

RECORD NO. 12-2102

In The
United States Court of Appeals
For The Fourth Circuit

**METROPOLITAN REGIONAL
INFORMATION SYSTEMS, INC.,**

Plaintiff – Appellee,

v.

AMERICAN HOME REALTY NETWORK, INC.,

Defendant – Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT GREENBELT**

**BRIEF OF CONSUMER ADVOCATES IN AMERICAN REAL ESTATE
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

who is _____, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

- 4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

- 5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

- 6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

I certify that on _____ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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I. INTERESTS OF AMICUS

Amicus Curiae Consumer Advocates in American Real Estate (“CAARE”) is a non-profit, all volunteer 501(c)3 charity dedicated to exposing conflicts of interests in residential real estate and providing information, solutions and resources to consumers and others to help combat these problems. CAARE appears to be the only non-profit charity that is focused on some of the most complex issues that face residential real estate consumers.

As part of its mission, CAARE represents the interests of residential real estate consumers nationwide who are being negatively impacted by anti-consumer and deceptive business practices in the residential real estate brokerage industry.

Amicus’ interest in this case is protecting the consumers’ interests in access to property data that Multiple Listing Services (“MLSs”) like Metropolitan Regional Information Systems, Inc. (“MRIS”) obtain in their capacity as servants of real estate fiduciaries. The data at stake in this lawsuit is ultimately the property of individual consumers who have entrusted this data to state licensed listing brokers who have promised to use their data to help sell their homes. Those brokers have pledged fiduciary duties to these sellers and promised to use their efforts to help sellers sell their homes in the shortest time possible and for the highest price. It concerns us that brokers have hidden behind their MLSs to force their clients to sign away their copyrights on their own data that neither the brokers

nor the MLSs need in order to sell homes. Brokers have been using MLSs in ways that conflict with their home selling purpose and are now using their MLSs to further self-serving financial interests in lieu of the duties owed to their own clients.

It is our intention to shed some light on the wider social and economic implications of this case and how this case may have unintended consequences for American real estate consumers. If this case is decided in favor of MRIS it will perpetuate practices that discourage discounting, encourage self-dealing, facilitate inappropriate and possibly illegal payments to fiduciaries, lock in outmoded business models, smother innovation in the real estate industry, and prevent consumers from receiving the full benefits of competition. This case is part of a larger attack that is currently targeting the defendant. It is motivated by reasons that have little to do with copyright interests and more to do with brokers' interests in driving more traffic to their websites and encouraging dual agency transactions that yield payment of double commissions.

Amicus believes that this brief will assist the Court in understanding the underlying relationships between MRIS, the Realtor Association, the brokerage industry and their clients and how brokers are using MRIS to increase the frequency of dual agency (and double commission) transactions by stamping out firms like Defendant that desire to expand the visibility and marketing of homes –

the purpose that MRIS should be embracing to meet the obligations that its real estate broker associates owe to their clients.

II. ARGUMENT

A. Multiple Listing Service

MRIS, just like other Multiple Listing Services (“MLS”), is not in the business of selling real estate data. They are in the business of helping brokers sell homes. They collect data from their broker membership and share it with other broker members with an offer of compensation to the cooperating broker who procures a buyer. They were established by their parent non-profit Realtor trade associations to help real estate brokers expand the market visibility of houses they are selling. MLSs also serve as a portal for brokers to view shared data in the alternate purpose of helping buyers find homes. The National Association of Realtors on their Realtor.org member website state the purpose of the MLS is to provide, “a private offer of cooperation and compensation by listing brokers to other real estate brokers¹.” MRIS is a tool to help brokers sell houses that derives no value in securing copyrights on client data.

The Realtor.org website continues, “In the late 1800s, real estate brokers regularly gathered at the offices of their local associations to share information

¹ “Multiple Listing Service (MLS): What Is It,” National Association of Realtors website: <http://www.realtor.org/topics/nar-doj-settlement/multiple-listing-service-mls-what-is-it>

about properties they were trying to sell. They agreed to compensate other brokers who helped sell those properties, and the first MLS was born, based on a fundamental principal that's unique to organized real estate: Help me sell my inventory and I'll help you sell yours.”

“Today, through more than 800 MLSs, brokers share information on properties they have listed and invite other brokers to cooperate in their sale in exchange for compensation if they produce the buyer. Sellers benefit by increased exposure to their property. Buyers benefit because they can obtain information about all MLS-listed properties while working with only one broker. In other words, the sole purpose of the MLS is to assist brokers in marketing their clients' homes by providing for a method for them to enlist the assistance of cooperating brokers from other firms.” (emphasis added).

