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' REPLY TO PLAINTIFFS' RESPONSE TO
DEFENDANTS' JOINT MOTION TO DISMISS

Despite the vigor with which Plaintiffs admonish Defendants' failure to "dispute" or "explain" the allegations in the Amended Complaint (*see*, *e.g.*, Pls.' Resp. at 6-7), it is Plaintiffs' obligation to plead ***facts*** sufficient to show a "plausible entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Yet even accepting Plaintiffs' verbose version of the "truth" (vast parts of which Defendants dispute), there is no substance to salvage the wreckage of the Amended Complaint, which rests almost exclusively on legal conclusions and implausible extrapolations from the incorporated documents. When confronted with another plaintiffs' similar attempt to rely on conclusory labels, Judge Seyla of the First Circuit stated: "Painting a pumpkin green and calling it a watermelon will not render its contents sweet and juicy. That analogy is useful here: . . . [it] will not suffice to transform [Plaintiffs' bald assertions] into something they plainly are not.'" *Arruda v. Sears, Roebuck & Co.*, 310 F.3d 13, 24 (1st Cir. 2002).

There is no mistaking the fact that the crux of Plaintiffs' claims is that FMLS charges too much for its services. But the factual allegations do not plausibly establish that the FMLS fee structure, or the Rules through which it is implemented, distinguish FMLS from any other MLS provider in a way that opens the door to Defendants' civil liability under federal or state law. Not only do Plaintiffs stretch beyond logic the factual inferences to be drawn from incorporated

documents, they repeatedly overstate the actual allegations within the four corners of the Amended Complaint and overreach on the legal implications. (*See*, *e.g.*, Pls.' Resp. at 64 n.16 (stating "Shareholder members . . . tend to be more willing to offer innovative fee arrangements" which is not alleged in the Amended Complaint)). In fact, Plaintiffs' "à la carte" treatment of the elements of their claims—picking and choosing those that best suit their whims—reveals that they themselves cannot articulate how Defendants' conduct violates the law. The bottom line is that the FMLS Rules constitute nothing more than a voluntary agreement entered into between independent players in the real estate industry and nothing in those Rules impacts or alters the wholly separate agreements Plaintiffs entered with respect to the Three Transactions.[1]

[1] In apparent recognition of the impending dismissal of their suit, Plaintiffs request leave to file yet another amended complaint and the opportunity to conduct discovery before reasserting their claims. (Pls.' Resp. at 100 n.38). Having filed two eight-count pleadings (each in excess of 300 paragraphs) and a 100-page opposition to the most recent motion to dismiss, it is abundantly clear that Plaintiffs cannot state a claim upon which relief may be granted and permitting further amendment would be futile. *See*, *e.g.*, *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1255 (11th Cir. 2008) ("[J]ustice does not require district courts to waste their time on hopeless cases, [so] leave may be denied if a proposed amendment fails to correct the deficiencies . . . ."). Moreover, the Court should summarily reject Plaintiffs' desperate request to conduct discovery in order to properly plead their claims. *See Twombly*, 550 U.S. at 559 (requiring allegations of "plausible entitlement to relief" so courts and litigants can "avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the

I. ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiffs Do Not State A RESPA Claim.

Plaintiffs' brief focuses on three distinct theories for Defendants' alleged RESPA liability: (1) an "unearned fee" claim under RESPA Section 8(b); (2) an unlawful referral claim under RESPA Section 8(a); and (3) an independent cause of action for Defendants' alleged failure to satisfy the safe-harbor provision, RESPA Section 8(c), regarding affiliated business arrangements.[2] But Plaintiffs' tortured and convoluted application of the statute does not (and cannot) state any violation of the provisions at issue, even coupled with Plaintiffs' continued and unapologetic use of pejorative and misleading labels and conclusions.[3]

[discovery] process will reveal relevant evidence"); *see also Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1338 (11th Cir. 2010) (same).

[2] Plaintiffs appear to have abandoned any claim premised on alleged nondisclosures in the HUD-1s, essentially conceding that the Amended Complaint fails to state such a claim. (Pls.' Resp. at 38 n.26; *see also* Defs.' Br. at 23-25).

[3] Furthermore, Plaintiffs are mistaken that Defendants' reference to the rule of lenity raises doubt about the merits of the motion to dismiss the RESPA counts. (*See* Pls.' Resp. at 57). A plain reading of the unambiguous language of the statute shows that Plaintiffs have not stated a viable claim. If the Court agrees that RESPA clearly and unambiguously requires dismissal of Plaintiffs' claims, then the rule of lenity does not apply. If, on the other hand, the Court determines that Plaintiffs' claims may have merit, the only plausible basis for Plaintiffs' claims to exist would arise from some ambiguity in the statute, whereby the rule of lenity applies and would require the relevant provisions to be construed in favor of Defendants. (*See* Defs.' Br. at 29 n.27). Thus, far from signaling a deficiency in Defendants' motion, the rule of lenity further underscores why it is meritorious.

1. Plaintiffs Do Not State A Claim Under RESPA Section 8(b).

The bulk of Plaintiffs' brief is devoted to addressing Defendants' alleged violation of Section 8(b). To state a claim under the plain language of that provision, a plaintiff must allege: (1) a "charge" paid or received in exchange for a "settlement service" provided in connection with a federally related mortgage loan; (2) "a portion, split, or percentage" of such charge with another "person"; and that (3) the charge was unearned—*i.e.*, given or accepted "other than for services actually rendered." *See* 12 U.S.C. § 2607(b).

Defendants' opening brief provided a detailed explanation of why Plaintiffs do not (and cannot) state a Section 8(b) claim based upon any "charge" paid to or received by FMLS or any allegation that FMLS provides "settlement services." (*See* Defs.' Br. at 25-34). Rather than attempt to refute Defendants' position on these points, Plaintiffs now point to the commissions paid to the Brokers and Agents—charges indisputably paid in exchange for "settlement services"—as the "essence" of their Section 8(b) claim. (Pls.' Resp. at 29). But even from this perspective, there is no claim under Section 8(b) because Plaintiffs do not adequately allege that any portion of the commissions was "unearned."

a. Plaintiffs do not plead facts plausibly showing any "split" of commissions.

