No. _____

IN THE
Supreme Court of the United States

THE NATIONAL ASSOCIATION OF REALTORS; BRIGHT MLS, INC.; MIDWEST REAL ESTATE DATA, LLC; CALIFORNIA REGIONAL MULTIPLE LISTING SERVICE, INC.,

Petitioners,

— v. —

THE PLS.COM, LLC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner National Association of REALTORS® has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Petitioner Bright MLS, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Petitioner Midwest Real Estate Data, LLC is wholly owned by Multiple Listing Service of Northern Illinois, Inc., and no publicly held corporation owns 10% or more of its stock. Petitioner California Regional Multiple Listing Service, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice to the Ninth Circuit:

Petitioners National Association of REALTORS® ("NAR"), Bright MLS, Inc., Midwest Real Estate Data, LLC, and California Regional Multiple Listing Service, Inc., by undersigned counsel, respectfully request a 60-day extension of time, up to and including Friday, September 23, 2022, in which to file a petition for a writ of certiorari. In support of this request, counsel states as follows:

1. On April 26, 2022, a panel of the United States Court of Appeals for the Ninth Circuit reversed the decision of the United States District Court for the Central District of California that had granted the motion to dismiss filed by NAR and the other Defendants. (Attachment A.)

2. Petitioners have ninety days from April 26, 2022, to petition for a writ of certiorari. Sup. Ct. R. 13.3. The petition is therefore due on July 25, 2022. This application is being filed at least ten days before that date.

3. Respondent consents to the extension of time to file a petition for a writ of certiorari.

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

5. This case presents substantial and important questions of federal law that impact real estate brokers, home buyers, and home sellers across the country who have come to rely on multiple listing services for timely, useful data on home listings. The case concerns whether brokers who are members of multiple listing services will share information about all home listings with other members, including the smallest real estate brokers and popular online aggregators of real estate information. If Respondent has its

way, members of multiple listing services could pick-and-choose which listings to share and save select listings for "private" conversations that can exclude other brokers for any reason at any time.

6. Multiple listing services operate databases of information about homes listed for sale (and sold) in local geographic areas. Multiple listing services increase competition by giving even the smallest and newest brokers practically the same inventory as the largest ones. They benefit buyers and sellers of real estate by providing transparency into the homes for sale and recent sales prices for homes in the area. Multiple listing services bring buyers and sellers of real estate together in an efficient way, reducing transaction and search costs. NAR has established rules to ensure that multiple listing services work smoothly, and some (but not all) multiple listing services have adopted the NAR rules.

7. The underlying litigation involves a challenge by ThePLS.com, a fledging business that sold access to non-MLS, private home listings, to policies adopted by NAR and allegedly supported by the co-Defendant MLSs. NAR's version of that policy is called the "Clear Cooperation Policy," and it provides: "Within one (1) business day of marketing a property to the public, the listing broker must submit the listing to the MLS for cooperation with other MLS participants." The rule indisputably allows brokers to submit the same listings to *both* PLS and multiple listing services (and anywhere else), or for brokers who do not participate in the multiple listing service to market their listings privately (even exclusively with PLS) if they want. The Clear Cooperation Policy merely prohibits a broker from agreeing to participate in the multiple listing service, but then putting a subset of its listings only on a "private" database. Even though the Clear

Cooperation Policy indisputably makes more information available to more actual and potential market participants, PLS contends that the Clear Cooperation Policy is somehow an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

8. The District Court for the Central District of California dismissed PLS's claim, holding that there was no antitrust injury to PLS and therefore no standing to sue. The District Court also held that only the ultimate consumers—namely, the buyers and sellers of real estate—are relevant consumers for the purposes of this case. Those buyers and sellers of real estate were the first purchasers outside of the alleged conspiracy because PLS alleged that brokers were co-conspirators who adopted the Clear Cooperation Policy through their trade association (NAR) and their local multiple listing services. While PLS alleged that it was harmed, PLS failed to allege that consumers—home buyers or sellers—were worse off as a result of the Clear Cooperation Policy and therefore it failed to plausibly allege an injury caused by a reduction in competition.

9. The Ninth Circuit Court of Appeals reversed. The Ninth Circuit ignored PLS's allegation that brokers were co-conspirators, and decided that PLS (and any other antitrust plaintiff) could ignore the benefits of the Clear Cooperation Policy to buyers and sellers. The Court took the PLS allegation that the Clear Cooperation Policy reduced competition for these brokers (again, ignoring that PLS also alleged they were co-conspirators) as somehow sufficient to support PLS's claim to antitrust injury and standing because "[b]usinesses that use a product or service as an input to provide another product or service can be consumers for antitrust purposes." *PLS.com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 833 (9th Cir. 2022). And, while relying on alleged harm to co-conspirators, the Court ignored the benefits of the Clear Cooperation Policy to buyers

and sellers of real estate by simply labeling them irrelevant "ultimate consumers." *Id.* The Ninth Circuit therefore remanded to the District Court of Central California for discovery. *Id.* at 843.

10. In doing so, the Ninth Circuit: (1) created a circuit split when it misread and misapplied *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), which governs two-sided markets such as multiple listing services (which provide information to buyers, sellers, and their brokers); and (2) contravened established precedent by holding that alleged harm to co-conspirators is sufficient to establish antitrust injury, and the harm to the first consumer outside of the alleged conspiracy is irrelevant.

11. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Counsel of record and most of the attorneys who will work on the petition for a writ of certiorari were not involved in the proceedings in the District Court and Ninth Circuit and were retained for the purposes of representing NAR in this Court and filing this petition. Because appellate counsel are new to this case, they require additional time to familiarize themselves with the trial and appellate records and to prepare this petition. In addition, over the next four weeks, counsel are working on at least three amicus briefs to be filed in this Court in July and August 2022; preparing for two trials in July 2022; and drafting multiple merits briefs due in district courts and courts of appeal. During this period, appellate attorneys new to the matter are also facing medical and childcare issues. Of the appellate attorneys new to the matter, multiple team members have either just had a child born or are expecting children in the coming weeks and months. Finally, the team's resources have been further limited by the new wave of COVID illnesses.

12. Petitioners have not previously sought an extension of time from this Court.

13. The requested extension of time is for 60 days, up to and including Friday, September 23, 2022. Sup. Ct. R. 13.5 (authorizing extension of up to 60 days).

For these reasons, Petitioners respectfully request that an order be entered extending the time in which to petition for a writ certiorari by 60 days, up to and including September 23, 2022.

Dated: July 11, 2022

Respectfully submitted,

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ATTACHMENT A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE PLS.COM, LLC, a California limited liability company, *Plaintiff-Appellant*, v. THE NATIONAL ASSOCIATION OF REALTORS; BRIGHT MLS, INC.; MIDWEST REAL ESTATE DATA, LLC; CALIFORNIA REGIONAL MULTIPLE LISTING SERVICE, INC., *Defendants-Appellees.*	No. 21-55164 D.C. No. 2:20-cv-04790-JWH-RAO OPINION

Appeal from the United States District Court
for the Central District of California
John W. Holcomb, District Judge, Presiding

Argued and Submitted January 14, 2022
Pasadena, California

Filed April 26, 2022

Before: MILAN D. SMITH, JR. and JOHN B. OWENS, Circuit Judges, and STEPHEN J. MURPHY, III,[*] District Judge.

Opinion by Judge Milan D. Smith, Jr.

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[*] The Honorable Stephen Joseph Murphy, III, United States District Judge for the Eastern District of Michigan, sitting by designation.

SUMMARY[**]

Antitrust

The panel reversed the district court's dismissal of an action brought by The PLS.com, LLC, alleging that its competitors in the real estate network services market violated antitrust laws because they conspired to take anticompetitive measures to prevent PLS from gaining a foothold in the market, and remanded for further proceedings.

PLS challenged the National Association of Realtors' Clear Cooperation Policy, which required members of an NAR-affiliated multiple listing service who chose to list properties on the PLS real estate database also to list those properties on an MLS. The district court dismissed on the ground that PLS did not, and could not, adequately allege antitrust injury under § 1 of the Sherman Act or California's Cartwright Act because it did not allege harm to home buyers and sellers.

A competitor has standing to assert a Sherman Act claim only when the claimed injury flows from acts harmful to consumers. The panel held that the definition of the term consumer is not limited to one who buys goods or services for personal, family, or household use, with no intention of resale. Rather, a business that uses a product as an input to create another product or service is a consumer of that input for antitrust purposes and can allege antitrust injury. Accordingly, PLS was not required to allege harm to home

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

buyers and sellers to allege antitrust injury, and its allegation that the Clear Cooperation Policy harmed buyers' and sellers' real estate agents, the consumers of PLS's and the MLSs' listing network services, could suffice.

To allege antitrust injury, PLS was required to allege unlawful conduct, causing injury to PLS, that flowed from that which made the conduct unlawful, and that was of the type that the antitrust laws were intended to prevent. Without a violation of the antitrust laws, there can be no antitrust injury.

The panel held that PLS adequately alleged a violation of Sherman Act § 1, which prohibits a contract, combination, or conspiracy that unreasonably restrains trade. The panel held that PLS adequately alleged that the Clear Cooperation Policy was an unreasonable restraint of trade because it was a per se group boycott, but the panel left to the district court to determine in the first instance whether it should apply per se or rule of reason analysis at later stages in the litigation. The panel held that PLS satisfied *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) (*Amex*), which requires a plaintiff to define the relevant market to include both sides of the market in certain circumstances. The panel held that *Amex* can apply at the pleading stage, and that because PLS satisfied *Amex* by alleging injury to both sellers' agents and buyers' agents, the panel need not resolve the more difficult questions the parties raised about how broadly *Amex* applies.

The panel concluded that PLS adequately alleged antitrust injury by alleging a group boycott in which the Clear Cooperation Policy prevented PLS from gaining a foothold in the market and made it virtually impossible for new competitors to enter the market, leaving agents with fewer choices, supra-competitive prices, and lower quality products.

The panel held that it had jurisdiction to consider whether PLS adequately alleged that defendant Midwest Real Estate Date, LLC ("MRED") was involved in the alleged conspiracy. At the time of PLS's appeal, Federal Rule of Appellate Procedure 3(c)(1)(B) required a party to "designate" in its notice of appeal "the judgment, order, or part thereof being appealed." PLS's notice of appeal identified the object of its appeal as Subsection 1 of the district court's dismissal order, addressing antitrust injury, but PLS's opening brief also challenged Subsection 3 of the order, addressing whether PLS adequately alleged that MRED was part of the conspiracy. The panel held that it had jurisdiction to review Subsection 3 because PLS's intent to appeal Subsection 3 could be fairly inferred from its opening brief, and defendants were not prejudiced because they fully briefed the issue. The panel further held that PLS adequately alleged that MRED was involved in the conspiracy by alleging a conscious commitment to a common scheme designed to achieve an unlawful objective.

COUNSEL

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OPINION

M. SMITH, Circuit Judge:

The PLS.com, a new entrant in the real estate network services market after decades of there being little or no

competition in that market, alleges that its entrenched competitors violated the antitrust laws because they conspired to take anticompetitive measures to prevent it from gaining a foothold in the market. The district court dismissed PLS's complaint without leave to amend because it concluded PLS did not, and could not, adequately allege antitrust injury. We reverse.

FACTUAL BACKGROUND

Most people seeking to buy or sell a home hire a real estate agent to assist them with the process.[1] Agents assist sellers by marketing their homes, and they assist buyers by finding homes that match their preferences. To do so, most agents pay monthly fees to access multiple listing services (MLSs), which are databases of homes for sale in certain geographic areas. For example, the California Regional Multiple Listing Service (CRMLS) lists homes for sale in parts of California; the Bright MLS lists homes for sale in parts of New Jersey, Delaware, Maryland, Pennsylvania, West Virginia, Virginia, and Washington, D.C.; and Midwest Real Estate Data, LLC (MRED) lists homes for sale in parts of Illinois, Wisconsin, and Indiana.

