No. 25-326

IN THE
Supreme Court of the United States

REAL ESTATE EXCHANGE, INC.,
Petitioner,

v.

ZILLOW GROUP, INC. AND
NATIONAL ASSOCIATION OF REALTORS,
Respondents.

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

PETITION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Real Estate Exchange, Inc. ("REX") respectfully petitions for rehearing of the Court's October 20, 2025 order denying certiorari in this case.

GROUNDS FOR REHEARING

This case presents the exceptionally rare situation of an "intervening circumstances of a substantial . . . effect" which the Court has not yet had the opportunity to consider. *See* Sup. Ct. R. 44.2.

REX had sought certiorari on grounds of a three-to-two circuit split and a serious error by the Ninth Circuit below when it held that an association of competitors did not commit concerted action subject to antitrust scrutiny because the rule it published for its members to follow was labeled "optional."

Since REX filed its Petition for Certiorari on September 15, 2025, a new opinion within the Seventh Circuit shows the circuit split has deepened to three-to-three.

In this Petition for Rehearing, REX simply asks the Court to request a response from Respondents, as provided by Rule 44.3. This response will reveal that the Ninth Circuit's decision lacks legal support. The Respondents' last written position on "optional" rules *supports* REX and *conflicts* with what the Ninth Circuit held.

This case is worth the Court's time. The Court granted certiorari on a related issue in *Visa Inc. v. Osborn*, 137 S. Ct. 289 (2016), but did not get the opportunity to rule before dismissing the writ as improvidently granted when the defendant–petitioner's argument changed.

This case is exceedingly important. A ruling for REX would foster competition in the multi-trillion-dollar residential real estate market while also closing a loophole in antitrust law that other associations of competitors could try to exploit. If the loophole remains open, optional rules would become a new type of wink and nod used to achieve the same collusive effect of an express, binding agreement. Stopping concerted action through optional rules is critical. Few antitrust cases have ever been more important.

I. An Intervening Decision Shows the Circuit Split Has Deepened Since REX Filed Its Petition for Certiorari.

As of September 15, 2025 when REX filed its Petition for Certiorari, a three-to-two plurality of circuits held that an association of competitors could commit concerted action even if the association's rule were optional. Decisions from the First, Third, and Fifth Circuits held that optional rules could be concerted action. *See* Pet. at 11–12 (citing *Advert. Specialty Nat'l Ass'n v. FTC*, 238 F.2d 108 (1st Cir. 1956); *LifeWatch Services v. Highmark Inc.*, 902 F.3d 323 (3d Cir. 2018); and *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008)). In contrast, decisions from the Ninth and Tenth Circuits held that

optional rules were not concerted action as a matter of law. *See* Pet. at 10 (citing Pet. App. 3a; *Llacua v. Western Range Ass'n*, 930 F.3d 1161 (10th Cir. 2019)).

On September 24, 2025, a district court in the Seventh Circuit interpreted Seventh Circuit precedent to hold that an association of competitors did not commit concerted action because the rule at issue was "not a mandatory [association] rule." *See Hansen v. Nw. Univ.*, No. 24-cv-9667, 2025 U.S. Dist. LEXIS 188777, at *36–37 (N.D. Ill. Sep. 24, 2025) (reprinted at Pet. for Rehearing App. 27a–28a). The district court considered this the law of the Seventh Circuit. It relied on the following statement from a Seventh Circuit opinion: "'When a trade association provides information (there, gives a seal of approval) but does not constrain others to follow its recommendations, it does not violate the antitrust laws.'" *Id.* (quoting *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989)). Like the flawed Ninth Circuit decision against REX, the Seventh Circuit district court expressly relied on the rule's optionality. It distinguished a different case—which had found concerted action in a mandatory association rule—by reasoning, "The non-mandatory nature of the [rule at issue] distinguishes this case." *Id.* at *38 (Pet. for Rehearing App. 28a).

This new decision indicates that there is a three-to-three circuit split on whether an association of competitors' optional rule is concerted action subject to Sherman Act Section 1, and that prior rulings by the Supreme Court are considered ambiguous in at least three circuits. Decisions in the Seventh, Ninth,

and Tenth Circuits have overlooked this Court's reasoning that optionality of a rule does not affect whether publication of the rule is concerted action. *See, e.g.*, *United States v. Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485, 488–89 (1950) ("[T]he fact that no penalties are imposed for deviations from the price schedules is not material.").

This new indication of how circuits are split justifies a rehearing of the Court's denial of certiorari, as this Court has done in the past. Earlier this year, for example, the Court granted a petition for rehearing after denying certiorari. *Oklahoma v. United States*, No. 23-402, 145 S. Ct. 2836 (June 30, 2025). That petition for rehearing alerted the Court to a circuit split which arose "11 days" after certiorari was denied. Pet. for Rehearing at 2, *Oklahoma v. United States*, No. 23-402 (July 18, 2024). The Court requested respondents in that case to respond to the petition for rehearing, which should occur here as well because of the circuit split and the problematic decision below.

II. This Case Presents the Ideal Vehicle to Resolve the Circuit Split.

This appeal is a uniquely clean vehicle for the Court to resolve whether a trade association's labeling of a rule as optional exempts it from antitrust scrutiny. The Ninth Circuit made the erroneous legal determination that the challenged rule published by Respondent National Association of Realtors ("NAR") "was in fact optional and does not establish a Section 1 agreement by itself." Pet. App. 3a.

The error is straightforward to fix. The Ninth Circuit's grant of immunity for concerted action labeled "optional" is a type of "formalistic distinction[] . . . generally disfavored in antitrust law." *Ohio v. Am. Express Co.*, 585 U.S. 529, 542–43 (2018) (citation omitted).

This Court should call for a response to this Petition for Rehearing, which will show that the Ninth Circuit's ruling finds no support in any of the parties' briefing. NAR's brief to the Ninth Circuit considered it "undisputed" that optional rules can be concerted action:

> The United States' primary basis for filing its amicus brief appears to be to defend the principle that *rules designated as optional can provide a basis for finding a Section 1 agreement in some circumstances*. U.S. Br. 1–2, 12–20. *That principle is undisputed*[.]

Pet. for Rehearing App. 35a (emphases added).

Similar to NAR, Respondent Zillow's brief to the Ninth Circuit did not take the position that an association's optional rule is immune from antitrust liability. Rather, Zillow called that position a "straw man" in order to avoid it rather than defend it:

> REX, as well as the Department of Justice ("DOJ"), are both equally mistaken in suggesting that the District Court's decision hinged on a finding that the No-Commingling Rule was optional. . . .

> REX attempts to slay a straw man. It claims the District Court ruled that the optional nature of NAR's model rule precluded antitrust liability. . . .
>
> [The District Court] never suggested that an "optional" label could immunize defendants from antitrust liability.

Pet. for Rehearing App. 40a, 42a, 46a.

Despite these positions taken by NAR and Zillow, the Ninth Circuit nonetheless held, "The rule was in fact optional and does not establish a Section 1 agreement by itself." Pet. App. 3a. This is an error worth correcting.

CONCLUSION

The Court should call for a response to this Petition for Rehearing, and then reconsider the denial of certiorari, because an intervening event confirms widespread confusion in the circuit courts about whether an association's optional rules are subject to Sherman Act Section 1. No party currently supports the flawed reasoning of the Ninth Circuit's decision below. Absent a review by the Supreme Court, not only NAR but trade associations in other industries will restrict competition under the legal theory of optional rules, resetting the structure of the entire U.S. economy.

November 14, 2025 Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

Bennett Rawicki

APPENDIX

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APPENDIX A – OPINION & ORDER, *HANSEN V. NW. UNIV.*, NO. 24-CV-9667 (N.D. ILL. SEPT. 24, 2025)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 24 C 9667

MAXWELL HANSEN AND EILEEN CHANG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

NORTHWESTERN UNIVERSITY, COLLEGE BOARD, AMERICAN UNIVERSITY, BAYLOR UNIVERSITY, BOSTON COLLEGE, BOSTON UNIVERSITY, BRANDEIS UNIVERSITY, BROWN UNIVERSITY, CALIFORNIA INSTITUTE OF TECHNOLOGY, CARNEGIE MELLON UNIVERSITY, CASE WESTERN RESERVE UNIVERSITY, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, CORNELL UNIVERSITY, TRUSTEES OF DARTMOUTH COLLEGE, DUKE UNIVERSITY, EMORY UNIVERSITY, FORDHAM UNIVERSITY, GEORGE WASHINGTON UNIVERSITY, GEORGETOWN UNIVERSITY, HARVARD UNIVERSITY, THE

Appendix A

JOHNS HOPKINS UNIVERSITY, LEHIGH UNIVERSITY, MASSACHUSETTS INSTITUTE OF TECHNOLOGY, UNIVERSITY OF MIAMI, NEW YORK UNIVERSITY, NORTHEASTERN UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC, THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA, WILLIAM MARSH RICE UNIVERSITY, UNIVERSITY OF ROCHESTER, UNIVERSITY OF SOUTHERN CALIFORNIA, SOUTHERN METHODIST UNIVERSITY, STANFORD UNIVERSITY, SYRACUSE UNIVERSITY, TUFTS UNIVERSITY, TULANE UNIVERSITY, VILLANOVA UNIVERSITY, WAKE FOREST UNIVERSITY, WASHINGTON UNIVERSITY IN SAINT LOUIS, WORCESTER POLYTECHNIC INSTITUTE, AND YALE UNIVERSITY,

Defendants.

