by this Court. The FTC/DOJ Report is no more instructive, as it was issued to the real estate market generally and did not focus on Georgia or any other particular real estate market. Moreover, that Report recognizes the procompetitive benefits of an MLS and only expresses anticompetitive concerns where MLS rules exclude brokers from membership, which Plaintiffs here do not allege. *See* FTC/DOJ Report at 63-66.

a. Plaintiffs do not allege any conspiracy regarding broker commissions based on the setting of the FMLS Fees.

Plaintiffs vaguely allege that the FMLS fee structure somehow affected a price-fixing conspiracy on broker commissions. However, Plaintiffs' complete failure to allege any facts regarding ***how*** the FMLS Fees are set precludes any claim that the Fees somehow resulted in a violation of the antitrust laws. Furthermore, as indirect purchasers, Plaintiffs are barred from basing an antitrust claim on any pass-down of the FMLS Fees via broker commissions.

i. Plaintiffs do not allege any concerted action with respect to the FMLS Fees.

To state a Section 1 claim, Plaintiffs must do more than allege that FMLS, a single entity, established a price for its services. Among other things, Section 1 requires plurality of actors and concerted action; it does not proscribe "conduct that is 'wholly unilateral.'" *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984); *see also Twombly*, 550 U.S. at 553. The Supreme Court has emphasized that the "distinction between unilateral and concerted action is ***critical***." *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986) (emphasis added); *see also Kline v. Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974).

Plaintiffs do not dispute that FMLS, like any MLS, is entitled to receive compensation for the services it provides. Plaintiffs' only complaint is that the

method by which FMLS calculates its Fees differs from its competitors and allegedly results in higher prices for FMLS's services. (Am. Compl. ¶¶ 61-66). Although Plaintiffs allege that Defendants "agreed to and did fix, raise, maintain, and stabilize the commissions . . . through the adoption and enforcement of the [Fees]" (*id.* ¶ 340), they do not state a claim for price-fixing of broker commissions based on the FMLS Fees, because Plaintiffs do not allege concerted action in setting the FMLS Fees. Other than conclusively stating that the "[b]rokers with . . . large brokerage firms . . . own and control FMLS" and that FMLS's "stockholder members are among the larges and most successful brokers in Georgia," Plaintiffs do not allege any facts describing FMLS's corporate structure, its method of doing business, or the process by which it sets its Fees. (*Id.* ¶¶ 38, 39). Plaintiffs do not allege that Defendant Brokers "own and control" FMLS or even identify which brokers allegedly "own and control" FMLS. Nor do Plaintiffs allege that any broker's ownership of, or membership in, FMLS requires or even permits it to set the FMLS Fees. Indeed, Plaintiffs make no allegations regarding how, or by whom, the FMLS Fees are set. As a result, Plaintiffs have not pled concerted action by FMLS and its Members in setting the FMLS Fees. *See*, *e.g.*, *Kendall*, 518 F.3d at 1048 (dismissing complaint alleging the defendant banks "participate[d] in the management of and ha[d] a proprietary interest in the

Consortiums" because "merely charging, adopting or following the fees set by a Consortium is insufficient as a matter of law to constitute a violation of Section 1" (internal quotation marks omitted)); *In re ATM Fee*, 2010 WL 3701912, at *10.

Rather than provide factual allegations regarding how the Fees are set, Plaintiffs merely allege that the FMLS Fees are too high. But there is nothing inherently unlawful about an entity's decision to adopt a fee structure that is different from that of its competitors, or even higher than its competitors' fees.[36] *Kendall*, 518 F.3d at 1048; *Ariz. v. Standard Oil of Cal. (In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.)*, 906 F.2d 432, 445 (9th Cir. 1990) (rejecting that evidence suggesting prices were "'too high'" could indicate existence of an unlawful conspiracy, reasoning that "[w]ere [it] to permit such a theory, few pricing decisions would be immune from antitrust scrutiny").[37]

[36] Similarly, FMLS's mere change in the method of calculating its Fees, regardless of whether the amount of Fees was thereby increased or, as alleged here, stayed the same (Am. Compl. ¶¶ 84-85, 336), does not allege an overt act in furtherance of a conspiracy to fix commissions. "[I]t is perfectly plain that an internal 'agreement' to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police." *Copperweld*, 467 U.S. at 769.

[37] Even if Plaintiffs had alleged facts suggesting concerted action in setting the FMLS Fees, Plaintiffs do not allege conduct that would constitute a *per se* violation of Section 1. A joint venture's act of setting the price of its service is judged under the rule of reason. *See*, *e.g.*, *Texaco, Inc. v. Dagher*, 547 U.S. 1, 7 (2006) (holding that "[a] single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells," and such

ii. Plaintiffs lack standing under Illinois Brick *to challenge any agreement regarding the FMLS Fees.*

Additionally, because Plaintiffs explicitly acknowledge that their alleged harm is attributable to the pass-on of the FMLS Fees via inflated commission rates, they are merely indirect purchasers under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and cannot recover based on that alleged pass-on. (*See* Am. Compl. ¶ 181 ("The [FMLS Fees] 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 . . . .")). Under *Illinois Brick*, consumers who purchase a product or service from a retailer or distributor (here, the Brokers and Agents)—and not directly from a manufacturer or original supplier (here, FMLS)—lack standing to bring an antitrust action against the original supplier. *Ill. Brick*, 431 U.S. at 746. Although the Court announced two exceptions to this rule, neither exception applies to the facts alleged here. *See, e.g.*, *Kan. v. UtiliCorp United, Inc.*, 497 U.S. 199, 207 (2010); *Dickson*

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action is not *per se* illegal); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) ("When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act."). Under the rule of reason, Plaintiffs' failure to define the relevant market requires dismissal of the antitrust claim. *See infra* Part III.C.1.d.

v. Microsoft, 309 F.3d 193, 213-216 (4th Cir. 2002); *Austin v. Blue Cross & Blue Shield of Ala.*, 903 F.2d 1385, 1392 (11th Cir. 1990); *In re ATM Fee*, 2010 WL 3701912, at *10. As indirect purchasers, Plaintiffs are not entitled to recover for the pass-on of the FMLS Fees via broker commissions.

b. Each Member-broker's agreement to pay FMLS Fees does not establish any agreement among Defendants to fix broker commissions.

