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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GREATER SAN DIEGO COUNTY ASSOCIATION OF REALTORS, INC. a California Corporation,

Plaintiff,

v.

SANDICOR, INC., a California Corporation; NORTH SAN DIEGO COUNTY ASSOCIATION OF REALTORS, a California Corporation, PACIFIC SOUTHWEST ASSOCIATION OF REALTORS, a California Corporation, and DOES 1 through 20, inclusive,

Defendants.

Case No. 16cv0096 MMA KSC

DEFENDANTS NORTH SAN DIEGO COUNTY ASSOCIATION OF REALTORS AND PACIFIC SOUTHWEST ASSOCIATION MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE RULE 12(B)(6) MOTION TO DISMISS THE THIRD AMENDED COMPLAINT

Date: November 21, 2016
Time: 2:30 p.m
Courtroom 3A
Judge: Hon. Michael M. Anello

"Oral Argument Requested"

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Defendants NORTH SAN DIEGO COUNTY ASSOCIATION OF REALTORS® ("NSDCAR") and PACIFIC SOUTHWEST ASSOCIATION OF REALTORS® ("PSAR") (collectively, "Association Defendants") respectfully submit this Memorandum of Points and Authorities in support of the Rule 12(b)(6) Motion to Dismiss Plaintiff SAN DIEGO ASSOCIATION OF REALTORS®'s ("Plaintiff" or "SDAR") Third Amended Complaint (Doc. No. 52, hereinafter, "TAC").

INTRODUCTION

Plaintiff's Third Amended Complaint ("TAC") still fails to adequately allege a conspiracy between Association Defendants under the standards set forth by the Supreme Court and the Ninth Circuit. The TAC fails to address numerous deficiencies identified by the Court in the prior two dismissals. Again, the TAC merely concludes that there is a conspiracy based upon decisions made by the Sandicor board of directors and independent decisions made by NSDCAR and PSAR. However, "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 597, n. 21 (1986); *Eclectic Props. E., LLC v. Marcus & Millichap Co.,* 751 F.3d 990, 996 (9th Cir.2014).

While Plaintiff attempts to allege "plus factors" to supplement its conclusory allegations of conspiracy, a review of all the newly alleged matter shows that the TAC again presents other conclusory allegations of conspiracy and agreement. For example, Plaintiff asserts that Association Defendants agreed to abandon plans for a formal merger, conspired to push a "task force" to advance their interests, entered into a market allocation agreement and agreed to share confidential membership records. While these allegations are conceivably consistent with an agreement, combination or conspiracy, they do not cross the line from "conceivable to plausible." Other additional "plus factors" such as allegations that Association

Defendants and Sandicor acted against their self-interest and against their economic interests are so conclusory, lacking in factual detail, and/ or otherwise facially implausible in the antitrust context they epitomize what the Supreme Court has referred to as the "formulaic recitation of the elements." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiff's TAC cannot survive dismissal by merely supplying plus factors which are conclusory or otherwise only provide a context for the conduct complained of. *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1198 (9th Cir. 2015). Plaintiff must provide plus factors which provide a context "that plausibly suggests that [defendants] entered into illegal horizontal agreement." *Id*. Plaintiff does not provide this.

In sum, the TAC still fails to satisfy the Ninth Circuit's requirement that a Plaintiff plead not conclusory allegations of conspiracy but "evidentiary facts" regarding any alleged unlawful agreement in restraint of trade. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). Putting aside any of the allegations that are not entitled to any presumption of truth, Plaintiff's allegations offer little, if anything, to support the claims of the existence of a contract, combination or conspiracy in restraint of trade.

SUMMARY OF PLAINTIFF'S ALLEGATIONS

After three prior attempts at pleading its antitrust causes of action, the Court is aware of the general parameters of Plaintiff's allegations. In the interest of economy, Association Defendants will not repeat the general allegations here. In the TAC, Plaintiff adds the following allegations: (1) After a failed merger attempt, NSDCAR and PSAR ultimately decided to abandon another attempt for a formal merger because they realized that they had greater power through the fiction of separateness, TAC, ¶¶ 66, 70; (2) Sandicor acted against its own interest by rejecting Plaintiff's proposal to buy the data Plaintiff was entitled to, TAC, ¶ 100; (3) NSDCAR and PSAR acted against their self-interest by entering into a market allocation agreement whereby each would not compete for the others' members, TAC, ¶ 101; (4)