September 24, 2025, Decided;
September 24, 2025, Filed

OPINION AND ORDER

SARA L. ELLIS, *District Judge.*

Plaintiffs Maxwell Hansen and Eileen Chang filed this putative class action lawsuit against the College Board and 40 universities: American University ("American"), Baylor University ("Baylor"), Boston College, Boston University ("BU"), Brandeis University, Brown University,

California Institute of Technology, Carnegie Mellon University ("Carnegie Mellon"), Case Western Reserve University ("Case Western"), the Trustees of Columbia University in the City of New York ("Columbia"), Cornell University ("Cornell"), Trustees of Dartmouth College ("Dartmouth"), Duke University ("Duke"), Emory University ("Emory"), Fordham University ("Fordham"), George Washington University ("George Washington"), Georgetown University ("Georgetown"), Harvard University ("Harvard"), The Johns Hopkins University ("Johns Hopkins"), Lehigh University ("Lehigh"), Massachusetts Institute of Technology ("MIT"), University of Miami ("Miami"), New York University ("NYU"), Northeastern University, Northwestern University, University of Notre Dame du Lac, the Trustees of the University of Pennsylvania ("Penn"), William Marsh Rice University ("Rice"), University of Rochester, University of Southern California ("USC"), Southern Methodist University ("SMU"), Stanford University, Syracuse University ("Syracuse"), Tufts University, Tulane University ("Tulane"), Villanova University, Wake Forest University ("Wake Forest"), Washington University in Saint Louis ("WashU"), Worcester Polytechnic Institute, and Yale University (collectively, the "University Defendants"). Plaintiffs allege that the College Board and the University Defendants (collectively, "Defendants") violated Section 1 of the Sherman Act by engaging in concerted action to require a noncustodial parent ("NCP") of any applicant seeking non-federal financial aid to provide their financial information (the "NCP Agreed Pricing Strategy"), which allegedly substantially increased Plaintiffs' and the putative class members'

costs to attend college. Plaintiffs contend that absent this agreement, the University Defendants would have competed to offer better financial aid packages to students in an effort to enroll their top candidates. Defendants have moved to dismiss the complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Certain non-Illinois Defendants – specifically, Baylor, Carnegie Mellon, Case Western, Duke, Emory, Fordham, Georgetown, Harvard, Lehigh, MIT, Penn, SMU, Tulane, Miami, and Wake Forest (collectively, the "Non-Illinois Defendants") – have moved to dismiss Plaintiffs' claims against them for lack of personal jurisdiction and improper venue pursuant to Rules 12(b)(2) and 12(b)(3). Because the Court does not have personal jurisdiction over the Non-Illinois Defendants, the Court dismisses them from the case without prejudice. And because Plaintiffs have not plausibly alleged that Defendants entered into an agreement as required to pursue their Section 1 claim, the Court dismisses the complaint without prejudice.

Appendix A

BACKGROUND[1]

I. Defendants

The College Board develops and administers standardized methodologies for the college admissions process. The University Defendants belong to the College Board. The University Defendants' employees attend College Board meetings, supervise College Board operations, and participate in the development of College Board aid methodologies and standards.

The Board of Trustees is the College Board's governing body, elected by College Board member delegates. It consists of thirty-one members. Representatives of BU, Columbia, Duke, George Washington, Johns Hopkins, NYU, USC, and WashU have served or currently serve on

1. The Court takes the facts in the background section from the complaint and presumes them to be true for the purpose of resolving Defendants' Rule 12(b)(6) motion to dismiss. *See Phillips v. Prudential Ins. Co. of Am.,* 714 F.3d 1017, 1019-20 (7th Cir. 2013). Although the Court normally cannot consider extrinsic evidence without converting a Rule 12(b)(6) motion to dismiss into one for summary judgment, *Jackson v. Curry,* 888 F.3d 259, 263 (7th Cir. 2018), the Court may consider "documents that are central to the complaint and are referred to in it" in ruling on a motion to dismiss, *Williamson v. Curran,* 714 F.3d 432, 436 (7th Cir. 2013). The Court also considers the affidavits submitted in connection with the Non-Illinois Defendants' motion to dismiss in addressing personal jurisdiction and venue. *See Purdue Rsch. Found. v. Sanofi-Synthelabo, S.A.,* 338 F.3d 773, 782-83 (7th Cir. 2003) (Rule 12(b)(2)); *Deb v. SIRVA, Inc.,* 832 F.3d 800, 809-10 (7th Cir. 2016) (Rule 12(b)(3)).

the College Board's Board of Trustees. The Vice Provost for Admissions and Financial Aid at WashU chaired the Board of Trustees from 2020 to 2022.

The College Board has three national assemblies that provide guidance on specific issues and College Board activities related to these issues. The CSS Financial Assistance Assembly Council "considers issues, research, policies, programs, and standards related to providing financial guidance and assistance to students, including all economic aspects of postsecondary attendance, affordability, and access." *Id.* ¶ 63. Representatives of Columbia, Harvard, Johns Hopkins, MIT, Penn, and WashU have served or currently serve on the CSS Financial Assistance Assembly Council. A Johns Hopkins representative previously chaired the Council, and a Columbia representative currently serves as its chair.

The Financial Aid Standards and Services Advisory Committee (the "FASSAC") operates under the CSS Financial Assistance Assembly Council and draws its members from economists and representatives of selective colleges. The FASSAC designs and implements the formula for the Institutional Methodology, explained below. Duke, Harvard, Penn, and Syracuse have had representatives on the FASSAC.

II. Financial Aid Determinations

A college student's financial aid package can include need-based federal and non-federal funding. The federal government uses the Federal Methodology to determine eligibility for need-based federal funding, such as Pell

Grants. The Federal Methodology uses information that applicants submit through the Free Application for Federal Student Aid ("FAFSA"). Some states also use the FAFSA to assess financial aid.

The College Board administers the CSS Profile, an "online application used by colleges and scholarship programs to award non-federal institutional aid." Doc. 1 ¶ 4. Approximately 250 institutions require students to submit a CSS Profile to receive non-federal need-based financial aid. The CSS Profile has more stringent requirements for aid eligibility than the FAFSA. Schools that require students to submit a CSS Profile use the Institutional Methodology, which provides an "economically sound measure of family financial strength." College Board, Institutional Methodology, https://secure-media.collegeboard.org/digitalServices/pdf/professionals/institutional-methodology.pdf (last visited Sept. 15, 2025).[2] The College Board, in partnership with financial aid leaders, develops and maintains the Institutional Methodology. The FAFSA does not consider NCP information, while, as of 2006, the Institutional Methodology allows schools to request NCP information as part of the application.

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2. The Court includes this description of the Institutional Methodology, which it takes from a College Board document from which Plaintiffs quote in their complaint. *See* Doc. 1 at 30 n.72. The Court also notes that the document describes the "flexibility" of the Institutional Methodology, noting that it "can be tailored to meet institutional goals and to address the special circumstances of schools and programs, students, and their families." College Board, Institutional Methodology.

Appendix A

Before 2006, schools took various approaches to considering parental assets in making financial aid determinations. Many schools focused on the custodial parent's assets. According to a Vice President at Syracuse, institutions that only considered a custodial parent's assets could offer students better aid packages and improve those institutions' yield (the percentage of admitted students who enroll) over institutions that considered both parents' assets. The College Board FASSAC developed the NCP Agreed Pricing Strategy in 2006 to standardize consideration of NCP assets amongst its members. The University Defendants had "prominent involvement" in the development of this strategy. Doc. 1 ¶ 70. Sally Donahue, Harvard's Director of Financial Aid, chaired the FASSAC at the time it developed the NCP Agreed Pricing Strategy, and Donald Feehan, a Vice President at Syracuse, served on the FASSAC at that time. Julia Benz, a Director of Financial Aid at Rice, also made public statements advocating for the NCP Agreed Pricing Strategy in 2006.