Plaintiffs attempt to allege that each Member-broker's independent agreement to pay the FMLS Fees somehow resulted in a collective agreement to fix the level of their commissions. Plaintiffs allege that the Fee "establishes a 'floor' or minimum commission rate for residential real estate settlements involving FMLS," and that Defendants agreed to "fix, raise, maintain, and stabilize the commissions paid" through the adoption and enforcement of the Fees. (Am. Compl. ¶¶ 92, 340.) However, an agreement to pay for a service "could just as easily suggest rational, legal business behavior by the defendants. . . [and is] insufficient to plead a violation of the antitrust laws." *Kendall*, 518 F.3d at 1049 (holding that while interchange fee "effectively sets a floor for each bank's merchant discount fee . . . much as the cost of eggs sets a floor for the price of an omelet on a menu . . . [t]his behavior suggests a rational business decision, not a conspiracy"); *see also In re Cal. Title Antitrust Litig.*, No. C 08-01341 JSW, 2009

WL 1458025, at *6 (N.D. Cal. May 21, 2009) (noting that when defendants share similar costs, their prices may also be similar even without an agreement to fix prices); *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 964 (N.D. Cal. 2007) ("If anything, similar cost structures would explain why the defendants' prices would naturally be similar without the need for any agreement.").[38]

Moreover, Plaintiffs do not even allege parallel conduct with respect to broker commissions. Indeed, Plaintiffs make no allegation that Member-brokers all charged the same commission,[39] or that broker commissions moved up or down in tandem. "If a conclusory allegation of agreement is not sufficient even when supported by facts demonstrating parallel conduct, such an allegation cannot be sufficient . . . where no parallel conduct or any other factual context is alleged." *Int'l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, No. CV 07-00043 MMM, 2007 WL 4976364, at *10 (C.D. Cal. Oct. 29, 2007); *see also In re Iowa Ready-*

[38] Here, Plaintiffs' allegations are especially implausible because the FMLS Fee constitutes such a small cost to the broker relative to its commission, as seen in the Three Transactions alleged by Plaintiffs. *See supra*, Part I.C. at 17 (chart). Even ignoring the amount of refunded Patronage Dividends, which reduce the cost of FMLS even further, the FMLS Fees in the Three Transactions ranged from $379 to $576, compared to commissions of $8,470 to $10,980. It simply is not plausible to speculate that the payment of this common cost affects a conspiracy to fix broker commissions. *Kendall*, 518 F.3d at 1049.

[39] In fact, the Brokers did not receive commissions at a uniform rate in connection with the Three Transactions. *See supra* Part I.C. at 17 (chart).

Mix Concrete Antitrust Litig., No. C-10-4030, 2011 WL 782049, at *11 (N.D. Iowa Mar. 8, 2011) (dismissing complaint because "the [complaint] does not even allege parallel conduct, but skips straight to conclusory allegations of an agreement among the defendants"). The Member-brokers' payment of this input cost could not plausibly support a price-fixing conspiracy, even if commissions were similar. *See Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 n.22 (9th Cir. 1982) ("Similar costs would necessarily require somewhat similar prices.").

c. No FMLS Rule facilitates or establishes an agreement regarding broker commissions.

Plaintiffs contend that Defendants agreed to "fix, raise, maintain, and stabilize the commissions" through Rules 6, 7, 14, and 16 (Am. Compl. ¶ 340), yet fail to explain how any of these Rules led to an agreement regarding broker commissions. In fact, other than to expressly disavow any role in setting broker commissions, none of the Rules ever address commissions or competition among Member-brokers. (*Id.*, Ex. B at 12 (Rule 14.3)).

i. Rules 6 and 14 cannot plausibly suggest facilitation of an agreement regarding broker commissions.

Rule 6, which requires Members to list properties in a certain area on FMLS without restricting their ability to list on other MLS databases, including GAMLS, does not support an agreement to fix broker commissions. *See, e.g.*, *United States*

v. Realty Multi-List, 629 F.2d 1351, 1355 n.6 (5th Cir. 1980) (noting—but not prohibiting—that the MLS required its members to list all single family residences in the county they agreed to represent on the MLS); *Reifert v. S. Cent. Wisc. MLS Corp.*, 450 F.3d 312, 317 (7th Cir. 2006) (recognizing that an MLS is a "unique product" in part because it often requires members to list on the MLS); FTC/DOJ Report at 10 (recognizing that an MLS contains information on "virtually every home listed for sale in a given area" and that most MLSs require their members to enter newly accepted listings into the MLS database within a short period of time).

Likewise, the requirement in Rule 14 that Members notify FMLS when a contract for sale is executed cannot possibly support an inference of price-fixing. Plaintiffs have not alleged how simply notifying FMLS of the execution of a contract for the sale of a property listed on FMLS could have any effect on broker commissions. Simply put, Rules 6 and 14 do not establish a minimum commission that FMLS Members must charge, restrict the way brokers are permitted to compete with one another, or otherwise affect broker commissions.

ii. Plaintiffs do not plead sufficient facts to support an inference of collusion based on information sharing via Rules 7 and 16.

Finally, Plaintiffs' naked allegation that "FMLS provides its Member Brokers with access to the commission information it compiles" (Am. Compl. ¶¶ 119, 335) does not cure Plaintiffs' failure to allege facts sufficient to plead an

agreement to fix broker commissions. Plaintiffs allege that Rule 7 (through which FMLS collects listing agreements) and Rule 16 (through which FMLS collects the HUD-1 Statements) "invite, encourage, and facilitate collusion among the Members, as competitors, with respect to commissions on residential real estate within at least the Compulsory Area." (*Id.* ¶ 335). Plaintiffs also allege that FMLS "utilizes" commission information in the HUD-1s "to assist the Defendant Brokers and Agents, in combination with each other, in stabilizing and maintaining inflated commission rates." (*Id.* ¶ 118). These allegations do not even allege a lawful agreement to share price information, much less an agreement to fix prices.