Most MLSs are owned and controlled by members of the National Association of Realtors (NAR), a trade association to which the "vast majority" of residential real estate agents

[1] This account is based entirely on the allegations in PLS's complaint, which we must accept as true at this stage of the litigation. *Ellis v. Salt River Project Agric. Improvement & Power Dist.*, 24 F.4th 1262, 1266 (9th Cir. 2022). The complaint distinguishes between real estate "agents" and "brokers," and uses the term "real estate professional" to refer to both collectively. Because this distinction does not affect our analysis, we use the term "agent" to refer to agents and brokers collectively.

belong. There are approximately 600 NAR-affiliated MLSs in the United States, and CRMLS, Bright, and MRED each contain "over 65 percent of residential real estate listings marketed by licensed real estate professionals in their respective service areas." Residential real estate agents "regard participation in their local MLS as critical to their ability to compete."

Most sellers prefer to list their homes on NAR-affiliated MLSs to reach the widest possible range of buyers, but some sellers prefer not to do so because they do not wish to share all of the information NAR-affiliated MLSs require. For instance, a public figure may not wish to share certain details about his or her home with an entire MLS. Listings that are not shared on a NAR-affiliated MLS are sometimes called "pocket listings."

Historically, pocket listings were marketed through face-to-face communications, telephone calls, or email. In 2017, as "[d]emand for pocket listing[s] . . . skyrocketed," a group of real estate agents created PLS, which was a database similar to an MLS, but that allowed sellers to choose how much information to share, and that included listings anywhere in the United States rather than just in a particular region. PLS was open to any agent who wished to join, and agents who joined were charged less than they were by the MLSs. PLS grew rapidly, and by late 2019 had 20,000 members who "were cooperating to sell billions of dollars of residential real estate listings nationwide."

Even before PLS was formed, NAR and several MLSs, including CRMLS, Bright MLS, and MRED, became concerned with the growth of pocket listings. A 2015 NAR study warned, "Off-MLS listings may contribute to the unraveling of the MLS as we know it, and its replacement by a private network that serves to benefit a certain group of

participants." Another NAR study cautioned, "A number of industry initiatives suggest that the current MLS-centric era might be coming to an end. After half a century of operating as the only gateway, there is a strong likelihood that the MLS may lose its exclusive positioning as the principal source of real estate listings."

Two years after PLS launched, NAR's "MLS Technology and Emerging Issues Advisory Board" voted to recommend that NAR adopt a policy that would require agents posting listings on competing services to also post those listings on the appropriate MLS. A month later, CRMLS, Bright MLS, MRED, and other MLSs issued a white paper "that called for collective action to address the threat to the MLS system presented by the rise of pocket listings and the prospect of a competing listing network that would aggregate such listings." A month after that, Bright MLS adopted a policy consistent with the NAR board's recommendation, and CRMLS, Bright MLS, and MRED met with other NAR-affiliated MLSs "at a [Council of Multiple Listing Services] conference in Salt Lake City, Utah to discuss the competitive threat presented by pocket listings and the need for NAR to take action at the upcoming NAR Convention to eliminate that threat through adoption of" the policy nationwide. MRED's CEO "explained that the [policy] was motivated by concerns that pocket listings were 'making the MLS less valuable.'"

The next month, NAR adopted the Clear Cooperation Policy, which provides: "Within one (1) business day of marketing a property to the public, the listing broker must submit the listing to the MLS for cooperation with other MLS participants." This new policy meant that members of a NAR-affiliated MLS who chose to list properties on PLS were required to also list those properties on an MLS. Agents

who did not comply faced severe penalties, including in some cases several-thousand dollar fines, or suspension from, or termination of, their access to the MLS.

"NAR-affiliated MLSs and [the Council of Multiple Listing Services] have admitted that the purpose of the Clear Cooperation Policy was to maintain the market dominance of the NAR-affiliated MLS system, and specifically to exclude PLS." PLS alleges that the Clear Cooperation Policy has had its intended effect: After the Clear Cooperation Policy was adopted, "[l]istings were removed from PLS and submitted instead to NAR-affiliated MLSs," "[a]gent participation in PLS declined," and "PLS was foreclosed from the commercial opportunities necessary to innovate and grow" "a critical mass of members and listings to create a powerful network effect."

PLS also alleges that the Clear Cooperation Policy "harmed PLS and consumers in the relevant market by excluding PLS." Based on PLS's briefing, we initially understood this allegation to mean that PLS was driven from the market.[2] At oral argument, however, PLS conceded that it did not allege that the Clear Cooperation Policy drove it from the market, and instead directed us to a news article, which is not cited in the complaint, that suggests that PLS has exited the market. Although the parties seem to agree that PLS is no longer in the listing network services market, our analysis at this stage is confined to the allegations in the

[2] For example, PLS cites to this part of the complaint and states that "competition from listing networks such as PLS that competed with the MLSs was eliminated." In its reply brief, PLS argues that "the graveyard of the MLS Defendants' former direct competitors—like PLS and the Top Agent Network—proves that Clear Cooperation *actually succeeded* at having [the] practical effect" of "driving those competitors out of business."

complaint, so we proceed on the understanding that the Clear Cooperation Policy injured PLS but did not drive it from the market.

PROCEDURAL BACKGROUND

Roughly seven months after the Clear Cooperation Policy was adopted, PLS filed suit, alleging that the Clear Cooperation Policy is an unreasonable restraint of trade in violation of Section 1 of the Sherman Act and Section 1670(a)–(c) of California's Cartwright Act.[3] PLS seeks treble damages for its "lost profits and damaged equity and goodwill" and a permanent injunction prohibiting Defendants from enforcing the Clear Cooperation Policy.

Defendants moved to dismiss, arguing that PLS failed to state a claim. The district court granted the motions to dismiss because it concluded that PLS did not allege antitrust injury, and it denied PLS leave to amend because it determined that PLS could not cure this deficiency. The district court also held that PLS did not adequately allege that MRED participated in the alleged conspiracy. PLS timely appealed.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's dismissal of the complaint de novo. *City of Oakland v. Oakland Raiders*, 20 F.4th 441, 451 (9th Cir. 2021). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.*

[3] PLS's claim is brought via the Clayton Act, 15 U.S.C. § 15, which provides a private right of action for enforcing the Sherman Act and other federal antitrust laws.

v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The Cartwright Act analysis mirrors the Sherman Act analysis, so we analyze both claims together. *See Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001).

ANALYSIS

I

At the outset, we hold that the district court erred when it held that PLS did not adequately allege antitrust injury because it did not allege harm to home buyers and sellers.

We begin with some general principles. The purpose of the Sherman Act is "the promotion of consumer welfare." *GTE Sylvania Inc. v. Cont'l T.V., Inc.*, 537 F.2d 980, 1003 (9th Cir. 1976). Therefore, the Act seeks "to preserve competition for the benefit of consumers," not competitors. *Am. Ad Mgmt. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999). But sometimes harm to a competitor also harms competition which, in turn, harms consumers. For example, predatory pricing designed to eliminate "competitors in the short run and reduc[e] competition in the long run . . . harms both competitors *and* competition" if the predator can raise prices above the competitive level after its rivals are driven from the market. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117–18 (1986).

Congress has allowed competitors to enforce the antitrust laws only when they have experienced an "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). In other words, a

competitor has standing to assert a Sherman Act claim "only when the claimed injury flows from acts harmful to consumers." *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1445 (9th Cir. 1995). This requirement "ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990).

The district court held that these principles required PLS to allege that the Clear Cooperation Policy directly harmed "*ultimate* consumers"—which the court identified as "home buyers and sellers"—to allege antitrust injury. (emphasis added). According to the district court, PLS did not allege antitrust injury because "PLS [did] not adequately allege that the Clear Cooperation Policy has increased prices for services purchased or otherwise paid for by home sellers and buyers or that home sellers and buyers have been denied brokerage services that they desire as a result of the Clear Cooperation Policy." The legal basis for the district court's conclusion is not clear. The district court appears to have understood the term "consumer" to mean something like one "who buys goods or services for personal, family, or household use, with no intention of resale." *Consumer*, *Black's Law Dictionary* (11th ed. 2019). But our use of the term in the antitrust context has not been so limited. As our opinion in *Glen Holly Entertainment, Inc. v. Tektronix, Inc.*, 352 F.3d 367 (9th Cir. 2003) demonstrates, a business that uses a product as an input to create another product or service is a consumer of that input for antitrust purposes and can allege antitrust injury.

In that case, Tektronix and Avid Technology were the only manufacturers of "non-linear editing systems" that were used by film production companies to edit movies and

television shows. *Id.* at 368. Glen Holly purchased Tektronix's machines and leased them to digital film companies or used them itself to provide editing services for those companies. *Id.* at 369. Tektronix and Avid unexpectedly formed an "alliance" and Tektronix agreed not to sell its product anymore. *Id.* Glen Holly, which had purchased only Tektronix's product, was forced out of business when its customers "refuse[d] to have their films edited with [Tektronix's] technology after they discovered that the system had been discontinued" and Glen Holly could not switch to Avid's product due to its cost and "insurmountable change-over complications." *Id.* at 370.

Throughout the opinion, we characterized Glen Holly as a "consumer-purchaser" and a "customer-consumer" of Tektronix's products and held that the alliance harmed competition because it "limited consumers' choice to one source of output." *Id.* at 368–69, 374. We also used "consumer" and "customer" interchangeably, explaining, for example, that "*customers* are the intended beneficiaries of competition, and . . . *customers* are presumptively those injured by its unlawful elimination." *Id.* at 378 (emphasis added). We ultimately held that Glen Holly adequately alleged antitrust injury even though it was not an "ultimate consumer" of movies and television shows. *See id.* at 374–78.

As *Glen Holly* makes clear, our use of the term "consumer" is not limited to "ultimate consumers" as the district court appears to have understood the term. Businesses that use a product or service as an input to provide another product or service can be consumers for antitrust purposes. Therefore, PLS was not required to allege harm to home buyers and sellers to allege antitrust injury. Its allegation that the Clear Cooperation Policy harmed real

estate agents—who are the consumers of PLS's and the MLSs' listing network services—may suffice.

II

Our conclusion that PLS can adequately allege antitrust injury without alleging harm to an "ultimate consumer" does not answer the question of whether it has actually done so. To allege antitrust injury, PLS must allege "(1) unlawful conduct, (2) causing an injury to [PLS], (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt.*, 190 F.3d at 1055. "Without a violation of the antitrust laws, there can be no antitrust injury." *Id.* at 1056.

A

We consider first whether PLS has adequately alleged a Sherman Act violation. The Sherman Act prohibits "[e]very contract, combination . . . or conspiracy in restraint of trade." 15 U.S.C. § 1. The Supreme Court has interpreted this language to "prohibit only *unreasonable* restraints of trade." *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98 (1984) (emphasis added). We use two kinds of analysis to determine whether a restraint of trade is unreasonable: the *per se* approach and the rule of reason. Some practices are "so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances." *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998). These practices are *per se* violations of the Sherman Act, and we presume that they are anticompetitive "without inquiry into the particular market context in which [they] are found." *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 100.

