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

Heather Q. Bolinger, Paul A. Terry, and Anne M. Terry, on behalf of themselves and all others similarly situated, Plaintiffs, v. First Multiple Listing Service, Inc., Gainesville-Hall County Board of Realtors, Inc., Atlanta Board of Realtors, Inc., Lanier Partners, LLC, d/b/a Keller Williams Realty Lanier Partners, Heritage Real Estate, Inc., d/b/a Coldwell Banker Heritage Real Estate, Peggy Slappey Properties, Inc., Atlanta Partners Realty, LLC, d/b/a Keller Williams Realty Atlanta Partners, Bueno and Finnick, Inc., d/b/a Re/Max Center Dacula, Sue Edwards, Mary Beth Smallen, Patricia Garner, and John Doe Members Comprising Defendant Class of Residential Real Estate Brokers Similarly Situated as Members of FMLS, Defendants.	CIVIL ACTION FILE NO.: 2:10-cv-00211-RWS

PLAINTIFFS' RESPONSE TO DEFENDANTS' JOINT MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs and members of the class they seek to represent (the "Plaintiffs") bought and sold real estate with the assistance of the Defendant real estate Brokers and Agents. The Defendant Brokers and Agents disclosed to Plaintiffs the real estate commissions they would be paid in connection with these transactions. But Defendants failed to disclose to Plaintiffs that these commissions would be split with a third party, Defendant First Multiple Listing Service, Inc. ("FMLS"). The Defendant Brokers also failed to disclose that the commissions were split with FMLS not to pay for FMLS' services, but to enable FMLS to pay kickbacks to the highest-volume Defendant Brokers, resulting in higher settlement charges being imposed on Plaintiffs and other consumers in metropolitan Atlanta.

FMLS is the largest multiple listing service ("MLS") in Georgia, and one of the largest in the United States, with over 2,260 real estate brokerage firms and 42,000 real estate agents as members. FMLS operates primarily in those counties where the most expensive residential real estate in Georgia is located. Like other MLSs around the country, FMLS operates an electronic database that enables its broker and agent members (collectively, "Members") to share with other Members information about real estate that is for sale. MLSs are essential to the modern real estate brokerage business because they efficiently provide consumers with comprehensive information

on available real estate listings.

While the broker Members can elect whether to list some Georgia properties on the FMLS database, they are required by FMLS' Rules and Regulations to list with FMLS all residential real estate they or their agents list for sale within twenty-one of the most populous counties in North Georgia, including most of the Atlanta metropolitan area (the "Compulsory Area"). FMLS, like other MLSs, charges broker Members fixed fees, such as an application fee, minimum annual fees, and other nominal fees in order to pay its expenses This, however, is where the similarities between FMLS and other MLSs end.

Unlike any other MLS in the country, FMLS annually generates millions of dollars in revenue by charging an additional fee (in addition to the fixed fees) on every sale of property listed on FMLS based on the selling price. The Members split their commissions with FMLS in order to pay this fee (hereinafter, the "Hidden Settlement Fee"). The Hidden Settlement Fee is paid from settlement proceeds (i.e., real estate commissions) even though FMLS is not and has never been a licensed real estate broker or agent[1], and even though FMLS has already performed and been paid for its

[1] Because Defendant Brokers are legally prohibited from splitting commissions with unlicensed third parties such as FMLS, the Hidden Settlement Fees are not real estate commissions. O.C.G.A. § 43-40-25(b)(17).

services.[2]

The reason FMLS is paid the additional Hidden Settlement Fee is so that FMLS can periodically, and no less than annually, pay kickbacks (the "Kickbacks") to those broker Members who generate a high volume of business. The Kickbacks are paid based solely on the volume of business referred to FMLS, and like the Hidden Settlement Fees, without any additional services being rendered by the Defendant Brokers. The Kickbacks are a significant inducement for Broker Members both to continue requiring their agents to list properties with FMLS and to pay the Hidden Settlement Fees. Defendant Brokers and FMLS have kept the Hidden Settlement Fees and Kickbacks secret from consumers for decades.

As a result of this arrangement, the Plaintiff Class has unknowingly been charged and paid commissions burdened with Hidden Settlement Fees and sullied with Kickbacks. Again, it appears that nowhere else in the United States are residential real estate settlements burdened with a percentage fee payable to a MLS upon closing, calculated like a commission and paid with settlement proceeds. Moreover, Defendants have maintained this unique practice – which they insist is "legitimate" (Def. Br., p. 1)

[2] Defendants contend the Hidden Settlement Fee is a payment for FMLS' services (Defendants' Brief in Support of Joint Motion to Dismiss, Dkt. 54-8, pp. 1-2.) (hereafter "Def. Br." or "Brief"). Discovery will reveal whether FMLS' other fixed fees fully cover its expenses and other costs, as alleged by Plaintiffs (Am. Compl. ¶ 65), or whether the Hidden Settlement Fee pays some of those expenses.

-despite the specific admonition against doing so from the National Association of Realtors ("NAR"), the largest trade association for real estate brokers and agents in the country and to which Defendants belong.

The fee splitting and referral relationship between FMLS and its affiliated Members have been kept secret from Plaintiffs and the other members of the Plaintiff Class through the agreement of FMLS and the other Defendants. The Defendant Boards of Realtors (the "Boards") are included as Defendants because their stated mission is to maintain the integrity of the profession and to sponsor ethics education for their members. By acquiescing in and allowing this practice to continue unabated and to expand geographically from metro Atlanta into much of North Georgia, the Boards (in which the Defendant Brokers and Agents are members) share in culpability.

The Hidden Settlement Fees and Kickbacks have damaged the Plaintiff Class through inflated commissions.[3] In fact, Congress has expressly found that fee splitting and kickbacks inflate settlement charges to consumers and for that reason enacted the Real Estate Settlement Procedures Act ("RESPA") in 1974. RESPA requires disclosure to consumers of the true nature and costs of the real estate settlement process to protect them from abusive practices, such as kickbacks, compensated referrals, and

[3] Defendants contend the Kickbacks actually lower commissions. (Def. Br., pp. 3-4.) What Plaintiffs allege, however, is that both the Brokers who receive the Kickbacks and those that do not are induced to maintain inflated commissions. (Am. Compl. ¶ 181.)

unearned splits of fees. Toward these ends, RESPA and its implementing regulations require that all fees incident to a real estate settlement service involving a federally related mortgage loan (a) be accurately disclosed to the buyer and seller at closing, (b) not be payment for a referral, (c) not be split with another party other than for services performed, and (d) not be in excess of the cost of services provided. The undisclosed Hidden Settlement Fees and Kickbacks are squarely at odds with these RESPA provisions.

Defendants vigorously contend that FMLS is not subject to RESPA because it is not a "settlement service provider" and because the Hidden Settlement Fees are ordinary business expenses similar to those paid other vendors (e.g., newspapers) that are exempt from RESPA. (Def. Br., pp. 26-27.) Plaintiffs allege, however, that the Hidden Settlement Fees are not ordinary business expenses, but extraordinary ones; and so extraordinary that no other broker in the country pays a similar fee to a MLS at closing. (Am. Compl. ¶¶ 66-68.) Nor is there anything "ordinary" about FMLS later paying kickbacks from these Hidden Settlement Fees in exchange for the Member brokers' referrals of Plaintiffs' business. Further, Plaintiffs' RESPA claims do not hinge on whether FMLS is a "settlement service provider," nor whether other MLS' provide "settlement services." RESPA expressly prohibits Kickbacks, fee splits, and unearned referrals by any "person," not just settlement service providers.

By adopting these practices, Defendants have also violated Section 1 of the Sherman Act by conspiring to artificially maintain and inflate commissions (i.e., price fixing) and otherwise unreasonably restrain competition in providing residential real estate brokerage services in at least the Compulsory Area. Likewise, the Hidden Settlement Fees and Kickbacks run afoul of Georgia statutory and common law, including the obligation of licensed real estate brokers to accurately disclose to their clients the basis of calculation and true amount of their compensation.

In the face of an Amended Complaint of 123 pages, in which Plaintiffs have asserted eight substantive Counts resting on detailed allegations in more than 400 separately numbered paragraphs, Defendants insist that Plaintiffs have presented only conclusory allegations and have failed as a matter of law to state even a single legally viable claim for relief. Defendants' reliance on Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), in making this argument is misplaced, given the extensive factual allegations supporting each of Plaintiffs' claims. In fact, the former Assistant General Counsel to HUD, who was also the Senior Counsel for RESPA and who authored opinions, interpretations, statements of policy, and regulations under RESPA, agrees that the practices alleged in the Amended Complaint, if true, violate RESPA. (Am. Compl. Ex. A.) Notably, in an 81-page brief in support of their Joint Motion to Dismiss, Defendants never deny Plaintiffs' core factual allegations, including the

existence of and financial incentives for the Hidden Settlement Fees and Kickbacks. Nor do they dispute that, or explain why, FMLS is the only MLS in the country that engages in these practices.