Plaintiffs do not allege that Member-brokers agreed to share commission information with one another, whether through FMLS or otherwise. Nor do they attempt to allege ***what*** commission information FMLS uses, ***when*** it is used, or ***how*** it is used. There is no allegation of any conduct indicating any agreement was reached to fix broker commissions as a result of sharing that information. For example, to the extent Plaintiffs are relying on the mere publication in the FMLS listing database of the commission information contained in the Data Input Form, which reflects the information to be included in the database, the only commission to be shared is that being offered to a selling broker. (*Id.* ¶¶ 142, 143, Ex. H at 2). Providing this information through an MLS listing facilitates a cooperation

agreement on particular transactions, is common practice, and enhances the efficiency of the MLS and brokers and agents. *See*, *e.g.*, FTC/DOJ Report at 12 ("[B]y stating up-front the compensation being offered to a cooperating broker, the MLS can reduce the costs associated with listing brokers having to negotiate separately with each potential cooperating broker."). Thus, the vague allegation that FMLS somehow provides its Members with access to commission information does not plausibly suggest an unlawful agreement among Defendants to share commission information. Without allegations of agreement to share commission information, or even an FMLS Rule that requires such information exchange, Plaintiffs have not alleged an agreement to share commission information.

Moreover, even if Plaintiffs had adequately alleged that FMLS Members somehow have access to the commissions charged by their competitors—even by agreement—price exchanges alone are not unlawful. *See, e.g.*, *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 709 (7th Cir. 2011) ("Information exchange can help support an inference of a price-fixing agreement, but, like all circumstantial evidence of conspiracy, it is not on its own demonstrative of anticompetitive behavior, even when pricing data is what is exchanged." (internal citations omitted)); *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d at 447 n.13 ("[I]nformation exchanges help to establish an antitrust violation only when either

(1) the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices, or (2) the exchange is made pursuant to an express or tacit agreement that is itself a violation of § 1 under a rule of reason analysis."); *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1505 (11th Cir. 1985) (sharing price information is not a per se violation and is not unlawful absent an agreement to fix prices); *In re LTL*, 2009 WL 323219, at *8 ("A plaintiff likewise cannot state an antitrust claim by showing only that the Defendants made price information publicly available."). Similarly, the mere opportunity to collude does not establish concerted action. *See*, *e.g.*, *In re Cal. Title*, 2009 WL 1458025, at *6 (allegations that members of a rate-setting organization had the opportunity to obtain competitors' rate information were insufficient to state a Section 1 claim because plaintiffs did not allege the time, place, or persons involved in the conspiracy or facts indicating defendants' acceptance of the alleged rates); *Classic Homes & Dev., LLC v. Fid. Nat'l Title Ins. Co.*, 4:08-CV-00217-GTE, 2009 U.S. Dist. LEXIS 78569, at *15-16 (E.D. Ark. May 12, 2009) (plaintiffs' conspiracy allegations, including allegations that defendants met and exchanged price information, did not plead plausible theory of price fixing, because they "allege[d] nothing more than a set of facts establishing an opportunity to conspire, high prices, and market concentration").

Here, Plaintiffs' vague allegations regarding FMLS's use of commission information cannot support the conclusory assertion that "Defendants colluded on commission rates" where Plaintiffs never allege that brokers' commissions were parallel or any facts at all regarding the who, what, when, where, or how of a price-fixing agreement. *Compare In re Petroleum Prods. Antitrust Litig.*, 906 F.2d at 447 n.13 *with In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1360 (N.D. Ga. 2010) ("[U]nlawful conspiracies may be inferred when collusive communications among competitors *precede changed/responsive business practices, such as new pricing practices*." (emphasis added)).

d. Plaintiffs' failure to allege a relevant antitrust market requires dismissal of their claim.

Plaintiffs' allegations that each Member-broker's agreement to abide by FMLS's Rules somehow effects a price-fixing conspiracy, without any explicit agreement on commissions at all, should be judged under the rule of reason. While agreements to fix prices are *per se* illegal, Plaintiffs here do not allege an agreement to fix prices. Instead, they allege that the Member-brokers' mere adherence to the FMLS Rules somehow restrains competition and results in the stabilization of commissions (although not parallel pricing). "The categorical descriptions of *per se* offenses are quite misleading for anyone not well versed in antitrust." *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 47 (1st Cir. 2001).

"[P]rice-fixing in its literal sense is not condemned *per se*: virtually every sale is an agreement on price." *Id.* Instead, "[t]he only price-fixing agreements that are condemned *per se* . . . are agreements (1) between competitors (2) as to competing products or services (3) where, in addition, the agreement is not part of a larger, legitimate economic venture." *Id.* (citing *Broad. Music v. Columbia Broad. Sys.*, 441 U.S. 1 (1979)). Because the FMLS Rules are part of a larger, legitimate, and procompetitive economic venture, those Rules should be analyzed under the rule of reason. In fact, MLS rules are typically analyzed under the rule of reason, as courts have long recognized the procompetitive benefits offered by an MLS. *See, e.g.*, *Realty Multi-List*, 629 F.2d at 1367; *Keller v. Greater Augusta Ass'n of Realtors*, No. CV 110-050, 2011 WL 108726, at *4 (S.D. Ga. Jan. 12, 2011); *Pope v. Miss. Real Estate Comm'n*, 872 F.2d 127, 130 (5th Cir. 1989) (analyzing fees set by an MLS under the rule of reason); *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) ("The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1.").

Under the rule of reason, courts must consider whether the alleged agreement actually or potentially harms competition. *Tempur-Pedic*, 626 F.3d at 1336. "Regardless of whether the plaintiff alleges actual or potential harm to competition, . . . he must identify the relevant market in which the harm occurs."

Id. Moreover, "antitrust plaintiffs . . . must present enough information in their complaint to plausibly suggest the contours of the relevant geographic and product market." *Id.*; *see also Keller*, 2011 WL 108726, at *4-5.

Here, Plaintiffs have failed to even attempt to define the relevant product or geographic markets, which they must do to state a claim judged under the rule of reason. *See, e.g., JES Props., Inc. v. USA Equestrian, Inc.,* 253 F. Supp. 2d 1273, 1282 (M.D. Fla. 2003) (dismissing Section 1 claim for failure to properly identify product market); *Gen. Cigar Holdings, Inc. v. Altadis, S.A.,* 205 F. Supp. 2d 1335, 1356 (S.D. Fla. 2002) (same). Therefore, Plaintiffs' claim must be dismissed.

Given Plaintiffs' failure to allege any facts indicating an agreement to fix broker commissions or any facts showing that the FMLS Rules restrict its Members' ability to compete with one another on commission rates, this Court should dismiss Plaintiffs' Section 1 claim with prejudice.