The College Board sent letters to its members urging them to follow the NCP Agreed Pricing Strategy in 2006. It explained that the FASSAC reached consensus on the following: (1) "[t]here should be a consistent approach among institutions to the analysis of family data when birth/adoptive parents do not live in the same household"; (2) "[t]he definition of family should be viewed as a set of relationships rather than a domestic unit"; (3) "[t]he standard [parental contribution] should include an assessment of the noncustodial parent's resources calculated in a format parallel to that of the custodial

parent contribution"; (4) "[t]he College Board is uniquely structured to serve as the facilitating center for data collection, methodology development and operational implementation;" and (5) "[f]inal decisions on the requirement for and use of noncustodial data must be determined by *institutional policy and procedure*." *Id.* ¶ 75; Doc. 234-3 at 3.

Completing the CSS Profile requires tax returns, W-2 forms and other records of income, records of untaxed income and benefits, assets, and bank statements. The CSS Profile webpage indicates that some colleges may require both custodial and noncustodial parents to complete the CSS Profile. For those schools that have adopted the NCP Agreed Pricing Strategy, the College Board sends students an email indicating that both parents must provide their financial information with no exceptions, even if a divorce court order concerning college expenses exists. Schools then use formulas to generate financial aid offers, with students receiving an estimate for the family contribution based on what both parents can contribute, regardless of whether both parents actually contribute.

At least 75 schools immediately adopted the NCP Agreed Pricing Strategy in 2006, including Cornell, Dartmouth, Fordham, Georgetown, Harvard, and non-Defendants Colgate and the University of Chicago. As of the filing of the complaint, all of the University Defendants required applicants seeking non-federal financial aid to provide both custodial and noncustodial parents' financial information through the CSS Profile. Their financial aid

websites link to the CSS Profile website, which the College Board hosts. The University Defendants have all agreed to consider the income of the NCP in determining their aid awards.

The adoption of the NCP Agreed Pricing Strategy at least doubled the available parental assets for a significant minority of students, those from single-parent households. It has also caused an increase in the net price of education, in other words, the cost per student of tuition plus room and board, decreased by financial aid. The average net price of education at the University Defendants is approximately $6,200 more than the ten non-NCP universities in the top 50 private universities.[3] The need to provide NCP information also means that disadvantaged students may not be able to provide all the information required by the NCP schools.

III. Plaintiffs' Financial Aid Experiences

Hansen attended American from fall 2021 to fall 2023 and then transferred to BU. Before applying to college, he submitted a CSS Profile. Both his custodial parent and NCP provided information to support his aid application.

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3. Plaintiffs identify the 10 universities in the top 50 private universities that do not require NCP financial information as Gonzaga University, Loyola Marymount University, Pepperdine University, Princeton University, Rensselaer Polytechnic Institute, Santa Clara University, Vanderbilt University, and Yeshiva University. They also indicate that, based on undergraduate attendance, the University Defendants have an 84% market share of the top 50 private schools.

He indicated he expected that his NCP would contribute $0 toward his educational expenses. Hansen received approximately $15,000 per year in financial aid from American and approximately $20,000 per year in financial aid from BU. His mother has co-signed loans to pay the rest of his tuition, and his father has not contributed to his educational expenses.

Chang attended Cornell from 2017 to 2021. Before applying to colleges, she submitted financial aid forms, including the CSS Profile. Her NCP is on disability with a much higher income than her custodial parent. When Chang attended Cornell, tuition was approximately $70,000 per year. She received both federal and non-federal need-based financial aid. Chang emailed Cornell's financial aid office to inquire about removing her NCP's income from the calculation, indicating that her NCP could not contribute to her educational expenses given the NCP's disability. Cornell's financial aid office nonetheless indicated that it expected NCPs to help pay tuition. Chang's custodial parent took out a Parent Plus loan to pay the remainder of Chang's tuition.

ANALYSIS

I. Rule 12(b)(2) and Rule 12(b)(3) Motion to Dismiss for Lack of Personal Jurisdiction and Improper Venue

The Court first addresses the Non-Illinois Defendants' motion to dismiss Plaintiffs' claims against them for lack of personal jurisdiction and improper venue. A motion

to dismiss under Rule 12(b)(2) challenges the Court's jurisdiction over a party. Fed. R. Civ. P. 12(b)(2). When a defendant raises a Rule 12(b)(2) challenge, "the plaintiff bears the burden of demonstrating the existence of jurisdiction." *Curry v. Revolution Lab'ys, LLC,* 949 F.3d 385, 392 (7th Cir. 2020) (citation omitted). If the Court rules on the Rule 12(b)(2) motion without an evidentiary hearing, the plaintiff need only establish a *prima facie* case of personal jurisdiction. *Id.* at 392-93; *N. Grain Mktg., LLC v. Greving,* 743 F.3d 487, 491 (7th Cir. 2014). In resolving a Rule 12(b)(2) motion, the Court "accept[s] as true all well-pleaded facts alleged in the complaint," *Felland v. Clifton,* 682 F.3d 665, 672 (7th Cir. 2012), and "reads the complaint liberally with every inference drawn in favor of [the] plaintiff," *GCIU-Emp. Ret. Fund v. Goldfarb Corp.,* 565 F.3d 1018, 1020 n.1 (7th Cir. 2009). However, if the defendant submits "evidence opposing the district court's exercise of personal jurisdiction, the plaintiffs must similarly submit affirmative evidence supporting the court's exercise of jurisdiction." *Matlin v. Spin Master Corp.,* 921 F.3d 701, 705 (7th Cir. 2019). The Court "accept[s] as true any facts contained in the defendant's affidavits that remain unrefuted by the plaintiff," *GCIU-Emp. Ret. Fund,* 565 F.3d at 1020 n.1, but resolves "any factual disputes in the [parties'] affidavits in favor of the plaintiff," *Felland,* 682 F.3d at 672.

A motion to dismiss under Rule 12(b)(3) challenges the plaintiff's choice of venue as improper. Fed. R. Civ. P. 12(b)(3). "Once a defendant challenges the plaintiff's choice of venue, the plaintiff bears the burden of establishing" proper venue. *Nicks v. Koch Meat Co.,* 260 F. Supp. 3d 942,

951 (N.D. Ill. 2017). To resolve a Rule 12(b)(3) motion, the Court accepts the truth of all allegations in the complaint, unless the defendant's affidavits contradict the allegations. *Deb,* 832 F.3d at 809. The Court may consider evidence the parties submit outside the pleadings; in doing so, the Court resolves all factual conflicts and draws all reasonable inferences in the plaintiff's favor. *Id.* at 809-10; *Faulkenberg v. CB Tax Franchise Sys., LP,* 637 F.3d 801, 809-10 (7th Cir. 2011). If venue is improper, the Court must dismiss the case or, if it is "in the interest of justice," transfer the case to any district or division where the case could have been brought. *Nicks,* 260 F. Supp. 3d at 952; 28 U.S.C. § 1406(a).

Because Plaintiffs bring an antitrust claim, they can establish personal jurisdiction and venue through (1) general principles of personal jurisdiction and venue, or (2) Section 12 of the Clayton Act, 15 U.S.C. § 22. *See KM Enters. v. Glob. Traffic Techs., Inc.,* 725 F.3d 718, 730 (7th Cir. 2013). In their complaint, Plaintiffs focus on Section 12 of the Clayton Act, although in their response to the Non-Illinois Defendants' motion to dismiss, they also contend that Illinois law and 28 U.S.C. § 1391 provide a basis for finding they have established personal jurisdiction and venue. The Court first turns to Section 12.

A. Section 12

Section 12 provides for nationwide service of process and, consequently, nationwide personal jurisdiction. 15 U.S.C. § 22 ("Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not

only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."); *KM Enters., Inc.,* 725 F.3d at 724. "To avail oneself of the privilege of nationwide service of process, a plaintiff must satisfy the venue provisions of Section 12's first clause." *KM Enters.,* 725 F.3d at 730. Personal jurisdiction under Section 12 requires only that the Non-Illinois Defendants have sufficient minimum contacts with the United States, which they do, and nothing is unreasonable about requiring the Non-Illinois Defendants to submit to the federal courts' authority. *Id.* at 731. Therefore, the Court's focus turns to the propriety of venue in this District. *Id.* at 730.

Under Section 12, venue is proper where "a defendant is an inhabitant, is found, or transacts business." Only the last aspect of this definition, transacting business, possibly applies to the Non-Illinois Defendants. The Supreme Court has interpreted "transacts business" to mean "[t]he practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character.'" *United States v. Scophony Corp. of Am.,* 333 U.S. 795, 807 (1948).