The words "portion, split, or percentage" all indicate a statutory requirement that any claim asserted under Section 8(b)—which is titled "Splitting charges"—must be supported with allegations plausibly demonstrating that the underlying "charge for settlement services" was divided between two parties. *See*, *e.g.*, *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003) ("[T]he plain language of Section 8(b) requires plaintiffs to plead facts showing that the defendant illegally shared fees with a third party."). Notwithstanding Plaintiffs' repeated conclusory assertions that Defendants "split" commissions (*see*, *e.g.*, Am. Compl. ¶¶ 95, 265, 274), the documents incorporated into the Amended Complaint—specifically, the FMLS Rules, brokerage agreements, and purchase contracts—conclusively show that Defendants never "split" brokerage commissions.[4]

Plaintiffs attach and rely on the FMLS Rules to support this argument (Am. Compl., Ex. B), yet nothing in the Rules: (1) requires a Member to "split" a commission with FMLS; (2) directs a Member to pay FMLS directly from

[4] "While the Court is compelled to accept the facts in the Complaint as true in considering a motion to dismiss, those alleged facts can be trumped by contradictory facts presented in an exhibit or attachment to the pleadings." *Lane v. Wells Fargo Home Mortg.*, No. 1:10-cv-2385-RWS, 2010 WL 5087855, at *2 (N.D. Ga. Dec. 7, 2010) (citations omitted).

settlement proceeds; or (3) in any way ties the Member's obligation to pay FMLS to the commissions received in any individual transaction. Rather, Rule 16 simply requires Members to pay FMLS within ten days following settlement (*id.*, Ex. B at 12 (Rule 16.2)); Members are free to use whatever resources are available to them to do so, and Plaintiffs do not (and cannot) allege otherwise. In fact, Plaintiffs do not dispute that the Rules require a Member to pay FMLS ***even if*** a consumer does not pay the Member's agreed-upon commission. (*See* Defs.' Br. at 31-32). The independent nature of the parties' respective obligations contradicts the repeated conclusory allegations that Defendants "split" the commissions paid to the Brokers and Agents on each of the Three Transactions.[5]

[5] Although not alleged in the Amended Complaint and wholly irrelevant to **these** Plaintiffs' transactions, Plaintiffs' brief refers to "flat-fee" brokers—*i.e.*, those who, according to Plaintiffs, assess the FMLS Fee to consumers ***in addition to*** a small, flat-rate brokerage fee. (Pls.' Resp. at 33 n.21). But Plaintiffs' own example works against them because these flat-fee brokers do not "split" commissions, but instead charge their clients a separate fee to cover the FMLS services, which eviscerates any allegation that the FMLS fee structure ***requires*** a "split" of earned commissions. Unlike the Three Transactions at issue, where the Brokers elected to simply absorb the FMLS Fee as a cost of doing business, the flat-fee brokers in Plaintiffs' example elected to pass the FMLS Fees directly on to the seller as an additional cost. The absence of a split fee in the Three Transactions is also clear from Plaintiffs' allegations regarding the required security deposit—if FMLS required its Members to provide a "split" from each commission, there would be no need to charge a deposit to cover future Fees. (*See* Pls.' Resp. at 13). Thus, Plaintiffs' own examples (albeit outside of the four corners of their Amended Complaint) show that the Brokers' commissions are not split or shared with FMLS.

Apparently recognizing the weakness of their fee-split allegations, Plaintiffs cite to *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979 (11th Cir. 2003), as negating the "split charge" requirement. (*See* Pls.' Resp. at 29 n.19). But in *Friedman v. Market Street Mortgage Corp.* ["*Friedman II*"], 520 F.3d 1289 (11th Cir. 2008), the Eleventh Circuit suggested that the language in *Sosa* addressing this issue appears to be mere *dicta*. *Id.* at 1292; *see also Wooten v. Quicken Loans, Inc.*, No. 07-00478-CG-C, 2008 WL 687379, at *3 (S.D. Ala. Mar. 10, 2008) ("The undersigned is not persuaded that *Sosa* stands for the proposition that an unsplit fee . . . can violate section 8(b)."). Moreover, a majority of appellate courts to have examined this issue have concluded that Section 8(b) does require an alleged "split" of the underlying fee. *See*, *e.g.*, *Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 803 (5th Cir. 2010) (citing cases). This finding is more in line with the clear language of Section 8(b). The confusion surrounding *Sosa* is ultimately a red herring, however, because, as shown below, there is no question that the charge underlying Plaintiffs' Section 8(b) claim is not "unearned."

b. Plaintiffs do not plead facts plausibly showing any "unearned" fee.

To support the key element of their Section 8(b) claim—namely, that a portion of the commissions was "unearned"—Plaintiffs apparently intend to prove that the commissions paid to the Brokers and Agents were "burdened" by

the obligation to pay FMLS for services Plaintiffs allege were never provided. (*See* Pls.' Resp. at 29). But, the Amended Complaint contradicts this assertion.

i. The factual allegations do not support the contention that the brokerage commissions were "unearned."

Plaintiffs never dispute that the brokerage agreements and purchase contracts entitle the Brokers and Agents to collect the full amount of contracted-for commissions in exchange for providing ***their*** brokerage services to Plaintiffs. (*Accord* Defs.' Mot. to Dismiss, Ex. B ¶ 6(A)-(B), Ex. C ¶ 6(A)-(B) & Special Stipulations, Ex. D ¶ 7(A)-(B), Ex. E ¶ 13(B), Ex. F ¶ 13(B), Ex. G ¶ 13(B)). Nor do Plaintiffs allege that the Brokers and Agents failed to provide the brokerage services for which they were paid. Moreover, both the Amended Complaint and the listing agreements show that each of the three properties at issue was listed in the FMLS database (Am. Compl. ¶¶ 185, 204, 223; Defs.' Mot. to Dismiss, Ex. B ¶ 5(C), Ex. C ¶ 5(C), Ex. D ¶ 5(B)), and Plaintiffs never allege that the buyers' Brokers and Agents did not have access to the database to view posted listings. In other words, the Brokers and Agents clearly "earned" their full commissions by providing Plaintiffs the full benefit of their bargain under their respective brokerage agreements, which included benefits derived from the Brokers' and Agents' access to the FMLS listing

service.[6] These alleged facts reveal a single, important truth: Plaintiffs do not genuinely contend that the commissions were "unearned," but instead complain that they were excessively high as a result of the FMLS Fees. But, such a complaint does not generate a viable RESPA claim under Section 8(b).

ii. Plaintiffs cannot sustain a Section 8(b) claim based upon allegedly "excessive" commissions.

The law is clear that Section 8(b) does not impose liability "for charging a fee that is excessive in relation to services or goods actually rendered." *Friedman II*, 520 F.3d at 1296-97; (*see also* Defs.' Br. at 36-38). Plaintiffs attempt to circumvent this legal reality by arguing that the portion of the commissions allegedly attributable to the FMLS Fees is a charge for an "extraordinary" business expense of the Brokers and Agents, one for which there is no underlying justification and is, therefore, "unearned." (*See* Pls.' Resp. at 5).

[6] Plaintiffs mistakenly rely on a district court's nonbinding decision in *Busby v. JRHBW Realty, Inc.* [*"Busby II"*], 642 F. Supp. 2d 1283 (N.D. Ala. 2009), to contradict this point. (*See* Pls.' Resp. at 33-34, 45-48). Aside from the numerous questionable aspects of the *Busby II* decision (such as its apparent resolution of factual questions on summary judgment), it is factually distinguishable from the present case: *Busby II* involved a broker's ***separate*** charge directly to the consumer meant to cover the "array of services" provided by the broker. *See* 642 F. Supp. 2d at 1293-94. Here, by contrast, the Brokers and Agents charged a single commission to cover the entire "array of services" they provided on the Three Transactions, which included listing with FMLS and GAMLS on the selling side and accessing listed properties for the benefit of the buyers. (Am. Compl. ¶¶ 45, 185, 204, 223). Consequently, *Busby II* is inapposite.