As will be shown below, Plaintiffs are entitled to the opportunity to prove each of their claims. Defendants cannot cut off this right by offering their own self-serving spin on the facts, as alleged by Plaintiffs, and by making hyper-technical arguments that are contrary to the language and purposes of the applicable statutory provisions and unsupported by the controlling case law. Consequently, Defendants' Joint Motion to Dismiss should be denied.

II. STATEMENT OF FACTS[4]

A. The Non-FMLS Parties.

Like thousands of other consumers in the Plaintiff Class, Plaintiffs, before purchasing and selling residential real estate in Georgia, entered into written brokerage agreements with the Defendant Brokers, who are licensed real estate brokers in Georgia. (Am. Compl. ¶¶ 28, 30.) Sellers, such as Plaintiffs Paul and Anne Terry (the "Terrys"), entered into exclusive listing agreements with their brokers, who are referred to as "listing" brokers. (Id. at ¶¶ 202, 221.) Purchasers, like Plaintiff Heather Bolinger

[4] In ruling on the Motion to Dismiss, the well-pled allegations in the Amended Complaint are accepted as true. See, e.g., Hoffman-Pugh v. Ramsey, 312 F.3d 1222, 1225 (11th Cir. 2002).

("Bolinger"), also entered into agreements with their brokers, who are often referred to as "selling" brokers (because the "selling" broker is considered to be the procuring cause of the sale). (Id. at ¶¶ 183-84.)

The brokers named as Defendants, and the class of brokers they represent (collectively the "Defendant Brokers"), typically assign licensed real estate agents to fulfill their contractual and other legal obligations. (Id. at ¶ 29.) The brokers hold the licenses of these agents as required under Georgia law and, therefore, have substantial control over them. (Id. at ¶ 30.) Consistent with the terminology described above, such agents are typically referred to as either the listing agent (for the seller) or the selling agent (for the buyer). (Id. at ¶ 31.)

The Georgia Real Estate Commission ("GREC") licenses and regulates real estate brokers and agents in Georgia. (Id. at ¶ 32.) GREC's statutorily stated purpose is "to ensure professional competency among real estate licensees and . . . to promote a fair and honest market environment for practitioners and their customers and clients in real estate transactions in Georgia." (Id. at ¶ 33.) The Defendant Boards were involved in the formation of GREC and in the promulgation of licensing rules and regulations applicable to realtors. (Id. at ¶ 34.) The Defendant Boards keep their members informed about laws and regulations affecting the industry, and also shape the formulation of those policies through professional lobbying. (Id. at ¶ 35.) The Atlanta

Board of Realtors is the largest and most predominant board of realtors operating in metro Atlanta. (Id. at ¶ 174.)

The Defendant Boards' stated mission includes enhancing the public's confidence in real estate brokers and agents and maintaining the ethical standards of their members, which include the Defendant Brokers and Agents. (Id. at ¶ 167.) Pursuant to those objectives, the Defendant Boards sponsor professionalism and ethics education for their members. (Id.) In addition, the Defendant Boards are familiar with the form contracts and disclosure forms regularly used in residential real estate transactions in Georgia, all of which are silent with regard to the Hidden Settlement Fees and the Kickbacks. (Id. at ¶ 171.) While the Defendant Boards have long been aware of the existence of the Hidden Settlement Fees and Kickbacks, they too have remained silent, even as such practices have expanded beyond metro Atlanta into the other heavily populated areas of North Georgia. (Id. at ¶ 172.) The incestuous relationship among brokers, GREC, and the Boards has enabled these practices to continue and grow in direct contradiction of the mission of GREC and the Boards to uphold the integrity of the profession.

B. FMLS Is The Dominant Multiple Listing Service In Georgia.

A multiple listing service ("MLS") provides an electronic database that facilitates the dissemination of listing information about available properties to broker Members

and, to a lesser degree, the public. (Am. Compl. ¶¶ 41, 45.) As Defendants emphasize (Def. Br., p. 5), properties listed for sale on the FMLS database are not directly accessible by the public at the FMLS website (Am. Compl. ¶ 46.), which Defendants extrapolate into a suggestion that FMLS has no duty to disclose the Hidden Settlement Fees and Kickbacks. What Defendants fail to mention, however, is that through an internet data exchange ("IDX Display"), listings from FMLS' electronic database may be viewed by the public through various other websites, including those of the broker Members. (Id. at ¶ 47.)

FMLS was founded in 1957 by a group of Atlanta brokers as a joint venture to "operat[e]…a multiple listing service…for the benefit of licensed real estate brokers." (Id. at ¶ 36.) FMLS has approximately 24 stockholder-members who are the largest and most successful brokers in Georgia. (Id. at ¶¶ 37-38.) Defendants have not denied that the same large brokerage firms that own and control FMLS also have significant influence upon, and in most cases control, the Defendant Boards. (Id. at ¶ 39.) The Defendant Brokers and Agents and the Defendant Boards actively support and regularly use FMLS' database in the course of performing real estate brokerage services. (Id. at ¶ 40.)

FMLS admits that it pays Kickbacks to its Members, claiming that they are

permissible "Patronage Dividends."[5] Because FMLS pays Kickbacks in proportion to the volume of Hidden Settlement Fees it receives, the largest and most successful broker Members benefit the most from the Kickbacks.

Under FMLS' Rules and Regulations, only a broker Member or an Associate Member, who is an agent working for a broker Member (collectively, the "Members"), can list property for sale on the FMLS database. (Id. at ¶ 44.) FMLS itself offers no advertising services (the right to advertise listed properties is vested solely in the Members pursuant to FMLS' Rules and Regulations); for this reason, listing information is not directly accessible by the public on FMLS' website. (Id. at ¶¶ 28, 41, 46, 93.) To use the FMLS database, FMLS provides members with a user name and password if they agree to abide by FMLS' Rules and Regulations. (Id. at ¶ 79.)

Rule 6 of FMLS' Rules and Regulations requires its members to list on the FMLS database any properties for sale within the twenty-one county Compulsory Area, consisting of Barrow, Bartow, Cherokee, Chatooga, Cobb, Dawson, DeKalb, Douglas, Floyd, Forsyth, Fulton, Gordon, Gwinnett, Hall, Haralson, Jackson, Lumpkin, Paulding, Pickens, Polk and Walton counties. (Id. at ¶¶ 70-71.) Accordingly, the

[5] Patronage Dividends are associated with cooperatives, where there is common ownership by its members. As discussed more fully below, whether or not FMLS and the Defendant Brokers operate as a "cooperative" is a matter to be determined in discovery, but in any event, will not shield the Defendants from liability under RESPA or otherwise. (See § IIIC(4), n. 30 *infra*.)

Broker Members require their agents – the Associate Members – to place all of their listings in the Compulsory Area onto the FMLS database. (Id. at ¶ 70.) It is undisputed that FMLS is dominant in those markets where most of the more expensive residential properties in Georgia are located. (Id. at ¶ 72.)

Under FMLS Rule 7, Members can be fined if they do not (1) enter a property into the FMLS computer system within 48 hours after executing a listing contract, and (2) send a copy of the contract to FMLS within seven business days of the listing. (Id. at ¶ 77.) FMLS enforces its Rules and Regulations by disciplining Members for violations, including through fines or removing their privilege to use the FMLS database. (Id. at ¶ 110.) Each of the Defendant Brokers and Agents has regularly listed properties for sale on the FMLS database. (Id. at ¶ 22.) The Defendant Class includes all broker Members of FMLS. (Id. at ¶ 23.)

Fueled by the Hidden Settlement Fees and the Kickbacks they fund, in just five years FMLS has expanded from fourteen counties to twenty-one in the Compulsory Area, from 1,800 broker Members to 2,260, and from 27,000 member agents to 42,000. (Id. at ¶ 73.) Currently, FMLS adds fifty new broker offices per month. (Id. at ¶ 74.) The FMLS database now contains more than 68,000 active listings of properties located all over Georgia and the Southeast. (Id. at ¶ 75.) FMLS is the largest and most dominant MLS in Georgia. (Id. at ¶¶ 72, 75.)

C. Unlike Any Other MLS In The United States, FMLS Imposes A Hidden Settlement Fee On All Transactions.

It is standard practice for a MLS to charge its broker Members a fixed application fee plus an annual or other periodic fixed membership fee. For example, GAMLS charges a $500 application fee, first month membership dues per licensee (agent) of $100, then a monthly fee of $100 per office and $20 per agent. (Id. at ¶ 57.) There are MLSs other than FMLS that do business in Georgia, including Georgia Multiple Listing Service ("GAMLS"). (Am. Compl. ¶¶ 49, 76.) Notably, GAMLS charges no additional fee (like the Hidden Settlement Fee) when a GAMLS member sells a property listed on the GAMLS database. (Id. at ¶ 57.) GAMLS also does not split fees with listing or selling brokers after a settlement, nor does it kick money back to its members upon their reaching a threshold sales amount. (Id. at ¶ 66.) Thus, all of the fees GAMLS charges its members are fixed.