The article sums up the MLS's purpose as follows, “The MLS is a tool to help listing brokers find cooperative brokers working with buyers to help sell their clients' homes.”

MRIS, on their web page similarly describes their service and enhances the description of their service, “Cooperation is key to the success of an MLS. Licensed brokers and agents agree to cooperate in sharing their information with one another as an integral component of their participating in an MLS. When brokers and agents cooperate, consumers benefit. When real estate practitioners

share their listings with one another, they are able to gain massive exposure for that property through the MLS. The consumers trying to buy or sell property benefit from the practitioners' cooperation by accessing the listings of the various participating professionals - giving them more choices and more exposure. Knowing that listings originate with licensed brokers provides a degree of accountability for the substance and accuracy of the listing, since the legal and professional rules governing the real estate professional's business, as well as the MLS rules and regulations, apply to each real estate professional listing properties on the MLS²."

To this day, the listing brokers' offer of compensation to cooperating buyer brokers is rarely discussed with buyer clients and is offered through hidden fields in the MLS system that only members can see.

B. Who Really is Behind This Litigation?

Look no further than the list of shareholders and Board of Directors of MRIS³ to uncover the legal fiction at play in this lawsuit. The shareholders include only local Realtor Trade Associations and MRIS's Board of Directors is comprised exclusively of member real estate brokers. MRIS is a collaboration of real estate brokers tied together through a network of corporate trade associations

² "Your MLS, The MRIS MLS System" webpage

³ MRIS Board of Directors

whose ultimate beneficiaries should be the clients whom they are obligated by law to represent. Instead, the real estate brokers who comprise 100% of the MRIS Board of Directors, and who owe their clients fiduciary duties, are using MRIS to engage in self-dealing. They are hiding behind MRIS and the Realtor Associations to develop practices and policies that encourage dual agency and double commissions. And they obtain dual agency in part by abusing fiduciary relationships to obtain copyrights on client data.

Perhaps one of the most unfortunate things about this lawsuit is that many MRIS members support what defendant - appellant is doing. Agents who believe dual agency is bad and that market exposure is good support defendant's work. There are many agents who compete with the larger firms by providing marketing plans that incorporate online third party data syndicators. We question how MRIS can discount the interests of a potentially large number of their own membership by not even engaging in even a minimal amount of due diligence to poll them.

MRIS will generate the same amount of revenue from its broker membership whether they have a copyright on their brokers' clients' data or not. MRIS members will earn just as much in commissions whether defendant is in business or not. In fact, defendant's services generate more market exposure for broker listings and are more likely to result in more sales – just not dual agency sales. MRIS is a broker owned and run entity (through the legal fiction of the broker

owned Realtor Trade Association) that is designed to serve its broker membership. The broker membership is served by expanding market exposure of homes for sale, not by limiting it.

MRIS does not generate ad revenue from sharing data with other brokers. MRIS does not get paid extra if a broker uses MRIS to sell or buy a house for one of their clients. MRIS gets paid an annual fee from real estate brokers and agents for access to the data. MRIS does not need copyrights on their clients' data and they are certainly not harmed by sharing this data. More importantly, consumers are well served when this data is distributed beyond the confines of the MRIS members.

MRIS brokers get paid a brokerage commission whether buyers find their listings on MRIS, a third party vendor or even if their clients procure the buyer themselves. MRIS rules require that brokers only list properties on MRIS for sellers for whom they have an Exclusive Right to Sell or Exclusive Agency Listing agreements⁴. That means that the broker still gets paid a commission even if the seller sells the home to a family member or finds the property on a different website. And MRIS gets paid regardless of whether the property is sold. MRIS is not harmed and suffers no damage if other parties expand the marketing exposure of the listings and that additional marketing results in a transaction. MRIS is

⁴ Metropolitan Regional Information Systems, Inc. Rules and Regulations Manual (page 5)

nothing more than a Realtor owned tool that creates a contract between cooperating brokers and insures that commissions get paid to cooperating brokers.

MRIS stands in the shoes of their broker members. Broker members should not be able to hide behind the corporate fictions of MRIS and their Realtor Trade Associations in order to perpetrate fiduciary breaches against their own brokerage clients. A breach of fiduciary duty through MRIS is a breach of fiduciary duty of the broker supplying information obtained from the broker's consumer-principal.