Most restraints, however, are subject to the rule of reason. *Hahn v. Or. Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988). "The rule of reason requires courts to conduct a fact-specific assessment of 'market power and market structure . . . to assess the restraint's actual effect' on competition." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (cleaned up) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)). A "three-step, burden-shifting framework" guides courts' analysis. *Id*. "Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Id.* "If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint." *Id.* "If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.*

A plaintiff can establish a substantial anticompetitive effect for purposes of the first step of the rule of reason analysis either "directly or indirectly." *Id.* To prove a substantial anticompetitive effect directly, the plaintiff must provide "'proof of actual detrimental effects [on competition]' such as reduced output, increased prices, or decreased quality in the relevant market." *Id.* (quoting *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460 (1986)). When a plaintiff does so, no "inquir[y] into market definition and market power" is required. *Ind. Fed'n of Dentists*, 476 U.S. at 460–61. To prove a substantial anticompetitive effect indirectly, a plaintiff must show that the defendants have market power in the relevant market and that "the challenged restraint harms competition." *Am. Express Co.*, 138 S. Ct. at 2284.

PLS argues that the Clear Cooperation Policy is an unreasonable restraint of trade because it is an unlawful group boycott.[4] Our court has found the following description of a group boycott from the D.C. Circuit to be helpful:

> The classic "group boycott" is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. Typically, the boycotting group combines to deprive would-be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates. The group may accomplish its exclusionary purpose by inducing suppliers not to sell to potential competitors, by inducing customers not to buy from them, or, in some cases, by refusing to deal with would-be competitors themselves. In each instance, however, the hallmark of the "group boycott" is the effort of competitors to "barricade themselves from competition at their own level."

Smith v. Pro Football, Inc., 593 F.2d 1173, 1178 (D.C. Cir. 1978) (quoting L.A. Sullivan, Antitrust 230, 232, 244–45 (1977)) (footnotes omitted); *accord Oakland Raiders*, 20 F.4th at 453 n.5.

[4] PLS also argues that the Policy is an agreement to restrict output. Because we conclude that PLS adequately alleged a violation of the Sherman Act through its group boycott theory, we decline to address its alternative theory.

The Clear Cooperation Policy, as PLS characterizes it, shares all the hallmarks of a group boycott: PLS's competitors coerced its suppliers (sellers' agents) not to supply PLS with listings (or to do so only on highly unfavorable terms), and they did so for the express purpose of preventing PLS, a new entrant to the market after decades of little to no competition, from competing with the MLSs. *See NYNEX Corp.*, 525 U.S. at 135 (describing "a group boycott in the strongest sense" as when a "group of competitors threaten[s] to withhold business from third parties unless those third parties . . . help them injure their directly competing rivals"). PLS also alleges that the effort succeeded: "Listings were removed from PLS and submitted instead to NAR-affiliated MLSs," "[a]gent participation in PLS declined," and "PLS was foreclosed from the commercial opportunities necessary to innovate and grow." Therefore, PLS has adequately alleged a group boycott.

The district court appeared to agree with this conclusion when it held that PLS adequately alleged that "the Clear Cooperation Policy is a *prima facie* unreasonable restraint of trade under the Rule of Reason framework." But to the extent the district court's reference to the rule of reason implicitly dismissed PLS's *per se* claim, the district court erred. Precisely which group boycotts qualify as *per se* violations of the Sherman Act has been a source of confusion for decades. In 1985, the Supreme Court observed that "[t]here is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing, Co.*, 472 U.S. 284, 294 (1985) (quoting L. Sullivan, Law of Antitrust 229–30 (1977)). In that case, the Court held that a group boycott "generally" falls into the *per se* category if "the boycotting firms possess[] a dominant position in the relevant market,"

they "cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete," and the practice is "not justified by plausible arguments that [it was] intended to enhance overall efficiency and make markets more competitive." *Id.* at 294. At the same time, "a concerted refusal to deal need not necessarily possess all of these traits to merit *per se* treatment." *Id.* at 295. The Court has provided little guidance since then.

Defendants argue that the Policy is not a *per se* group boycott because (1) it "does not cut off access to anything, and brokers remain free to use PLS or any other listing service," (2) "on its face" it does not prevent real estate agents from posting listings on competing networks or from "making a choice about the listing network platforms in which they choose to participate," and (3) it is procompetitive.[5] These arguments are not persuasive.

First, a group of competitors coercing a competitor's suppliers to sell to that competitor only on "unfavorable terms" constitutes a group boycott even if the competitors do not completely cut off the competitor's access to inputs it needs. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209, 213 (1959). That is because businesses that can obtain those inputs only on unfavorable terms are unlikely to

[5] Defendants do not seriously dispute that PLS has adequately alleged that they have market power. Defendants' only argument regarding market power is a single line in NAR's brief, which states: "PLS's hazy, speculative allegations about market share do not plead the necessary evidentiary facts to support its claims about market power.'" (Citation and quotation marks omitted). But NAR never explains *why* it believes PLS's allegations are inadequate, and "a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994).

be able to compete. *See Nw. Wholesale Stationers*, 472 U.S. at 295 n.6 (noting that "a concerted refusal to deal . . . *on substantially equal terms* . . . might justify *per se* invalidation if it place[s] a competing firm at a severe competitive disadvantage" (emphasis added)); *see also Ind. Fed'n of Dentists*, 476 U.S. at 458 (characterizing a group boycott as "a concerted refusal to deal *on particular terms*" (emphasis added)).

Here, the Clear Cooperation Policy impaired PLS's ability to compete against the MLSs in the market for sellers' listings on almost any dimension because it requires the vast majority of PLS's suppliers (sellers' agents that are members of a NAR-affiliated MLS) to supply to PLS's dominant competitors (NAR-affiliated MLSs) even if PLS's product is better on the merits. Regardless of what PLS does—whether it charges less to list properties, provides a nationwide network, or develops a better interface—agents who belong to a NAR-affiliated MLS may not list on PLS without also listing on an MLS. Thus, the Clear Cooperation Policy essentially *eliminates* competition for most sellers' agents' listings between NAR-affiliated MLSs and rival services.

Defendants' second argument—that the Clear Cooperation Policy is not coercive because sellers' agents who wish to place some listings exclusively on competing services may do so if they give up their access to the MLSs—is even less persuasive. That is precisely the dilemma the Sherman Act is designed to prevent. In *every* group boycott, the dominant firms force their suppliers or customers to choose between assisting the dominant firms in injuring their competitors or working exclusively with those competitors, knowing that because of the dominant firms' market power very few suppliers or customers will be able to rely exclusively on the competitors. That the customers or

suppliers technically have a choice does not mean the group boycott is not coercive.

Finally, Defendants argue that the Clear Cooperation Policy is procompetitive because it "reduc[es] search and transaction costs." Although this contention is dressed up in the language of economics, at its core it is just an argument that the Clear Cooperation Policy benefits buyers' agents because it allows them to see more listings on the MLSs and to avoid the need to consult competing services. This is not a procompetitive justification because it does not explain how the Clear Cooperation Policy enhances *competition*. At bottom, Defendants argue that the Clear Cooperation Policy results in a higher quality product: a listing service with all of the publicly available listings in one place. But justifying a restraint on competition based on an assumption it will improve a product's quality "is nothing less than a frontal assault on the basic policy of the Sherman Act." *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978). The antitrust laws assume that "competition will produce not only lower prices, but also better goods and services." *Id.* If Defendants are correct that buyers' agents prefer listing networks that offer more listings in one place, the MLSs should be in a good position to compete with upstarts like PLS. But the fact that PLS was growing rapidly despite the MLSs' larger inventory of listings might suggest that PLS offered features that at least some buyers' agents found attractive, despite the lower concentration of listings. In the end, sparing consumers the need to patronize competing firms is not a procompetitive justification for a group boycott. *See id.* at 689 (rejecting "the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition").

Although we hold that PLS has adequately alleged a *per se* group boycott, we leave to the district court to determine in the first instance whether it should apply *per se* analysis or rule of reason analysis at later stages in this litigation.

B

Defendants next argue that PLS failed to state a claim because it did not define the market properly, and did not allege injury to participants on both sides of the market, as they contend is required by *Ohio v. American Express Company*, 138 S. Ct. 2274 (2018) (*Amex*). PLS responds that *Amex* does not apply here, both because it does not apply at the pleading stage and because it applies only to two-sided platforms that facilitate simultaneous transactions, like credit-card networks. PLS also argues that it has satisfied *Amex* even if it does apply. We hold that *Amex* can apply at the pleading stage in some circumstances, but that PLS has satisfied *Amex*, so we need not resolve the more difficult questions the parties raise about how broadly the *Amex* decision applies.

(1)

In *Amex*, the federal government and several states sought to prove that an anti-steering provision American Express (Amex) imposed on merchants who chose to accept its cards violated Section 1 of the Sherman Act. *See* 138 S. Ct. at 2283. To understand the Court's decision, one must first have a basic understanding of Amex's business model. Briefly stated, credit-card companies earn revenue by charging merchants fees, which are generally calculated as a percentage of each transaction. *Id.* at 2281. Amex earns most of its revenue from these fees, and Amex generally charges merchants a higher percentage of each transaction than do its rivals. *Id.* at 2282. As a result, merchants sometimes attempt

to persuade or incentivize customers to use different cards to make their purchases. *Id.* at 2283. "This practice is known as 'steering.'" *Id.* Amex's anti-steering provision prohibits merchants who accept its cards from steering customers toward using other credit cards. *Id.*

After a bench trial, the district court held that Amex's anti-steering provision violates the Sherman Act based on the rule of reason because Amex has market power in the transaction-processing market and has used that market power to prohibit merchants from steering their customers toward lower-cost cards, thereby "short-circuit[ing] the ordinary price-setting mechanism" and eliminating "price competition among American Express and its rival networks." *See United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 151–52 (E.D.N.Y. 2015). The Supreme Court ultimately reversed and provided new instructions about how to define the relevant market when analyzing a product that is a two-sided platform.

According to the Court, "a two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them." *Amex*, 138 S. Ct. at 2280. The Court offered two examples: credit-card companies and newspapers. *See id.* at 2285–86. Credit card companies, the Court explained, sell credit to consumers on one side of the market and sell transaction-processing services to merchants on the other side of the market. *Id.* at 2280. Newspapers are also "arguably" two-sided platforms: they sell advertising space to advertisers and news to subscribers. *Id.* at 2286. The key difference between two-sided platforms and traditional products is that two-sided platforms "often exhibit what economists call 'indirect network effects,' . . . where the value of the two-sided platform to one group of participants depends on how

many members of a different group participate." *Id.* at 2280. "A credit card, for example, is more valuable to cardholders when more merchants accept it, and is more valuable to merchants when more cardholders use it." *Id.* at 2281.

The Court held that, for at least certain subsets of two-sided platforms, courts must define the relevant market to "include both sides of the platform" because one cannot accurately assess the competitive impact of a particular practice by looking to only one side of the market. *Id.* at 2286–87.[6] For instance, a credit card company might choose to increase merchant fees and use the increased revenue to offer more generous rewards for cardholders, thus reducing the price to cardholders and keeping the overall cost of the credit card service the same. *Id.* at 2281. The plaintiffs in *Amex* failed to prove an anticompetitive effect at the first step of the rule of reason analysis, the Court held, because they "wrongly focus[ed] on only one side of the two-sided credit-card market." *Id.* at 2287. To meet their burden of proof, they were required to prove anticompetitive effects "on the two-sided credit-card market as a whole." *Id.* In other words, they were required to prove that the "provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market." *Id.*

[6] However, "it is not always necessary to consider both sides of a two-sided platform." *Id.* at 2286. For example, "the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such." *Id.*

(2)

PLS argues that *Amex* has no role to play at the pleading stage because the proper definition of the market and whether a practice is anticompetitive "are fact-bound issues not susceptible to resolution on a motion to dismiss." We disagree.