Contrary to its initial contention that it charges no upfront fees (FMLS' Initial Br., p. 2), FMLS does require its broker Members to pay fixed up front and annual minimum fees. New broker Members are required to pay FMLS a $500 application fee and between $1,500 and $3,000 as a "security deposit" for future Hidden Settlement Fees, depending on the number of licenses granted to the broker Member. (Am. Compl. ¶ 62.) If a broker Member withdraws or is suspended from FMLS, Hidden Settlement Fees are charged against the security deposit on all pending listings. (Id. at

¶ 62.) In January of each year, FMLS also bills its broker Members a fixed $1,500 minimum fee for the next 12 months (the "Minimum Annual Fee"), reduced by any Hidden Settlement Fees paid the previous year. (Id. at ¶ 63.) In addition, FMLS imposes miscellaneous fixed fees for administrative matters related to a listing, such as $25 for the withdrawal of a listing, $35 for a duplicate listing, and $7 for a rental listing. (Id. at ¶ 64.)

Defendants contend that FMLS' charges are similar in amount to those of GAMLS. (Def. Br., p. 7.) They note that a broker with one agent pays GAMLS an annual fee that is only $60.00 less than FMLS'. (Id.) In fact, they argue, where a broker has more than one agent, the GAMLS annual fee will exceed FMLS' annual fee. (Id.) This misleading focus on annual fees ignores, of course, the substantial additional Hidden Settlement Fees.

Unlike any other MLS in the country, FMLS charges an additional Hidden Settlement Fee on virtually every closing of residential real estate in North Georgia (as well as on other real estate transactions in Georgia and elsewhere) based solely on the selling price of the property. (Am. Compl. ¶¶ 61, 66, 67, 90.) Thus, the Hidden Settlement Fees and Kickbacks are a component of and affect thousands of real estate transactions each year. (Id. at ¶ 41.) As with commissions generally, this Hidden Settlement Fee is due only if a listed property sells and is based on the sales price, not

the value of any services provided or expenses incurred by FMLS. (Id. at ¶¶ 61, 82.) Once a property is contracted by a broker Member, the Hidden Settlement Fee is due upon the sale of the property whether or not the property is ever listed on FMLS' database or FMLS performed any service in connection with that listing.[6] (Id. at ¶¶ 94, 286.) Moreover, the Hidden Settlement Fee becomes due at the time of settlement and is paid using settlement proceeds through a split of fees - real estate commissions - charged to sellers and some purchasers. (Id. at ¶¶ 61, 82, 89, 95.) Both the listing and selling Member brokers split their commission with FMLS, even though the buyer did not use FMLS as a listing service. Significantly, the payment of the Hidden Settlement Fees to FMLS is in direct contravention of the "MLS Antitrust Compliance Policy" adopted by NAR, which specifically prohibits these practices, as follows:

> Boards and associations of REALTORS© and their MLSs shall not:
>
> 1. Fix, control, recommend, or suggest the commissions or fees charged for real estate brokerage services (Interpretation 14).
>
> 2. Fix, control, recommend, or suggest the cooperative compensation offered by listing brokers to potential cooperating brokers.
>
> 3. Base dues, fees, or charges on commissions, listed prices, or sales prices. Initial participation fees and charges should directly relate to the costs incurred in bringing services to new participants.

[6] Under FMLS' rules, if a Member enters into a listing contract and the property sells before the listing can be entered into the FMLS database, the listing Broker still must pay the Hidden Settlement Fee. (Id., at Ex. B, Rule 18.)

(Id. at ¶ 329, Ex. I.) (emphasis added). Plaintiffs allege that FMLS and the other Defendants are members of NAR, are aware of these prohibitions, and have steadfastly run roughshod over them. (Id. at ¶¶ 165-66, 332, 334, 339.)

FMLS' Rules require the Defendant Brokers to immediately split their commissions with FMLS before paying their marketing and other expenses. (Id. at ¶¶ 88, 94-95.) Under FMLS Rule 16, both the listing and selling Members must: (a) report the closing of a sale to FMLS within 72 hours; (b) submit the first two pages of the HUD-1 Settlement Statement (discussed more fully below) to FMLS within this same 72 hours; and (c) remit the Hidden Settlement Fee to FMLS within ten (10) days after closing. (Id. at ¶ 108.)

Historically, the Hidden Settlement Fee was 4% of the total commissions. (Id. at ¶ 80.) If both a listing and selling broker Member participated in the settlement, 4% of the commissions was paid to FMLS, and the two brokers split the remainder of the commissions. (Id. at ¶ 80.) Now, the Hidden Settlement Fee is calculated by multiplying .0012 times the selling price if both the listing and selling brokers are affiliated with the same Member.[7] (Id. at ¶ 82.) The Hidden Settlement Fee is doubled

[7] Defendants imply that the imposition of Hidden Settlement Fees is discretionary by stating "FMLS generally receives its Fee in cases where its MLS database plausibly contributed to the procurement of the sale of a listed property." (Def. Br., p. 6.) However, the FMLS Rules provide, as Plaintiffs allege, that a Hidden Settlement Fee is due on every closing of property in the Compulsory Area (even if not listed or if listed

if, as is usually the case, the selling and listing agents are affiliated with different broker Members. (Id. at ¶ 83.) Defendants do not dispute that (but fail to explain why) FMLS changed the method of calculating the Hidden Settlement Fee to a percentage of the selling price. But Plaintiffs allege that change was implemented to avoid any reduction in revenue if commissions fell below 6%.[8] (Id. at ¶ 84.) The current method of calculating the Hidden Settlement Fee usually achieves the same result as the original method because 4% of the desired 6% commission is equal to .0024 of the selling price, or twice .0012. (Id. at ¶ 85.) This change resulted in Defendants continuing to have an incentive to maintain a floor commission rate of 6%; if a commission fell below 6%, the Defendant Brokers would pay a Hidden Settlement Fee that was more than the historical rate - 4% of commissions. (Id. at¶¶ 84, 85.)

FMLS does not render additional services or incur additional expenses if more than one Member broker is involved in a sale. (Id. at ¶¶ 98, 287-289.) Even though the cost of the services FMLS provides is not affected by either the sales price or how many Members are involved, Defendants have failed to explain why those factors used to determine the amount of the Hidden Settlement Fee. (Id. at ¶¶ 82, 83, 98.) The reason the Hidden Settlement Fee is doubled is to assure the Kickbacks will be

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elsewhere), whether or not FMLS "plausibly contribute[s]" to the sale.

[8] This manner of calculating the Hidden Settlement Fee is both contrary to NAR's prohibitions, supra, and was made for the purpose of fixing prices in violation of the Sherman Act. See § IIID(1), *infra*.

undiluted by having another broker Member involved in the transaction. (Id. at ¶ 289.) Defendants also remain resolutely silent in the face of Plaintiffs' allegations that the Hidden Settlement Fees are unrelated to the actual costs incurred by FMLS in operating its database and are imposed for the sole purpose of funding the Kickbacks. (Id. at ¶¶ 81, 129, 287.)

D. FMLS Pays Kickbacks To Broker Members Based Upon The Volume Of Hidden Settlement Fees.

Due to the imposition of the Hidden Settlement Fees on thousands of transactions annually, FMLS receives revenue that substantially exceeds its expenses. (Am. Compl. ¶ 90.)[9] As a result, FMLS periodically (but at least annually) pays Kickbacks to those broker Members generating Hidden Settlement Fees in excess of the Minimum Annual Fee of $1500. (Id. at ¶ 131.) Although a broker Member begins receiving Kickbacks after meeting the Minimum Annual Fee, FMLS' Rules require the broker Member to continue paying the Hidden Settlement Fees. (Id. at ¶132.)[10]

The Member brokers are motivated by the Kickbacks to comply with FMLS'

[9] Defendants contend this allegation is contradictory because FMLS does not profit from the Hidden Settlement Fees, but instead returns some of this additional revenue to the Member brokers. (Def. Br., pp. 7-8.) This contradicts the Amended Complaint (Am. Compl. ¶ 90) and does not explain why Defendants engage in this charade at the expense of consumers.

[10] Defendants' suggestion that the Hidden Settlement Fee is intended as an advance payment of the Minimum Annual Fee (Def. Br., p. 6) fails to explain why Members continue to pay the Hidden Settlement Fee in a year when they have already covered the Minimum Annual Fee.

Rules and to require their agents – the Associate Members - to list properties for sale with FMLS. Although both Agents and Brokers split their commissions with FMLS, FMLS pays 100% of the Kickbacks only to the Brokers. (Id. at ¶ 135.)

Brokers often split commissions with their agents 50/50. (Id. at ¶ 86.) However, some Brokers give their agents a more generous split. (Id. at ¶ 87.) But that more generous split results in the agents funding an even greater portion of the Hidden Settlement Fees. FMLS actively recruits new broker Members, including those outside of the Compulsory Area, by highlighting the financial benefits of the Kickbacks. (Id. at ¶ 136, Ex. G.) As one broker Member gushed in a series of "Testimonials" FMLS uses for marketing purposes:

> … and best of all you receive **Patronage Dividends** from the office sales, in other words the more you and your agents sell the more money you [the broker] will receive.