Since MRIS is run by its broker members, it is they who are the driving force behind this lawsuit. For brokers who desire to engage in self-dealing to obtain dual agency, MRIS is the perfect tool to do so.

C. Dual Agency/Double Commissions – The Driving Force Behind This Lawsuit

This lawsuit has little to do with copyright protection and a lot to do with dual agency. Real estate brokers have a terrible financial interest in exposing their clients to dual agency because dual agency allows brokers to collect both the seller's broker and the buyer's broker parts of the total real estate commission. In a dual agency transaction, brokerages collect a double fee and their clients get stripped of their representation when they need their broker's advocacy the most.

A recent National Association of Realtors study⁵ found that two of the top three reasons buyers hire Realtors is to help them negotiate price and terms. In a dual agency transaction real estate brokers and agents are prohibited from doing anything to the detriment of either the buyer or the seller. That means the broker is prohibited from helping their clients negotiate price or terms. In dual agency, consumers are abandoned by their Realtor advocates just when they need them the most. Clearly dual agency is something to be avoided.

However, brokers get paid double in dual agency transactions because they do not have to split their commission with cooperating brokers in dual agency transactions. Brokers have a huge financial conflict of interest in actually limiting the market exposure of their clients' listings in order to increase the chances of collecting a double commission. The cost/benefit analysis is an easy one. Even though a house may take longer to sell and it might not sell for as much, the benefit of collecting a double commission is well worth that cost. This lawsuit is not the first example of real estate brokerages limiting the market exposure of listings in order to encourage dual agency.

Edina Realty, a Minnesota company, and one of the largest brokerages in the country, is the poster child of evils of dual agency. In 1992 Edina Realty made national news for its involvement in a class action lawsuit for engaging in

⁵ National Association of Realtors Study "Profile of Home Buyers and Sellers 2010" Page 62, Exhibit 4-9.

undisclosed dual agency⁶. The case was settled. Although that case resulted in a plethora of Realtor sponsored pro dual agency laws throughout the United States that created an exception only for Realtors to engage in dual agency, those laws did not eliminate the problems of dual agency.

Edina Realty has once again been in the news, this time in real estate trade journals for its involvement in promoting dual agency, only this time Edina Realty found a novel way to encourage the practice – by limiting the online market exposure of their listings. Edina Realty removed their listing data from the top buyer frequented websites in the country. That means that buyers who are looking for a home to buy on the internet are not likely to see an Edina listing unless they go directly to Edina’s website. If they go to Edina’s website, they will be directed to an Edina agent to buy the house and both the buyer and seller will be subjected to dual agency and Edina Realty will collect a double commission.

Although Edina Realty cites reasons of consumer privacy and data inaccuracy in the mainstream news, the real reasons came out in Inman News⁷: ““Bob Peltier, president and CEO of Edina Realty Home Services, says he expects the brokerage’s website will pick up additional market share when it stops sending

⁶ Dismuke v. Edina Realty, 1993 WL 327771 (Minn. Dist. Ct. 1993) unpublished opinion

⁷ Exhibit 5: “Minnesota broker will stop sending listings to Trulia, Realtor.com” Inman News

listings to third-party sites.” A little bit of this is SEO,” Peltier said, referring to the “search engine optimization” boost that listing data provides to websites when consumers begin their house-hunting process using Google or another search engine. Once Edina Realty stops sending listings to third-party websites, “we are going to move up in SEO, because we have more listings than they do.”“

Mr. Peltier in his above remarks has indicated that Edina Realty has pulled the listing data to increase the market share of Edina Realty’s website. If buyers find the home that they want to buy on Edina’s website, the site will direct them to an Edina agent and a dual agency/double commission will result. Peltier’s purpose in increasing, “search engine optimization,” by removing listings from free third party sites directly conflicts with the best interests of his clients because to increase the market share of Edina’s website also increases the likelihood of a dual agency transaction and severely limits the market exposure of their clients’ listings. He has sacrificed his clients’ best interests in order to increase the chance of collecting a double commission. Utilizing third party sites like Zillow, Trulia and the defendant’s site actually can reduce the likelihood of a dual agency arising and benefits brokers’ clientele. Defendant’s business model reduces the risk of dual agency by intentionally directing buyers to real estate agents not associated with the listing firm. Because of that, defendant is somehow perceived as a threat to brokers in Minnesota as well as to the plaintiff in this case.