In their complaint, Plaintiffs allege that each Defendant has "(1) transacted business in the United States and in this District, including by recruiting, and advertising for, students residing in this District; (2) transacted business with Class Members throughout the United States, including those residing in this District;

and (3) committed substantial acts in furtherance of an unlawful scheme in the United States including in this District." Doc. 1 ¶ 9. They further contend that "[e]ach Defendant has recruited, accepted, enrolled, and charged artificially high net prices of attendance to, and thus injured, individuals residing within this District." *Id.* The Court agrees with Defendants that these allegations fall short of suggesting that the Non-Illinois Defendants transact business in this District. In cases against associations focused on professional advancement, courts have found that an association does not transact business in a district based on its members' residence in the district, its advertisement in the district, or even its conduct of a program for its members in that district. *See Daniel v. Bd. of Emergency Med.,* 428 F.3d 408, 429 (2d Cir. 2005) (surveying cases and noting that "the determination whether a defendant transacted business in a district depend[s] on a realistic assessment of the nature of the defendant's business and of whether its contacts with the venue district could fairly be said to evidence the 'practical, everyday business or commercial concept of doing business or carrying on business of any substantial character'" (citation omitted)); *Bartholomew v. Va. Chiropractors Ass'n,* 612 F.2d 812, 816 (4th Cir. 1979) (finding that the defendant did not transact business in the state for purposes of Section 12 despite its advertisements in the state because it had only a small number of members in the state, did not qualify to do business in the state, and had no meetings in the state, among other things), *abrogated on other grounds, Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119 (1982); *Golf City, Inc. v. Wilson Sporting Goods, Inc.,* 555 F.2d 426, 436-38 (5th Cir. 1977)

(concluding that association did not transact business in the state based on having members there, a magazine circulating in the state carrying institutional advertising for the association, the availability of applications to join the association in the state, the association conducting a workshop for members in the state, and the association awarding membership in a special club to individuals who scored a hole-in-one at golf clubs in the state). While the Court has not identified applicable precedent involving universities, the application of this principle in situations involving professional associations is analogous.

Here, the University Defendants all provide educational services. The Non-Illinois Defendants have provided declarations, however, that they do not maintain a presence in Illinois and, while some have several employees who reside in Illinois, those employees provide remote services to the Non-Illinois Defendants outside of Illinois.[4] The declarations further indicate that the Non-Illinois Defendants make their financial aid decisions outside of Illinois. While a small percentage of Illinois residents attend the Non-Illinois Defendants and thus are subject to the NCP Agreed Pricing Strategy, without

4. Plaintiffs do not appear to rely on the fact that the Non-Illinois Defendants have some employees who work remotely from this District as a basis for finding venue here, nor would such an argument be successful. *See Am. Home Healthcare Sys., Inc. v. Floyd Mem'l Hosp. & Health Servs.,* No. 3:17-cv-00048, 2017 WL 2261740, at *3 (W.D. Ky. May 23, 2017) ("The fact that some of Floyd's employees resided in Kentucky, without a showing that they transacted any business in Kentucky, is not enough to satisfy the standard for Section 12 of the Clayton Act.").

more detail about the Non-Illinois Defendants' activities, the fact that the Non-Illinois Defendants recruit students from Illinois, draw some part of their student body from Illinois, and receive tuition payments from Illinois residents does not provide a basis to conclude that the Non-Illinois Defendants conduct business "of any substantial character" in this District. *See Dale v. Deutsche Telekom AG,* No. 1:22-CV-03189, 2023 WL 7220054, at *5 (N.D. Ill. Nov. 2, 2023) (presentations and recruitment of employees in the district fell short of transacting business in the district for purposes of Section 12's venue prong), *motion to certify appeal granted on other grounds,* 2024 WL 1302783 (N.D. Ill. Mar. 27, 2024); *World Ass'n of Icehockey Players Unions N. Am. Div. v. Nat'l Hockey League,* No. 24-CV-01066, 2024 WL 4893266, at *19-20 (S.D.N.Y. Nov. 26, 2024) (plaintiffs did not meet Section 12's venue prong where they did not provide allegations "as to the regularity of any recruiting activities in" the district, with conclusory allegations that the defendants had "recruited and sourced players from" the district being "plainly insufficient"); *Dennis v. JPMorgan Chase & Co.,* 343 F. Supp. 3d 122, 200 (S.D.N.Y. 2018) (allegations that Australian corporation recruited students in the Southern District of New York for its New York offices did not sufficiently allege venue under Section 12 because the complaint did not include allegations "as to the regularity of such recruitment" or that the "recruitment efforts comprise a substantial component of the company's business"). Therefore, Section 12 does not provide a basis for Plaintiffs to proceed against the Non-Illinois Defendants in this case.

B. Specific Personal Jurisdiction

Alternatively, Plaintiffs argue that specific personal jurisdiction exists under Illinois law, with venue proper under any of § 1391's subsections. Specific jurisdiction arises "when the defendant purposefully directs its activities at the forum state and the alleged injury arises out of those activities." *Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.,* 623 F.3d 440, 444 (7th Cir. 2010); *see also Abelesz v. OTP Bank,* 692 F.3d 638, 654 (7th Cir. 2012) ("Specific jurisdiction is jurisdiction over a specific claim based on the defendant's contacts with the forum that gave rise to or are closely connected to the claim itself."). For purposes of specific jurisdiction, "[t]he relevant contacts are those that center on the relations among the defendant, the forum, and the litigation." *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.,* 751 F.3d 796, 800-01 (7th Cir. 2014). A defendant is not subject to jurisdiction solely because the plaintiff suffered injury in the forum state. *Id.* at 802. Instead, to establish specific jurisdiction over the Non-Illinois Defendants, Plaintiffs must show that "(1) [the Non-Illinois Defendants] purposefully directed [their] activities at the forum state or purposefully availed [themselves] of the privilege of conducting business in the state; (2) the alleged injury arises out of or relates to [the Non-Illinois Defendants'] forum-related activities; and (3) any exercise of personal jurisdiction . . . comport[s] with traditional notions of fair play and substantial justice." *Rogers v. City of Hobart,* 996 F.3d 812, 819 (7th Cir. 2021).

Here, even assuming that the Non-Illinois Defendants purposefully directed their financial aid determinations

at Illinois, the Court cannot exercise jurisdiction over the Non-Illinois Defendants because Plaintiffs' claims do not arise out of nor are related to that conduct. "[I]n a putative class action, the specific jurisdiction inquiry is evaluated with respect to the named plaintiffs" only, without regard to absent class members. *Batton v. Nat'l Ass'n of Realtors,* No. 21-CV-00430, 2024 WL 689989, at *12 (N.D. Ill. Feb. 20, 2024) (citing *Mussat v. IQVIA, Inc.,* 953 F.3d 441, 445, 448 (7th Cir. 2020)); *see also Greene v. Mizuho Bank, Ltd.,* 169 F. Supp. 3d 855, 866 (N.D. Ill. 2016) ("Specific personal jurisdiction can arise only from the claims of the named plaintiffs, not those of absent class members."). While Plaintiffs allege that each University Defendant has "recruited, accepted, enrolled, and charged artificially high net prices of attendance to, and thus injured, individuals residing within this District," Doc. 1 ¶ 9, Plaintiffs allege no connection between their own claims and the Non-Illinois Defendants' actions in Illinois. Because Plaintiffs' claims do not arise out of any of the Non-Illinois Defendants' conduct directed at Illinois, the Court cannot exercise specific jurisdiction over them. *See Kurt v. Platinum Supplemental Ins., Inc.,* No. 19 C 4520, 2021 WL 3109667, at *6-7 (N.D. Ill. July 22, 2021) (no specific jurisdiction over defendants whose contacts with Illinois did not relate to the named plaintiffs even though putative class members' injuries that occurred in Illinois "could potentially provide the critical link between [the defendant's] Illinois-based business and a plaintiff's Illinois-based claim related to that business"); *Cooley v. First Data Merch. Servs., LLC,* No. 1:19-CV-1185, 2019 WL 13207579, at *7 (N.D. Ga. Nov. 15, 2019) ("The Plaintiffs do not allege that the calls that injured them

were made from, or received in, Georgia. The Plaintiffs' claims therefore do not 'arise from' the Defendants' contacts with Georgia as required by Georgia's long-arm statute and federal due process."). Nor can the Court exercise jurisdiction over the Non-Illinois Defendants because their liability for the alleged antitrust violation would be joint and several, given that Illinois does not recognize a conspiracy theory of personal jurisdiction. *See Batton,* 2024 WL 689989, at *13 (collecting Illinois state and federal cases refusing to exercise jurisdiction over a party based on a co-conspirator's acts in Illinois).

Therefore, while arguably inefficient, the Court agrees with the Non-Illinois Defendants that the Court cannot exercise jurisdiction over them and dismisses them without prejudice from this case.[5]

II. Rule 12(b)(6) Motion to Dismiss

The Court now turns to Defendants' motion to dismiss pursuant to Rule 12(b)(6). A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint, not its merits. Fed. R. Civ. P. 12(b)(6); *Gibson v. City of Chicago,*

5. This does not leave Plaintiffs without a remedy against the Non-Illinois Defendants. Plaintiffs arguably could choose to amend their complaint to add Illinois-based named plaintiffs whose claims arise out of the Non-Illinois Defendants' contacts with Illinois, or Plaintiffs could file individual actions against the Non-Illinois Defendants in their home districts, followed by a motion for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 filed before the United States Judicial Panel on Multidistrict Litigation.