(Id.) (emphasis in original).

E. The Hidden Settlement Fees And Kickbacks Are Never Disclosed To Purchasers And Sellers Of Real Estate Despite Being Paid With Settlement Funds.

The HUD-1 Settlement Statement ("HUD-1") is a form developed by the United States Department of Housing and Urban Development ("HUD") as a means of implementing RESPA.[11] The HUD-1 must be provided to the buyer and seller at

[11] (See Am. Compl., Ex. A, Report of Grant Mitchell, p. 8.)

closing in any residential real estate settlement involving a federally related mortgage loan. (Am. Compl. ¶ 111.) The purpose of the HUD-1 is to assure disclosure, in one document, of **all** charges imposed on a buyer or seller **in connection with** the settlement. (Id. at ¶ 113.) Even if the charge is imposed outside of the settlement (whether by the loan originator, real estate agent, or other person participating in the settlement), it must be disclosed on the HUD-1 in the box designated "Paid Outside of Closing." (Id. at ¶ 121.) Furthermore, under state licensing laws and other provisions of Georgia law, brokers and agents are required to disclose to their principals (sellers and purchasers) on the settlement statement the true amount and basis of calculation of their compensation, including any rebate, commission, or referral fee related to settlement. (Id. at ¶¶ 354, 361.) Thus, the HUD-1, RESPA, and state law disclosure requirements go hand-in-hand.

Concerning Plaintiffs' transactions, the commissions are incorrectly reported on the HUD-1 in at least two ways. First, the Defendant Brokers and Agents have never disclosed on a HUD-1, or otherwise, that their commissions are split with a third party - FMLS - to pay Hidden Settlement Fees. (Id. at ¶¶ 360, 363.)[12] Instead, the Defendant Brokers and Agents have reported only the commissions paid to the listing and selling

[12] Defendants proudly note that the listing agreement with the seller authorizes the use of a MLS. (Def. Br., p. 14.) But this disclosure misleads by failing to mention that the use of a MLS will result in a Hidden Settlement Fee or a Kickback.

brokers. (Id. at ¶¶ 363-64.) Second, on those transactions involving a broker Member who has already reached or will reach the Minimum Annual Fee, sellers and buyers are not advised that their brokers later receive another payment that is not disclosed on the HUD-1, the Kickback. (Id.) In those cases, therefore, the commissions reported on the HUD-1 understate the total payments to the Defendant Brokers. (Id. at ¶ 364.)

This information vacuum created by FMLS and the Defendant Brokers is not limited to the HUD-1. As a condition of listing their property on the FMLS database through a Member, sellers are required to complete and sign the FMLS Residential Data Input form (the "Listing Form") (Am. Compl. ¶ 142, Ex. H.). Contrary to Defendants' contentions, FMLS has direct contact with sellers through several documents, including the Listing Form.[13] (Am. Compl. ¶ 142.) The Listing Form, which Defendants fail to discuss in their Brief, requires that sellers describe their property in detail, certify that the information is accurate, and agree to indemnify FMLS against any liability if the information is inaccurate. (Id. at ¶¶ 143, 145.) Although the Listing Form discloses the listing price and commission to be paid to the selling broker, it once again is silent as to the Hidden Settlement Fee and the potential for a Kickback. (Id. at ¶ 144.)

[13] Defendants do not even acknowledge the Listing Form, stating "FMLS interacts directly with its Members, not the individuals that its Members represent." (Def. Br., p. 5.)

The By-Laws and Rules and Regulations of FMLS from 1974 to the present have, by design, never required or even encouraged the Members to disclose the Hidden Settlement Fees or Kickbacks to their clients. (Id. at ¶ 147.) To the contrary, the Defendant Brokers were instructed by FMLS not to disclose them. (Id. at ¶ 148.) In this fashion, FMLS and the Defendant Brokers, with the complicity of the other Defendants, kept the Hidden Settlement Fees and Kickbacks secret from Plaintiffs and the other members of the Plaintiff Class. (Id. at ¶ 149.)

F. FMLS Shares Commission Information With Member Brokers For The Purpose Of Price Fixing.

FMLS collects sales information from HUD-1 settlement statements submitted by the broker Members within 72 hours of a closing. (Am. Compl. ¶ 116.) The HUD-1 is a two page form. (Id. at ¶ 117.) The first page of the HUD-1 reflects the selling price of the property. (See, e.g., Bolinger HUD-1, Am. Compl. Ex. J.) While Defendants argue that FMLS obtains this information "to double check the accuracy of the sales data" (Def. Br., p. 11-12.) FMLS does not stop with simply gathering sales information.

FMLS also requires the submission of the second page of the HUD-1, where the commissions and other settlement charges are reported. (Am. Compl. ¶ 117.) The split

of commissions with FMLS was not reported on the HUD-1 for any of Plaintiffs.[14] Notably, FMLS does not need the second page of the HUD-1 to confirm the amount of the Hidden Settlement Fee. Although Defendants contend Plaintiffs fail to allege FMLS shares all of the commission information (Def. Br., p. 11.), in fact, Plaintiffs allege FMLS gathers the commission information on page 2 to provide its broker Members with information on commissions actually paid on closings. (Am. Compl. ¶¶ 118, 119.) Contrary to Defendants' contentions (Def. Br., p. 11.), Plaintiffs specifically allege that Defendants, with the knowledge and acquiescence of the Boards, utilized information on commissions paid on closings in order to stabilize commissions in FMLS' market area. (Am. Compl. ¶¶ 118, 120.)

G. FMLS Pays Kickbacks With Commissions Commingled From Multiple Settlements.

The Kickbacks are paid by FMLS from commissions received from multiple settlements. (Am. Compl. ¶ 137.) As previously noted, FMLS requires payment of Hidden Settlement Fees at the time of sale, whether or not a property has been listed in the FMLS database. (Id. at ¶ 94.) In addition, because their sales volume does not exceed the applicable threshold, some broker Members who have paid Hidden

[14] Inexplicably, Defendants note that the HUD-1's for the three transactions at issue also do not report any fee paid to GAMLS. (Def. Br., p. 16.) Plaintiffs allege, however, that only FMLS – not GAMLS - imposes an unearned transaction fee at closing. Plaintiffs do not allege a fee splitting and kickback scheme between the Defendant Brokers and GAMLS.

Settlement Fees do not qualify for Kickbacks. (Id. at ¶ 134.) Accordingly, the Kickbacks are paid with funds commingled from multiple settlements from multiple Brokers, including from settlements where FMLS indisputably provided no settlement services.[15] As a result, settlement proceeds paid by consumers are funneled to other brokers with whom they have no relationship and who provided no settlement service to those consumers in their transaction. (Am. Compl. ¶ 138.) Further, in all events, these Kickbacks are paid after the closing and after the Defendant Brokers and Agents have provided all of their services to sellers and buyers. (Id. at ¶ 127.)

H. Plaintiffs Were Damaged By Higher Commissions And Settlement Costs Due To The Hidden Settlement Fees And Kickbacks.

Defendants do not deny that the Defendant Brokers and Agents paid a Hidden Settlement Fee in all three of Plaintiffs' settlements (as well as in those of all other members of the Plaintiff Class). (Am. Compl. ¶¶ 22, 197, 216, 236.) When the Terrys sold Newberry Point for $195,000, for example, two broker Members charged the Terrys commissions totaling $10,980. (Id. at ¶ 207.) At this settlement, these Members split their commissions with FMLS by paying to FMLS, collectively, $468.00 (.0024 x $195,000 sales price). (Id. at ¶ 210.) As in each of the transactions involving Plaintiffs and the Plaintiff Class, the purchase of the subject property was financed with a

[15] Defendants have, once again, failed to explain why they consider this practice to be "legitimate".

federally related mortgage loan. (Id. at ¶ 206.)

As previously noted, many smaller broker Members do not pay sufficient Hidden Settlement Fees to cover the Minimum Annual Fee and, therefore, they do not receive Kickbacks; accordingly, they subsidize the FMLS system for the benefit of higher-volume broker Members. (Id. at ¶ 134.) As a result, these smaller brokers, who are the most likely to reduce commissions in order to compete for market share, are impeded from doing so due, at least in part, to having to pay the Hidden Settlement Fees. (Id. at ¶¶ 140, 181.) Thus, the Hidden Settlement Fees, which serve as a floor under commissions, and the Kickbacks have artificially inflated commissions (and overall settlement charges) to the detriment of the Plaintiff Class. (Id. at ¶ 181.)