A plaintiff is not required to define a particular market for a *per se* claim, *see Bd. of Regents of Univ. of Okla.*, 468 U.S. at 100; *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1104 (9th Cir. 1999), nor is it required to do so for a rule of reason claim based on evidence of the actual anticompetitive impact of the challenged practice, *see Ind. Fed'n of Dentists*, 476 U.S. at 460–61.[7] PLS is therefore correct that *Amex* does not apply to these claims. For rule of reason claims based on indirect evidence, however, *Amex* may play a role. For those claims, a plaintiff must define the relevant market and show that the defendant has market power in that market to prove that the challenged practice is anticompetitive. *See Amex*, 138 S. Ct. at 2284. Since these are elements of the claim, the plaintiff must plead facts that, when accepted as true, show they are satisfied. *Newcal Indus., Inc. v. Ikon Off. Sol.*, 513 F.3d 1038, 1044 (9th Cir. 2008). If "the alleged market suffers a fatal legal defect," the court may dismiss the claim at the pleading stage. *Id.* at 1045.

[7] In *Amex*, the Supreme Court held that the plaintiffs were required to define the relevant market even though they relied on direct evidence of an anticompetitive impact. *See Amex*, 138 S. Ct. at 2285 n.7. But the Court distinguished *Amex*, where the plaintiff complained of a vertical restraint of trade, from cases like this one, where the plaintiff complains of a horizontal restraint of trade. *Id.* Therefore, *Amex* did not disturb the *Indiana Federation of Dentists* rule.

Although we hold that *Amex can* apply to rule of reason claims based on indirect evidence at the pleading stage, we do not hold that it always does. Under both parties' theories, whether *Amex* applies depends on the characteristics of the relevant product. Defendants argue that strong indirect network effects alone trigger *Amex*, while PLS argues that simultaneous transactions are required. Either way, whether *Amex* applies depends on the facts. In some cases, a plaintiff will include facts in the complaint that disclose these characteristics and thus trigger *Amex*. In others, the complaint will not contain the necessary facts, and the court may need to wait to examine the evidence to determine whether *Amex* applies.

In this case, PLS alleges that the listing networks do not facilitate simultaneous transactions, but they nevertheless exhibit strong indirect network effects. Therefore, if PLS is correct that *Amex* applies only to transaction networks, it does not apply here. But if Defendants are correct that only strong indirect network effects are required, then *Amex does* apply because PLS alleged that the relevant products exhibit strong indirect network effects. We need not resolve the parties' dispute regarding the precise characteristics that trigger *Amex*, however, because PLS's allegations satisfy *Amex*, even if it applies.

(3)

The district court held that PLS failed to satisfy *Amex* because "PLS does not allege a plausible injury to participants on both sides of the market," namely to "*both* home sellers *and home buyers*." Defendants also argue that PLS failed to satisfy *Amex* because it did not "take account of the impact of the Policy on home buyers (or their agents)." As we have explained, the relevant consumers in this case are buyers' and sellers' *agents*, not the people buying and

selling homes. But even substituting buyers' agents and sellers' agents for the references to buyers and sellers, we find ourselves puzzled by Defendants' argument.

As a preliminary matter, *Amex* does not require a plaintiff to allege harm to participants on both sides of the market. All *Amex* held is that to establish that a practice is anticompetitive in certain two-sided markets, the plaintiff must establish an anticompetitive impact on the "market as a whole." 138 S. Ct. at 2287. Sometimes this will be by alleging harm to participants on both sides of the market and sometimes it will not. It is possible that a practice harming participants on one side of the market could outweigh the benefits to participants on the other, causing anticompetitive effects on the market as a whole.

More importantly, although it is not required, PLS *did* allege that the Clear Cooperation Policy harms competition in the real estate listing network services market because it injures *both* sellers' agents *and* buyers' agents. PLS alleges that the Clear Cooperation Policy prevented innovative competitors from entering the market and growing large enough to meaningfully compete with the MLSs, leaving both buyers' agents and sellers' agents with fewer choices, supra-competitive prices, and lower quality products. Defendants suggest that the purported benefits of the Clear Cooperation Policy to buyers' agents outweigh the costs to buyers' agents and sellers' agents, so PLS did not adequately allege harm to the market as a whole. But whether the alleged procompetitive benefits of the Clear Cooperation Policy outweigh its alleged anticompetitive effects is a factual question that the district court cannot resolve on the pleadings. *See Amex*, 138 S. Ct. at 2284 (describing the rule of reason as a "fact-specific assessment" designed to

distinguish between anticompetitive and procompetitive practices).

In sum, even if *Amex* were to apply to PLS's indirect evidence claim, PLS's allegations satisfy *Amex's* requirements.

III

Having concluded that PLS has adequately alleged a Sherman Act violation, we next examine the relationship between that violation and PLS's injury to determine whether PLS has adequately alleged antitrust injury. We hold that it has.

We find our precedent regarding antitrust injury in the context of predatory pricing to provide a helpful guide. The Supreme Court has held that a competitor can adequately allege antitrust injury when it alleges that it has been injured by a competitor's predatory pricing. *See Cargill*, 479 U.S. at 117–18. "Predatory pricing [is] pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." *Id.* at 117. It "harms both competitors *and* competition" because it "has as its aim the elimination of competition." *Id.* at 118. At the same time, the Court has made clear that a competitor that loses profits or market share due to a competitor's *non*-predatory price cuts does not experience antitrust injury because non-predatory price competition is procompetitive. *Id.* at 116–17.

The same reasoning applies to group boycotts: the Sherman Act prohibits group boycotts because they are designed to drive existing competitors out of the market or to prevent new competitors from entering, thus leaving consumers with fewer choices, higher prices, and lower-

quality products. PLS alleges that is what happened here: the Clear Cooperation Policy prevented PLS from gaining a foothold in the market and makes it virtually impossible for new competitors to enter, leaving agents with fewer choices, supra-competitive prices, and lower quality products. Therefore, PLS has adequately alleged antitrust injury. *See Am. Needle*, *Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010) ("[T]he 'central evil addressed by Sherman Act § 1' is the 'elimin[ation of] competition that would otherwise exist.'" (quoting 7 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 1462b, at 193–94 (2d ed. 2003))).

Defendants cite an out-of-context quotation from *Pool Water Products v. Olin Corporation*, 258 F.3d 1024 (9th Cir. 2001), to argue that decreased market share and shifting sales from one competitor to another can never constitute antitrust injuries. They suggest that because PLS does not allege that it was driven from the market entirely, there was no antitrust injury. But that is not what *Pool Water* held. In *Pool Water*, we held that the plaintiffs had "not presented any evidence that [the defendants] engaged in predatory pricing. Plaintiffs' reduced profits attributable to defendants' decrease in prices [was] therefore not an antitrust injury." *Id.* at 1036 (citations omitted). Nor was the plaintiffs' decreased market share. *Id.* Thus, *Pool Water* simply reiterated what the Supreme Court had already made clear: injuries due to lower prices are not antitrust injuries unless those lower prices are predatory. It did not hold that injuries short of being forced from the market—such as shifting sales or decreased market share—*never* constitute antitrust injuries.

Contrary to Defendants' argument, the Supreme Court has long recognized that "competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened." *Brunswick*

Corp., 429 U.S. at 489 n.14. And we recently reaffirmed that "a plaintiff need not allege that the exclusionary conduct has succeeded in displacing all competition" to "adequately plead antitrust injury." *Ellis*, 24 F.4th at 1274. Therefore, the fact that PLS does not allege that it was driven from the market does not mean that it failed to allege antitrust injury.

IV

Bright MLS and MRED argue that we should affirm the district court's dismissal of PLS's claims against them even if we hold that PLS has stated a claim against the other Defendants because PLS did not adequately allege that they were involved in the alleged conspiracy. Before turning to the merits of these arguments, we must first determine whether we have jurisdiction to consider the parties' dispute regarding MRED's involvement.

A

At the time of PLS's appeal, Federal Rule of Appellate Procedure 3(c)(1)(B) required a party to "designate" in its notice of appeal "the judgment, order, or part thereof being appealed."[8] This requirement is jurisdictional, so we must assure ourselves that it is satisfied, even though no party has raised it. *Smith v. Barry*, 502 U.S. 244, 248 (1992). PLS's

[8] Rule 3(c)(1)(B) was amended in April 2021 to eliminate the "or part thereof" language because the advisory committee concluded that it contributed to "the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal" rather than simply designating the judgment into which all of the district court's orders merge.

Fed. R. App. P. 3(c) advisory committee's note to 2021 amendment. We quote the former language because the 2021 amendment did not become effective until several months after PLS filed its notice of appeal.

notice of appeal identifies the object of its appeal as "Subsection 1 of Order (ECF 97) dismissing First Amended Complaint with prejudice and without leave to amend." This portion of the order addresses only whether PLS adequately alleged antitrust injury. But PLS's opening brief also challenges the district court's holding in Subsection 3 of its order that PLS did not adequately allege that MRED was part of the alleged conspiracy. If PLS had simply designated the entire order or the district court's judgment as the object of its appeal, we would clearly have jurisdiction to review Subsection 3. But PLS's designation of only Subsection 1 muddies the waters. Nevertheless, we hold that we have jurisdiction to review Subsection 3.

We have not required technical compliance with Rule 3(c)(1)(B). *Le v. Astrue*, 558 F.3d 1019, 1022 (9th Cir. 2009). To determine whether we have jurisdiction to entertain an appeal from a portion of an order that is not designated in the notice of appeal, we have applied a two-part test. *See id.* at 1022–23. At the first step, we determine "whether the intent to appeal a specific judgment can be fairly inferred," and at the second step, we analyze "whether the appellee was prejudiced." *Id.* at 1023 (quoting *Lolli v. Cnty. of Orange*, 351 F.3d 410, 414 (9th Cir. 2003)).

When examining whether the appellant's intent to appeal a portion of an order can be fairly inferred, we have not limited ourselves to inferences from the face of the notice of appeal; we have also inferred "appellants' intent to appeal . . . from their briefs," and from an appellant appealing another portion of the same order. *West v. United States*, 853 F.3d 520, 524 (9th Cir. 2017) (holding that notice of appeal designating the district court's dismissal of some counts against one defendant "sufficiently indicated [the plaintiff's] intent to appeal the entire district court order,"

including the dismissal of the plaintiff's claims against another defendant); *see also Le*, 558 F.3d at 1021, 1024–25. In addition, we have held that when an "appellee has argued the merits [of the disputed issue] fully in its brief, it has not been prejudiced by the appellant's failure to designate specifically an order which is subject to appeal." *Le*, 558 F.3d at 1025 (quoting *Lockman Found. v. Evangelical All. Mission*, 930 F.2d 764, 772 (9th Cir. 1991)). PLS's opening brief notified Defendants that it sought to appeal Subsection 3 of the district court's order and Defendants have fully briefed the issue. We therefore have jurisdiction to address the district court's holding that PLS did not adequately allege that MRED was involved in the alleged conspiracy.

B

Turning to the merits, we hold that PLS adequately alleged that Bright and MRED were involved in the alleged conspiracy. "Section 1 applies only to concerted action that restrains trade." *Am. Needle*, 560 U.S. at 190. Therefore, to adequately allege that Defendants violated Section 1, PLS must allege that Defendants' conduct was concerted action and was "not merely parallel conduct that could just as well be independent action." *Twombly*, 550 U.S. at 557. A formal agreement is not necessary. *Interstate Cir. v. United States*, 306 U.S. 208, 227 (1939). All that is required is "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney & Sons*, *Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)).