But "a RESPA plaintiff may not avoid the prohibition on excessive fee claims by asking a court to divide a fee for services actually performed into 'reasonable' and 'unreasonable' (and hence, unearned) components." *Hazewood v. Found. Fin. Group, LLC*, 551 F.3d 1223, 1225-26 (11th Cir. 2008) (citing *Friedman II*, 520 F.3d at 1297). If courts were permitted to engage in such analysis, then RESPA liability would become totally subjective, opening the door to potential liability where a broker escorted customers in limousines instead of Ford Pintos, spent twice as much as a competitor in advertising client listings, or utilized direct mail campaigns to target select homebuyers instead of quarter-inch ads in a "Pennysaver." Section 8(b) simply does not require cost-saving measures; "[i]t follows, therefore, that where a plaintiff concedes that a service is actually performed in exchange for a settlement fee, [a plaintiff] may not avoid dismissal . . . by arguing that the 'excessive' portion of the fee was 'unearned.'" *Id.* at 1226; *see also Sosa*, 348 F.3d at 983-84 (dismissing Section 8(b) claim where allegations reflected a service was provided in exchange for "mark-up" of courier fee); *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1321 (11th Cir. 2008) (Section 8(b) claims are actionable only if ***no*** service is performed in exchange for the fee). Here, notwithstanding Defendants' view that the FMLS-Broker agreements are not subject to RESPA, by alleging that each of the three properties was listed with

FMLS and acknowledging the benefit FMLS provided to the buyers' Brokers and Agents (*see*, *e.g.*, Am. Compl. ¶¶ 45, 185, 204, 223), Plaintiffs concede that a service was performed in exchange for the FMLS Fees.

iii. Plaintiffs cannot sustain a Section 8(b) claim based upon FMLS's multi-faceted fee structure.

In the same vein, Plaintiffs also appear to predicate their Section 8(b) claim on FMLS's two-component fee structure—*i.e.*, the Minimum Annual Fee coupled with the Fees charged per listing sold, arguing the former was "earned" while the latter was not. (*See* Am. Compl. ¶ 132; Pls.' Resp. at 44-45). However, nothing in Section 8(b) prohibits FMLS (or its Members) from implementing a multi-faceted fee structure to compensate for the full value of its services. *Accord* Letter from Helen R. Kanovsky, U.S. Dept. of HUD, to Jay N. Varon, Foley & Lardner LLP (Jan. 22, 2010) (on file with recipient), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=respa-discfees.pdf (noting that broker's commission "may be determined using a flat fee, a percentage of the sale price or a ***combination of those methods***" (emphasis added)). Plaintiffs do not allege why FMLS is precluded from implementing such a fee structure to compensate it for the full range of services provided to its Members, including, among other things, listing services, 24-7 technical support, mobile access, monthly newsletters, and professional training. *See* Member Perks on FMLS website, http://www.fmls.com/

FMLS/FMLS_CONSUMER/default.cfm?ACTION=MEMBER_DISCOUNTS (identifying broad range of services and discounts to Members).

Plaintiffs erroneously refer to HUD's 2001 Policy Statement in their attempt to argue that FMLS's fee structure is actionable. (Pls.' Resp. at 33-34). Relying on *Heimmermann v. First Union Mortgage Co.*, 305 F.3d 1257 (11th Cir. 2002), Plaintiffs contend the 2001 Policy Statement is entitled to deference under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Although the *Heimmermann* court afforded deference to the 2001 Policy Statement, it did so in the context of a Section 8(a) claim, and thus that case is not relevant to Plaintiffs' Section 8(b) arguments. By contrast, the Eleventh Circuit's later rulings in *Friedman* and *Sosa*—both of which addressed Section 8(b) claims—rejected, rather than deferred to, the Section 8(b) portion of the 2001 Policy Statement.[7]

[7] Plaintiffs attempt to reconcile *Heimmermann*, *Friedman* and *Sosa* by characterizing *Friedman* and *Sosa* as "excessive fee" cases (rather than "unearned fee" cases) and arguing that "excessive fee" claims "clearly" are not cognizable under Section 8(b) and thus do not require *Chevron* deference to the 2001 Policy Statement. (Pls.' Br. at 35 n.24). But *Sosa* was not an "excessive fee" case, and so Plaintiffs' purported distinction cannot explain the court's refusal to defer to the 2001 Policy Statement. *See Sosa*, 348 F.3d at 983-84 (analyzing allegedly unearned "mark-up"). More importantly, as explained *supra* Part I.A.1.b.ii, Plaintiffs' Section 8(b) claims are properly characterized as "excessive fee" claims and thus, by Plaintiffs' own logic, should be "clearly" dismissed as outside the purview of Section 8(b).

2. Plaintiffs Do Not State A Claim Under RESPA Section 8(a).

Plaintiffs also attempt to state a claim under Section 8(a), which requires: (1) an agreement to refer "business incident to or any part of a real estate settlement service" in connection with a federally related mortgage loan; and (2) a corresponding exchange of a "fee, kickback, or thing of value." *See* 12 U.S.C. § 2607(a). In addition to the fact that FMLS does not provide a "settlement service" or any "business incident" thereto, Plaintiffs' Section 8(a) claim fails because they have not properly alleged that any "referral" occurred.

a. FMLS does not provide "settlement services" or "business incident" thereto.

The listing services that FMLS provides are not "settlement services" (or even "business incident" to settlement services) as that term is defined in the RESPA statute and the HUD regulations interpreting it. *See* 12 U.S.C. § 2602(3); 24 C.F.R. § 3500.2(15); (*see also* Defs.' Br. at 26-27). Plaintiffs' attempt to expand the statutory and regulatory definition to encompass MLSs generally, and FMLS specifically, is unprecedented and does not square with the case law.

First, Plaintiffs ignore that the term "settlement service" has been construed narrowly, not broadly. *See Wooten v. Quicken Loans, Inc.*, 626 F.3d 1187, 1192-93 (11th Cir. 2010). Second, Plaintiffs ignore the fact that MLSs are not identified as "settlement services" in either the RESPA or the HUD definitions of that term.

The reason for this is easily explained: the RESPA definition of "settlement services" was intended to encompass services provided to individual consumers, and MLSs (including FMLS) provide a service to brokers and agents, not to consumers. (*See* Defs.' Br. at 27-28).

Plaintiffs never allege that all MLS providers fall within the purview of RESPA, or that FMLS's services differ from those of any other MLS provider. The only distinction Plaintiffs draw between FMLS and other MLS providers is the method by which FMLS charges for its services. (*See*, *e.g.*, Am. Compl. ¶¶ 66, 68). But Plaintiffs fail to cite a single case (and Defendants are not aware of any) in which a fee structure—rather than the character of the service provided—was the deciding factor in defining a "settlement service." Assuming *arguendo* that FMLS provides "settlement services," then the inescapable conclusion is that ***all*** MLS providers are "settlement service" providers. Again, Plaintiffs do not cite any case (and Defendants are not aware of any) in which an MLS provider was determined to provide "settlement services," and Plaintiffs have not articulated why the Court should do so here. (*But see* Defs.' Br. at 26-34 (explaining why an MLS, generally, and FMLS, in particular, does not provide "settlement services")).

b. Plaintiffs do not plead facts plausibly alleging any "referral."