910 F.2d 1510, 1520 (7th Cir. 1990). In considering a Rule 12(b)(6) motion, the Court accepts as true all well-pleaded facts in the plaintiff's complaint and draws all reasonable inferences from those facts in the plaintiff's favor. *Kubiak v. City of Chicago,* 810 F.3d 476, 480-81 (7th Cir. 2016). To survive a Rule 12(b)(6) motion, the complaint must assert a facially plausible claim and provide fair notice to the defendant of the claim's basis. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007); *Adams v. City of Indianapolis,* 742 F.3d 720, 728-29 (7th Cir. 2014). A claim is facially 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." *Iqbal,* 556 U.S. at 678.

Plaintiffs bring an antitrust claim under § 1 of the Sherman Act. To state a § 1 claim, Plaintiffs must allege: "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in [a] relevant market; and (3) an accompanying injury." *Always Towing & Recovery, Inc. v. City of Milwaukee,* 2 F.4th 695, 703 (7th Cir. 2021) (alteration in original) (quoting *Agnew v. Nat'l Collegiate Athletic Ass'n,* 683 F.3d 328, 335 (7th Cir. 2012)). Defendants argue that Plaintiffs have not satisfied any of these elements, but the Court need only address their arguments as to the first element at this time.

Stating a § 1 claim requires the complaint to include "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly,* 550 U.S. at 556. Plausible allegations of an agreement "usually take one of two forms: (1) direct allegations of an agreement, like an admission

by a defendant that the parties conspired; or (2) more often, circumstantial allegations of an agreement, which are claimed facts that collectively give rise to a plausible inference that an agreement existed." *Always Towing,* 2 F.4th at 703 (quoting *Alarm Detection Sys., Inc. v. Vill. of Schaumburg,* 930 F.3d 812, 827 (7th Cir. 2019)). Here, Plaintiffs do not suggest that they have direct evidence of an agreement, and so the Court considers only whether Plaintiffs have sufficiently pleaded an agreement by way of circumstantial evidence.

Circumstantial evidence requires allegations of "parallel conduct . . . placed in a context that raises a suggestion of a preceding agreement." *Twombly,* 550 U.S. at 557. In other words, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Id.* at 556. Instead, a plaintiff must identify "plus factors," or "economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." *Greco v. Mallouk,* No. 22 C 2661, 2024 WL 4119169, at *6 (N.D. Ill. Sept. 9, 2024) (citation omitted). Court have recognized "plus factors" to include "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Id.* (citation omitted). In reviewing the allegations for a plausible agreement, the Court "views the circumstances as a whole." *In re MultiPlan Health Ins. Provider Litig.,* No. 24 C 6795, 2025 WL 1567835, at *15 (N.D. Ill. June 3, 2025). "If the allegations are as consistent with a wide range of lawful and independent business conduct as they

are with an anticompetitive agreement, then the first element of § 1 is not satisfied." *Mirage Wine + Spirit's, Inc. v. Apple Inc.,* No. 3:23-CV-3942, 2025 WL 1896006, at *3 (S.D. Ill. July 9, 2025); *see also Marion Diagnostic Ctr., LLC v. Becton Dickinson & Co.,* 29 F.4th 337, 351 (7th Cir. 2022) ("*Twombly* demonstrates that courts should dismiss antitrust conspiracy complaints for failure to state a claim when the allegations, taken as true, could just as easily reflect innocent conduct or rational self-interest.").

Plaintiffs claim that Defendants entered into an agreement to reduce the amount of financial aid awarded to Plaintiffs and the putative class members by collecting and using NCP financial information to determine students' financial aid awards. According to Plaintiffs, this agreement reduced competition among the University Defendants because they all considered the same financial information, which reduced the advantages a school that did not consider NCP financial information might have in offering better aid packages or making the aid application easier. Plaintiffs contend that they have sufficiently alleged circumstantial evidence of Defendants' agreement to participate in the conspiracy because (1) the University Defendants' representatives regularly attend College Board meetings, supervise College Board operations, and help develop College Board policies related to financial aid; (2) the University Defendants have implemented the NCP Agreed Pricing Strategy; and (3) the University Defendants require students to submit NCP data, with the University Defendants then using that data to determine the need-based financial aid they provide to the students.

The Court agrees with Plaintiffs that they have sufficiently alleged parallel conduct, given that all University Defendants collect NCP financial information using the College Board's CSS Profile and then allegedly use that information to fashion their financial aid awards. Defendants argue, however, that the complaint does not even allege parallel conduct because not all University Defendants began to require NCP financial information at the same time, with the complaint only indicating that the University Defendants all currently require submission of such information. "But concurrent adoption of a price-fixing scheme is not required to prove parallel conduct." *In re MultiPlan,* 2025 WL 1567835, at *14; *see also In re Broiler Chicken Antitrust Litig.,* 290 F. Supp. 3d 772, 791 (N.D. Ill. 2017) ("[T]he Supreme Court has long held that simultaneous action is not a requirement to demonstrate parallel conduct."). Similarly, the fact that the University Defendants may not have used the NCP financial information in the same way does not necessarily defeat a finding of parallel conduct. *See In re MultiPlan,* 2025 WL 1567835, at *15 ("If competitors agree to abide by a third-party algorithm that guarantees a below market price, it would not matter if every price the algorithm recommended differed for each competitor based on each of the competitor's preferred settings. An agreement to fix prices within a below-market range through use of an algorithm is no different for antitrust purposes than an agreement to fix prices to a single point."); *In re Turkey Antitrust Litig.,* 642 F. Supp. 3d 711, 723 (N.D. Ill. 2022) ("Plaintiffs do not need to allege that Defendants restricted supply in an identical manner.").

But the Court nonetheless finds that, when viewed as a whole, the complaint falls short in plausibly alleging that this parallel conduct reflects an agreement among Defendants to fix prices. While the fact that the University Defendants did not all act at once to adopt the NCP Agreed Pricing Strategy does not prevent an inference of parallel conduct, the lack of details surrounding when each University Defendant began to require NCP financial information and the potential that the period of time lasted almost twenty years calls into question whether the use of NCP financial information suggests coordinated action among all Defendants. *See Washington Cnty. Health Care Auth., Inc. v. Baxter Int'l Inc.,* 328 F. Supp. 3d 824, 837 (N.D. Ill. 2018) ("Even if the disparities in the magnitude and timing of the defendants' recalls does not, in and of itself, render plaintiffs' complaint implausible, it is yet another strike against the complaint's plausibility." (citations omitted)); *cf. In re Text Messaging Antitrust Litig.,* 630 F.3d 622, 628 (7th Cir. 2010) (explaining that the "allegation that all at once the defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third," was the "kind of 'parallel plus' behavior" that could support an inference of conspiracy); *In re Broiler Chicken,* 290 F. Supp. 3d at 791 (collecting cases of courts finding that allegations of defendants "joining or effectuating a conspiracy" over periods of five years or less sufficed to allege parallel conduct); *Mirage Wine + Spirit's, Inc.,* 2025 WL 1896006, at *3 ("Multiple bilateral agreements can evince a single conspiracy if they are sufficiently interdependent and are executed in the context of other plus factors that suggest coordination.").

Defendants also point out that the College Board's documents indicate that each University Defendant makes the final decision as to how to use the NCP financial information gathered in the CSS Profile. According to Defendants, the University Defendants' discretion in how to use the collected data makes implausible any alleged price-fixing agreement. Indeed, Plaintiffs include only the most conclusory allegation about Defendants' agreement as to using the collected NCP financial information. While Plaintiffs do allege that the University Defendants used NCP financial information as part of the Institutional Methodology, which generated a family contribution estimate, the complaint does not go further and explain how the University Defendants used the family contribution estimate to formulate their financial aid offers or whether all University Defendants based the family contribution estimate on the same or similar factors. The conclusory nature of Plaintiffs' allegations calls into question whether Plaintiffs have alleged a plausible agreement to fix financial aid offers at the same amount or level across the board. *Cf. In re MultiPlan,* 2025 WL 1567835, at *15 (rejecting argument that use of algorithm could not be considered parallel conduct where the plaintiffs alleged that despite the "theoretical ability to deviate" from the "calculated rate," the rates actually were "more akin to mandates" and often adopted "with little to no changes").