Edina Realty and some other real estate brokers seem to ignore their fiduciary duties when it comes to marketing their sellers' homes for sale. In that same article cited above, Peltier also complains that another problem he has with data syndicators is that these syndicators often direct homebuyers to agents who are not with the listing firm (dual agents). Agents from other firms can place ads right next to Edina's listings and receive buyer leads to go show buyers Edina listings and that is a concern. Edina makes it clear that they believe those leads should belong to Edina Realty agents: "I believe these companies sucked us in with all the free stuff -- I'll be the first to say we were supportive. We gave our listings to Trulia and Realtor.com," Peltier said. "Now they say you have to buy enhanced listings or ad space or you are not going to get leads back. That's a poor business model I'm not willing to support."

If Edina Realty truly were representing their clients' best interests, they would be grateful that these third party syndicators were directing business that resulted in the sale of Edina Realty listings. They should be grateful that these syndicators also help reduce the incidence of dual agency. Unfortunately, Edina Realty and other brokers are on the attack to defend the double commission and dual agency and they are using their trade association owned MLSs, like MRIS, to wage that deceptive battle for them.

In Minnesota, Northstar MLS (Edina Realty is a member) is also suing the defendant and Edina Realty may even be behind that case as it was their attorney who filed a licensing complaint against defendant in Minnesota. There is much talk of MLSs making a concerted effort to “collaborate” to sue defendant and other firms like defendant throughout the country⁸ (in the cited document, defendant is specifically mentioned).

In our opinion, MLSs are engaged in this war against defendant only because defendant’s business model does not promote dual agency. In fact, defendant advocates against dual agency on their webpage. Defendant’s business model actually reduces the incidence of dual agency and helps buyers save money on commissions and for those reasons CAARE believes that their innovation is an important contribution to competition and informed real estate decisions.

D. MRIS is a Government Created Monopoly

There is simply no other source of real estate listing data available to prospective “competitors” and consumers in MRIS service area, other than data from MRIS. Innovation and competition in the industry of real estate marketing will not flourish unless MRIS shares this data. It is vital that the court understands that MRIS obtains this data through a governmental licensing privilege.

⁸ Exhibit 7: “Cooperation and Communication Among Industry Participants Dealing with Piracy” A Presentation for the Legal Seminar of the Council of Multiple Listing Services Conference, Boston, Massachusetts, September 26, 2012

MRIS obtains all their listing data from licensed real estate brokers and agents. MRIS is owned by and works for the benefit of these licensees in furtherance of their charge to help their seller clients sell homes and their buyers to buy homes. As fiduciaries, listing brokers' primary duty should be to sell their clients' houses through means that will generate the most interest and sell the houses for the highest price in the shortest amount of time.

Through an agreement with cooperating brokerage firms, ALL active licensed brokers have become members of MRIS and have agreed to share their data with each other. The brokers obtain that data through a licensing privilege that only permits brokers to legally help consumers buy and sell real estate for a fee. Only brokers have access to that data. MRIS has a monopoly on this data.

It is impossible for brokers to do their job without access to the MLS data provided by MRIS. In addition, since the Realtor Associations own MRIS, brokers cannot gain access to this data unless they first join the Realtor Association. Just as it would be impossible for a real estate broker to do their job without the MRIS data, it is impossible for the defendant, and others similarly situated, to their job and bring their innovation to the industry without the MRIS data.

Allowing MRIS brokers to manipulate the access and quality of data to serve their self-interests, rather than the interests of their clients flies in the face of being a fiduciary. Locking out data syndicators like the defendant (especially in light of

the fact that data syndicators further the broker's fiduciary charge) decreases market exposure of sellers' listings and buyers' access to information and thereby has a negative impact on consumers and competition.

MRIS is a collaboration of all of the competing real estate brokers in the area and anytime competitors gather and in concert try to eliminate a perceived competitor their motives should be suspect. In this case, all of the collaborators have gotten together as well as MLSs from all over the country to act in concert to try and eliminate defendant. Therefore, MRIS does not have clean hands.

MRIS is only able to obtain the data at issue because of the "collaboration" of all the brokerage companies that locks out other would be innovators and data distributors. Brokers, acting through MRIS, are utilizing their position as custodians of client data to make decisions that harm their own clients.

MRIS is not your ordinary "for-profit" business entity. It is owned by a non-profit Realtor trade association. The Realtor trade association exists to serve its member brokers who ultimately owe their fiduciary duty to the sellers and buyers they represent. Those trade associations are made up of active real estate licensees who obtain their client's data through their government licensed activities. MRIS exists only because all the competitors in the real estate industry gathered together to create it. If they are using client data to lockout innovators with whom they do

not even compete, to the detriment of their customer-principals, they should be stopped.