Nor have Plaintiffs alleged any "referral" of a settlement service. Although RESPA itself does not define "referral," the definition set forth in HUD's Regulation X explicitly requires that the person being referred must "***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). This definition requires Plaintiffs to allege that they paid for the "settlement service" allegedly referred to them (here, the FMLS services).

But Plaintiffs never allege they made direct payment to FMLS. Instead, they point to select language from Regulation X and argue that the commissions they paid to the Brokers and Agents were "attributable in part" to the FMLS Fees. (Pls.' Resp. at 41). Plaintiffs' reliance on this clause in Regulation X is misplaced. First, as explained *supra* Part I.A.2.a, FMLS does not provide any "settlement service," and Plaintiffs cannot eliminate this language from the HUD definition simply to suit their purposes. Second, the cited clause was intended to apply to settlement costs (like title insurance or real estate commissions) for which both buyers and sellers may be responsible such that each party pays part of the charge "attributable to" the underlying settlement service. (*See* Defs.' Br. at 35 n.32, 36).

Plaintiffs never address this point from Defendants' brief, but instead attempt to fabricate a "referral" by virtue of their alleged "direct contact" with FMLS. (*See* Pls.' Resp. at 37 (citing Am. Compl. ¶ 143, Ex. H)). This nonsensical basis for alleging a "referral"—which still does not show any payment for the service referred—is not supported by RESPA, HUD's Regulation X, or any cases of which Defendants are aware. Indeed, unless Plaintiffs paid for the service referred, they cannot state a claim that Defendants violated Section 8(a), and any allegations regarding the Patronage Dividends become patently irrelevant to their claim. *Accord* FAQ's About RESPA for Industry No. 17, *available at* http://www.hud.gov/offices/hsg/ramh/res/resindus.cfm (settlement provider can give borrower's incentive so long as not based on referral of other business).

3. Plaintiffs Do Not State A Claim Under RESPA Section 8(c).

Plaintiffs are simply incorrect that the safe harbor outlined in Section 8(c) provides an independent basis for pursuing a RESPA cause of action. (*See* Defs.' Br. at 39-41). Pretermitting this argument, however, Plaintiffs do not allege any affiliated business arrangement ("ABA") that could even potentially violate Section 8(c). An ABA exists when a person who owns at least a one-percent interest in a settlement service provider is in a position to (and does) refer business to that provider. *See* 12 U.S.C. § 2602(7). Even assuming the Brokers each own a

one-percent interest in FMLS,[8] Plaintiffs do not allege an ABA because: (1) FMLS does not provide any settlement service; and (2) Plaintiffs were not referred to FMLS. *See supra* Parts I.A.2. Thus, even if Plaintiffs' ABA claim were actionable (which it is not), Plaintiffs' allegations do not trigger Section 8(c).

B. Plaintiffs Do Not State A Section 1 Price-Fixing Claim.

Instead of pleading any facts about some alleged agreement among brokers to set commission rates, Plaintiffs allege a stabilization of commissions resulting from each Member-broker's agreement to participate in FMLS and pay its Fees. (Pls.' Br. at 61, 63). But there is nothing in the FMLS Rules—the only agreement alleged in the Amended Complaint—that plausibly could have caused such an effect. Unlike the MLS rules at issue in the cases Plaintiffs cite, there is no FMLS rule that explicitly sets commission rates or otherwise limits competition. Because the Member-brokers' agreement to the Rules is the ***only*** concerted action alleged, the Court need not look further to conclude that Plaintiffs do not state a price-fixing claim based on broker commissions. Plaintiffs' admitted failure to allege any agreement ***among Member-brokers*** to fix the amount or rate of commissions seals the fate of their antitrust claim: it must be dismissed.

[8] Notably, Plaintiffs never allege that any of the Brokers maintain any interest, much less a one-percent interest, in FMLS.

1. Plaintiffs Fail To Plead Sufficient Facts To State A Claim For Price Fixing As To Broker Commissions.

Although price-fixing agreements between competitors are *per se* illegal, Plaintiffs have not alleged any horizontal agreement to fix broker commissions. Plaintiffs' attempt to manufacture an agreement on commissions based on an alleged agreement to abide by the FMLS Rules, fails the *Iqbal* test of logic and plausibility because: (1) Plaintiffs do not adequately allege that the FMLS Rules establish an agreement as to commissions, either explicitly or in practice; and (2) an agreement to pay a fee for a service, especially when the fee is such a small input cost relative to the commissions, does not plausibly suggest an agreement to fix commissions. Thus, Plaintiffs do not allege a violation of Section 1 and the Court should dismiss Count Three. (*See* Defs.' Br. at 43-47).

a. <u>An agreement to abide by the FMLS Rules and to pay Fees does not plausibly suggest an agreement to fix broker commissions.</u>

Plaintiffs argue that concerted action to fix commissions can be inferred from each Member-brokers' agreement to abide by the FMLS Rules and pay the FMLS Fees, because "'[t]he concerted action necessary to establish a Section 1 violation exists in the agreement of [an MLS's] members to adopt and apply [their] rules and membership criteria.'" (Pls.' Resp. at 61 (quoting *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1361 n.20 (5th Cir. 1980)). But, even assuming

Plaintiffs had adequately alleged any facts regarding the adoption of the FMLS Rules, the holding in *Realty Multi-List* does not support Plaintiffs' claim. The court's inquiry did not end when it found ***concerted action*** in the adoption of rules by an MLS and its members; it went on to analyze whether those rules ***restrained competition*** by excluding competitors. *Id.* at 1361. Here, the allegations do not plausibly state that the FMLS Rules restrain competition expressly or in practice. Other than illogically asserting that the FMLS Rules stabilize broker commissions because they require payment for FMLS's services, Plaintiffs do not allege that the Rules fixed or stabilized broker commissions. In fact, the Rules disavow FMLS's role in setting broker commissions.[9] (Am. Compl., Ex. 2 at 11 (Rule 14.3)). Nor do Plaintiffs allege any facts from which this Court could infer any agreement regarding broker commissions, such as the specific time, place, or persons involved in the alleged price-fixing conspiracy. *See Twombly*, 550 U.S. at 548-49, 565 n.9; *In re LTL Shipping Servs. Antitrust Litig.*, No. 1:08-MD-01895-WSD, 2009 WL 323219, at *10 (N.D. Ga. Jan. 28, 2009).

Plaintiffs argue that an agreement regarding commissions can be inferred from allegations that FMLS requires its Member-brokers to provide FMLS with

[9] Even though Rule 14.3 does not immunize FMLS from antitrust liability, it demonstrates FMLS's intent to play no role in setting broker commissions.

the two-page HUD-1 Statement,[10] which contains commission information, and that "FMLS gives its broker Members access to this commission data." (Pls.' Resp. at 69). Not only do Plaintiffs fail to allege any facts regarding how, when, and to whom FMLS allegedly provides access to commission information (*see* Am. Compl. ¶¶ 117-19; Pls.' Resp. at 69), the bare-bones allegation that FMLS provides "access" is insufficient to plead an agreement to share information, much less an agreement to fix broker commissions. (*See* Def.'s Br. at 56-58).