PLS has satisfied this requirement. Specifically, PLS alleges that MRED and other MLSs conceived of the Clear Cooperation Policy through "private interfirm

communications," including at a meeting of "NAR's MLS Technology and Emerging Issues Advisory Board" that MRED's CEO attended. PLS then alleges that MRED, Bright, and CRMLS signed a white paper "call[ing] for collective action to address the threat to the MLS system presented by . . . the prospect of a competing listing network." That same day, "MRED published a statement supporting adoption by NAR of the Clear Cooperation Policy at the upcoming NAR convention." The next day, MRED and other NAR-affiliated MLSs met in Salt Lake City "to discuss the competitive threat presented by pocket listings and the need for NAR to take action at the upcoming NAR Convention to eliminate that threat through adoption of the Clear Cooperation Policy." MRED's CEO and Bright's Chairman both addressed representatives of NAR-affiliated MLSs at the CMLS conference in Salt Lake City and urged them to adopt the Clear Cooperation Policy, and to encourage NAR's Board of Directors to do the same. Bright's CEO said, among other things, "We have an opportunity in front of us to make, put this policy into effect in November. And Bright adopted it yesterday, MRED's already adopted it, other people are already doing it, but we really need to get it through." The next month, Bright and MRED executives advocated for the policy at a meeting of NAR's Multiple Listing Issues and Policies Committee, where the policy was approved. Two days later, NAR's Board of Directors formally adopted it.

These allegations suggest that Bright and MRED agreed to adopt the Clear Cooperation Policy and then worked together to ensure that NAR required it so that every NAR-affiliated MLS would be forced to adopt it too. Therefore, PLS has plausibly alleged that Bright and MRED acted in concert rather than independently.

Bright argues that because PLS alleges it adopted "a version of what would become the Clear Cooperation Policy . . . before having any obligation under NAR rules . . . to do so," PLS has not alleged that it adopted the policy pursuant to an agreement. But PLS is not required to allege that Bright adopted the Policy because of NAR's rule. All that PLS must allege is that Bright adhered to a common scheme. Whether it did so by formally adopting the Clear Cooperation Policy after NAR required it or by voluntarily adopting a substantially equivalent policy beforehand makes no difference. *See Interstate Cir.*, 306 U.S. at 227 ("Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.").

V

We hold that PLS adequately alleged a violation of the Sherman Act and antitrust injury. We therefore reverse the district court's dismissal of PLS's complaint and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED

ATTACHMENT B

O

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

THE PLS.COM, LLC,

Plaintiff,

v.

THE NATIONAL ASSOCIATION OF REALTORS; BRIGHT MLS, INC.; MIDWEST REAL ESTATE DATA, LLC; and CALIFORNIA REGIONAL MULTIPLE LISTING SERVICE, INC.,

Defendants.

Case No. 2:20-cv-04790-JWH-RAOx

MEMORANDUM OPINION ON MOTIONS OF DEFENDANTS TO DISMISS PLAINTIFF'S AMENDED COMPLAINT [ECF Nos. 50, 53, & 55] and MOTION TO STRIKE OF DEFENDANT CALIFORNIA REGIONAL MULTIPLE LISTING SERVICE, INC. [ECF No. 54]

I. INTRODUCTION

This antitrust case concerns an alleged conspiracy among three regional real property multiple listing services—Defendants Bright MLS, Inc. ("Bright MLS"); Midwest Real Estate Data, LLC ("Midwest RED"); and California Regional Multiple Listing Service, Inc. ("Cal Regional MLS") (collectively, the "MLS Defendants")—and Defendant The National Association of Realtors ("NAR") to eliminate a competitor, Plaintiff The PLS.com, LLC. PLS maintains that Defendants are engaging in an unreasonable restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and California's Cartwright Act, Cal. Bus. & Prof. Code § 16720(a)–(c).[1]

Before the Court are the three motions of Defendants Bright MLS and Midwest RED (jointly), Cal Regional MLS, and NAR, respectively, to dismiss PLS's Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[2] Also pending before the Court is the motion of Cal Regional MLS to strike the second claim for relief in PLS's Amended Complaint pursuant to California's Anti-SLAPP Statute, Cal. Civ. Proc. Code § 425.16.[3] The Court held a hearing on Defendants' three Motions to Dismiss and on Cal Regional MLS's Motion to Strike on October 15, 2020. After considering the papers filed in support of and in opposition to all four Motions[4] and the

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[1] First Am. Compl. (the "Amended Complaint") [ECF No. 46] ¶¶ 123 & 126.

[2] Defs. Bright MLS's and Midwest RED's Mot. to Dismiss (the "Bright MLS & Midwest RED Motion") [ECF No. 50]; Def. Cal Regional MLS' Mot. to Dismiss (the "Cal Regional MLS Motion") [ECF No. 53]; and Def. NAR's Mot. to Dismiss (the "NAR Motion") [ECF No. 55] (collectively, the "Motions").

[3] Def. Cal Regional MLS' Mot. to Strike Pl.'s Second Claim for Violation of the Cartwright Act Pursuant to Cal. Code Civ. Proc. § 425.16 (Anti-SLAPP Statute) (the "Motion to Strike") [ECF No. 54].

[4] The Court considered the following papers: (1) the Amended Complaint; (2) the Motions (including all of their respective supporting declarations and attachments); (3) the Motion to Strike; (4) Pl.'s Opp'n to the Motions (the "Opposition") [ECF No. 62]; (5) Pl.'s Opp'n to the Motion to Strike [ECF No. 63]; (6) Defs. Bright MLS's and Midwest RED's Reply in Supp. of Mot. to

arguments of counsel presented at the hearing, for the reasons explained herein, the Court will **GRANT** Defendants' Motions to Dismiss **without leave to amend** and will **DENY** Defendant Cal Regional MLS's Motion to Strike **as moot**.

II. BACKGROUND[5]

Transactions for the sale of residential real estate involve a seller and a buyer who are typically each represented by a real estate professional.[6] Real estate professionals are licensed real estate brokers and agents.[7] Agents have the most direct relationship with the consumer; they solicit listings, work with sellers to market their homes, and work with buyers to find homes that match the buyers' preferences.[8] Brokers supervise agents and often provide branding, advertising, and other services that help agents attract sellers and buyers and complete transactions.[9] Brokers and agents compete between and among

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Dismiss (the "Bright MLS & Midwest RED Reply") [ECF No. 64]; (7) Def. Cal Regional MLS' Reply in Supp. of Mot. to Dismiss (the "Cal Regional MLS Reply") [ECF No. 65]; (8) Def. NAR's Reply in Supp. of Mot. to Dismiss (the "NAR Reply") [ECF No. 66]; (9) Def. Cal Regional MLS' Reply in Supp. of Motion to Strike [ECF No. 67]; (10) Pl.'s Notice of Suppl. Authority in Supp. of Opposition [ECF No. 71]; (11) Suppl. Brief in Supp. of the Motions (the "Defs.' Suppl. Brief") [ECF No. 83]; (12) Suppl. Brief in Supp. of the Opposition (the "Pl.'s Suppl. Brief") [ECF No. 84]; (13) Pl.'s Notice of Suppl. Authority [ECF No. 86] and Pl.'s Ex. to Suppl. Authority. [ECF No. 87]; and (14) Def. NAR's Notice of Resp. to Pl.'s Suppl. Authority (including its attachments) [ECF No. 88].

[5] The Court assumes the truth of the factual allegations in PLS's Amended Complaint solely for the purpose of deciding the Motions. The Court restates PLS's allegations for context, but it makes no determination regarding their veracity at this stage of the case. *See, e.g.*, *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996) (on a motion to dismiss for failure to state a claim, "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party").

[6] Amended Complaint ¶¶ 27 & 28.

[7] *Id.* at ¶ 27.

[8] *Id.*

[9] *Id.*

themselves to provide residential real estate brokerage services to home sellers and buyers.[10]

A. The MLS Defendants and NAR

Most residential real property for sale in the United States is marketed through a multiple listing service ("MLS") platform.[11] MLSs are joint ventures among, in effect, their members: licensed real estate professionals doing business in a particular local or regional area.[12] Real estate professionals pay for membership and, therefore, access to an MLS, and those professionals must adhere to any restrictions that the MLS imposes.[13] An MLS combines its members' home sale listings information into a central database and then makes the listing data available to all of its members.[14] Listing a property on an MLS enables a home seller's professional to market the property to a large set of potential buyers.[15] Correspondingly, a professional who represents a buyer can search an MLS for listed homes in the area that match the buyer's preferences.[16]

The value of the network services provided by an MLS is largely a function of the number of members within the network.[17] That is, the greater the number of members in the MLS, the greater the number of listings on the MLS, which increases the value of membership.[18] Bright MLS, Cal Regional MLS, and Midwest RED are each regional MLSs: Bright MLS serves the Mid-

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10 *Id.* at ¶ 32.
11 *Id.* at ¶ 1.
12 *Id.*at ¶ 32 & 34.
13 *Id.* at ¶ 32.
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.* at ¶ 50 & 51.
18 *Id.* at ¶¶ 32, 50, & 51.

Atlantic region;[19] Cal Regional MLS serves California;[20] and Midwest RED serves areas in the Upper Midwest.[21]

NAR is a trade association with more than 1.4 million individual members who are organized into 54 state and territorial associations and more than 1,200 local associations (the "Realtor Associations").[22] NAR establishes and promulgates policies and professional standards for its individual members and for its Realtor Associations.[23] Most real estate professionals in the U.S. are NAR members.[24] Realtor Associations are required to adopt the rules and polices promulgated by NAR and to enforce those rules on the real estate professionals comprising the associations.[25] Those policies include NAR's Handbook on Multiple Listing Policy.[26]

B. The NAR-Affiliated MLS System

There are around 600 MLSs nationwide that are affiliated with NAR through their ownership or operation by NAR's Realtor Associations (the "NAR-affiliated MLSs").[27] NAR-affiliated MLSs are required to adopt new or amended NAR policies.[28] All NAR-affiliated MLSs are actual or potential

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19 *Id.* at ¶ 19 (Bright MLS is owned and controlled by NAR members throughout the states of New Jersey, Delaware, Maryland, Pennsylvania, West Virginia; the Commonwealth of Virginia; and the District of Columbia).

20 *Id.* at ¶ 18 (Cal Regional MLS "is the largest MLS in the United States with over 100,000 members who have access to more than 70[%] of the listings for sale in California").

21 *Id.* at ¶ 20 (Midwest RED serves northern Illinois, southern Wisconsin, and northwest Indiana, with over 45,000 members).

22 *Id.* at ¶ 17. "Realtor" is a registered trademark of NAR.

23 *Id.* at ¶¶ 30 & 33.

24 *Id.*at ¶ 29.

25 *Id.* at ¶ 30.

26 *Id.* at ¶ 33.

27 *Id.* at ¶¶ 2 & 33.

28 *Id.* at ¶ 35.

competitors with other NAR-affiliated MLSs.[29] Bright MLS and Cal Regional MLS are NAR-affiliated MLSs,[30] while Midwest RED is indirectly owned and controlled by NAR members.[31] Real estate professionals are not required to be NAR members to participate in NAR-affiliated MLSs.[32] Consequently, many real estate professionals who are not NAR members participate in NAR-affiliated MLSs.[33]

The majority of NAR-affiliated MLSs are for-profit entities that charge membership fees for access to their services.[34] For years, NAR-affiliated MLSs have enjoyed a high market share across the country.[35]

C. Pocket Listings

MLSs generally impose specific requirements for their members' entry of listing data regarding residential real properties. Sometimes, for a variety of reasons (including privacy), sellers of residential real property want to avoid providing all of the information required to market a listing through an MLS. A seller with those interests might ask her real estate professional to market the listing by other means, outside of an NAR-affiliated MLS system. An off-MLS listing service is referred to as a "pocket listing."[36] A pocket listing allows a seller to customize and to limit the amount of information that she provides about her home, and, in this way, a pocket listing affords a seller with a level of privacy and discretion that is not available with an MLS listing.[37] Historically,

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29 *Id.* at ¶ 40.
30 *Id.* at ¶¶ 18 & 19.
31 *Id.* at ¶ 20.
32 *Id.* at ¶ 34.
33 *Id.*
34 *Id.* at ¶ 39.
35 *Id.* at ¶ 38.
36 *Id.* at ¶ 7.
37 *Id.* at ¶¶ 6 & 61.

pocket listings were marketed bilaterally by real estate professionals—"face to face, through phone calls, or by email."[38]

PLS was created in 2017 in response to consumer demand for a centralized, nationwide searchable repository for pocket listings.[39] Like an MLS, membership in PLS is available to all licensed real estate professionals who pay a membership fee. But unlike the many regionally-based MLSs, each of which charges its own membership fee, PLS charges a single fee to access its nationwide network.[40] By joining PLS, real estate professionals can privately share pocket listings in cooperation with other members while avoiding the exposure of those listings through the NAR-affiliated MLSs.[41] Also unlike MLS listings, PLS offers sellers the ability to share as much or as little information about their property as they desire.[42] In sum, PLS's business model combines the network efficiencies of an MLS with the privacy and discretion of the pocket listing on a national—as opposed to a local or regional—platform.[43]

D. The Clear Cooperation Policy

1. Definition

On November 11, 2019, NAR adopted its "Clear Cooperation Policy."[44] The text of the Clear Cooperation Policy is as follows:

> Within one (1) business day of marketing a property to the public, the listing broker must submit the listing to the MLS for cooperation with other MLS participants. Public marketing includes, but is not limited to, flyers displayed in windows, yard signs, digital marketing

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38 *Id.* at ¶ 8.