NSDCAR, and PSAR acted against their members' self-interest and their own self-interest in communicating with Point2 and requesting that Point2 remove their broker members' data, TAC, ¶ 102; (5) NSDCAR and PSAR had multiple interactions and regularly attended Sandicor meetings which provided them with an opportunity to conspire, TAC, ¶ 105; (6) NSDCAR and PSAR also had opportunities to conspire by creating "joint committees" and other steps to "align their operations following the failed merger attempt," TAC, ¶ 105;" (7) The structure of the real estate industry facilitated collusion between NSDCAR and PSAR, TAC, ¶ 106; (8) NSDCAR and PSAR had a strong motive to conspire because they were facing increasing attrition of members, TAC, ¶ 109; (9) NSDCAR and PSAR took identical actions after the Sandicor Board of directors made a decision to restrict Plaintiff's access to the aggregated MLS data feed, 111; (10) The chairman of Sandicor's board of directors admitted to anticompetitive intent. TAC, ¶, 113.

ARGUMENT

I. Plaintiff Fails to Adequately Allege the Unlawful Agreement, Combination or Conspiracy Element of Section 1 of the Sherman Act

Section 1 of the Sherman Act does not prohibit all restraints of trade. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984). It only prohibits those unreasonable restraints that are "effected by a contract, combination, or conspiracy." *Id.* The important question therefore is whether the conduct at issue was effected through independent decision making or whether there was an agreement or conspiracy. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954). Concerted action therefore is a fact which an antitrust Plaintiff must plead before the court can engage in any antitrust inquiry. *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 663 (9th Cir. 2009). Moreover, "[i]t is not enough merely to include conclusory allegations that certain actions were the result of a conspiracy; the plaintiff must allege facts that make the conclusion plausible." *Name.Space, Inc. v. Internet Corp. for Assigned*

Names and Numbers, 795 F.3d 1124, 1129 (9th Cir. 2015). While this does not require Plaintiff to prove the probability of its case, Plaintiff's factual allegations must be "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Allegations are not "enough to raise a right to relief above the speculative level" in the antitrust context when they merely show parallel conduct between the alleged conspirators.

Regarding Plaintiff's Second Amended Complaint, the Court determined that Plaintiff failed to allege a contract, combination, or conspiracy under section 1 of the Sherman Act. Doc. No. 50, p.2:17-19. Specifically, the Court informed Plaintiff that it must allege certain plus factors in order to support its earlier allegations of a section 1 violation. In the TAC, plaintiff echoes the same or similar allegations as those in the Second Amended Complaint. While Plaintiff adds new allegations and "plus factors" to bolster its allegations, a closer look reveals that Plaintiff's additional allegations fair no better than the former allegations.[1]

A. Plaintiff's Newly Alleged Plus Factors Are Implausible and Are not Sufficient to Push the TAC Past Dismissal

Plaintiff's recitation of "plus factors" to support its earlier allegations of an agreement, combination or conspiracy is the quintessential "formulaic recitation of elements" of their antitrust conspiracy allegations. *Twombly*, 550 U.S. at 555. In the TAC, Plaintiff merely tracks elements identified in *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1198 (9th Cir. 2015). In particular, Plaintiff advances additional conclusory allegations of various agreements and fails to allege facts that tend to discount the obvious independent business reasons for the alleged conduct by Association Defendants. Plaintiff also fails to point to any individual action by Association Defendants that is "so perilous in the absence of advance agreement that no reasonable firm would make the challenged move without such an

[1] Because Cartwright Act claims are treated similarly to the Sherman Act claims, Association Defendants' arguments as to Plaintiff's Sherman Act claim are also directed to the Cartwright Act claim. *Name.Space*, 795 F.3d at 1131, n. 5.

agreement." *Id*. at 1195.