Even the cases Plaintiffs cite do not support such an inference.[11] *See Penne v. Greater Minneapolis Area Bd. of Realtors*, 604 F.2d 1143, 1147 (8th Cir. 1979) (declining to apply *per se* treatment to information exchange, even though plaintiffs alleged facts showing the board had published commissions to punish realtors that offered lower commission rates). The facts alleged in the case at hand are in no way comparable to the facts in *Penne* and are insufficient to state a claim

[10] Given FMLS's interest in collecting Fees due from its Members (Am. Compl. ¶ 61), FMLS has a clear, legitimate business purpose for obtaining both pages of the HUD-1 Statement—*i.e.*, the basis for the Fee calculation (sales price) appears on page 1, and the identity of the Members who owe Fees appears on page 2.

[11] Plaintiffs' reliance on the consent decree entered in *United States v. Consolidated Multiple Listing Service, Inc.*, No. 3:08-cv-01786-SB, 2009 WL 3150388 (D.S.C. Aug. 27, 2009), is unfounded, because a consent decree is not persuasive authority, *see, e.g.*, *In re Int'l Bus. Machs. Corp.*, 687 F.2d 591, 602 (2d Cir. 1982); *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 594 F. Supp. 2d 945 (N.D. Ill. 2009), and because *Consolidated Multiple Listing Service* did not involve any price-fixing claim. 2009 WL 3150388, at *1.

for *per se* illegal price fixing. *See*, *e.g.*, *Omnicare, Inc. v. UnitedHealthGroup, Inc.*, 629 F.3d 697, 709 (7th Cir. 2010); (*see also* Def.'s Br. at 54-58).

b. It is implausible to infer a conspiracy to fix broker commissions based on payment of FMLS Fees.

Plaintiffs ask this Court to infer a conspiracy based only on each Member-brokers' agreement to pay FMLS for the services it provides. Critically, Plaintiffs ***do not*** allege that Defendants agreed to fix broker commissions by .0012 or .0024 percent. Rather, they merely allege that the Members each agreed with FMLS to pay FMLS .0012 percent of each listed property's sales price, and that this Fee sets a floor to broker commissions.[12] (Am. Compl. ¶¶ 82-83, 181). This is the exact inference rejected in *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008), because "[t]his behavior suggests a rational business decision, not a conspiracy."

[12] Plaintiffs argue that FMLS's decision to change its fee structure from 4% of commissions to .0012% of the listed property's sales price supports an inference of an agreement to fix broker commissions. (Pls.' Resp. at 64 ("[U]nder the new formula for the [Fees, a] commission rate [lower than 6%] would negatively impact the Defendant Broker's net commissions.")). However, it is not plausible to conclude that this change in an input cost effected a price-fixing conspiracy. In the absence of allegations that Member-brokers participated in the decision to change the Fee calculation, FMLS's unilateral decision to modify its fee structure is of no significance. Moreover, a supplier's change in its fee calculation, especially one alleged to impose the same historic rate on many (but not all) of its customers, is at least as consistent with lawful, independent behavior as it is with Plaintiffs' strained theory, and is insufficient to allege an agreement to fix broker commissions. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (quoting *Twombly*, 550 U.S. at 557).

Id. at 1049 (explaining input fees set consumer prices in the same way "the cost of eggs sets a floor for the price of an omelet on a menu"). Plaintiffs' argument that *Kendall* does not apply because "residential commission rates differ (if at all) only within a very tight range" (Pls.' Resp. at 64 n.15), fails for two reasons: (1) Plaintiffs did not make this allegation in the Amended Complaint; and (2) that factor made no difference to the *Kendall* court, which addressed fees that also fell within a very tight range. 518 F.3d at 1045-46. Moreover, if all Plaintiffs were required to plead to state claim for price-fixing as to broker commissions was an agreement to pay the FMLS Fees, any agreement to pay a fee for a service would state a claim for price-fixing, including GAMLS members' agreements to pay fees to GAMLS, which apparently represents Plaintiffs' vision of the quintessentially pro-competitive MLS. Fortunately, this is not the law. *See id.* at 1049.

2. Plaintiffs' Allegations Are Insufficient To State A Claim For A Conspiracy Regarding The FMLS Fees.

Plaintiffs' real complaint is that FMLS charges Member-brokers too much for its services, and that the Member-brokers in turn pass the Fees on to consumers via inflated commissions. (*See* Am. Compl. ¶ 181; Pls.' Resp. at 3, 4). Plaintiffs cannot recover for the alleged pass-on of Fees, however, because they do not allege concerted action in the setting of those Fees and because they are not direct purchasers of FMLS services. *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

a. Plaintiffs do not allege concerted action in setting FMLS Fees.

To the extent Plaintiffs attempt to allege a violation of Section 1 with respect to the FMLS Fees, they have failed to plead concerted action, an essential element for such a claim. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772-73 (1984) ("[A]n internal 'agreement' to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police."). Plaintiffs do not allege any facts regarding the manner in which the FMLS Fees are set, including that Defendant Brokers, Agents, and Boards were involved in setting the Fees. Without such allegations, Plaintiffs have not plausibly pled that Defendants set the Fees through concerted action. *See*, *e.g.*, *Boland v. Consol. Multiple Listing Serv., Inc.*, No. 3:09-cv-01335-SB, at *4-7 (D.S.C. Mar. 23, 2011) (considering the facts alleged by plaintiffs to determine whether the MLS rules were adopted by economically separate and competing actors). Unlike in *Boland*, Plaintiffs have alleged ***no*** facts regarding how FMLS sets the Fees, and thus have not alleged concerted action in the setting of those Fees.

b. Plaintiffs have not pled sufficient facts to defeat application of *Illinois Brick*.

Even if Plaintiffs had attempted to allege concerted action in setting the FMLS Fees, Plaintiffs cannot recover for their alleged injuries, because they are "indirect purchasers" under the antitrust laws, and their claims are barred.

Remarkably, Plaintiffs do ***not*** deny that they are indirect purchasers of FMLS services. (Pls.' Resp. at 66). Instead, without referencing any facts from the Amended Complaint, they incorrectly and conclusively assert that the co-conspirator and control exceptions bar application of *Illinois Brick*.

"[T]he 'control' exception is limited to relationships involving such functional economic or other unity between direct purchaser and . . . the defendant . . . that there effectively has been only one sale." *Jewish Hosp. Ass'n of Louisville, Ky., Inc. v. Stewart Mech. Enters., Inc.*, 628 F.2d 971, 975 (6th Cir. 1980); *see also In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1162 (5th Cir. 1979). Plaintiffs' allegation that "FMLS has approximately 24 stockholder-members" (Am. Compl. ¶ 37), does not allege sufficient facts to establish the functional unity between FMLS and those stockholder-members required by the control exception.[13] Moreover, Plaintiffs do not even allege that the named Brokers are stockholder members of FMLS.