2. Plaintiffs' Allegations Are Wholly Inadequate to Show That the Boards Were Involved With Any Price-Fixing Conspiracy.

Plaintiffs' conclusory allegations do not in any way show that the Boards participated in or properly could be held liable for any alleged price-fixing conspiracy. Plaintiffs merely contend that the Boards "knew or should have known" of the alleged anticompetitive conduct of FMLS and its Members. (Am. Compl. ¶¶ 167, 171-178, 342). Merely alleging that the Boards had knowledge of

an alleged antitrust conspiracy[40] is insufficient to establish that they engaged in such conspiracy in violation of Section 1. *See*, *e.g.*, *In re Brand Name Prescription Drugs Antitrust Litig.*, 288 F.3d 1028, 1034 (7th Cir. 2002).

Nor have Plaintiffs alleged any facts plausibly suggesting that the Boards engaged in conduct that facilitated collusion among the other Defendants. Simply alleging that the Brokers and Agents are (or were) members of the Boards does not establish the plausibility of an antitrust conspiracy involving the Boards. *See, e.g.*, *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1295 (11th Cir. 2010) (recognizing "participation in trade organizations provides no indication of conspiracy"). Moreover, even assuming, *arguendo*, that Plaintiffs had adequately alleged that some subset of the Boards' respective members participated in an antitrust conspiracy (which they have not), such allegations, without more, would be insufficient to state a claim against the Boards themselves. *See Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1061 (5th Cir. 1985) ("The Board is less than the sum of its parts: the fact that some members . . . participated in the boycott

[40] The only allegations truly pertaining to the Boards' alleged antitrust liability are that (1) the NAR Handbook and Antitrust Policy prohibit the conduct engaged in by FMLS and the Brokers, and (2) the Boards "failed to take action against FMLS, the Defendant Brokers, or the Defendant Agents to protect the public, including the Plaintiffs, against the [FMLS Rules, Fees, and/or Patronage Dividends]." (Am. Compl. ¶ 342). These allegations, however, do not state a legally cognizable antitrust claim against the Boards.

conspiracy does not imply that the Board itself participated in the conspiracy."). Plaintiffs' Section 1 claim against the Boards should be dismissed with prejudice, because they have not satisfied their burden of adequately alleging the Boards "knowingly joined or agreed to participate in the conspiracy." *See Jung*, 300 F. Supp. 2d at 160-61 (emphasis added).

D. Plaintiffs Fail To State A Claim Under Georgia Law.

Plaintiffs' final counts purport to allege violations of Georgia state law under theories of unfair competition, unfair and deceptive trade practices, unjust enrichment, negligent misrepresentation, and civil conspiracy. As with Plaintiffs' federal causes of action, the vague and conclusory allegations of state-law violations fail to state a claim and should be dismissed.

1. Plaintiffs do not state a claim for unfair competition.

Count Four contends that the agreements by and among Defendants are "unlawful and void" as anticompetitive and encouraging a monopoly. (Am. Compl. ¶¶ 348-49). Although Plaintiffs ask this Court to enjoin Defendants from entering into or abiding by such agreements (*id.*), Plaintiffs never specify which "contracts and agreements" allegedly violate Georgia law, or why or how these indeterminate "contracts and agreements" violate Georgia law. Although Plaintiffs allege that the FMLS Rules "encourag[e] a monopoly" (*id.* ¶ 347), Plaintiffs never

even attempt to identify a relevant antitrust market or otherwise identify what monopoly the Rules supposedly encourage. Such gaping omissions alone are sufficient to warrant dismissal of Count Four.

But, there are additional reasons why any claim for unfair competition arising under the Georgia Constitution—or O.C.G.A. § 13-8-2(a)(2)[41]—must fail as a matter of law.[42] First, despite Plaintiffs' request for compensatory damages and fees, it is well established that a private party may not recover monetary damages for a violation of the constitutional prohibition. *See Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 715 (11th Cir. 1984); *E.T. Barwick Indus. v. Walter E. Heller & Co.*, 692 F. Supp. 1331, 1349 (N.D. Ga. 1987).

[41] The Georgia Constitution provides: "The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void." Ga. Const., art. III, § 6, ¶ 5(c) (1986). The Georgia Supreme Court has construed this constitutional provision and O.C.G.A. § 13-8-2(a)(2) "to mean precisely the same thing." *Griffin v. Vandergriff*, 53 S.E.2d 345, 348 (Ga. 1949); *see also Valley Prods. Co.*, 877 F. Supp. at 1095.

[42] To the extent that Plaintiffs intended to assert a claim for unfair competition under Georgia common law, such claim fails because "'in Georgia, the term unfair competition is a nomenclature for the doctrine that one cannot pass off his goods as those of another.'" *SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc.*, 455 F. Supp. 2d 1347, 1366 (N.D. Ga. 2006); *see also Nationwide Adver. Serv., Inc. v. Thompson Recruitment Adver., Inc.*, 359 S.E.2d 737, 741 (Ga. Ct. App. 1987) (citing *Hayes v. Hallmark Apartments*, 207 S.E.2d 197 (Ga. 1974)). None of the factual allegations in the Amended Complaint are sufficient to support any such a claim.

Additionally, it is axiomatic that a plaintiff asserting claims under the constitutional provision must be a party to the alleged illegal contract in order to have standing to pursue such a claim. *Valley Prods. Co. v. Landmark*, 877 F. Supp. 1087, 1096 (W.D. Tenn. 1994) (citing *Palmer v. Atl. Ice & Coal Corp.*, 173 S.E. 424 (Ga. 1933)), *aff'd*, 128 F.3d 398 (6th Cir. 1997). Plaintiffs' entire claim rests on the conclusory assertion that the contracts ***by and among Defendants*** are "unlawful and void." (Am. Compl. ¶¶ 348-349). Notwithstanding the utter failure to identify any allegedly unlawful contracts, Plaintiffs' own allegations demonstrate that they intend to rely on agreements to which none of Plaintiffs is a party.[43] Accordingly, Count Four must be dismissed for lack of standing.