39 *Id.* at ¶¶ 8 & 58.

40 *Id.* at ¶¶ 59, 60, 63, & 64.

41 *Id.* at ¶ 8.

42 *Id.* at ¶ 61.

43 *Id.* at ¶¶ 12 & 61.

44 *Id.* at ¶¶ 86–90.

> on public facing websites, brokerage website displays . . ., digital communications marketing (email blasts), multi-brokerage listing sharing networks, and applications available to the general public.[45]

NAR created an exception to its Clear Cooperation Policy for so-called "office listings," which are listings marketed entirely within a brokerage firm without submission to an MLS.[46] The Clear Cooperation Policy became effective on January 1, 2020, and it was included as a mandatory rule in the 2020 NAR Handbook on Multiple Listing Policy.[47] NAR-affiliated MLSs enforce Clear Cooperation by monitoring members' adherence to the policy, by encouraging members to report violations, and by threatening or imposing penalties on members for non-compliance.[48]

2. History and Adoption

In the months leading up to NAR's adoption of the Clear Cooperation Policy, the MLS Defendants privately and publicly coordinated with NAR, which has a national footprint, to formulate Clear Cooperation as a method to stamp out pocket listings.[49] The collusion between the MLS Defendants and NAR began in August 2019 at a meeting of NAR's MLS Technology and Emerging Issues Advisory Board.[50] PLS alleges, on information and belief, that a representative of Midwest RED was present at this meeting as a representative of the Council of Multiple Listing Services (the "MLS Council").[51] The NAR

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45 *Id.* at ¶ 89.

46 *Id.* at ¶ 93.

47 *Id.* at ¶ 90. NAR-affiliated MLSs, including Bright MLS and Cal Regional MLS, were required to modify their rules by May 1, 2020, to conform to the Clear Cooperation Policy. *Id.*

48 *Id.* at 94.

49 *See id.* at ¶¶ 69–86.

50 *Id.* at ¶ 71.

51 *Id.*

Technology and Emerging Issues Advisory Board ultimately voted to recommend a version of what would become the Clear Cooperation Policy.[52]

In September 2019, the MLS Defendants were among the signatories of a white paper that called for action against the threat of pocket listings.[53] On October 16, 2019, Bright MLS adopted a policy similar to the Clear Cooperation Policy, which (as discussed above) NAR adopted the next month.[54] Around the same time, Midwest RED published a statement supporting the adoption of the Clear Cooperation Policy at NAR's upcoming convention.[55] On October 17 and 18, 2019, the MLS Defendants met at an MLS Council conference.[56] The CEO of Midwest RED and the Chairman of Bright MLS each made statements at the conference to address the purported threat of pocket listings to the MLS business model. Midwest RED's CEO discussed Midwest RED's pocket listing policy,[57] and Bright MLS's Chairman advocated for the adoption of similar policies—including the policy that eventually became Clear Cooperation—and encouraged participants to attend the upcoming NAR convention.[58]

III. LEGAL STANDARD

A. Motions to Dismiss

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In ruling on a Rule 12(b)(6) motion, "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Am. Family Ass'n v. City &*

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52 *Id.*

53 *Id.* at ¶ 75.

54 *Id.* at ¶ 76.

55 *Id.* at ¶ 77.

56 *Id.* at ¶ 78.

57 *Id.* at ¶ 79.

58 *Id.* at ¶¶ 80–85.

County of San Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002). Although a complaint attacked through a Rule 12(b)(6) motion "does not need detailed factual allegations," a plaintiff must provide "more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

To state a plausible claim for relief, the complaint "must contain sufficient allegations of underlying facts" to support its legal conclusions. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . ." *Twombly*, 550 U.S. at 555 (citations and footnote omitted). Accordingly, to survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," which means that a plaintiff must plead sufficient factual content to "allow[] the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A complaint must contain "well-pleaded facts" from which the Court can "infer more than the mere possibility of misconduct." *Id.* at 679.

B. Leave to Amend

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely granted when justice so requires." The purpose underlying the amendment policy is to "facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Leave to amend should be granted unless the Court determines "that the pleading could not possibly be cured by the allegation of other facts." *Id.* (quoting *Doe v. United States*, 8 F.3d 494, 497 (9th Cir. 1995)).

IV. DISCUSSION

PLS argues that, by promulgating and adopting the Clear Cooperation Policy, Defendants engaged in an unreasonable restraint of trade in violation of

§ 1 of the Sherman Act and California's Cartwright Act.[59] To assess the plausibility of PLS's claims, it is necessary first to take note of the applicable antitrust principles and the elements that PLS must plead to state a claim. *See Iqbal*, 556 U.S at 675; *Twombly*, 550 U.S. at 553–54.

A. PLS's Claim Under § 1 of the Sherman Act

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. "Congress designed the Sherman Act as 'a consumer welfare prescription.'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting R. BORK, THE ANTITRUST PARADOX 66 (1978)). Key concepts underlying antitrust law include the notion that when economic resources are allocated to their best use, and when competitive price and quality are assured to the consumer, consumer welfare is maximized. *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995); *accord National Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 387–88 & n.13 (1981). Thus, "an act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality." *Id.* Accordingly, the Supreme Court has repeatedly emphasized that in enacting the Sherman Act, "Congress intended to outlaw only unreasonable restraints" on trade or commerce. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

Restraints can be unreasonable for antitrust purposes in one of two ways. Some restraints are unreasonable *per se* because they "always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v.*

[59] *Id.* at ¶¶ 123 & 126.

Columbia Broadcasting Sys., Inc., 441 U.S. 1, 19-20 (1979); *see also Ohio v. American Express Co.*, 138 S. Ct. 2274, 2283 (2018) ("*Amex*"). If the challenged restraint is not unreasonable *per se*, then the restraint is judged under the Rule of Reason. *Id.* at 2284.

Most antitrust claims are analyzed under the Rule of Reason. *See State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). The goal of the Rule of Reason analysis is to "distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Id.* (quoting *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)). To state a § 1 claim under the Rule of Reason, a plaintiff must plead sufficient facts to show the plausible existence of "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). In addition, a plaintiff must also plead (4) that it was harmed by the unlawful anti-competitive restraint and that such harm flowed from an "anti-competitive aspect of the practice under scrutiny." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). The latter element is referred to as an "antitrust injury." *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012); *accord Atl. Richfield*, 4985 U.S. at 334.

The underlying goal of the *per se* rule and the Rule of Reason is, ultimately, the same; both "'are employed "to form a judgment about the competitive significance of the restraint."' [Citation.] '[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.'" *Atl. Richfield*, 495 U.S. at 342 n.12 (internal citations omitted). In this regard, the antitrust injury requirement is paramount. "The antitrust

injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-***reducing*** aspect or effect of the defendant's behavior." *Id.* at 341 (emphasis in original).

1. Antitrust Injury

Standing is a "threshold question in every federal case;" it implicates "the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues"). In private antitrust cases, the plaintiff is required to make plausible allegations regarding both ***constitutional standing*** and ***antitrust standing***. *See Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983). In the constitutional dimension, standing requires justiciability: that "the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of [Article] III." *Warth*, 422 U.S. at 498. In most antitrust cases, the "[h]arm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact." *Associated Gen. Contractors*, 459 U.S. at 535 n.31. But the standing inquiry does not end there.

In addition to the traditional constitutional limitations upon standing, "Congress imposed . . . limitations upon those who can recover damages under the antitrust laws." *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485–86 (1977). These limitations are often referred to as "antitrust standing requirements." *Pool Water*, 258 F.3d at 1034. Because § 1 of the Sherman Act does not provide a private right of action, private parties like PLS must bring their Sherman Act claim "pursuant to the authorization under [§] 4 of the

Clayton Act."[60] *Id.* Under that statute, "private plaintiffs can be compensated only for injuries that the antitrust laws were intended to prevent." *Id.*; *see also Atl. Richfield*, 495 U.S. at 334 (the plaintiff must plausibly allege "the existence of 'antitrust injury.'" (quoting *Brunswick*, 429 U.S. at 489)).[61]

As a rule of standing, the "antitrust injury" requirement embodies the fundamental principle that antitrust laws "were enacted for 'the protection of ***competition*** not ***competitors***'" *Brunswick Corp.*, 429 U.S. at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis in original), because "'[i]t is inimical to [the antitrust] laws to award damages' for losses stemming from continued competition," *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109–110 (1986) (quoting *Brunswick*, 429 U.S. at 488).[62] The Supreme Court has explained that "[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). In this regard, the antitrust injury requirement clarifies that the

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[60] PLS alleges that it has standing to assert its claim under § 1 of the Sherman Act pursuant to §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 & 26. Amended Complaint ¶ 23.

[61] "[A] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. 544.

[62] In *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), the Supreme Court explained that "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *Id.* at 610; *see also* William Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1451 (1985) ("most commentators now agree that the purpose of [antitrust] law is to maximize economic efficiency, or consumer welfare, by the preservation of competitive markets" (footnote omitted)).

Sherman Act is not directed against "conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself . . . , out of concern for ***the public interest***." *Id.* (emphasis added).

Thus, even when a challenged restraint has the effect of eliminating a rival, thereby reducing competition (at least with that rival), the elimination of a rival without harm to consumer welfare does not invoke the Sherman Act. *See Rebel Oil Co.*, 51 F.3d at 1433 (citing *Prods. Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663 (7th Cir. 1982)); *see also Reiter*, 442 U.S. at 343. A private antitrust plaintiff must allege a plausible connection between the harm to itself and harm to the ultimate consumer. *See Atl. Richfield*, 495 U.S. at 340–42. In sum, to allege a plausible antitrust injury, a private plaintiff must allege facts that, assumed to be true, show that the plaintiff's injuries are caused by an anticompetitive aspect of the defendant's conduct that also injures competition and consumers. *See id.* at 334–35 & 342–44; *Rebel Oil Co.*, 51 F.3d at 1445; *see also Cargill*, 479 U.S. at 109–110; *Brunswick*, 429 U.S. at 489.

Here, Defendants contend that PLS has not alleged facts plausibly to demonstrate that PLS has suffered an antitrust injury and, therefore, that PLS does not have standing as an antitrust plaintiff. For the reasons explained below, the Court agrees.