[13] The only case Plaintiffs cite in which the court concluded the control exception applied was expressly ***overturned*** on that point by the Seventh Circuit, a fact Plaintiffs conveniently omitted from their brief. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 606 (7th Cir. 1999).

The co-conspirator exception is also inapplicable because: (1) it has not been adopted or applied by the Eleventh Circuit;[14] and (2) Plaintiffs have not alleged facts sufficient to plead a conspiracy regarding the FMLS Fees, let alone that the Brokers and Agents were "completely involved" co-conspirators in such a conspiracy. To come within the co-conspirator exception, Plaintiffs must allege facts that plausibly suggest "the middlemen would be barred from bringing a claim against their former co-conspirator . . . because their involvement in the conspiracy was 'truly complete.'" *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 378-79 (3d Cir. 2005). Here, however, Plaintiffs do not allege that the Member-brokers' and agents' involvement in any conspiracy was "truly complete."[15] In fact, the Amended Complaint recognizes that any conceivable

[14] The co-conspirator exception has not been adopted by the Eleventh Circuit or the Supreme Court. *See Austin v. Blue Cross & Blue Shield of Ala.*, 903 F.2d 1385 (11th Cir. 1990) (denying plaintiffs' attempt to satisfy the co-conspirator exception). The Supreme Court has cautioned courts against broadening the exceptions to *Illinois Brick*. *See Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 216 (2010) ("The rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.' *Illinois Brick*, 431 U.S., at 744. The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule.").

[15] Contrary to Plaintiffs' assertion, it is irrelevant whether any "brokers or agents of Plaintiffs or the Plaintiffs Class have raised any antitrust objections to the [Fees] or [Patronage Dividends] or expressed any public intention to do so." (Pls.' Resp. at

involvement by such middlemen was ***not*** "truly complete." (*See* Am. Compl. ¶¶ 130-35, 140 (recognizing there are Member-brokers and agents who pay allegedly inflated FMLS Fees but do not receive the benefit of Patronage Dividends, and thus are allegedly harmed by the alleged conspiracy)). It is simply implausible to assume that all 2,260 Member-brokers and 42,000 Member-agents are "truly complete" participants in a conspiracy to set the FMLS Fees. *See In re ATM Fee Antitrust Litig.*, No. C 04-02676 CRB, 2010 WL 3701912, at *9-10 (N.D. Cal. Sept. 16, 2010) (concluding it was inappropriate to infer 4,100 banks that paid allegedly fixed fees but did not receive return payments were co-conspirators). Thus, the co-conspirator exception is inapplicable and Plaintiffs cannot recover for any conceivable conspiracy regarding the FMLS Fees.

3. Plaintiffs' Market Definition Is Deficient As A Matter Of Law.

Because Plaintiffs failed to allege a *per se* illegal conspiracy to fix commissions, any restraint on competition must be judged under the rule of reason, which requires allegations concerning the relevant geographic and product market. (*See* Def.'s Br. at 58-59); *see also Keller v. Greater Augusta Ass'n of Realtors*, No.

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68 n.20). *See Technical Learning Collective, Inc. v. Daimler-Benz A.G.*, No. N-77-1443, 1980 WL 1943, at *10 (D. Md. Aug. 28, 1980) ("[W]hether future suits by dealers are either speculative or unlikely is immaterial; *Illinois Brick* holds that the possibility of such suits is sufficient.").

CV 110-050, 2011 WL 108726, at * 4 (S.D. Ga. Jan. 12, 2011) (applying rule of reason to MLS's adoption and enforcement of membership rules).[16] Plaintiffs' failure to allege these facts requires dismissal of their claim. *Jacobs*, 626 F.3d at 1336 (requiring "enough information . . . to plausibly suggest the contours of the relevant geographic and product market").

Defining the relevant product market requires "identifying 'producers that provide customers of a defendant firm (or firms) with alternative sources for the defendant's product or services.'" *Id.* at 1337 (quoting *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1552 (11th Cir. 1996)); *see also U.S. Anchor Mfg. v. Rule Indus., Inc.*, 7 F.3d 986, 995 (11th Cir. 1993). A plaintiff must also identify specific geographic boundaries within which the defendant's conduct harmed competition. *Spanish Broad. Sys. of Fla. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1075 (11th Cir. 2004). This requires establishing the limits of a consumer's ability to look for and use substitute products. *See City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 567 n.27 (11th Cir. 1998).

[16] FMLS is a joint venture (Am. Compl. ¶ 36), and thus is generally subject to rule of reason analysis. *See*, *e.g.*, *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2216-17 (2010) ("Joint ventures and other cooperative arrangements are also not usually unlawful where the agreement is necessary to market the product at all." (internal citation, quotation marks, and ellipses omitted)).

Here, the Amended Complaint does not even use the words "product market" or "geographic market," nor does it allege facts that would allow the Court to determine whether any conceivable market allegations are sufficient.[17] Accordingly, the Amended Complaint does not state a claim under Section 1.

4. Plaintiffs' Allegations Are Wholly Inadequate To State A Section 1 Claim Against The Defendant Boards.

Plaintiffs' brief also fails to identify a single allegation regarding the Boards' involvement in the alleged conspiracy. *See Jung v. Ass'n of Am. Med. Coll.*, 300 F. Supp. 2d 119, 161 (D.D.C. 2004) (requiring plaintiff to allege each defendant "knowingly joined or agreed to participate in the conspiracy" in order to state an actionable Section 1 claim). Plaintiffs' reliance on *Twombly* for the suggestion that the Boards participated in the alleged conspiracy through a "tacit agreement" is misplaced. As the Supreme Court recognized in *Twombly*, "parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly*,

[17] Plaintiffs fail to provide even conclusory allegations concerning the relevant geographic and product markets. In fact, the Amended Complaint references a number of geographic areas, without ever identifying a proper antitrust market. *See, e.g.*, Am. Compl. ¶ 55 (discussing competition in Georgia and the Southeast); *id.* ¶ 49 (listing MLS services doing business in Georgia); and *id.* ¶ 71 (describing the FMLS "Compulsory Area"). The Amended Complaint is similarly deficient on the relevant product market. There are simply no allegations concerning substitute products, cross-elasticity of demand, or the existence of competing products.

550 U.S. at 552. Plaintiffs' "knew-or-should-have-known" allegations against the Boards are insufficient as a matter of law and warrant dismissal of Plaintiffs' Section 1 claim against the Boards.