Defendants respond that in some cases, a lower commission rate was paid at closing than was reflected in the listing agreement. (See Def. Br., p. 17, table of commission charges.) It is true that two of the six brokerage agreements in place for the three transactions at issue reflect a lower commission than was originally negotiated. (See Id.) What Defendants fail to acknowledge, however, is that in these two instances, neither resulted from negotiations with the named Plaintiffs. Although two parties on the other side of the transaction with the named Plaintiffs may have negotiated a lower commission with their broker, those commissions were still burdened with a built-in charge for the Hidden Settlement Fees. (Am. Compl. ¶¶ 181, -

270.) Defendants fail to mention that their table also shows that one of the commissions paid was actually higher than the commission set forth in the listing agreement.[16]

III. ARGUMENT AND CITATIONS OF AUTHORITY

A. Introduction.

Defendants' longstanding practice of paying Hidden Settlement Fees and Kickbacks from settlement proceeds violates federal and state law, affects thousands of real estate settlements annually, and has resulted in, and continues to cause, the Plaintiff Class paying inflated settlement charges. Defendants' Joint Motion to Dismiss should be denied so that Plaintiffs will have an opportunity to hold Defendants accountable for their misconduct and to end these surreptitious and illegal practices.

B. Plaintiffs Have Sufficiently Pled Their Claims Under Fed. R. Civ. P. 8(a)(2).

Defendants contend that Plaintiffs have not sufficiently articulated their claims under the standard of Fed. R. Civ. P. 8(a)(2). Pursuant to that standard, "[a] pleading must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to

[16] The commission is higher because a $195 "fee" was added to the commission in the Newberry Point Drive Transaction. Defendants inexplicably state that "Plaintiffs do not allege that was ever paid." (Def. Br., p. 17, n.18.) In fact, the fee was paid and included in the $5,670 commission paid to Coldwell Banker Heritage Real Estate. This fee appears to be imposed other than for services rendered, like the $149 administrative fee imposed in Busby v. JRHBW Realty, Inc., 513 F.3d 1314, 1320 (11th Cir. 2008), which was found to be in violation of RESPA.

state a claim upon which relief can be granted if it does not plead 'enough facts to state a claim to relief that is plausible on its face.'" Stannard v. Allegis Group, Inc., No. 1:08-cv-3357-RWS, 2009 WL 1309751, *3 (N.D. Ga. April 27, 2009)[17] (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)); Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, (2009). This Court has further explained that, "'[t]o survive a motion to dismiss, the factual allegations in the complaint 'must be enough to raise a right to relief above the speculative level.'" Stannard, 2009 WL 1309751 at *3 (citing Twombly, 550 U.S. at 555). Additionally, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'show[n]' - 'that the pleader is entitled to relief.'" Iqbal, 129 S. Ct. at 1949. (citing Fed. R. Civ. P. 8(a)(2)). As detailed below, Plaintiffs' Amended Complaint more than satisfies this pleading standard.

C. Plaintiffs Have Adequately Stated A Claim Under RESPA Against FMLS and The Defendant Brokers And Agents.

1. Background And Purpose Of RESPA.

In a recent decision ignored by Defendants in their initial briefs and only mentioned in passing in their most recent Brief, the Eleventh Circuit broadly observed that, "Congress passed RESPA to regulate the costs consumers pay to settle their real

[17] A copy of this unpublished opinion is attached as Exhibit 1 for the Court's convenience.

estate transactions." Busby v. JRHBW Realty, Inc., 513 F.3d 1314, 1320 (11th Cir. 2008) ("Busby I"). RESPA seeks to accomplish that ambitious, but laudable, goal by requiring greater and more timely information about the nature and cost of the real estate settlement process and by eliminating certain abusive practices that "increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(a), 2601(b)(2). "One of the abusive practices that Congress sought to eliminate through the enactment of RESPA was the payment of referral fees, kickbacks, and other unearned fees." Busby I, 513 F.3d at 1320 (citing Sosa v. Chase Manhattan Mortg. Corp., 348 F.3d 979, 981 (11th Cir. 2003) (citations omitted)). The Hidden Settlement Fees and Kickbacks paid by Defendants fly directly in the face of these statutory prohibitions.

Congress prohibited both kickbacks and unearned fees in 12 U.S.C. §§ 2607(a) and (b) (commonly referred to as "Sections 8(a) and (b)") of RESPA, specifically as follows:

> (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 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 (emphasis added). "Read together, the two subsections create a broad

prohibition against fees that serve solely to increase the cost of settlements to consumers." Sosa, 348 F.3d at 981-82.

Plaintiffs allege that they were charged real estate commissions burdened with unearned Hidden Settlement Fees even though FMLS had already been fully compensated for its database listing service.[18] (Am. Compl. ¶¶ 181, 188, 207, 226, 263, 265, 266, 274.) The essence of Plaintiffs' claims under Section 8(b) is that fees charged to consumers (real estate commissions) were split between two parties (real estate brokers and FMLS), but only one (real estate brokers) provided a service for that fee. This claim falls squarely within the meaning of Section 8(b)'s prohibition against fee splitting. "Under the plain language of Section 8 . . . fee splitting is prohibited under RESPA[,] that is, situations in which a single charge is split between two parties, only one of which performed the services on which the charge was based." Freeman v. Quicken Loans, Inc., Nos. 08-1626, 08-1627, 08-4744, 2009 WL 2448033, *2 (E.D. La. Aug. 10, 2009) (citation omitted.).[19]

Plaintiffs also allege that in violation of Section 8(a), FMLS later paid Kickbacks

[18] Defendants admit that the Minimum Annual Fee is compensation for Member brokers' and Agents' use of the FMLS database. (Def. Br., p. 6.)

[19] There is a split among the circuits regarding whether at least two parties are required for there to be an unearned fee in violation of 8(b). See Sosa, 348 F.3d at 982; see also Freeman, 2009 WL at *10-11(a copy of this unpublished opinion is attached hereto as Exhibit 2). This is not an issue here because the compensated referrals and unearned fees involve multiple parties – FMLS, the Member brokers, and the Agents. Moreover, the Eleventh Circuit has held that one party can violate Section 8(b). Id. at 983.

- unearned referral fees to high-volume Member brokers - even though these brokers had already been fully compensated for their services. (Am. Compl. ¶¶ 199, 218, 238, 275, 276, 277, 278.) "One of RESPA's stated goals is 'the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." Heimmermann v. First Union Mortgage Corp., 305 F.3d 1257, 1262 (11th Cir. 2002). Although Defendants argue that Plaintiffs have not alleged even a single RESPA violation, a fair reading of the Amended Complaint, Sections 8(a) and 8(b), HUD's regulations and applicable case law can lead only to the conclusion that Plaintiffs have stated a claim that the Hidden Settlement Fees and Kickbacks violate RESPA.

2. Plaintiffs Are Required To Allege Only That The Hidden Settlement Fees And Kickbacks Are Paid "Incident To", "Part Of" Or "In Connection With" A Settlement Service Under Sections 8(a) and 8(b).

Defendants' threshold contention is that Plaintiffs have failed to allege a violation of either 8(a) or 8(b) because FMLS is not a settlement service provider, so Plaintiffs are unable to show either (1) a payment made in exchange for the referral of a "settlement service" or (2) a fee paid for a settlement service that was never provided to Plaintiffs. (Def. Br., pp. 25-27.) But this narrow interpretation of Section 8 emasculates the plain, broader language of Sections 8(a) and (b) and ignores the explication of these provisions in HUD's regulations. In particular, this argument

ignores that Defendant Brokers themselves provide settlement services,[20] as contemplated by Section 8, and FMLS is engaged in a critical role "incident to", "part of" and "in connection with" the provision of those services and the transaction itself.

As previously noted, the provision of real estate brokerage services is by statute a "settlement service". 12 U.S.C.A. §2607(c). RESPA provides in both Section 8(a) and 8(b) that "[n]o person shall **give** and no person shall **accept**" the proscribed fees and kickbacks. 12 U.S.C.A. §2607(a), (b) (emphasis added). The statute, therefore, extends to all "persons," not just settlement service providers.

Plaintiffs allege that the Defendant Brokers, in **accepting** a "fee, **kickback** or thing of value" [the Kickbacks] pursuant to "an[y]" agreement or understanding, oral or otherwise [FMLS' Rules and Regulations], that **business** [listings] **incident to or a part of** a real estate settlement service [real estate brokerage services] involving a federally related mortgage loan shall be **referred** to **any person** [FMLS]," violated Section 8(a). See 12 U.S.C. §2607(a) (emphasis added). Likewise, the Defendant Brokers, in paying unearned fees to FMLS [the Hidden Settlement Fees] that represent a **split of a charge** [brokerage commissions] made "for the rendering of a real estate settlement service [brokerage services] **in connection with** a transaction involving a

[20] Defendants concede that FMLS' services are critical to the efficient provision of real estate brokerage services (Def. Br., pp. 4-5) and that FMLS' services are among the services "ancillary to" and "associated with" the provision of the services of the Defendant Brokers and Agents. (Def. Br., p. 28.)

federally related mortgage loan," also violated Section 8(b). See 12 U.S.C. §2607(b) (emphasis added).