Plaintiffs, however, emphasize that the Court can find plus factors evidencing an agreement in the University Defendants' involvement in the College Board and development of the NCP Agreed Pricing Strategy. "[T]rade

organizations are ubiquitous and serve numerous legitimate and pro-competitive purposes," however. *Washington Cnty.,* 328 F. Supp. 3d at 843. For this reason, "[a]bsent additional facts addressing the content of defendants' discussions at or the (nefarious) subjects of trade organization meetings, allegations that defendants were members of the same trade organizations are unspectacular and fail to move the needle." *Id.*; *see also Wilk v. Am. Med. Ass'n,* 895 F.2d 352, 374 (7th Cir. 1990) ("[A] trade association is not, just because it involves collective action by competitors, a 'walking conspiracy.'" (citation omitted)). While "[c]ommon membership, meeting attendance, and adoption of the trade groups' suggestions can . . . evidence an *opportunity* to conspire," *Kraft Food Glob., Inc. v. United Egg Producers, Inc.,* No. 11-CV-8808, 2023 WL 6065308, at *13 (N.D. Ill. Sept. 18, 2023) (alterations in original) (citation omitted) (internal quotation marks omitted), "having the *opportunity* to conspire does not necessarily imply that wrongdoing *occurred*," *Kleen Prods. LLC v. Georgia-Pacific LLC,* 910 F.3d 927, 938 (7th Cir. 2018).

Here, Plaintiffs allege that the College Board urged colleges to collect NCP financial information beginning in 2006, and that some schools followed the College Board's suggestion "immediately." Doc. 1 ¶¶ 72-73. But without more, this does not suggest a conspiracy, particularly given that the NCP Agreed Pricing Strategy is not a mandatory College Board rule and many other College Board members do not require NCP financial information as part of the CSS Profile. *See Schachar v. Am. Acad. of Ophthalmology, Inc.,* 870 F.2d 397, 399 (7th Cir. 1989)

("[W]hen a trade association provides information (there, gives a seal of approval) but does not constrain others to follow its recommendations, it does not violate the antitrust laws."); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349 (3d Cir. 2010) ("[N]either defendants' membership in the CIAB, nor their common adoption of the trade group's suggestions, plausibly suggest conspiracy. While these allegations indicate that the brokers had an opportunity to conspire, they do not plausibly imply that each broker acted other than independently when it decided to incorporate the CIAB's proposed approach as the best means of protecting its lucrative arrangements from hostile scrutiny." (citations omitted)). The non-mandatory nature of the NCP Agreed Pricing Strategy distinguishes this case from *Moehrl v. National Association of Realtors,* where the trade association conditioned membership and access to its infrastructure and resources on compliance with the association's rules, essentially forcing all real estate professionals to follow those rules. 492 F. Supp. 3d 768, 778 (N.D. Ill. 2020) ("Unlike in *Twombly,* where the plaintiffs only set forth parallel business conduct bound together by a conclusory allegation of a secret agreement, the purported anticompetitive restraints here are a product of written rules issued by the NAR that each Corporate Defendant expressly imposes upon their franchisees and realtors."). And while Plaintiffs mention that representatives of three University Defendants – Harvard, Syracuse, and Rice – advocated for the changes or had involvement in developing the NCP Agreed Pricing Strategy, Doc. 1 ¶ 82, Plaintiffs allege that only one of those schools, Harvard, immediately adopted the NCP methodology upon its introduction, *id.* ¶ 74. Further,

Plaintiffs allege that only a handful of the other University Defendants have had representatives on the College Board financial aid committees over the past almost 20 years. Given these sparse allegations, Plaintiffs' desired inference that the University Defendants' involvement in the College Board's committees demonstrates an agreement does not follow. *See Washington Cnty.*, 328 F. Supp. 3d at 843 (allegations concerning membership in trade associations did not suggest unlawful agreement where "the complaint stops far short of alleging that these defendants similarly exploited the opportunities for collusion that industry associations provided"); *cf. In re Turkey Antitrust Litig.*, 642 F. Supp. 3d at 727 (trade association membership was plus factor where the trade association created a special team "to lead an industry approach of 'coopetition' to increase turkey consumption in the United States while maintaining historic profit levels"); *Kraft*, 2023 WL 6065308, at *13 (trade association membership served as plus factor where defendants placed executives on associations' boards and committees, played "key roles in developing and approving the conspiracy's supply-reducing initiatives," and participated in the initiatives "nearly in unison"); *In re Loc. TV Advert. Antitrust Litig.*, No. 18 C 6785, 2020 WL 6557665, at *10 (N.D. Ill. Nov. 6, 2020) (plaintiff alleged "numerous instances in which Defendants' executives made express public statements regarding cooperation among Defendants" through a trade organization).

Plaintiffs also argue that the CSS Profile essentially functioned as an information-sharing program, in which the University Defendants exchanged highly sensitive

information with the other members of the conspiracy. This, according to Plaintiffs, runs afoul of antitrust laws. *See* FTC Guide to Antitrust Laws: Spotlight on Trade Associations, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade-associations (last visited Sept. 15, 2025) ("It is illegal to use information-sharing programs . . . as a disguised means of fixing prices."). But nothing in Plaintiffs' complaint suggests that the University Defendants exchanged their own internal financial aid decisionmaking processes or guidelines or otherwise shared with the other University Defendants the amount of financial aid they planned to offer a particular student. Nor does the complaint allege that the University Defendants all agreed on the same exact formula for calculating financial aid based on the NCP financial information. Plaintiffs thus cannot rely on an information exchange as a plus factor. *Cf. In re Turkey Antitrust Litig.,* 642 F. Supp. 3d at 726 (defendants' communications with each other about intended price cuts, encouragement of each other to cut supply, and exchange of information on pricing structures served as a plus factor that could facilitate price fixing); *In re Loc. TV Advert.,* 2020 WL 6557665, at *9 (plus factor where a third party facilitated the defendants' exchange of "competitively sensitive information with one another").

In summary, having reviewed the complaint and parties' arguments as a whole, the Court finds Plaintiffs' allegations of an agreement conclusory and lacking in plausibility. For example, Plaintiffs talk about "concerted action" and "collective effort" without providing details

to flesh out these conclusory descriptions. *See, e.g.,* Doc. 1 ¶ 70. Further, although Plaintiffs allege that some of the University Defendants had representatives on the relevant College Board committees, the Court has no details as to the remaining Defendants' involvement in the alleged agreement aside from the allegations that they belong to the College Board and, at some point since 2006, began requiring NCP financial information. *See Bank of Am., N.A. v. Knight,* 725 F.3d 815, 818 (7th Cir. 2013) ("Although every conspirator is responsible for others' acts within the scope of the agreement, it remains essential to show that a particular defendant joined the conspiracy and knew of its scope."); *Greco,* 2024 WL 4119169, at *7 ("group pleading" is particularly problematic in antitrust case where the court has to "consider whether allegations about each Defendant's purported conduct is sufficient to infer an illegal agreement"). The complaint also leaves unexplained how or why this particular subset of institutions that require NCP financial information formed an agreement while leaving out others that also collect and use the same information in their financial aid determinations.[6] On a similar note, the complaint provides no basis to infer an agreement from the industry structure or the market

6. efendants note that of the College Board members who use the CSS Profile, 177 institutions and programs require the submission of NCP financial information, while 93 do not. Plaintiffs have only named 40 of the 177 institutions that require NCP financial information in this lawsuit. Plaintiffs have not provided a basis to infer that these 40 institutions had some special agreement amongst themselves that would differentiate them from the remaining institutions and programs that also collect NCP financial information.

power of a small group of institutions, given the inclusion of 40 University Defendants here. *Cf. In re Text Messaging,* 630 F.3d at 628 (the fact that the four defendants sold "90 percent of U.S. text messaging services" and that "it would not be difficult for such a small group to agree on prices" supported the existence of an agreement); *Moehrl,* 492 F. Supp. 3d at 779 (industry structure suggested collusion because the four largest real estate brokers belonged to the trade association and provided a "membership base that [gave] the [Corporate Defendants] the power to impose the [trade association's] rules upon the entire industry"). The Court acknowledges that Plaintiffs need not defeat Defendants' alternative explanations at the pleading stage. *See In re MultiPlan,* 2025 WL 1567835, at *19 (alternative explanations "cannot override a plausibly alleged agreement" at the motion to dismiss stage); *In re Broiler Chicken,* 290 F. Supp. 3d at 801 ("[T]he Supreme Court did not intend for courts to weigh the plausibility of a plaintiff's conspiracy claims against the plausibility of the defendants' alternative explanation for their conduct."). But because Plaintiffs have not plausibly plus factors that would suggest more than lawful parallel conduct, the Court cannot allow Plaintiffs to proceed on their § 1 claim at this time.[7] *See Twombly,* 550 U.S. at 556 ("[L]awful parallel conduct fails to bespeak unlawful agreement. . . . [A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice.").