C. Plaintiffs Do Not Have Standing And Do Not State A Claim For Unfair Competition.

Plaintiffs' brief identifies three purported bases for their unfair competition claim: (1) the Georgia Constitution; (2) O.C.G.A. § 13-8-2(a); and (3) Georgia common law. Plaintiffs lack standing to assert claims under the state constitution, or O.C.G.A. § 13-8-2(a), because Plaintiffs were not parties to any of the allegedly illegal contracts.[18] (Defs.' Br. at 63-64). Plaintiffs scarcely oppose this conclusion, and it is not undermined by the numerous side issues raised in Plaintiffs' brief.[19] Plaintiffs admit that, as with nearly all their claims, "FMLS's

[18] Plaintiffs also tacitly concede (as they must) that a party may not recover monetary damages for a breach of the cited constitutional provision or O.C.G.A. § 13-8-2(a). *See Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 715 (11th Cir. 1984); *E.T. Barwick Indus. Inc. v. Walter E. Heller & Co.*, 692 F. Supp. 1331, 1349 (N.D. Ga. 1987).

[19] Plaintiffs cite two inapposite cases in an attempt to argue that a non-party may have standing to sue for unfair competition. (Pls.' Resp. at 76). Neither case involved a standing challenge, or even addressed that issue. *See Personnel Options, Inc. v. Reserves Network, Inc.*, No. 10-cv-071-WSD, 2010 WL 2662733 (N.D. Ga. June 30, 2010) (granting motion to remand due to failure to satisfy amount-in-controversy requirement for diversity jurisdiction); *Hasty v. St. Jude Med. S.C. Inc.*, No. 06-cv-102, 2007 WL 1428733 (M.D. Ga. May 11, 2007)

Rules and Regulations through which ***Defendants have contracted***" form the underpinnings of Count Four. (Pls.' Resp. at 74). As such, Plaintiffs lack standing and their unfair competition claim should be dismissed, with prejudice.

As support for their purported claim arising under Georgia common law, Plaintiffs rely on *U.S. Anchor*, 7 F.3d 986. Such reliance is misplaced, however, because *U.S. Anchor* (and the cases on which it relies) only supports the proposition that ***competitors*** of an alleged bad actor who are harmed by anticompetitive conduct may be able to assert a common law claim for unfair competition. *Id.* at 1002-03. Plaintiffs do not cite a single case (and Defendants are unaware of any) recognizing a ***consumer*** price-fixing claim under Georgia common law, and this Court should reject Plaintiffs' attempt to create such a claim out of whole cloth.

D. <u>Plaintiffs Lack Standing And Do Not State A Claim Under UDTPA.</u>

Plaintiffs' brief fails to resuscitate their UDTPA claim. First, with respect to the standing issue, Plaintiffs cannot overcome their personal lack of standing by relying on the potential claims of a putative class that has not been certified and which undoubtedly would present numerous transactions with facts that vary

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(granting motion to transfer venue based on forum selection clause). And, in both cases, at least one named plaintiff was party to the contract at issue.

widely from those the named Plaintiffs here present.[20] (*See* Pls.' Resp. at 81-82). Before this Court evaluates whether Plaintiffs have standing to represent the putative consumer class, they must demonstrate individual standing to bring the asserted claims. *See*, *e.g.*, *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1307 (11th Cir. 2008). The cases Plaintiffs cite do not dispose of this threshold requirement, and the Amended Complaint simply does not allege any ongoing or future harm to Plaintiffs sufficient to demonstrate individual standing. (*See* Defs.' Br. at 66-67).

Second, Plaintiffs fail to plead sufficient factual allegations to state a plausible UDTPA claim against the Brokers.[21] (*See* Defs.' Br. at 67-71). Defendants have already explained why the alleged violations of the GREC rules and O.C.G.A. § 43-40-25(b)(17)[22]—*i.e.*, their failure to disclose certain

[20] Without further explanation, Plaintiffs contend that the grounds on which Defendants moved to dismiss the UDTPA claim—namely, that Plaintiffs lack standing to seek the injunctive relief and have failed to allege facts sufficient to support any violation of that statute—are "extremely premature." (Pls.' Resp. at 80, 84). This argument ignores the mandate of Fed. R. Civ. P. 12(b) requiring Defendants to assert both defenses by motion before filing a responsive pleading, and that standing is "'the threshold question in every federal case.'" *Baloco v. Drummond Co., Inc.*, 631 F.3d 1350, 1354 (11th Cir. 2011) (citation omitted).

[21] Notably, Plaintiffs completely ignore the argument that the Court must dismiss the UDTPA claim to the extent Plaintiffs seek relief against FMLS because Count Five was alleged exclusively against the Brokers. (*See* Defs.' Br. at 66).

[22] Plaintiffs' brief erroneously suggests that their passing reference to O.C.G.A. § 43-40-1 *et seq*. is sufficient to state a UDTPA claim premised upon a violation of any provision found anywhere in that section of the Code. (Pls.' Resp. at 84-6, 85

information to Plaintiffs in connection with the Three Transactions—do not state a claim under the UDTPA. (Defs.' Br. at 67-69). Plaintiffs feebly respond that the UDTPA claim was adequately pled under the general principles in *Energy Four, Inc. v. Dornier Medical Systems, Inc.*, 765 F. Supp. 724 (N.D. Ga. 1991). But *Energy Four* does not apply to this case and actually supports a point of law that Defendants highlighted in their brief—*i.e.*, to state a UDTPA claim, Plaintiffs were required to plead facts demonstrating ***either*** (1) likelihood of confusion or misunderstanding concerning approval or certification of a product, (2) misrepresentations concerning the standard, quality or grade of a product, (3) disparagement of the goods of another by false or misleading statements, or (4) "other conduct similarly creating a likelihood of confusion or misunderstanding." *Id.* at 730. None of Plaintiffs' factual allegations even arguably states a claim under any of these theories, all of which relate to product disparagement, false advertising, misuse of trade names, or other ***similar*** conduct regarding the origin, quality, or description of goods or services. (*See* Defs.' Br. at 69-70).

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n.33). Such a preposterous argument is clearly contrary to Plaintiffs' pleading requirements, and also serves to highlight the fact that even Plaintiffs themselves cannot identify the basis for their purported UDTPA claim.

E. Plaintiffs Do Not State A Claim For Unjust Enrichment.

Plaintiffs' unjust enrichment claim seeks to strip FMLS of its Fees based on the bare allegation that the Brokers paid FMLS Fees from commissions received from the Plaintiffs. It is patently untrue that Plaintiffs made any payment to FMLS, and the Amended Complaint does not allege otherwise. Instead, as Plaintiffs concede in their brief, the ***Brokers*** were contractually obligated to pay Fees to FMLS (Pls.' Resp. at 2, 94), irrespective of whether Plaintiffs ever actually paid any commissions. Plaintiffs voluntarily paid the Brokers' commissions, in exchange for services rendered in accordance with the parties' contractual expectations, and they clearly received the benefit of their bargains. *See CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Grp.*, 642 S.E.2d 393, 398-99 (Ga. Ct. App. 2007). The independent nature of the parties' contractual allegations undercuts the plausibility of any allegation that Plaintiffs were the true owners of the funds used to pay FMLS. (*See* Defs.' Br. at 74-75).

Moreover, none of the allegations show that Plaintiffs conferred any unearned or unjust benefit to anyone (much less FMLS), *see supra* Part I.A.1.b; (Defs.' Br. at 75-76), and permitting Plaintiffs to recover the Fees would constitute an inequitable windfall. Rather than disputing this argument, Plaintiffs attempt to shift the Court's focus by engaging in semantics over the definition of "subsidy."