MRIS has exclusive control over data obtained from licensed brokers and for them to misuse access to this data for self-serving purposes hinders competition, innovation and harms consumers.

E. The Ultimate Purpose Should Be to Sell the Seller's House

The ultimate purpose and duty of listing brokers is to use their expertise to sell the seller's house in the shortest time possible and for the highest price. As fiduciaries, side deals and conflicts of interests should be avoided and not encouraged. Abusing the fiduciary relationship to obtain copyrights on their clients' data interferes with their duty to sell the house and pursuing copyright claims to limit the market exposure of their own listings directly opposes their primary purpose and duty.

Realtors can no more hide behind their complex legal infrastructure to skirt their fiduciary duties, then can lawyers hide behind the bar association to engage in illegal client solicitation. If it would be wrong for individual brokers to pirate copyrights from their seller clients, then it would be wrong for them to use their MLSs to accomplish the same thing. This is exactly what has occurred with MRIS. If there is any piracy taking place in the present action, it is by MRIS in trying to take rights to data belonging to real estate clients -- rights that it does not

need in order to fulfill its purpose of selling houses. The act of securing these copyrights on consumer data is detrimental to consumers.

The defendant in this case does not charge MRIS or any of its members for the services that it provides. Nor does Defendant charge consumers for information Defendant disseminates. Its activities, just like other data syndicators, increases the likelihood that homes will sell faster and for a higher price. In fact, the top frequented homebuyer websites are not affiliated with MLSs at all, but are independent data syndicators like Defendant's website, Neighborcity.com⁹. These independent data syndicators serve a good and useful purpose to consumers.

F. MRIS is a Market Manipulator

The data presented by MRIS to real estate consumers is done in a manner that protects outmoded business practices. Those practices encourage listing brokers to financially incentivize licensed buyer brokers through hidden MLS fields that are only visible to licensees. Buyer brokers are offered substantially more compensation from listing brokers on certain properties, which provides them with a financial incentive to manipulate the advice that they provide to their buyers. That sort of manipulation does not belong in a fiduciary relationship and we believe that it is important for the court to understand how this is accomplished.

⁹ Exhibit 8: "Top 20 real estate websites in February" Inman News, March 18, 2011

MRIS's primary purpose, as is true with any MLS, is to facilitate offers of compensation from listing brokers to cooperating brokers who procure a ready, willing and able buyer. That compensation is visible only to real estate licensees when they are logged in to the MLS. Only MRIS member licensees can log in to the MLS. The compensation is in the hidden MLS "compensation" field as a percentage of the purchase price or as a buyer broker bonus in the hidden field called "General/Agent Remarks."

MRIS member real estate brokers working with buyers also represent those buyers in a full fiduciary capacity (except when dual agency arises). Most of these buyer brokers collect their compensation offered by listing brokers through MRIS. However, MRIS hides the compensation fields from consumers and the result is that hidden compensation is being offered by the seller's broker to the buyer's broker. The secret compensation being offered through MRIS to buyer brokers varies from listing to listing and provides secret financial incentives to buyer brokers to sell certain houses. In many cases, the compensation is beefed up and even called a bonus – many times in excess of \$1,000. In one example, the MRIS listing broker has used a listing field that is visible only to brokers (and invisible to consumers) called "Remarks General/Agent." In that field, the listing broker is offering, "selling agents" (buyer brokers or seller sub-agents) "a bonus of \$1,500 on a full price sale and \$1,000 on anything under \$125,000." This is an incentive

being paid to buyer agents to encourage their buyer clients to pay full price for the house and we believe MRIS is harming consumers by facilitating this conduct.

In this time of high foreclosures and short sales, Real estate consumers need more than ever to be able to rely upon the advice and counsel of their licensed broker advocates. That means no dual agency, no secret bonuses to buyer brokers and removing entry barriers to data sharing businesses.

MRIS serves to protect the undesirable qualities of the current system rather than to promote and focus on innovations that might better serve consumers. Their practices encourage unsustainable market influences that provide inappropriate financial incentives to fiduciaries in exchange for working against their own clients. If the fiduciaries act on those financial incentives, the most likely result is bad advice for consumers from the experts whom they trust. That means bad decisions and bad impacts on the marketplace.