Moreover, even absent the standing hurdle, Plaintiffs do not plead any facts to develop their unfair competition argument or explain why or how Defendants have violated Georgia law. Defendants can only assume, therefore, that Count Four attempts to assert a state-law alternative to Plaintiffs' federal antitrust claims, discussed *supra* Part III.C. Thus, for the same reasons Plaintiffs failed to state a

[43] With respect to the Boards in particular, Plaintiffs have not alleged any agreement, anticompetitive or otherwise, to which the Boards are parties.

claim under the federal antitrust laws, Plaintiffs' attendant state-law claim for unfair competition likewise must fail.[44]

2. Plaintiffs Do Not State a Claim Under the UDTPA.

Count Five purports to state a claim against the Brokers under the UDTPA for alleged violations of O.C.G.A. § 43-40-25(b)(17) and several Rules of the Georgia Real Estate Commission ("GREC"). Plaintiffs specifically rely on allegations that the Brokers: (1) provided HUD-1s to FMLS; (2) paid Fees to FMLS and accepted Patronage Dividends; and (3) failed to disclose to Plaintiffs the FMLS Rules, Fees, and Patronage Dividends. (Am. Compl. ¶¶ 355, 356-57, 359). First and foremost, Plaintiffs' UDPTA claim fails as a matter of law because Plaintiffs lack standing under that statute to pursue injunctive relief. In addition, Plaintiffs do not plead facts establishing any breach of the GREC Rules, O.C.G.A. § 43-40-25(b)(17), or any other plausible violation of the UDTPA.

[44] In addition to compensatory damages, Plaintiffs seek to enjoin Defendants from entering into or abiding by agreements that would allow the FMLS fee structure to continue. (*See* Am. Compl. ¶ 349). Notably, such an injunction would actually tend to ***reduce***, not ***promote*** competition because, according to Plaintiffs, each metro-Atlanta MLS provider would then be similarly structured. (*See id.* ¶ 55).

a. Plaintiffs do not have standing to pursue the requested injunctive relief under the UTDPA.

Plaintiffs seek to enjoin the Brokers from paying Fees or accepting Patronage Dividends, and to enjoin FMLS from accepting Fees or paying Patronage Dividends to the Brokers. (Am. Compl. ¶ 365). The requested injunction against FMLS is clearly improper, given that Plaintiffs exclusively alleged Count Five as a claim against the Brokers, not FMLS. (*Id.*).

The claim against the Brokers is equally infirm because Plaintiffs lack standing to pursue the requested injunctive relief:

> In order to obtain an injunction under Georgia's UDTPA, a plaintiff must show that he is likely to be damaged by the defendant's deceptive trade practice. A plaintiff who demonstrates past harm, but does not allege ongoing or future harm, has not shown that he is likely to be damaged within the meaning of section 10-1-373(a). Such a plaintiff lacks standing to maintain his suit.

Silverstein v. Proctor & Gamble Mfg. Co., No. CV 108-003, 2008 WL 4889677, at *4 (S.D. Ga. Nov. 12, 2008) (internal quotation marks omitted); *see also Catrett v. Landmark Dodge, Inc.*, 560 S.E.2d 101, 106 (Ga. Ct. App. 2002). Even if the Brokers had somehow violated the UDTPA with respect to the Three Transactions (which they did not), any resulting harm to Plaintiffs would necessarily amount to inactionable past harm. Plaintiffs never allege facts demonstrating that they, individually, are likely to suffer harm as a result of the Brokers' ***future*** compliance

with FMLS Rules, payment of FMLS Fees, or receipt of Patronage Dividends, and thus have not pled any facts demonstrating a likelihood of future harm.

b. Plaintiffs have not pled facts establishing any breach of GREC Rule 520-1-.06(4)(c), GREC Rule 520-1-.10(6)(a), O.C.G.A. § 43-40-25(b)(17). or any other violation of the UDTPA.

The UDTPA claim also fails because Plaintiffs' allegations that the Brokers failed to comply with the GREC Rules and O.C.G.A. § 43-40-25(b)(17) do not state a viable claim under the UDTPA.[45] Plaintiffs have failed to plead facts demonstrating any actual violation of the GREC Rules or O.C.G.A. § 43-40-25(b)(17). Moreover, any attempt to demonstrate any other violation of the UDTPA is facially implausible and thus cannot support a UDTPA claim.

i. Plaintiffs do not plead any violation of the GREC Rules or O.C.G.A. § 43-40-25(b)(17).

Plaintiffs first contend that the Brokers violated GREC Rule 520-1-.06(4)(c) by accepting Patronage Dividends from FMLS. (*See* Am. Compl. ¶¶ 358-59). GREC Rule 520-1-.06(4)(c) provides: "***[r]eal estate licensees*** shall not pay a fee or

[45] Plaintiffs do not seek direct redress for any alleged violation of the GREC Rules or O.C.G.A. § 43-40-25(b)(17). And, Plaintiffs lack standing to assert a direct claim for violation of the GREC Rules, which are merely regulatory in nature and only apply to actions by the GREC in the exercise of its licensing powers, and not to private, individual actions. *Johnson Realty, Inc. v. Hand*, 377 S.E.2d 176 (Ga. Ct. App. 1988); *Magliaro v. Lewis*, 417 S.E.2d 395 (Ga. Ct. App. 1992) (breach of GREC regulatory provisions will not support separate cause of action).

commission ***to a licensee*** representing another party to a transaction except with the full knowledge and written consent of all parties." (Emphasis added). As Plaintiffs acknowledge, FMLS is not a "real estate licensee" (Am. Compl. ¶ 89), so this particular GREC rule does not (and cannot) apply to the Patronage Dividends that FMLS pays to Defendant Brokers, and the Brokers' acceptance of such payments thus cannot violate GREC Rule 520-1-.06.

Plaintiffs also selectively reference portions of GREC Rule 520-1-.10(6)(a)—miscited as GREC Rule 520-10-1(6)(a)—as requiring the Brokers to disclose any fee, charge, rebate, profit, commission, referral fee or other valuable consideration that is related to a purchase, sale or exchange transaction. (Am. Compl. ¶ 361). That rule, however, goes on to provide that "[n]otwithstanding the above, no disclosure shall be required of . . . ***[o]rdinary business expenses*** incurred on behalf of a licensee's principal in performing the services of a broker . . . ." GREC Rule 520-1-.10(6)(a)(1). As Plaintiffs acknowledge, listing a property in an MLS database is an ordinary and routine part of a real estate broker's business. (Am. Compl. ¶¶ 40, 45, 50, 54). Since the GREC Rules expressly state that the Brokers are ***not*** required to disclose routine, ordinary business expenses, and since the use of multiple listing services generally, and the FMLS services in particular,

constitute just such expenses, the Brokers have no obligation to disclose the Fees paid to FMLS.