(Pls.' Resp. at 91). This irrelevant discussion does not alter Georgia law, which clearly states that a "plaintiff is only entitled to the benefit of the bargain," and is "not to recover a windfall." *John Thurmond & Assocs., Inc. v. Kennedy*, 668 S.E.2d 666, 670 (Ga. Ct. App. 2008). Count Six, therefore, fails as a matter of law.

F. Plaintiffs Do Not State A Claim For Negligent Misrepresentation.

The parties agree that Plaintiffs must allege three elements in order to state a claim for negligent misrepresentation: (1) the negligent supply of false information; (2) reasonable reliance upon that false information; 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). Although the Amended Complaint recites these elements in purely conclusory fashion (*see* Pls.' Resp. at 95-96), there are no ***factual allegations*** to support Plaintiffs' claim. Such failure to plead sufficient factual support distinguishes this case from *Sarif v. Novare Group, Inc.*, 703 S.E.2d 348 (Ga. Ct. App. 2010), where the plaintiffs alleged specific oral and written misrepresentations, specific facts tending to show the defendants' knowledge of falsity, specifically how the plaintiffs relied on such statements, and the specific detriment suffered as a result. *Id.* at 742, 745. Because Plaintiffs have not alleged the factual predicate needed to support the elements of this claim (*see* Defs.' Br. at 77-79), it must be dismissed as matter of law. *See Iqbal*, 129 S. Ct. at

1937; *Next Century Commc'ns Corp. v. Ellis*, 214 F. Supp. 2d 1366, 1370 (N.D. Ga. 2002) (dismissing negligent misrepresentation claim where complaint "merely states the conclusion that Plaintiff 'reasonably' relied . . . but . . . fails to allege facts sufficient to support the justifiable reliance element").

G. Plaintiffs Do Not State A Claim For Civil Conspiracy.

Plaintiffs acknowledge that the viability of Count Eight, for civil conspiracy, depends upon this Court's rulings on the alleged state-law torts (*i.e.*, unfair competition, violation of the UDTPA, and negligent misrepresentation). (Pls.' Resp. at 99). Consequently, because Plaintiffs have failed to state a claim under Counts Four, Five, and Seven (*see supra* Parts I.C, D, & F), Count Eight also fails as a matter of law. *O'Neal v. Home Town Bank of Villa Rica*, 330(4), 514 S.E.2d 669 (Ga. Ct. App. 1999) ("[A]bsent the underlying tort, there can be no liability for civil conspiracy.").

III. CONCLUSION

For the reasons stated herein and in Defendants' opening brief, the Amended Complaint fails to state any plausible cause of action and is due to be dismissed, with prejudice, in its entirety.

Respectfully submitted this 19th day of May, 2011.

/s/ Teresa T. Bonder
TERESA T. BONDER

/s/ Ned Blumenthal
NED BLUMENTHAL

Georgia Bar No. 703969
teresa.bonder@alston.com
A. McCAMPBELL GIBSON
Georgia Bar No. 292741
mac.gibson@alston.com
ALLISON S. THOMPSON
Georgia Bar No. 779509
allison.thompson@alston.com
JASON D. POPP
Georgia Bar No. 213057
jason.popp@alston.com

ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Tel: (404) 881-7000
Fax: (404) 881-7777

For Defendant First Multiple Listing Service, Inc.

/s/ Gary Beelen
GARY BEELEN
Georgia Bar No. 120520
gbeelen@deflaw.com
JOE CHANCEY
Georgia Bar No. 046230
jchancey@deflaw.com

DREW ECKL & FARNHAM, LLP
880 W. Peachtree St.
Atlanta, Georgia 30309
Tel: (404) 885-1400
Fax: (404) 876-0992

For Defendant Bueno and Finnick, Inc., d/b/a Re/Max Center Dacula

Georgia Bar No. 064480
nedb@wncwlaw.com
JULIE SELLERS
Georgia Bar No. 984708
julies@wncwlaw.com

WEISSMAN, NOWACK, CURRY & WILCO, P.C.
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, Georgia 30326
Tel: (404) 926-4500
Fax: (404) 926-4600

For Defendants Lanier Partners, LLC d/b/a Keller Williams Realty Lanier Partners, Atlanta Partners Realty, LLC, d/b/a Keller Williams Realty Atlanta Partners, Peggy Slappey Properties, Inc., Sue Edwards, and Mary Beth Smallen

/s/ Frederick G. Boynton
FREDERICK G. BOYNTON
Georgia Bar No. 073538
fboynton@closingsource.net

MORRIS | HARDWICK | SCHNEIDER
1867 Independence Square, Suite 105
Atlanta, Georgia 30338
Tel: (770) 392-0500
Fax: (678) 370-0698

For Defendants Gainesville-Hall County Board of Realtors, Inc. and Atlanta Board of Realtors

***Of Counsel*:**

JAY N. VARON
jvaron@foley.com
JENNIFER M. KEAS
jkeas@foley.com

FOLEY & LARDNER LLP
3000 K Street, N.W.
Suite 600
Washington, D.C. 20007

For Defendant First Multiple Listing Service, Inc.

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' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' JOINT MOTION TO DISMISS** was typed in a font and point selection approved by this Court and authorized in Local Rule 5.1.

This the 19th day of May, 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' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' JOINT MOTION TO DISMISS** was electronically filed on May 19, 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:

Foy R. Devine, Esq.
fdevine@taylorenglish.com
Gregory G. Schultz, Esq.
gschultz@taylorenglish.com
William A. Clineburg, Jr., Esq.
bclineburg@taylorenglish.com
Michael Eric Ross
mross@taylorenglish.com
TAYLOR ENGLISH DUMA, LLP
1600 Parkwood Circle, Suite 400
Atlanta, Georgia 30339

Jay F. Hirsch, Esq.
jayhirsch@pmkm.com
POPE, McGLAMRY, KILPATRICK, MORRISON & NORWOOD, LLP
3455 Peachtree Road, N.E.
Suite 925
Atlanta, Georgia 30326-3243

Marx David Sterbcow
marx@sterbcowlaw.com
THE STERBCOW LAW GROUP, LLC
1734 Prytania Street
New Orleans, Louisiana 70130

Frederick George Boynton
fboynton@closingsource.net
MORRIS HARDWICK SCHNEIDER. LLC
1867 Independence Square
Suite 105
Atlanta, GA 30338

Gary Beelan
gbeelen@deflaw.com
Joe Chancey
jchancey@deflaw.com
DREW ECKL & FARNHAM, LLP
880 West Peachtree Street
Atlanta, Georgia 30309

Ned Blumenthal
nedb@wncwlaw.com
Julie L. Sellers
julies@wncwlaw.com
WEISSMAN, NOWACK, CURRY & WILCO, P.C.
One Alliance Center, 4th Floor
3500 Lenox Road, NE

Atlanta, Georgia 30326

This the 19th day of May, 2011.

/s/ Allison S. Thompson
Allison S. Thompson