In the principal case relied upon by Defendants (Def. Br., p. 26.) for the proposition that FMLS is not a settlement service provider, Wooten v. Quicken Loans, Inc., 626 F.3d 1187 (11th Cir. 2010), the court held that, in interpreting the meaning of the term "settlement service," a court should look first to the statutory definition and the regulations interpreting it, and that if neither the statute nor the regulations apply, it should proceed to the "common or ordinary meaning of the term." Id. at 1192-93 (citing Schwarz v. City of Treasure Island, 544 F.3d 1201, 1214 (11th Cir. 2008)). The Wooten court went on to rely upon the ordinary meaning of the term "service" in ruling that loan discount points were not a "service." "RESPA defines a 'settlement service' as "any service provided in connection with a real estate settlement." Id. at 1192. Using the same rationale employed in Wooten, under the statute, the regulations, and the ordinary meaning of such terms, FMLS provided a "service" that was "incident to," "part of," and "in connection with" real estate brokerage services and the transactions themselves.

3. Plaintiffs Need Not Allege They Were Separately Charged and Directly Paid Hidden Settlement Fees To FMLS.

Another premise for Defendants' threshold argument is that "business incident to settlement services" encompasses only "direct charges to consumers for components of

settlement services." (Def. Br., p. 30.) Defendants repeatedly contend that Plaintiffs do not allege that Member brokers "charged" Plaintiffs for the Hidden Settlement Fees, and Plaintiffs are, therefore, disqualified from recovering damages under RESPA. (Def. Br., pp. 20, 31-32, 38-39.) However, Plaintiffs specifically allege that Plaintiffs paid commissions burdened with unearned Hidden Settlement Fees (Am. Compl. ¶¶ 22, 188, 207, 226, 263, 265, 266, 274) and paid higher commissions as a result. (Id. at ¶ 181.)[21]

Nevertheless, Defendants' contention that consumers must be separately charged and directly pay for business incident to settlement services ignores HUD's expansive and definitive interpretation of RESPA's prohibitions against fee splits and unearned fees as extending to all payments, regardless of source: [22]

> the source of the payment—**whether from consumers, other settlement service providers, or other third parties**—is not relevant in determining

[21] Defendants' argument also overlooks that "Fee-for-Service" Brokers (sometimes referred to as "flat-fee" brokers) "often offer an 'MLS-only' package, which allows consumers, who are not permitted by MLS rules to list their homes in the MLS on their own, to list their homes in the MLS by contracting with a broker who is member of the local MLS." (See DOJ & FTC, Competition in the Real Estate Brokerage Industry 16 (2007) ("DOJ/FTC Report"), *available at* http://www.ftc.gov/reports/real estate/ V050015.pdf., cited at Am. Compl. ¶ 337, also cited approvingly at Def. Br., pp. 4-5.) In these transactions, the Member brokers charge a flat brokerage fee (e.g., $595.00) plus they charge the FMLS Hidden Settlement Fee directly to the consumer (which could equal or even exceed the flat fee). Plaintiffs expect to identify such transactions in discovery.

[22] The RESPA Statement of Policy 2001-1 issued by HUD is attached hereto as Exhibit 3 and cited herein as "SOP 2001-1."

> whether the fee is earned or unearned because ultimately, all settlement payments come directly or indirectly from the consumer.

Ex. 3, SOP 2001-1, p. 26 (emphasis added); see also Regulation X, 24 C.F.R. 3500.14(c) ("The source of the payment does not determine whether or not a service is compensable.").[23]

Defendants argue that Plaintiffs' reliance on the 2001-1 SOP and Regulation X ignores the Eleventh Circuit's refusal to defer to HUD's Section 8(b) interpretations. This argument misreads Eleventh Circuit authorities, which do not defer to HUD's interpretations only where the statute is clear. Because RESPA expressly grants HUD rule making authority, Regulation X is entitled to deference under Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), where there is any need for clarification of the statute. See Culpepper v. Irwin Mortgage Co., 253 F.3d 1324, 1327 (11th Cir. 2001). Furthermore, the 2001-1 SOP is entitled to the same deference. See Heimmermann, 305 F.3d at 1261("Because the power to issue interpretations is expressly delegated to RESPA, the 2001 SOP carries the full force of

[23] Plaintiffs also ignore a series of cases involving reinsurance. In those cases, reinsurance premiums were received from consumers' primary mortgage lenders, not from consumers. Plaintiffs alleged that the reinsurance premiums were either kickbacks or unearned fees and inflated primary mortgage insurance ("PMI") premiums. A number of courts have denied motions to dismiss those claims. See, e.g., Alston v. Countrywide Fin. Corp., 585 F.3d 753, 764 (2009) and cases cited therein.

law. As a result we give deference to the 2001 SOP [under Chevron].").[24]

Defendants seek to support their direct payment argument with the unhelpful example that, if a settlement service provider engaged a courier to deliver documents and charged the consumer a fee, the delivery service would be a "business incident to a settlement service," but would not be so if the settlement service provider delivered the documents itself without a separate charge. (Def. Br., p. 31.) This straw man argument ignores that FMLS does impose a separate charge - the Hidden Settlement Fee – that is a component part of the commissions that are paid directly by consumers.

In its 2001-1 SOP, HUD further explains that it did not intend to provide an exhaustive list of prohibited payments. Instead, HUD broadly states that Section 8(b) restricts all unearned fees paid "in connection with" real estate settlements, not simply fees paid by consumers:

> Section 8(b) prohibits the giving or accepting of any portion, split, or percentage of any charge other than for goods or facilities provided or

[24] Defendants ignore Heimmermann in arguing that this Court need not defer to HUD's 2001 Policy Statement, citing Sosa and Friedman II. (Def. Br., pp. 36-7). While Friedman II acknowledges Heimmermann, it holds simply that deference need not be given to HUD's interpretations of RESPA when the statute is clear. 520 F.3d at 1298. Both Friedman and Sosa did not defer to HUD's 2001 Policy Statement because they were both overcharge cases, and the Eleventh Circuit has repeatedly held that Section 8(b) expressly applies only to fee splits where no service was provided, not to overcharges where a service was provided. Because the statute is clear as to overcharges, the Eleventh Circuit concluded that reference to HUD's interpretation is unnecessary. Deference to HUD is appropriate in this case, as in Heimmermann, because no overcharge is alleged.

> services performed; it is intended to eliminate unearned fees …. In HUD's view, Section 8(b) forbids the paying or accepting of any portion or percentage of a settlement service--including up to 100%--that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person.

See Ex. 3, 2001-1 SOP, p. 25, § D. Also, if a fee is paid or a settlement charge is split with a party that provided no services for that fee, Section 8(b) is violated regardless of who makes these payments. That is precisely how Plaintiffs describe the Hidden Settlement Fee. (Am. Compl. ¶284; Ex. A, Report of Grant Mitchell, p. 10 ("Despite being funded by settlement proceeds disbursed at closing, the [Hidden Settlement Fees] are paid outside of and after closing and are not disclosed . . . .").)

Grasping at straws, Defendants suggest that the Hidden Settlement Fee cannot be considered an unearned fee because it does not appear on the HUD-1 as having been separately charged to the consumer at closing. This argument ignores (1) the economic reality that the unearned Hidden Settlement Fee is a component of the commission that is reported on the HUD-1 (the requirements of which form Defendants studiously avoid discussing) and directly charged to consumers and (2) that Defendants purposefully omitted the Hidden Settlement Fees from the HUD-1's. Were the Hidden Settlement Fee separately reported on the HUD-1 (something Plaintiffs had no control over), then this unearned fee would have been separately charged to the consumer, vitiating Defendants' argument. Defendants are effectively arguing that they should be shielded

from liability because they did indirectly – pay and accept unearned fees and kickbacks - what they acknowledge they could not do directly – charge consumers unearned fees and kickbacks on the HUD-1. Accepting Defendants' circular logic would only reward them for keeping the Hidden Settlement Fees and Kickbacks secret from Plaintiffs.

Defendants' argument that FMLS is not a "business incident to settlement service" (Def. Br., p. 30.) is also undermined by the detailed information shared by the Defendant Brokers and Agents with FMLS about each settlement. Although Defendants avoid discussing the FMLS Residential Data Input Form (Am. Compl. Ex. H), that form is completed by the Brokers (typically through the Agents) to provide FMLS with a detailed, written description of each listed property along with the seller's indemnity of FMLS in the event of any inaccuracies. (Id. at ¶ 143.) Other FMLS forms also indicate direct contact between FMLS and consumers on specific transactions as well. (Am. Compl, Ex. H.)

Similarly, FMLS' Rules and Regulations are replete with requirements that FMLS be provided with detailed information about each transaction. For example, Rule 14 requires that, upon execution, a sales contract must be sent to FMLS within three business days. (Id. Ex. B, Rule 14.) After each closing, the first two pages of the HUD settlement statement and the completed FMLS Notice of Closing form must be submitted to FMLS. (Id. at Ex. B, Rule 16.1.) All fees due FMLS "**in connection** with

the **sale** of any listing shall be submitted to FMLS within ten (10) business days of **closing** accompanied by the completed FMLS Payment Identifier form." (Id., at Ex. B, Rule 16.2.) (emphasis added). Significantly, Rule 16.2 uses the phrase "in connection with" in describing the broker Members' obligations.