III. CONCLUSION

CAARE believes that the Defendant and similar data disseminating organizations bring valuable innovations that increase the likelihood that consumers will make more informed decisions about their residential real estate investments. Instead of directing homebuyers to contact the listing broker of homes for sale, the defendant makes a responsible and consumer-friendly point of avoiding recommendations that would result in dual agency. The defendant rates

buyer agents and attempts to direct consumers to agents who are not with the listing broker and thereby avoiding dual agency and preserving the advocate's fiduciary responsibilities. Plaintiff's should be grateful to defendant for ensuring that consumers receive proper representation in their residential real estate transactions. Instead, Plaintiff is trying to limit the market exposure of their seller's properties by stopping defendant's market competition friendly conduct. Plaintiff is also encouraging dual agency and double commissions to the detriment of their members' own clientele.

Unfortunately, the defendant is dependent upon MRIS for the accuracy and timeliness of the data that it receives. Rather than encourage practices that would enhance the accuracy and timeliness of the data made available to defendant, MRIS withholds current data from defendant leading to MRIS membership voicing objections to the data quality as a reason not to use defendant's services – a self-fulfilling prophecy.

MRIS is owned and controlled by a conglomerate of Maryland, Virginia and D.C. Realtor trade associations which are comprised of real estate brokers and agents who owe fiduciary duties to homebuyers and sellers. The Board of Directors is comprised of member real estate brokers. Real estate brokers should not be able to shirk their fiduciary duties by hiding behind a smokescreen of Associations and hidden compensation data fields. Just as it would not further the broker's purpose

of selling a house for the broker to obtain a copyright of their client's data, it should not serve the MLSs purpose either, because an MLS stands in the shoes of its member-brokers. In the same way that it would constitute self-dealing for the broker/fiduciary to obtain a copyright on their client's data, it is also a violation of those same duties for the MLS to demand a copyright from the broker's clients. In fact, as is evidenced in this case, the MLS is using their claimed copyright on seller's data to interfere with the broker's purpose in marketing their clients' homes in a manner that encourages dual agency and double commissions. The MLS is being used as a smokescreen to increase the frequency of dual agency instances which financially benefits listing brokers in the form of double commissions but at the same time strips both buyers and sellers of the brokers' fiduciary representation. This is not conduct that brokers could engage in and brokers should not be allowed to engage in this wrongful and harmful conduct through the façade of corporate fictions.

The MLS is the only repository of the fiduciary-obtained data at issue in this case. If the decision of the lower court is allowed to stand, the MLS can exert absolute control over customer data, to the exclusion of innovators who seek to use this data to the benefit of member brokers' clients. Only licensed real estate brokers are legally licensed to obtain this data for the purpose of selling their clients' homes for a fee and only they are privy to this data. The MLS is claiming

a copyright on data that they obtained through state mandated licensing activity which provides them with exclusive access to this data. Imagine trying to compete in an industry where your competitor has exclusive access to your product and will only allow you access to the data if you agree to engage in conduct that is harmful to the marketplace and the consumers to whom the MLS are supposed to serve. MRIS has a monopoly on this data and is using this data to interfere with their broker members' purpose in selling homes. The source of the discontent over Defendant's use of customer data is coming from the brokers themselves who are financially incentivized to seek dual agency. This is a lawsuit to protect the brokers' ability to control data so that buyers are directed to websites where they are more likely to encounter dual agency (a highly profitable proposition for brokers). Plaintiff's purpose flies directly in the face of the brokers' fiduciary duties to their clients.

Neither MRIS nor Brokers lose money due to Defendant's dissemination of information. They are not harmed. In fact, Brokers benefit from the Defendant's work. If a buyer finds a property on Defendant's neighborcity.com website, the broker does not lose their commission. They still get their commission, they just get the added value of having a third party help sell the property for free by expanding the market visibility. In fact, firms like Defendant create a market efficiency that does not otherwise exist in that they benefit in the form of

advertising dollars for showing these properties – something Realtors can't and don't do. It is a whole new avenue to get homes sold that serves only to help Realtors in general and their clients. However, Realtors lose out only in the fact that they lose the ability to get double commissions (dual agency) – an illegitimate purpose that harms their clients.

Respectfully submitted,

/s/ Douglas R. Miller

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

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Dated: October 30, 2012

/s/ Douglas R. Miller
Counsel for Amicus Curiae

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Due to inclement weather and the court being closed on October 29, 2012, I hereby certify that on this 30th day of October, 2012, I caused this Brief of Consumer Advocates In American Real Estate as *Amicus Curiae* In Support of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 30th day of October, 2012, I caused the required copies of the Brief of Consumer Advocates In American Real Estate as *Amicus Curiae* In Support of Appellant to be hand filed with the Clerk of the Court.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

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