Plaintiffs also allege that payment of the FMLS Fees violates O.C.G.A. § 43-40-25(b)(17), which bans the payment of compensation to any unlicensed person for performing the services of a real estate licensee. (*See* Am. Compl. ¶ 359). But Plaintiffs never allege that FMLS performed the services of a real estate licensee. To the contrary, Plaintiffs contend that "FMLS provides ***no*** services to sellers or purchasers." (Am. Compl. ¶¶ 81, 96). It is axiomatic that the Brokers could not have paid FMLS for "performing the services of a real estate licensee" if FMLS did not provide any service to Plaintiffs.

ii. Plaintiffs do not plead any other violation of the UDTPA.

Nor do Plaintiffs allege any other basis for their UDTPA claim, which typically revolve around allegedly fraudulent misrepresentations as to the origin, approval, quality, or description of goods or services, false advertising and factual statements about goods or services, and false or misleading statements about the reasons for, existence of, or amounts of price reductions. *See*, *e.g.*, *Morrell v. Wellstar Health Sys., Inc.*, 633 S.E.2d 68 (Ga. Ct. App. 2006). Frequently, such claims relate to the misuse of trade names. *Future Prof'ls, Inc. v. Darby*, 470 S.E.2d 644, 646 (Ga. 1996); *Wood v. Archbold Med. Ctr., Inc.*, No. 6:05 CV

53(HL), 2006 WL 1805729, at *9 (M.D. Ga. June 29, 2006); *Debs v. Meliopoulos*, No. 1:90-cv-939-WCO, 1993 WL 566011, at *11 (N.D. Ga. Dec. 18, 1991).

Here, Plaintiffs never allege any misuse of trade names, or that any of the Brokers or Agents passed off goods, or created a false impression as to the source, sponsorship or approval of goods, or that any price reductions were given or advertised. *See Eckles v. Atlanta Tech. Grp., Inc.*, 485 S.E.2d 22, 24 (Ga. 1997); *Pac. W., Inc. v. LandAmerica Credit Servs., Inc.*, 1:05-CV-0895-JEC, 2007 WL 1970870, at *4 (N.D. Ga. June 29, 2007). The Amended Complaint merely asserts that the Brokers and Agents did not disclose the amount of Fees paid to FMLS and that FMLS refunded some of those Fees to the Brokers in the form of Patronage Dividends. (Am. Compl. ¶¶ 357, 359). At most, these allegations state that Plaintiffs were confused about the Brokers' and Agents' expenses, not their commissions, and that Plaintiffs were unaware of the specific terms of the Brokers' and Agents' contractual relationships with FMLS. But such confusion is wholly irrelevant and insufficient to state a UDTPA claim. Plaintiffs essentially acknowledge that they never paid (and the Brokers never received) any more or greater commissions than what their contracts provided for.[46] (*See* Am. Compl. ¶

[46] For example, on the buying side of the Germantown Drive transaction, Coldwell Banker Heritage Real Estate ("Coldwell Banker") received a $4,620 commission.

353). In other words, Plaintiffs do not (and cannot) allege that any confusion about the Fees or Patronage Dividends resulted in actionable harm under the UDTPA.

3. Plaintiffs do not state a claim against FMLS for unjust enrichment or money had and received.

Count Six alleges that FMLS was unjustly enriched by the Fees it received from the Brokers, and Plaintiffs seek to force FMLS to surrender to Plaintiffs the Fees it earned in connection with the Three Transactions.[47] (Am. Compl. ¶ 366-74). Specifically, Plaintiffs contend that "within 10 days after closing, FMLS received a benefit from the Plaintiffs in the form of . . . Fees from the Defendant Brokers that was funded entirely by the commissions paid by the Plaintiffs." (*Id.* ¶ 368). Plaintiffs thus acknowledge that they never made any direct payment to

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(Am. Compl. ¶ 226, Ex. L at 2 (line 701)). Plaintiffs allege that Coldwell Banker paid an FMLS Fee of $184.80 (*i.e.*, .0012% of the $154,000 sales price). (Am. Compl. ¶ 232). Thus, according to Plaintiffs' allegations, Coldwell Banker received net proceeds of $4,435.20. Even if FMLS provided Coldwell Banker with Patronage Dividends amounting to 100% of the Fees (*i.e.*, $184.80), Coldwell Banker's net proceeds would never exceed $4,620, the exact amount of commissions disclosed to Plaintiffs and paid by the seller in the Germantown Drive transaction. In other words, even based on Plaintiffs' own far-flung allegations, none of the Brokers would ever receive commissions any ***higher*** than those disclosed to Plaintiffs. Thus, Plaintiffs' confusion about the FMLS Fees or Patronage Dividends cannot form the basis of any claim under the UDTPA.

[47] Plaintiffs also confusingly allege that they are entitled to an accounting of all Patronage Dividends that FMLS paid to the Brokers "with respect to each of the settlements at issue." (Am. Compl. ¶ 372). But Plaintiffs never allege that FMLS paid any Patronage Dividends as a direct result of the Three Transactions, nor do they explain how or why they may be entitled to those amounts.

FMLS, and that there was never any contract between Plaintiffs and FMLS concerning the Fees. (*Id.* ¶¶ 368-369). Nevertheless, according to Plaintiffs, FMLS is not entitled to retain the Fees paid by the Brokers and has been unjustly enriched. (*Id.* ¶¶ 369-371). This claim is without merit, as it is contrary to Georgia law and Plaintiffs' own factual allegations, including the incontrovertible provisions of the contracts upon which Plaintiffs' claims depend. *See Friedman II*, 520 F.3d at 1231 ("Where there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control.").

A well-pleaded claim for unjust enrichment based on money had and received "must show that the plaintiff is entitled to money . . . wrongfully obtained or retained by the defendant."[48] *Johnson v. Broyles*, 107 S.E.2d 853 (Ga. Ct. App. 1959). A plaintiff also must show that he is the "true owner" of the money being retained. *Dep't of Medical Assistance v. Hallman*, 417 S.E. 2d 218 (Ga. Ct. App. 1992). Lastly, Plaintiff must demonstrate that the defendant cannot retain the money in good conscience. *Graves v. Carter*, 64 S.E.2d 450 (Ga. 1951); *St. Paul Mercury Ins. Co. v. Meeks*, 508 S.E.2d 646, 648 (Ga. 1998).

[48] "[T]hese are not separate causes of action. An action for money had and received is merely one form of action to recover damages based on unjust enrichment." *Nat'l City Bank of Rome v. Busbin*, 332 S.E.2d 678, 683 (Ga. Ct. App. 1985).

a. Plaintiffs do not sufficiently allege that they are the "true owners" of the Fees paid to FMLS.