These reporting requirements are unique to FMLS and amount to a "second set of books" (supplementing the HUD-1) so that FMLS, the Brokers, and the Agents – everyone but Plaintiffs – knows how much FMLS is to be paid in connection with each settlement.[25] Like other settlement charges that are disclosed on the HUD-1, such as real estate commissions, title insurance premiums, transfer taxes, intangible taxes, recording fees, and home warranty premiums, the Hidden Settlement Fees are calculated on a percentage of sale basis – and are thereby directly connected both to the sale and the amount of the sale – and yet are never reported on the HUD-1.[26]

Indeed, Defendants admit that the imposition of Hidden Settlement Fees occurs when "FMLS . . . plausibly contributed to the procurement of the sale of a listed property." (Def. Br., p. 6.) A fee due for "plausibly contribut[ing]" to a sale is no less

[25] These reporting requirements also enable FMLS to determine the eligibility of a Member broker to receive Kickbacks. (Am. Compl. ¶ 134.)

[26] Defendants contend that RESPA confers no private right of action for failing to properly disclose settlement charges on a HUD-1. (Def. Br., pp. 20, 23-25.) However, the Plaintiffs' claims under RESPA are based on the illegal practices of the RESPA Defendants, not just their failure to disclose those practices. RESPA does not permit unearned fees and kickbacks even if they are fully disclosed.

paid "incident to," "part of," or "in connection with" a settlement than are these other percentage-based settlement charges.[27] Nor are the Hidden Settlement Fees insignificant in comparison to other settlement charges reported on the HUD-1. (Def. Br., p. 16.)[28] Despite the numerous points of connection between the payment of Hidden Settlement Fees to FMLS and individual settlements, the Hidden Settlement Fees were omitted from the HUD-1 solely for the purpose of keeping secret this so-called "legitimate business model." (Def. Br., p. 2.) (Am. Compl. ¶149.) In short, the Member brokers' obligations to report settlements and remit payments to FMLS are directly connected to each settlement. Defendants' purposeful decision not to report the Hidden Settlement Fees on the HUD-1's, so that these fees could not be paid directly by consumers, does not shield Defendants from liability under RESPA.

4. FMLS Paid Kickbacks To Defendant Brokers In Exchange For Referrals Of Plaintiffs' Business In Violation Of Section 8(a).

Defendants also argue that Plaintiffs fail to adequately allege that Defendant

[27] FMLS emphasizes the connection between settlements and the benefits of membership in its marketing materials: "the more you and your agents sell the more money [Patronage Dividends] you [the broker] will receive." (Am. Compl. Ex. G.)

[28] Defendants provide a table of settlement charges to the named Plaintiffs that shows FMLS charges ranging from $369.60 to $575.76. (Def. Br. p. 17.) These charges dwarf, or are at least comparable to, many of the fees appearing on the HUD-1 in Plaintiffs' transactions. Fees disclosed on the HUD-1 in the Newberry Point Drive Transaction, for example, include: $6.00 (flood certification fee), $6.50 (administration fee), $15.00 (credit report fee), $83.00 (tax service fee), $150.00 (title examination fee), $275.00 (document prep fee), $300.00 (processing fee), $430.00 (appraisal fee), and $450.00 (attorneys' fees). (Am. Compl. Ex. K.)

Brokers referred Plaintiffs to FMLS in violation of Section 8(a). (Def. Br., p. 20.) Defendants ignore, however, Plaintiffs' numerous allegations of a compensated referral in violation of Section 8(a):

- FMLS paid Kickbacks (payments of a thing of value) to the Defendant Brokers. (Am. Compl. ¶¶ 67, 320, 364.)
- No services were performed in return for the Kickbacks. (Id. at ¶¶ 199, 218, 238.)
- The Kickbacks were made pursuant to an agreement (the FMLS Rules and Regulations) to refer listing business to FMLS, which, upon closing, will result in the payment of fees to FMLS. (Id. at ¶¶ 67, 279, 315, 364.)
- The Defendant Brokers agreed through the adoption of Rule 6 to refer all sellers who wish to sell property in the Compulsory Area to FMLS. (Id. at ¶¶ 70, 79.)
- Kickbacks were paid only because a referral in fact occurred. (Id. at ¶¶ 129, 315.)[29]
- FMLS tracks those referrals by requiring a copy of the purchase and sale agreement before closing (Rule 14) and a copy of the HUD-1 immediately after closing (Rule 16). (Id. at ¶¶ 108, 117.)

[29] Plaintiffs also allege that the Kickbacks were "significant," which characterization Defendants do not dispute. (Def. Br., pp. 7-8.)

Defendants argue that these allegations are insufficient under Twombly to establish a referral under Section 8(a) because, they contend once again, Plaintiffs do not allege they directly paid FMLS for the listing. Without differentiating between Plaintiffs' 8(a) and 8(b) claims, Defendants contend that RESPA applies only to services for which a settlement service provider "requires a borrower or seller to pay". (Def. Br., pp. 26-27.) Specifically, with respect to Plaintiffs 8(a) claims, Defendants contend that Plaintiffs were not "referred" to FMLS under the terms of HUD's Regulation X. (Def. Br., p. 35.) But that regulation makes clear that a compensated referral in violation of the statute occurs if a

> "….**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."

24 C.F.R. 3500.14(f)(1) (emphasis added). Contrary to Defendants argument, Plaintiffs do allege that they were charged real estate commissions (for settlement services), which charges were "attributable in whole or in part to" the Hidden Settlement Fees (a "business incident" to the brokerage services). (Am. Compl. ¶¶ 181, 188, 207, 226, 263, 265, 266, 274.)

In addition, it is undisputed that FMLS' Rules and Regulations require the Brokers and Agents to use FMLS for listings within the 21 county Compulsory Area in metro Atlanta. (Am. Compl. ¶¶ 70-71.) According to HUD's Regulation X, "a referral

also occurs when a person paying for a settlement service or **business incident thereto** is required to use … a particular provider of a settlement service **or business incident thereto**." 24 C.F.R. 3500.14(f)(2) (emphasis added). The Brokers (who are indisputably settlement service providers) were contractually obligated to list their clients' properties with FMLS, which is "a particular provider of a settlement service or business incident thereto."

Furthermore, the Defendant Brokers did not provide additional, distinct services to Plaintiffs or FMLS in return for the Kickbacks from FMLS, a party to whom they referred settlement business. "When a person in a position to refer a settlement service [the Defendant Brokers] receives a payment for providing additional services as part of the transaction, such payment must be for services that are **actual, necessary and distinct from** the primary services provided by the person." 24 C.F.R. 3500.14(f)(3) (emphasis added). The only services the Defendant Brokers provided were real estate brokerage services, and they were fully compensated for those services before receiving the Kickbacks. Thus, the Kickbacks were not paid for the provision of any distinct services performed by the Defendant Brokers.

Defendants also attempt to justify the FMLS fee structure by referring to corporate and tax law applicable to "cooperatives" without actually claiming that FMLS and the Member brokers and agents operate as a cooperative. (Def. Br., p. 9,

n.5.) However, none of the authorities cited by Defendants mention RESPA nor provide for the insulation of cooperatives from liability under RESPA simply because they operate as a "cooperative."[30]

Other than their misinterpretation of Regulation X, Defendants cite no authority under RESPA - because there is none - for the proposition that the person referred must be directly charged a fee. Moreover, Section 8(a) cases like Culpepper v. Inland Mortgage, 132 F.3d at 696 (11th Cir. 1998) (yield spread premium paid by mortgagor to mortgage broker was prohibited referral fee; borrower did not pay any additional fee) and Edwards v. First Am. Title Ins. Corp., 610 F.3d 514 (9th Cir. 2010) (settlement agent referred purchaser to title insurance company, which paid settlement agent a prohibited referral fee; purchaser did not pay any additional fee) are contrary to Defendants' position. In addition, a consumer has standing to bring a private cause of action under RESPA even if the kickback or thing of value does not result from a specific fee or result in an overcharge to the consumer. See Edwards, 610 F.3d at 518; Carter v. Welles-Bowen Realty, Inc., 553 F.3d 979, 989 (6th Cir. 2009); Alston v.

[30] For example, for FMLS and the Member brokers to be taxed as a cooperative, an election must be made under Subchapter "T" of the Internal Revenue Code. See Donald A. Frederick, *Income Tax Treatment of Cooperatives: Background, Cooperative Information Report*, Part I at 33 (2005) (cited by Defendants at Def. Br., p. 8, n. 5.). Further, "[c]ooperatives must report [patronage dividends] to [the] IRS (form 1096) and to the patron receiving the distribution (form 1099-PATR)." Id. at 35. Whether the Defendants complied with these provisions is a matter to be determined in discovery.

Countrywide Financial Corp., 585 F.3d 753, 755 (3d Cir. 2009). In Carter, for example, the Sixth Circuit explained that the plaintiffs, who were not overcharged for title insurance, were entitled to bring claims under Section 8(a) and 8(b) simply because the title insurer was "given referrals sullied by kickbacks in violation of RESPA." Carter, 553 F.3d at 989.