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7. Although the Court does not address Defendants' remaining arguments for dismissal of the Section 1 claim, to the extent that Plaintiffs choose to replead this claim, they should carefully consider those arguments and address any other potential pleading deficiencies in an amended complaint.

Appendix A

CONCLUSION

For the foregoing reasons, the Court grants Defendants' motion to dismiss [232] and the Non-Illinois Defendants' motion to dismiss [236]. The Court dismisses Plaintiffs' complaint without prejudice. The Court dismisses Baylor University, Carnegie Mellon University, Case Western Reserve University, Duke University, Emory University, Fordham University, Georgetown University, Harvard University, Lehigh University, Massachusetts Institute of Technology, the Trustees of the University of Pennsylvania, Southern Methodist University, Tulane University, University of Miami, and Wake Forest University without prejudice for lack of personal jurisdiction and improper venue.

Dated: September 24, 2025

/s/ Sara L. Ellis
Sara L. Ellis
United States District Judge

APPENDIX B – EXCERPTS FROM BRIEF OF APPELLEE NAT'L ASS'N OF REALTORS (9TH CIR. AUG. 14, 2024)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-685

REAL ESTATE EXCHANGE, INC.,
A DELAWARE CORPORATION,

Plaintiff-Appellant,

v.

ZILLOW GROUP, INC.,
A WASHINGTON CORPORATION;
NATIONAL ASSOCIATION OF REALTORS,

Defendants-Appellees.

Filed August 14, 2024

BRIEF OF APPELLEE NATIONAL ASSOCIATION OF REALTORS

Appeal from a Decision of the United States District Court for the Western District of Washington
2:21-cv-00312-TSZ • Honorable Thomas S. Zilly

[TABLES INTENTIONALLY OMITTED]

* * *

[42] disposition is unnecessary and unwarranted. REX lost the case that it chose to bring, and there is no basis for this Court to issue an advisory opinion addressing a different theory or remand for REX to pursue a different case.

A. The District Court Did Not Hold That Optional Rules Can Never Be A Basis For Section 1 Agreements.

The United States' primary basis for filing its amicus brief appears to be to defend the principle that rules designated as optional can provide a basis for finding a Section 1 agreement in some circumstances. U.S. Br. 1–2, 12–20. That principle is undisputed and fully consistent with the district court's decision. Although REX cursorily asserts that the district court relied only on the model rule's optional label, *see* Op. Br. 20–22, the court plainly did not do so. The court correctly stated the standard for a Section 1 agreement and carefully applied it to the evidence REX presented, expressly crediting REX's argument that the "optional nature of the no-commingling rule cannot immunize the defendants from antitrust liability." 1-ER-40; *see also* 1-ER-33–47. There is accordingly no need to vacate the district court's decision to vindicate the primary argument in the United States' brief.

The government nevertheless faults the district court for not addressing "additional ways that optional rules constitute concerted action." U.S. Br. 3. That criticism is misplaced. The district court applied settled antitrust [43] precedent to the record that REX chose to develop; it had

no obligation—and it would have been inappropriate—to explore additional theories. *See, e.g., United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). Indeed, the United States acknowledges that it "[l]ack[s] access to the full record," U.S. Br. 21, and frames its arguments largely in terms of allegations rather than the evidence presented at summary judgment, *see, e.g.*, U.S. Br. 22-23 (discussing what "REX has alleged" and theories that could support liability "[i]f proved"). There is no basis for this Court to address hypothetical scenarios beyond the record or to vacate the district court's decision simply because REX did not pursue theories later raised by an amicus on appeal.

B. The United States' "Invitation And Acceptance" Theory Does Not Support Vacatur

Although the United States asks this Court to consider several additional theories, it focuses on the prospect that an "optional rule can serve as an invitation for others to join in concerted action." U.S. Br. 20. The government does not outline the full contours of its position, but it appears to rely principally on *Interstate Circuit v. United States*, 306 U.S. 208 (1939). There, the Supreme Court affirmed the finding of a conspiracy among a group of film distributors who acquiesced to an exhibitor's "demands as a condition of [the exhibitor's] continued exhibition of the distributors' films." *Id.* at 216–

* * *

APPENDIX C – EXCERPTS FROM BRIEF OF APPELLEE ZILLOW GROUP, INC. (9TH CIR. AUG. 14, 2024)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-685

REAL ESTATE EXCHANGE, INC.,
A DELAWARE CORPORATION,

Plaintiff-Appellant,

v.

ZILLOW GROUP, INC.,
A WASHINGTON CORPORATION;
NATIONAL ASSOCIATION OF REALTORS,

Defendants-Appellees.

Filed August 14, 2024

ANSWERING BRIEF OF APPELLEE ZILLOW GROUP, INC.
[FILED UNDER SEAL]

On Appeal from the United States District Court
for the Western District of Washington
No. 2:21-cv-00312-TSZ, Hon. Thomas S. Zilly

[TABLES INTENTIONALLY OMITTED]

* * *

Appendix C

[1] INTRODUCTION

This appeal turns on the basic principle that "there's no substitute for concrete evidence." *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 803 F.3d 1084, 1087 (9th Cir. 2015). In a last-ditch effort to salvage a failing business, Real Estate Exchange Inc. ("REX") brought this lawsuit against Zillow Group, Inc. ("Zillow") and the National Association of REALTORS® ("NAR"), alleging that Zillow had agreed with NAR to "boycott[]" REX and "segregate, conceal, and demote" REX's listings on Zillow's platforms. 4-ER-651. But, after years of broad-ranging discovery, REX came up emptyhanded, and its antitrust claims fell flat.

The undisputed evidence showed that there was no conspiracy. Zillow never agreed with NAR or anyone else to put REX out of business. REX's Complaint faulted Zillow for redesigning its website in connection with acquiring new data feeds—a redesign that REX claimed was the product of an alleged scheme to boycott non-NAR-affiliated brokers. But the record left no doubt that Zillow had made an independent business decision to switch to Internet Data Exchange ("IDX") feeds from local multiple listing services ("MLSs"), because IDX feeds provided more complete, detailed, timely, and secure listings than the feeds upon which Zillow had previously relied. Zillow had to comply with various licensing rules imposed by each local MLS to obtain access to those feeds. And one of those rules, which roughly two-thirds of MLSs had adopted (the "No-Commingling Rule"), required [2] that certain listings be displayed separately from IDX listings. To comply with that and other MLS rules, Zillow devoted

millions of dollars and more than a year to independently redesign its website, while ensuring that it could continue to carry all listings. Throughout, Zillow continued to display REX's listings on its website for free.

Zillow's web redesign thus furthered its core mission of providing consumers with access to all their homebuying options on a single, online platform. And when making the transition, Zillow adopted one measure after another to continue carrying and promoting REX's listings. Far from evincing a "conscious commitment to a common scheme designed to achieve an unlawful objective," the evidence positively refutes the notion that Zillow had participated in REX's fabricated conspiracy. *Toscano v. Pro. Golfers' Ass'n*, 258 F.3d 978, 983 (9th Cir. 2001) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

REX cannot make up for its lack of evidence on appeal. REX points to no "smoking-gun" direct evidence that Zillow joined a conspiracy to "segregate, conceal, and demote" REX's listings. Nor does REX offer any circumstantial evidence that "tend[s] to exclude the possibility that the alleged conspirators acted independently." *Id*. at 985 (quotation marks omitted). As a result, REX's brief says surprisingly little about the record evidence and instead seeks to recast the District [3] Court's thorough and well-reasoned opinion as having turned, not on REX's failure to make its case, but on NAR's "optional" label of the No-Commingling Rule.

That is not what the court did. The court rejected REX's antitrust claims because the evidence did not

demonstrate any conspiracy to segregate, conceal, and demote REX's listings. REX did ***not*** challenge the No-Commingling Rule itself, ***but rather***, claimed harm from Zillow's website redesign. 4-ER-651; 4-ER-666–69. And, on the record before it, the District Court correctly held that NAR's decades-old promulgation of a model rule could not by itself "demonstrate a common scheme between NAR and Zillow to conceal non-MLS listings behind a secondary tab on Zillow's platforms." 1-ER-43. REX, as well as the Department of Justice ("DOJ"), are both equally mistaken in suggesting that the District Court's decision hinged on a finding that the No-Commingling Rule was optional.

REX also raises a new theory for the first time on appeal. REX morphs the supposed nationwide conspiracy between NAR and Zillow that it alleged, but could not prove, into an array of localized conspiracies involving Zillow and unidentified, non-party individual MLSs. REX made no effort to prove such a case in the District Court, and it would be meritless in any event. Nothing in the IDX form agreements between Zillow and local MLSs directed the concealment or demotion of REX's listings. And "merely agree[ing] to purchase products" on a counterparty's unilateral terms would not violate the antitrust laws anyway, absent evidence of a [4] "'conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Toscano*, 258 F.3d at 984 (citation omitted). ***No such evidence exists.*** The District Court properly granted summary judgment on REX's antitrust claims.