Here, Plaintiffs' own allegations belie any claim that they are the "true owners" of the Fees the Brokers paid to FMLS or that FMLS is not equitably entitled to retain the Fees. First, Plaintiffs plainly admit that the only money they paid, if any, were the commissions paid to the Brokers pursuant to the terms of various brokerage agreements and/or purchase and sale agreements. (Am. Compl. ¶¶ 188, 207, 226, 368). The amounts of the Brokers' commissions were clearly established as a matter of contract between the Brokers and the buyers and sellers in the Three Transactions. (Mot. Exs. B-G). Indeed, Plaintiffs never allege that they paid, or the Brokers received, any amount in excess of what the Brokers were entitled to receive pursuant to these contracts. Nor do Plaintiffs allege that the Brokers failed to provide the contracted-for services for which they received commissions. In other words, Plaintiffs tacitly admit that the commissions paid to the Brokers were paid voluntarily, in exchange for services rendered in accordance with the contractual expectations of the parties. *See CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Grp.*, 642 S.E.2d 393, 398-99 (Ga. Ct. App. 2007) (no unjust enrichment where plaintiff's "own complaint shows that [he] received the right [he] bargained for"); *see also Breckenridge Creste Apartments, Ltd. v. Citicorp Mortg., Inc.*, 826 F. Supp. 460, 466 (N.D. Ga. 1993).

Nothing in the Amended Complaint provides any plausible basis for disputing that the Brokers took full ownership of their commission funds immediately upon receipt. As such, the Brokers were free to use those funds as they saw fit. According to Plaintiffs' allegations, the Brokers paid Fees to FMLS (*e.g.*, Am. Compl. ¶ 82), which they did pursuant to their own contractual obligations to FMLS (*e.g.*, *id.* ¶ 69). The Brokers' payments of the FMLS Fees were not, as Plaintiffs suggest, in any way contingent upon the Brokers' receipt of commissions. Rather, the Brokers' contractual obligation to pay Fees to FMLS arose at the time Plaintiffs closed the Three Transactions, and such obligations arose irrespective and independent of whether the Brokers ever actually received any commissions in connection with such transactions. (*Id.* ¶¶ 61, 82-83, Ex. C). Given this factual backdrop, which is supported by the Amended Complaint and the documents incorporated by reference therein, Plaintiffs cannot plausibly allege that they were the "true owners" of the Fees the Brokers paid to FMLS.

b. Plaintiffs do not allege a sufficient basis for contending that equity requires FMLS to return the Fees to Plaintiffs.

Moreover, Plaintiffs have failed to allege sufficient facts to state a plausible claim that equity and good conscience require FMLS to return to Plaintiffs the Fees it received pursuant to independent contractual arrangements with the Brokers. The Brokers paid the Fees in exchange for services that FMLS actually provided to

the Brokers and Agents (*id.* ¶ 79), and the Amended Complaint acknowledges both that the Plaintiffs took advantage of and received the Brokers' and Agents' services (*id.* ¶¶ 183, 202, 221), and that the Brokers and Agents took advantage of and received the benefit of FMLS's services (*id.* ¶¶ 185, 204, 223).

Permitting Plaintiffs to recover the Fees paid to FMLS would result in an inequitable windfall to Plaintiffs because any award of the FMLS Fees to Plaintiffs would effectively result in FMLS subsidizing the commissions Plaintiffs were contractually obligated to pay their Brokers, if any, irrespective of whether the Brokers ever paid Fees to FMLS. *Accord John Thurmond & Assocs., Inc. v. Kennedy*, 668 S.E.2d 666, 670 (Ga. Ct. App. 2008) ("[T]he plaintiff is entitled only to the benefit of the bargain or to be made whole and not to recover a windfall." (citing *Ryland Grp. v. Daley*, 537 S.E.2d 732 (Ga. Ct. App. 2000)). Plaintiffs do not adequately allege ***why*** they are entitled to such a windfall from FMLS, particularly in light of the allegations collectively demonstrating that each party received precisely what he or she bargained for. (Am. Compl. ¶¶ 185, 204, 223).

c. Plaintiffs do not allege that they even provided any direct benefit to FMLS.

It is also worth noting that nowhere in the voluminous Amended Complaint do Plaintiffs assert that any Plaintiff ever made any payment directly to FMLS, and they repeatedly acknowledge through their allegations that the only payment

FMLS received came from the Brokers, not Plaintiffs. (*See*, *e.g.*, Am. Compl. ¶¶ 61, 88, 106, 135). Because Plaintiffs' factual allegations demonstrate that they never provided any ***direct*** payment or benefit to FMLS, the only plausible theory for their unjust enrichment claim is that Plaintiffs conferred some ***indirect*** benefit on FMLS through the commissions they paid to the Brokers and Agents. Any such claim must fail because there is no relevant Georgia authority to support an unjust enrichment claim against a party, such as FMLS, who receives only an indirect benefit from the plaintiff. *Brenner v. Future Graphics, LLC*, 258 F.R.D. 561, 576 (N.D. Ga. 2007). In at least one instance, the Georgia Court of Appeals has upheld summary judgment on an unjust enrichment claim where the record was bereft of evidence showing any direct benefit the plaintiff conferred on the defendant. *Scott v. Mamari Corp.*, 530 S.E.2d 208, 212 (Ga. Ct. App. 2000); *see also McClelland v. First Ga. Cmty. Bank*, No. 5:09-CV-256, 2010 WL 3199349, at *4 (M.D. Ga. Aug. 12, 2010) (dismissing unjust enrichment claim where "[t]he facts alleged do not indicate any [direct] benefit conferred by Plaintiff to the Bank"). For the additional reason that Plaintiffs do not (and cannot) allege any direct benefit conferred upon FMLS, they have failed to state a claim for unjust enrichment.

4. Plaintiffs do not state a claim against the Brokers and Agents for negligent misrepresentation.

In Count Seven of their Complaint, Plaintiffs attempt to state a claim for negligent misrepresentation against the Brokers and Agents. Like Plaintiffs' other state-law claims, this claim fails because Plaintiffs do not allege any facts to show the essential elements of negligent misrepresentation: (1) the negligent supply of false information; (2) reasonable reliance; and (3) economic injury proximately resulting from such reliance. *Hendon Props., LLC v. Cinema Dev., LLC*, 620 S.E.2d 644, 649 (Ga. Ct. App. 2005). Instead, Plaintiffs improperly rely on threadbare recitals of these elements and mere conclusory statements, which are insufficient to survive a motion to dismiss. *See Iqbal*, 129 S.Ct. at 1937.