In analyzing the antitrust injury requirement in the context of this case, one fundamental point informs the Court's analysis: the distinction between, on the one hand, a pocket listing as a particular service offered to home sellers by real estate professionals, and, on the other hand, PLS's business, which provides a platform for its members to market their pocket listings. As described above, a pocket listing, or an off-MLS listing, is a type of brokerage service provided by real estate professionals to home sellers who, "for reasons of privacy or

security"[63] for example, wish to avoid providing the detailed information that is required for a listing to be submitted to, and marketed through, an NAR-affiliated MLS.[64] PLS emerged as a platform for real estate professionals to market private listings to other members without having to provide the detailed listing information required by the NAR-affiliated MLSs, thus preserving the home seller's interest in not disclosing certain information about her listing.[65]

a. The Alleged Injury to PLS

To assess whether PLS states a plausible antitrust injury, the Court begins with PLS's allegations regarding how the Clear Cooperation Policy harms PLS's business.

PLS alleges that the Clear Cooperation Policy has "eliminated the ability and incentive of real estate professionals to market pocket listings through PLS,"[66] which has foreclosed PLS from accessing "a critical mass of listings necessary to obtain significant network effects and compete with the NAR-affiliated MLSs in the relevant market(s)."[67] Consequently, listings were removed from PLS and submitted to NAR-affiliated MLSs, agent participation in PLS declined, and "PLS was foreclosed from the commercial opportunities necessary to innovate and grow."[68] PLS claims damages in the form of "lost profits"[69] and "lost equity and goodwill,"[70] which "diminish[ed] the value of

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63 Amended Complaint ¶ 6. A seller might also desire a pocket listing in order "to test the market for their home without the stigma that comes from listing and then delisting the property on a NAR-affiliated MLS." *Id.*

64 *Id.* at ¶¶ 6–8 & 61.

65 *Id.* at ¶¶ 8, 58–60, 63,& 64.

66 *Id.* at ¶ 112.

67 *Id.* at ¶ 113.

68 *Id.* at ¶ 121.

69 *Id.* at ¶ 124.

70 *Id.* at ¶ 125.

PLS as a going concern."[71] PLS seeks injunctive relief and an award of compensatory and treble damages.[72]

PLS's allegations in this regard are sufficient to meet the constitutional requirement for injury-in-fact and the first element of antitrust injury. PLS plausibly alleges that the Clear Cooperation Policy effectively discourages real estate professionals who are also members of an NAR-affiliated MLS from marketing their listings on PLS's platform. Those real estate professionals' refusal to use PLS's platform necessarily harms PLS's business. But this is only the first element of antitrust injury—the constitutional dimension of the standing inquiry.

Whether the Clear Cooperation Policy "may be properly characterized as exclusionary" for the purpose of an antitrust injury cannot be answered simply by considering its alleged effects on PLS. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985); *Brantley*, 675 F.3d at 1200 ("Plaintiffs may not substitute allegations of injury to the claimants for allegations of injury to competition."). The Court must also consider whether PLS has alleged facts to show that the Clear Cooperation Policy harms competition and consumers in the same way. *See id.*; *Rebel Oil Co.*, 51 F.3d at 1445 ("because the Sherman Act's concern is consumer welfare, antitrust injury occurs only when the claimed injury flows from acts harmful to consumers").

b. <u>The Alleged Injury to Consumers</u>

In evaluating whether conduct can be properly characterized as exclusionary, the Court must consider how the challenged restraint affects consumers and "whether it has impaired competition in an unnecessarily restrictive way." *Aspen Skiing Co.*, 472 U.S. at 605. In this regard,

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[71] *Id.* at ¶¶ 125 & 128.

[72] *See id.* at Prayer for Relief.

"'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Id.* at 605 n.32 (quoting 3 P. AREEDA & D. TURNER, ANTITRUST LAW 78 (1978)) (quotation marks omitted).

Thus, the second element of antitrust injury requires PLS to allege facts showing a plausible injury to consumers that flows from an anticompetitive aspect of Defendants' conduct; in this case, the alleged restraint on output through the Clear Cooperation Policy that limits the ability of NAR members, or members of an NAR-affiliated MLS, to compete to provide services to consumers.[73] *See Atl. Richfield*, 495 U.S. at 335–36, 338–40, & 342–44 (rejecting the contention that "any loss flowing from a *per se* violation of § 1 automatically satisfies the antitrust injury requirement" and explaining that antitrust injury does not arise until "an ***anticompetitive*** aspect of the defendant's conduct" injures both the plaintiff and consumers (emphasis in original)). The Supreme Court has explained that violations of the antitrust laws may have three, often interwoven, effects: "In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition." *Id.* at 344. An antitrust injury does not arise, however, unless and until the challenged restraint also injures consumers. *Id.* at 335–36, 338–40, & 342–44.

PLS attempts to translate its own harm into harm to consumers by alleging that the Clear Cooperation Policy injures real estate professionals (the proximate purchasers of real estate listing network services) and home sellers and buyers (the ultimate consumers) through the same "mechanism of injury"

[73] *See* Opposition 27:1–13.

to PLS.[74] Specifically, PLS avers that through the Clear Cooperation Policy, NAR "restrained the ability of licensed real estate professionals to offer" pocket listings, which purportedly harms consumers and competition by eliminating "from the market a form of real estate brokerage services desired by consumers,"[75] thus excluding PLS, and thereby artificially maintaining or increasing the prices paid by real estate professionals for listing services.[76] The Court finds that these allegations do not show a ***plausible*** injury to the ultimate consumers—the home buyers and sellers. Fatally, PLS's theory that the Clear Cooperation Policy is a restraint on the output of brokerage listing services to consumers is illogical, and, additionally, it is contradicted by the allegations that PLS makes elsewhere in its Amended Complaint.[77] *See Iqbal*, 556 U.S at 675 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); *Brantley*, 675 F.3d at 1198 ("a complaint's allegation of a practice that may or may not injure competition is insufficient to 'state a claim to relief that is plausible on its face.'" (quoting *Twombly*, 550 U.S. at 570)); *Kendall*, 518 F.3d at 1047–48.

PLS does not allege any facts showing when, where, or, notably, how the output of real estate brokerage services or off-MLS listing services has

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[74] Amended Complaint ¶ 122.

[75] *Id.* at ¶ 115.

[76] *Id.* at ¶¶ 115 & 122

[77] *Cf. id.* at ¶¶ 35–37, 88–91, & 106–115. Citing these paragraphs, PLS succinctly summarizes its antitrust injury allegations as follows: "By requiring third-party listing agents who wish to obtain the essential benefits of NAR membership to provide their listings to the MLS defendants, *id.* ¶¶ 35–37, 88–91, Clear Cooperation not only harms competition by reducing output and quality in the market for listing services, *id.* at ¶¶ 106–15, but in so doing, it 'cut[s] off' PLS's access to a supply, pocket real estate listings, that is 'necessary to enable the boycotted firm'—PLS—'to compete.'" Pl.'s Suppl. Brief 7:1–7 (quoting *Nw. Wholesale Stat., Inc. v. Pac. Stat. & Print. Co.*, 472 U.S. 284, 294 (1985)).

decreased.[78] Defendants and PLS provide different marketing platforms for those listings. PLS does not adequately allege that the Clear Cooperation Policy has increased prices for services purchased or otherwise paid for by home sellers and buyers[79] or that home sellers and buyers have been denied brokerage services[80] that they desire as a result of the Clear Cooperation Policy.[81] In the absence of any specific factual allegations to support PLS's conclusions regarding consumer harm, there is no plausible antitrust injury.

PLS's antitrust injury contention is fundamentally flawed in yet another respect. PLS does not allege a plausible injury to participants on both sides of the market. The real estate market is a typical two-sided market where different products or services are offered to two distinct groups of customers—home sellers and home buyers. Listing platforms such as those provided by the MLS Defendants and PLS facilitate transactions by connecting sellers with potential buyers.[82] *See Ohio v. American Express*, 138 S. Ct. 2274, 2280 (2018) ("a two-

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[78] *Cf.* Amended Complaint at ¶¶ 95, 111, 112, & 121 (listings were removed from PLS and submitted ***instead*** to NAR-affiliated MLSs, and NAR-affiliated MLSs continue to allow members to market off-MLS listings).

[79] With respect to conspiracies to restrict output and how they injure consumers, *compare, e.g.*, *In re National Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1155, 1157–58 (9th Cir. 2019) (allegations of conspiracy to restrict output of telecasts resulting in prices paid by the ultimate consumers being higher than they would be in the absence of the conspiracy were sufficient to allege antitrust standing), *with* Amended Complaint ¶¶ 114, 115, & 122; *see also Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1521–23 (2019).

[80] PLS acknowledges that the market for real estate brokerage services is relevant to assess harm to competition and consumers. Amended Complaint ¶ 115 (the Clear Cooperation Policy "harmed consumers and competition by eliminating from the market a form of real estate brokerage services desired by consumers").

[81] S*ee Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 776–77 (1999) (the relevant question is whether the challenged restraint obviously tends to limit the total delivery of services to the consumer); Amended Complaint ¶ 95 (NAR-affiliated MLSs continue to allow members to market off-MLS listings through private networks); *cf. Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 114–15 (1984) (plaintiffs alleged a reduction in overall output of services to consumers as a consequence of the challenged restraint).

[82] *See* Amended Complaint at ¶ 31; *see also id.* at ¶¶ 19, 26, & 31 (explaining that the MLS Defendants "facilitate[ ]" real estate transactions).

sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them"); *see also* Evans & Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667, 668 (2005) ("members of one customer group need members of the other group").[83] *Amex* sets forth a pleading standard in antitrust cases involving two-sided platforms: a plaintiff must allege (and later prove) injury to participants on both sides of the market. *See Amex*, 138 S. Ct. at 2287 ("Evaluating both sides of a two-sided transaction platform is . . . necessary to accurately assess competition."); *Iqbal*, 556 U.S. at 675.

Accordingly, PLS must allege a plausible injury to ***both*** home sellers ***and home buyers***, which it has not done. It is, perhaps, telling that PLS's allegations focus almost entirely on home sellers. PLS makes no allegations regarding any demand for pocket listings by home buyers, no allegations explaining how pocket listings are beneficial to home buyers,[84] and no allegations regarding how the Clear Cooperation Policy harms home buyers. PLS's failure to address the buyer's side of the market is not surprising given that the alleged inherent

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[83] *Compare* Amended Complaint ¶¶ 50 & 51 (discussing the value of network services offered by MLSs), *with* Evans & Noel, *supra*, at 686–87 (indirect network effects promote larger and fewer two-sided platforms because "[p]latforms with more customers in each group are more valuable to the other group").

[84] *Cf. id.* at ¶ 8. PLS alleges that its platform benefits buyers by offering them an opportunity to learn about properties that were not widely marketed. This allegation, however, does not explain how buyers are otherwise benefited by off-MLS listings. According to PLS's allegations, PLS effectively offers buyers the same basic benefit as an MLS (an opportunity to learn about properties on the market), but without the other efficiencies that are created by increased information and competition (mostly through information sharing on an MLS), as explained above. Indeed, one of the most important market efficiencies created by an MLS "is manifested in the reduction of the obstacles brokers must face in adjusting supply to demand: market imperfections are overcome in that information and communication barriers are reduced, along with the easing of the built-in geographical barrier confronting the buyer-seller relationship. Moreover, a realistic price structure is engendered." Arthur D. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1329 (1970), *cited with approval in U.S. v. Realty Multi-List, Inc.*, 629 F.3d 1351, 1356 (5th Cir. 1980).

advantages of a pocket listing—*e.g.*, increased privacy and security for a seller to market his home without the wide exposure of the MLS and the avoidance of the stigma from listing and then delisting a property from the MLS[85]—appear to benefit the seller, almost exclusively. In contrast, home buyers stand to benefit from an increase in available information about the market (which increases price competition), not from a reduction in the provision of such information.