5. The Hidden Settlement Fees and Kickbacks Are Payments for Which No Service Was Provided In Violation of Section 8(b).

Defendants also argue that Plaintiffs' 8(b) claims fail because there must be no service provided in exchange for the fee. (Def. Br., p. 37.) This ignores the following specific allegations of the Amended Complaint that focus on the absence of any services in exchange for the Hidden Settlement Fees and Kickbacks:

- Plaintiffs allege that Plaintiffs were charged real estate commissions burdened with unearned Hidden Settlement Fees, even though FMLS had already been fully compensated for its database listing service. (Am. Compl. ¶¶ 181, 188, 207, 226, 263, 265, 266, 274.)
- The actual costs of listing properties on FMLS' database, plus a profit, are paid for not by the Hidden Settlement Fee, but by the various fixed fees FMLS charges the Defendant Brokers (Id. at ¶¶ 62-64.)
- The Hidden Settlement Fees are doubled when two Brokers are involved even though FMLS provides no additional service. (Id. at ¶¶ 83, 289.)

- The Hidden Settlement Fees are due once a property in the Compulsory Area is sold by a broker Member even if the property is never listed on the FMLS database (Id. at ¶¶ 94, 286.)
- The Hidden Settlement Fees continue to be imposed even after a broker Member exceeds the Minimum Annual Fee amount. (Id. at ¶ 132.)
- The Hidden Settlement Fees are paid solely to fund Kickbacks. (Id. at ¶ 364.)
- Any member that fails to pay the Hidden Settlement Fee at the time of closing a sale is required to pay a double fee. (Id. at Ex. B, Rule 21(g).)
- Kickbacks are paid from settlements based on the volume of business referred, not services rendered. (Id. at ¶¶ 127, 129.)

Defendants argue that because FMLS provided access to the listing database, Plaintiffs' allegations that the Hidden Settlement Fees are unearned are contrary to fact. (Def. Br., pp. 20, 37.) However, Plaintiffs allege that although FMLS provided the Member brokers and agents its database listing services, it was fully compensated for those services through various fixed fees (Am. Compl. ¶ 66.), making the Hidden Settlement Fees unearned and in violation of § 8(b) because "no, nominal, or duplicative work is done" in exchange for the fee. See also Am. Compl. Ex. A, pp. 9-11; Busby I, *supra*, 513 F.3d at 1321. This is, by definition, a violation of Section 8(b), as explained in Regulation X:

> A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable.

24 C.F.R. 3500.14 § (c). Because Plaintiffs were charged with commissions burdened with Hidden Settlement Fees, Plaintiffs have sufficiently alleged a Section 8(b) violation. The former Assistant General Counsel for RESPA agrees with Plaintiffs' contentions. (Am. Compl. Ex. A, Report of Grant Mitchell, p. 11.)

The Eleventh Circuit has examined a number of different real estate practices to determine whether Section 8(b) has been violated. In the most analogous case – Busby I– the Eleventh Circuit concluded that the district court had improperly analyzed whether an "Administrative Brokerage Fee" paid at closing was reasonable when it should have simply determined whether "any services" or "no services" were performed. See Busby I, 513 F.3d at 1324. On remand, the court in Busby v. JRHBW Realty, Inc., 642 F. Supp.2d 1283 (N.D. Al. 2009) ("Busby II"), concluded that the "Administrative Brokerage Fee" paid at closing was an unearned fee in violation of §8(b) of RESPA. See Busby II, 642 F. Supp.2d at 1303. Busby I relied on HUD's expansive 2001-1 Statement of Policy, which also makes it indisputable that one of the principal objectives of Section 8(b) is to eliminate all fees imposed when no services are provided:

> Payments that are unearned fees occur in, but are not limited to, cases

> where . . . (3) one settlement service provider charges the consumer a fee where no, nominal or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

Ex. 3, SOP 2001-1, p. 6, §III.)

Even though Plaintiffs' RESPA § 8(b) claims clearly allege that the Hidden Settlement Fee is an unearned fee, Defendants attempt to misdirect the Court by mischaracterizing Plaintiffs' claims as excessive fee or overcharge claims. (Def. Br., pp. 37-38.) To the extent Defendants seek to create confusion as to the difference in these distinct claims, an "unearned fee" claim arises when, as here, no service is provided in exchange for the fee charged. See, e.g., Busby I, 513 F.3d at 1321.[31] Conversely, an "excessive fee" or "overcharge" claim arises when a service is rendered, but the service provider is alleged to have charged substantially more for the service than the provider's cost; in other words, the fee is unreasonable in relation to the service provided. See, e.g., Haug v. Bank of Am., 317 F.3d 832 (8th Cir. 2003) (plaintiffs did not state a claim under RESPA § 8(b) where they claimed that charges for credit reports and other loan related services exceeded defendants' actual costs for those services). Here, the Amended Complaint expressly alleges that no service was provided in return for the Hidden Settlement Fee. (Am. Compl. ¶¶ 81, 287.) The

[31] As Plaintiffs' expert notes, the Hidden Settlement Fee is by definition an unearned fee because it is based on the selling price, not the value of services rendered. (Am. Compl. Ex. A, p.10.)

challenged practice involves commissions charged by one settlement service provider and split with another to pay fees that were not for services rendered. (Id. at ¶¶ 80-88, 95-96.)[32]

6. The Hidden Settlement Fees Are Not Ordinary Business.

Defendants next argue that the fees Defendant Brokers pay to FMLS are not subject to RESPA because they are like payments they make to other vendors as part of their overhead (e.g., newspapers, yard signs). (Def. Br., pp. 27-28.) But FMLS does not make its database of listings accessible to the public at its website or otherwise, so it is not a form of advertising that is part of overhead. Yet its database contains critical information, such as commissions offered to selling brokers, that is viewable only by

[32] The cases relied upon by Defendants to support their contention that Plaintiffs' § 8(b) claims have no merit are inapposite because they do not involve unearned, sham fees alleged to have been imposed solely for the purpose of funding kickbacks to another party, as Plaintiffs allege here. Instead, these cases analyze whether RESPA § 8(b) governs excessive fees and markups. See, e.g., Friedman v. Market St. Mortg. Corp., 520 F.3d 1289 (11th Cir. 2008) (reversing district court's class certification order and remanding with instruction to dismiss § 8(b) claim where services were rendered in exchange for escrow waiver fee; § 8(b) does not govern excessive fees because it is not a price control provision); Santiago v. GMAC Mortg. Group, Inc., 417 F.3d 384 (3rd Cir. 2004) (plaintiffs stated a claim under RESPA § 8(b) for unearned markups, which were different from kickbacks); Kruse v. Wells Fargo Mortg, Inc., 383 F.3d 49 (2nd Cir. 2004) (RESPA §(8)(b) did not govern overcharges, but does govern markups where defendants performed no additional services); Krzalic v. Republic Title Co., 314 F.3d 875 (7th Cir. 2002) (no § 8(b) claim where defendant charged plaintiffs a higher fee than the county recorder charged for recording plaintiff's mortgage); Boulware v. Crossland Mortg. Co., 291 F.3d 261 (4th Cir. 2002) (no § 8(b) claim for overcharging for a credit report).

FMLS' members. (Am. Compl. ¶ 46.) Nor do Defendants attempt to explain why selling (buyer's) brokers split their commissions with FMLS even though buyers do not list on FMLS the property they acquire, or why brokers who have reached the Minimum Annual Fee are required to continue paying Hidden Settlement Fees.[33] Also, unlike paying for a yard sign or newspaper advertisement, broker Members must pay the Hidden Settlement Fee even if the property is never listed on the FMLS database. (Id. at ¶¶ 94, 286, Ex. B, Rule 18.) Furthermore, when broker Members leave FMLS, they are still obligated to pay FMLS Hidden Settlement Fees if property is sold within 90 days of departure. (Id. at Ex. B, Rule 15.3.) In fact, the very nature of the Hidden Settlement Fees, calculated as a percentage of the sale as opposed to the cost or quality of MLS services provided, connects the payment of the fees to sales much more directly than most ordinary business expenses.[34] These payment arrangements are unique to FMLS and belie the assertion that they are normal business expenses like advertising.

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[33] Defendants emphasize that a significant portion of the Hidden Settlement Fees are returned to the Defendant Brokers as Patronage Dividends, making FMLS' profits not as large in comparison to GAMLS' profits as Plaintiffs allege. (Def. Br., p. 9.) As with many of Defendants' arguments, this is a matter to be resolved in discovery. Again, Defendants do not attempt to explain why the Defendant Brokers and Agents split their commission with FMLS only to have a significant portion returned to some of the Defendant Brokers. Which of the Defendant Brokers receive the bulk of the Patronage Dividends, and why, is also a matter to be resolved in discovery.

[34] See Report of Grant Mitchell, Am. Compl. Ex. A, p. 10.