The District Court also correctly denied REX's motion for a new trial after the jury rejected its Washington Consumer Protection Act ("WCPA") claim. Washington law provides a defense to a WCPA claim for "acts or practices which are reasonable in relation to the development and preservation of business." Wash. Rev. Code. § 19.86.920. At trial, the District Court issued a jury instruction that was materially identical to that statutory language and the Washington Pattern Jury Instruction, and the jury found in Zillow's favor. REX comes nowhere close to showing that the District Court improperly instructed the jury or abused its discretion by formulating that instruction to track Washington law to a tee.

In sum, REX's case failed in the District Court because it lacked the evidence necessary to support its claims. It tried to seize upon Zillow's website design change to mask its own business failings. But years of protracted litigation have shown that Zillow did not violate the law. The District Court properly rejected this baseless lawsuit, and its judgment should be affirmed.

JURISDICTIONAL STATEMENT

Zillow agrees with the jurisdictional statement set forth in REX's brief.

* * *

[43] require concealing or demoting REX's listings. *See name.space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1130 (9th Cir. 2015).

Finally, REX never argued below, as it does now, that prior regulatory actions regarding other NAR rules suggest Zillow's participation in the alleged conspiracy. See Opening Br. at 41. Which is not surprising: None of those investigations had anything to do with this case, with Zillow, or with the No-Commingling Rules.

* * *

Simply put, REX "failed to meet its burden" of "'provid[ing] specific evidence tending to show that [Zillow] was not engaging in permissible competitive behavior.'" *Stanislaus*, 803 F.3d at 1089, 1095 (citation omitted). Its evidence was plainly insufficient to establish "a genuine issue of material fact concerning the existence of an alleged agreement between the defendants to segregate, conceal, and demote non-MLS listings on Zillow's websites and mobile platforms." 1-ER-50. As a result, this Court should affirm the grant of summary judgment on REX's antitrust claims.

C. The District Court Did Not Hinge Its Ruling on the No-Commingling Rule's Optional Nature.

Left without evidence of its alleged conspiracy, REX attempts to slay a straw man. It claims the District Court ruled that the optional nature of NAR's model rule precluded antitrust liability. *See* Opening Br. at 20–31.

[44] But that is not what the District Court held. Rather, it rejected REX's antitrust theory as contrary to the undisputed evidence. And it correctly recognized that under the facts of this case, the optional rule, "standing alone, does not constitute direct or circumstantial evidence of an anticompetitive agreement between NAR and Zillow to segregate, demote, and conceal non-MLS listings on Zillow's website and mobile platforms." 1-ER-36–37. As always, REX had to "present evidence tending to show a 'conscious commitment to a common scheme designed to achieve an unlawful objective.'" 1-ER-37 (quoting *Toscano*, 258 F.3d at 984); *see also Cnty. of Tuolumne*, 236 F.3d at 1155–57.

REX just did not do so. Its claims failed because it "presented no evidence to refute that Zillow acted independently" and could not show that Zillow harbored a conscious commitment to the alleged common scheme to conceal and demote REX's listings. 1-ER-38. The District Court stressed this point repeatedly: "The undisputed evidence in this action shows that neither NAR nor its affiliated MLSs were involved in Zillow's decision to implement the challenged two-tab display that allegedly drove REX out of business." 1-ER-37. The alleged conspiracy was broader than the No-Commingling Rule, and none of REX's evidence suggested "that Zillow redesigned its website in an allegedly misleading manner at NAR's or any MLS's direction." 1-ER-42–43. That is, "Zillow's independent decision to implement a uniform two-tab display" was not dictated by NAR's model rule—no [45] matter whether it was mandatory or optional. 1-ER-43; *see* 1-ER-45–46 & n.16. And REX's bare reliance on

NAR's promulgation of the rule was particularly specious, given that NAR adopted the optional rule "years before Zillow designed and implemented its two-tab display"—in fact, before Zillow even existed. 1-ER-42. Add it all up, and there was simply no evidence of a "common scheme between NAR and Zillow to conceal non-MLS listings behind a secondary tab on Zillow's platforms." 1-ER-43. REX's optionality argument is thus beside the point.

The DOJ also errs by treating this case as turning on whether the rule was optional or mandatory.[8] The DOJ catalogs three ways it believes an "optional" rule can violate section 1. DOJ Br. at 16–20. Yet it admits that the first does not apply here and the second does not "reach Zillow" either. *Id.* at 21–22. As to the third, the DOJ suggests that "an optional rule can invite others to participate in a common plan," and that the District Court failed to consider whether Zillow "allegedly acquiesced" in NAR's purported invitation. *Id.* at 11, 31.

[46] But that is just another way of saying there was a conscious commitment to a common scheme.[9] The record shows that there was no such commitment here—as the District Court correctly recognized. *See, e.g.*, 1-ER-42–43.

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8. The DOJ focuses only on "the threshold element of concerted action." DOJ Br. at 12. Its brief does not address the District Court's alternative holding that REX failed to establish harm to competition. See infra Section I.E.

9. To the extent the DOJ means to suggest an optional rule *necessarily* invites others to conspire, NAR correctly explains why that novel theory is supported by neither the law nor the facts of this case.

Indeed, a member of an association following a nonbinding recommendation "does not" by itself "establish, or even reasonably suggest, the existence of a conspiracy" as a matter of law. *Cnty. of Tuolumne*, 236 F.3d at 1156 (citation omitted); *see also, e.g., Kendall*, 518 F.3d at 1048 ("Regarding the allegation that the Banks conspired to fix the interchange fee, merely charging, adopting or following the fees set by a Consortium is insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act."); *Kline*, 508 F.2d at 232 (similar). More is required to establish the antitrust "agreement." And that principle has been established for more than a century. *See Monsanto*, 465 U.S. at 761; *Colgate*, 250 U.S. at 307.

The DOJ's own authority underscores this point: To establish a section 1 violation, the evidence must show that the defendants "had an awareness of the general scope and purpose of the undertaking" to restrain trade and committed to that collective undertaking. *United States v. Masonite Corp.*, 316 U.S. 265, 275 (1942); *see also Associated Press v. United States*, 326 U.S. 1, 11–16 (1945) (finding [47] conspiracy existed where publishers employed "concerted arrangements" that "in and of themselves" restrained trade and "on their face" were "plainly designed in the interest of preventing competition"); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (finding conspiracy existed where, "knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it"); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948) (similar, where "concert of action [was] contemplated" and "the defendants conformed

to the arrangement"); *Arandell Corp. v. CenterPoint Energy Servs., Inc.*, 900 F.3d 623, 634 (9th Cir. 2018) (similar, to the extent defendant engaged in "purposeful and knowing furtherance of the alleged inter-enterprise price-fixing conspiracy"); *PLS.com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 842–43 (9th Cir. 2022) (similar, where "allegations suggest[ed] that [certain MLSs] 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").

There is simply no such evidence here. And that is all the District Court held. It never suggested that an "optional" label could immunize defendants from antitrust liability. *Contra* Opening Br. at 20–21; DOJ Br. at 25. Rather, it held only that NAR's promulgation of the optional model rule decades before the alleged conspiracy "does not, standing alone, constitute evidence of 'a common scheme' or [48] concerted effort among its members to enforce the rule" on Zillow's platforms in an anticompetitive manner. See 1-ER-42–43 (quoting *Toscano*, 258 F.3d at 984).

In addition, the DOJ overlooks the fact that the alleged conspiracy here is not the No-Commingling Rule itself, or the separation of listings standing alone, ***but rather***, the additional purported agreement to "boycott," "conceal," and "demote" REX's listings through the two-tab design. 4-ER-651; 4-ER-665. Optional or not, nothing in the model NAR rule goes to those "crucial components of the challenged restraint." 1-ER-46 n.16. Nor does any other piece of evidence.

For this reason, the DOJ's reliance on *Plymouth Dealers' Association of Northern California v. United States*, 279 F.2d 128 (9th Cir. 1960), is misplaced. Unlike here, that case involved a pricing restraint, and the "agreed starting point" set by the dealers for prices was ***itself*** a "per se violation of the antitrust laws." *Id.* at 131–32. By contrast, the No-Commingling Rule does not itself cover the alleged restraint of trade. It "simply says you can't put IDX listings in the same search results as non-IDX listings," 5-SER-931, and "does not require that the MLS data be given priority over non-MLS data," 5-SER-976. The District Court thus correctly held that the rule itself "does not demonstrate a common scheme between NAR and Zillow to conceal non-MLS listings." 1-ER-43. There is no evidence that Zillow acquiesced in any such scheme.

* * *