PLS simply has not alleged plausible facts to show an injury to consumers on both sides of the market. These fundamental problems, taken together, show that PLS cannot allege a plausible antitrust injury.

c. The Alleged Injury to Competition

On its face, the Clear Cooperation Policy does not preclude real estate professionals from offering pocket listing services, nor does it preclude them from marketing their listings on PLS. Furthermore, there is no plausible inference from the alleged facts that the Clear Cooperation Policy has any such restrictive effect on the output of brokerage services to consumers. PLS does not allege any facts to show that real estate professionals have stopped (or will stop) offering pocket listings, or other types of listing services, when those services are demanded by consumers.[86] To the contrary, sellers who desire to avoid listing their properties on an MLS may do so, for example, by working with an NAR-affiliated MLS member through the office exclusive exception[87] or by engaging a real estate professional who does not belong to an NAR-affiliated

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[85] *Id.* at ¶ 6.

[86] *Cf.* Amended Complaint ¶ 115 (suggesting the opposite, *i.e.*, that real estate professionals will presumably continue to compete to provide pocket listings as they have before).

[87] The office exclusive exception is significant. PLS alleges that the presence of large brokerages operating across the nation increased demand for a nationwide listing network. *See id.* at ¶¶ 46, 48, & 49. Surely, then, marketing a private listing within a large nationwide brokerage under the office exclusive exception provides significant exposure of the property in an off-MLS setting. This is important in evaluating whether the Clear Cooperation Policy has the plausible effect of reducing output of services to consumers. It does not.

MLS.[88] Moreover, the plain text of the policy does not proscribe real estate professionals from marketing pocket listings in the same way as they have previously: "bilaterally . . . , face to face, through phone calls, or by email."[89] Furthermore, the Clear Cooperation Policy does not proscribe real estate professionals from making a choice about the listing network platforms in which they choose to participate. Of equal importance, consumers are not deprived of any choice in products or services.

Indeed, accepting PLS's allegations as true, the Clear Cooperation Policy has some plainly pro-competitive aspects, which underscore that PLS cannot allege a plausible connection between harm to its business and harm to competition and consumers. *See F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) (in some cases, anticompetitive effects, or their absence, can be logically inferred based upon a rudimentary understanding of economics). At worst, the Clear Cooperation Policy is neutral to competition. And when a challenged restraint is beneficial or neutral to competition, "there is no antitrust injury, ***even if*** the defendant's conduct is illegal *per se*." *Rebel Oil Co.*, 51 F.3d at 1433 (emphasis added).

The Clear Cooperation Policy requires listings that are publicized by a member of an NAR-affiliated MLS to be reciprocally listed on an MLS for exposure to other MLS members.[90] This means that all MLS members have access to information about listings that are publicly marketed by other MLS

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[88] *Id.* at ¶ 95 (since the adoption of the Clear Cooperation Policy, NAR-affiliated MLSs have "effectively allow[ed] their members to market off-MLS listings under the auspices of the NAR-affiliated MLSs without violation of . . . Clear Cooperation Policy"); *see also id.* at ¶¶ 89, 93, & 115–17 (implicitly recognizing that the Clear Cooperation Policy has not resulted in a decrease in overall output of services to consumers).

[89] *Id.* at ¶ 8; *see also id.* at ¶ 95.

[90] *Id.* at ¶ 89; *see also id.* at ¶¶ 32, 50, & 51 (explaining the inherent benefits of MLS membership, and that the value of membership in an MLS is a function of the contributions of the MLSs members).

members, which ultimately promotes competition among real estate professionals and home sellers and buyers.[91] Basic economics dictates that increased information about market conditions stimulates more competition among real estate professionals, whose goal is, at least in part, to match a buyer and a seller as quickly and efficiently as possible. This effect minimizes transaction costs. Consumers also have access to more information regarding market conditions, enabling them to make better informed choices about the bundle of real estate brokerage services that will best serve their needs.

Although the Clear Cooperation Policy may harm PLS by discouraging the use of PLS's platform,[92] that injury to PLS's business model does not translate to consumer harm. Notably, PLS alleges that the Clear Cooperation Policy results in, among other things, listings being "removed from PLS and submitted instead to NAR-Affiliated MLSs."[93] Shifting sales to "other competitors in the market," however, "does not directly affect consumers and therefore does not result in antitrust injury." *Pool Water Prods.*, 258 F.3d at 1036. Indeed, based upon this allegation (and others like it),[94] it is evident that the Clear Cooperation Policy does not reduce the output of brokerage services to home sellers and buyers, nor does the policy reduce competition among the real estate professionals who provide services to consumers. *Compare Cal. Dental Ass'n*, 526 U.S. at 776–77 (no reduction in overall output of services to consumers), *and Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 21–24 (1979) (to similar effect), *with Sunday Ticket Antitrust Litig.*, 933 F.3d at 1155 (the challenged restraint plausibly reduced the overall output of services to consumers by restricting games available for viewing).

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91 *Id.* at ¶ 89; *see also id* at ¶¶ 32, 50, 51, & 95.

92 *Id.* at ¶¶ 111 & 112.

93 *Id.* at ¶ 121.

94 *See, e.g.*, *id.* at ¶¶ 95, 108, & 121.

2. Leave to Amend

In sum, based upon the foregoing, the Court finds that PLS fails to allege a plausible antitrust injury, so it will grant Defendants' Rule 12(b)(6) Motions. PLS requests leave to amend.[95] The Court, however, finds that another amendment of the complaint would be futile, for two reasons.

First, the parties' substantive meet-and-confer efforts already resulted in PLS's filing of the Amended Complaint, and PLS declined to amend its pleading a second time.[96] *See Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013) (a district court has "particularly broad" discretion to deny leave to amend where the plaintiff has previously amended). Second, under these circumstances, an amended complaint must allege "other facts consistent with the challenged pleading" that could "cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). In view of the fundamental problems with PLS's theory of antitrust injury discussed above, the Court finds that the complaint cannot be saved by amendment. *See Steckman v. Hart Brewing*, 143 F.3d 1293, 1298 (9th Cir. 1998) ("Although there is a general rule that parties are allowed to amend their pleadings, it does not extend to cases in which any amendment would be an exercise in futility or where the amended complaint would also be subject to dismissal.") (citations omitted).

Accordingly, the Court will **GRANT** Defendants' respective Motions, **without leave to amend**.

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[95] *See* Opposition 37:26–27.

[96] *See* NAR Motion 20:4–14; NAR Reply 15:11–16.

3. The Remaining Elements of PLS's Claim Under § 1 of the Sherman Act

With respect to Defendants' other arguments for the dismissal of PLS's Amended Complaint, the Court would grant the motion by Midwest RED for the reasons set forth below.

As stated in the preceding sections, to state a § 1 claim, a plaintiff must plead facts showing the plausible existence of "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Kendall*, 518 F.3d at 1047.

With respect to the first element, the Court would find that PLS sufficiently alleges concerted action by Defendants Bright MLS, Cal Regional MLS, and NAR. NAR promulgated the Clear Cooperation Policy, *see Alvord-Polk, Inc. v. Schumacher Co.*, 37 F.3d 996, 1007 (3d Cir. 1994) (a trade association's adoption of regulations that govern competition between members is sufficient to plead concerted action); *see also Silver v. N.Y. Stock Exchange*, 373 U.S. 341 (1963), and Bright MLS and Midwest RED, as NAR-affiliated MLSs,[97] were obligated to adopt the Clear Cooperation Policy by May 1, 2020, pursuant to the 2020 NAR Handbook on Multiple Listing Policy,[98] *see, e.g.*, *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 286-87 (4th Cir. 2012) (MLS rules are concerted action under § 1); *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d at 1150; *Realty Multi-List*, 629 F.2d at 1361 & n.20. Although the Amended Complaint does not allege that Bright MLS and Cal Regional MLS ultimately adopted the Clear Cooperation Policy, PLS's allegation that Bright MLS and

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[97] *Id.* at ¶¶ 18 & 19.

[98] *Id.* at ¶ 90; *see also id.* at ¶¶ 103–105.

Cal Regional MLS were required to do so supports a plausible inference that they did.[99] At this stage of the litigation, such allegations are sufficient to plead concerted action under § 1.

PLS does not, however, allege facts plausibly to show that Midwest RED was part of the alleged conspiracy. Notably, Midwest RED is not an NAR-affiliated MLS, and PLS does not allege that Midwest RED adopted the Clear Cooperation Policy. PLS merely alleges that Midwest RED participated in private communications about the Clear Cooperation Policy through the MLS Council, voiced support for the Clear Cooperation Policy, and was present for a vote recommending that NAR adopt the Clear Cooperation Policy at a later date.[100] These are allegations of parallel business conduct; they are not sufficient to establish Midwest RED's participation in the alleged conspiracy because such allegations do not give rise to a plausible inference that Midwest RED ever reached an agreement with the other MLS Defendants or NAR regarding the Clear Cooperation Policy. *Twombly*, 550 U.S. at 553–554 (allegations of parallel business behavior, even "conscious parallelism," falls short of establishing an agreement constituting a Sherman Act offense); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 (9th Cir. 2015) (to similar effect). Moreover, PLS's conclusory allegation that Midwest RED is a competitor with the other MLS Defendants is not plausible, given that each of the MLS Defendants serves a different geographic market.[101]

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[99] *See id.* at ¶¶ 68–94, 102, & 104–05.

[100] *Id.* at ¶¶ 71, 73–74, 77–79, & 86.

[101] The Court would not make any such finding with respect to the NAR-affiliated MLS Defendants because PLS's allegation that the NAR-affiliated MLSs were obligated to adopt the Clear Cooperation Policy is sufficient to plead concerted action, as explained above. Thus, the question with respect to Bright MLS and Cal Regional MLS is whether they were competitors with each other, and competitors with PLS in a national market. The Court would find that this is a question of fact not suitable for resolution on a motion to dismiss. *See Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044–45 (9th Cir. 2015).

Putting aside, for the moment, the Court's analysis and conclusion with respect to the element of antitrust injury, the Court would otherwise find that PLS has alleged facts plausibly to show that the Clear Cooperation Policy is a *prima facie* unreasonable restraint of trade under the Rule of Reason framework.[102] *See Indiana Fed. Of Dentists*, 476 U.S. at 459–62 (agreement to limit services offered to consumers requires a procompetitive justification under the Rule of Reason); *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1150–51 (9th Cir. 2019) (same); *Newcal Indus.*, 513 F.3d at 1044–45 (there is no requirement that a plaintiff allege the defendants' power within the relevant market with specificity, and "relevant market" element is typically a factual element); *Rebel Oil Co.*, 51 F.3d at 1433–35. Whether PLS would ultimately prevail under the Rule of Reason framework necessarily would involve questions of fact—such as the procompetitive justifications offered by Defendants and the market power of the respective Defendants—that would not be appropriate for resolution at this stage of the litigation.

B. PLS's Claim under the Cartwright Act

Claims under § 1 of the Sherman Act and claims under the Cartwright Act are analyzed under the same legal standard. *See name.space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1131 n.5 (9th Cir. 2015); *City of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001). Accordingly, the Court's analysis of and conclusion regarding, PLS's claim under § 1 of the Sherman Act are dispositive of PLS's claim under the Cartwright Act.

V. CONCLUSION

Based upon the foregoing, the Court will enter an Order **GRANTING** Defendants' respective Motions to Dismiss, **without leave to amend**, on the

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[102] *See* Amended Complaint at ¶¶ 1–15, 28–32, 38–41, 46–51, 94–101, & 106–116.

ground that PLS fails to allege a plausible antitrust injury. The Court will also **DENY** Cal Regional MLS's Motion to Strike **as moot**, in view of its ruling on the Motions to Dismiss.

Dated: February 3, 2021

John W. Holcomb
UNITED STATES DISTRICT JUDGE