Plaintiffs essentially allege that the Brokers and Agents negligently supplied Plaintiffs with false information by failing to disclose the Fees and Patronage Dividends. (Am. Compl. ¶ 385). According to Plaintiffs, the Brokers and Agents violated the Brokerage Relationships in Real Estate Transactions Act ("BRRETA"), O.C.G.A. § 10-6A-1 *et seq.*, because BRRETA required them to disclose "material facts of which the broker or agent has actual knowledge

concerning the transaction."[49] (Am. Compl. ¶ 377); *see also* O.C.G.A. §§ 10-6A-5(a)(2)(C) and 10-6A-7(a)(2)(C). Without a single supporting allegation, Plaintiffs ask this Court to make the illogical leap that the FMLS Fees and Patronage Dividends are somehow "material facts" within the meaning of BRRETA. Plaintiffs never even attempt to explain why they reasonably could not have discovered the Fees or the Patronage Dividends, or why they would reasonably want to know these amounts before deciding to close the Three Transactions.

Plaintiffs similarly fail to allege any factual support for the allegation that they "did justifiably and reasonably rely upon this false and misleading information to their detriment." (Am. Compl. ¶ 390). There is nothing on the face of the Amended Complaint to support this conclusory statement, and Plaintiffs certainly have not alleged any act or failure to act as a result of their purported ignorance of the Fees and Patronage Dividends. In fact, Plaintiffs have not even alleged that they would not have closed on the Three Transactions but for the alleged misrepresentation of the Brokers' commissions, much less any other injury allegedly suffered as a result.

[49] The term "material facts" means "those facts that a party does not know, could not reasonably discover, and would reasonably want to know." O.C.G.A. §10-6A-3(11).

Because Plaintiffs failed to plead more than "[t]hreadbare recitals of the elements of a cause of action" and "mere conclusory statements," their negligent misrepresentation claim must be dismissed. *See Iqbal*, 129 S. Ct. at 1949.

5. The Amended Complaint does not state a claim for civil conspiracy.

Plaintiffs' final count alleges that Defendants harmed Plaintiffs by conspiring to "actively suppress" or conceal from Plaintiffs the existence of the FMLS Rules, Fees, and/or Patronage Dividends. (*See* Am Compl. ¶¶ 393-94). This claim fails as a matter of law because Plaintiffs' factual allegations do not establish the fundamental elements of a conspiracy—namely, that Defendants engaged in or agreed to engage in any underlying tortious conduct.

A conspiracy is "'two or more persons [who,] in any manner, either positively or tacitly, arrive at a mutual understanding as to how they will accomplish an unlawful design.'" *Parrish v. Jackson W. Jones, P.C.*, 629 S.E.2d 468, 472 (Ga. Ct. App. 2006). "[T]he cause of action . . . lies not in the conspiracy itself, but in the underlying tort committed . . . and the resulting damage." *McKesson Corp. v. Green*, 683 S.E.2d 336, 343 (Ga. Ct. App. 2009).

First and foremost, for the reasons explained above, this claim fails because the Amended Complaint fails to state any plausible claim against Defendants under any of the state-law tort theories presented in Counts Four through Seven. *See*

supra Parts III.D.1. to 4. Having failed to properly allege any actionable conduct by ***any*** Defendant, Plaintiffs cannot sustain a conspiracy claim that is dependent upon the viability of their underlying tort claims. *See McKesson Corp.*, 683 S.E.2d at 343; *see also* 13 Ga. Jur. Pers. Injury & Torts § 14:2 (2011) ("[A]bsent the underlying tort, there can be no liability for civil conspiracy."). Moreover, Plaintiffs do not allege any facts plausibly suggesting any agreement, or "mutual understanding," among Defendants to "actively suppress" or conceal from Plaintiffs the existence of the FMLS Rules, Fees, and/or Patronage Dividends. *See Summit Auto. Grp., LLC v. Clark*, 681 S.E.2d 681, 685 (Ga. Ct. App. 2009) (noting that Georgia law "'does not authorize a finding that conspiracy exists merely because of some speculative suspicion'"). Even if Plaintiffs had properly alleged an agreement, or "conspiracy," among Defendants not to disclose certain information to Plaintiffs, nothing in the Amended Complaint establishes that such an agreement was ***wrongful*** such that Defendants are liable to Plaintiffs. *See* 13 Ga. Jur. Pers. Injury & Torts § 14:2 ("The averment of a conspiracy does not ordinarily change the nature of the action nor add to its legal force or effect. In other words, . . . the conspiracy itself furnishes no cause of action.").

IV. CONCLUSION

For the reasons stated, the Amended Complaint fails to state any plausible cause of action against any Defendant. As such, Defendants respectfully request this Court to dismiss all counts, with prejudice, in their entirety.

Respectfully submitted this 1st day of April, 2011.

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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 Defendant Class of Residential Real Estate Brokers Similarly Situated as Members of FMLS, Defendants.	CIVIL ACTION FILE NO. 2:10-CV-211-RWS

CERTIFICATION OF COUNSEL

Pursuant to Local Rule 7.1D, counsel for Defendants 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, and Patricia Garner hereby certify that this **DEFENDANTS' JOINT BRIEF IN SUPPORT OF JOINT MOTION TO DISMISS AMENDED COMPLAINT** was typed in a font and point selection approved by this Court and authorized in Local Rule 5.1.

This the 1st day of April, 2011.

/s/ Teresa T. Bonder
TERESA T. BONDER

/s/ Ned Blumenthal
NED BLUMENTHAL

/s/ Gary Beelen
GARY BEELEN

/s/ Frederick G. Boynton
FREDERICK G. BOYNTON

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 Defendant Class of Residential Real Estate Brokers Similarly Situated as Members of FMLS, Defendants.	CIVIL ACTION FILE NO. 2:10-CV-211-RWS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **DEFENDANTS' JOINT BRIEF IN SUPPORT OF JOINT MOTION TO DISMISS AMENDED COMPLAINT** was electronically filed on April 1, 2011, with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record follows:

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This the 1st day of April, 2011.

/s/ Allison S. Thompson
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