1. Plaintiff's Allegations that Sandicor, NSDCAR and PSAR Acted Against Their Own Self-Interests are Conclusory and Not Entitled to Any Presumption of Truth (Plus Factor No. 1)

Plaintiff presents three allegations to support its argument that the conduct of either of Association Defendants' was not in their self-interest unless they were conspiring to restrain trade: (1) Sandicor's directors acted contrary to Sandicor's central purpose and economic interest (of distributing or otherwise selling aggregated MLS data) by denying Plaintiff access to the aggregated data feed, TAC, ¶100; (2) Association Defendants acted contrary to their self-interest by agreeing not to compete for members amongst themselves, TAC, ¶101; (3) Association Defendants acted against their member's self-interest by unilaterally removing their members' listing data from the Point2 syndication feed since listing such data would have meant that listings would be displayed and usable by people across the county. TAC, ¶ 102. However, Plaintiff's allegations fails to address the obvious independent business reasons for the alleged conduct by Defendants. The TAC merely concludes that the conduct shows the parallel conduct alleged was the result of an unlawful agreement and conspiracy. TAC, ¶ 103.

a. Sandicor's Self-Interest Is Separable From Association Defendants' Self-Interest

In alleging this plus factor, Plaintiff points to Sandicor's self-interest but fails to explain how Sandicor's self-interest in distributing or reselling data relates to Association Defendants' self-interest. While Sandicor's general interest aligns with Association Defendants' in other contexts, for purposes of pleading this plus factor, Plaintiff must advance allegations that show that each of the Association Defendants (and not Sandicor – a party not accused of being a part of the conspiracy) acted against *their* self-interest in engaging in the parallel conduct alleged in the TAC. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 884 (9th Cir. 1982) ("[C]ourts also require that the plaintiff demonstrate that the allegedly parallel acts were against

each conspirator's self-interest[.]") (emphasis added). Here, Plaintiff does not allege that Sandicor is a part of the conspiracy in violation of Section 1. Plaintiff does not allege that Sandicor remunerates either of its member associations for the data sold or distributed by Sandicor or otherwise rewards them in manner that implicates their self-interest. Absent an allegation that Association Defendants' self-interest is implicated as a result of Sandicor's self-interest, Plaintiff's allegation fails.

Even if Plaintiff could somehow relate Sandicor's self-interest to Association Defendants', it was in the self-interest of Sandicor to resist competition from Plaintiff, as noted below. Plaintiff alleges that it is a competitor with Sandicor "at the same level of distribution." TAC, ¶ 27. Plaintiff also alleges that Sandicor intended to and now offers a product that "competes" with Plaintiff's Just Knock product. TAC, ¶¶ 82, 134. Plaintiff further alleges that Sandicor's leadership informed Plaintiff that Sandicor provided information to third parties because the third parties did not compete with it. TAC, ¶¶ 40, 92, 113. Even taking Plaintiff's allegations as true, it was not contrary to Sandicor's business interests to refuse to provide the aggregated MLS data it controls to a member who would compete with it using the same resources.

Similarly, Association Defendants' decision to vote in favor of the Sandicor position demonstrates actions that are independent, but similar reactions to the same market stimulus. As beneficiaries of the aggregated MLS resources, and as sources of some of the MLS data, it was well within their independent business judgment to choose who could have access to their respective data. *InterVest, Inc. v. Bloomberg, LP*, 340 F.3d 144, 165 (3d Cir. 2003) (it was a legitimate business reason that defendant "simply chose not to partner with a new partner with unproven technology".).

It was in each of the Association Defendants' self-interest to protect the copyrighted works of Sandicor, Association Defendants' and of their members. *See* Jeffrey Kenneth Hirschey, *Symbiotic Relationships: Pragmatic Acceptance of Data*

Scraping, 29 BERKELEY TECH. L.J. 897, 899 (2014) (noting that "[t]here are countless examples of recent cases where data hosts sought legal remedies for the collection and dissemination of their data"). MLS data and compilations of the same are protectable under copyright law. *See e.g.*, *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1409 (9th Cir. 1986) (confirming district court's summary judgment determination on copyright infringement counterclaim for copying of multiple listing data); *Key W. Ass'n of Realtors, Inc. v. Allen*, No. 11-CV-10084-JLK, 2013 WL 12094688, at *5 (S.D. Fla. May 22, 2013) (granting injunctive relief, fees and costs to a Multi Listing Service database Plaintiff who claimed copyright violations); *Metro. Reg'l Info. Sys. v. Amer. Home Realty Net.*, 722 F.3d 591 595-96 (4th Cir. 2013) (affirming district court finding and rejecting contention that MLS database did not merit copyright protection). Here, it was in each of Association Defendants' self-interest to respect and take action to protect any copyright claims that Sandicor may have in its data compilations by requesting Point2 to abide by instructions given by Sandicor. Similarly, the Association Defendants had similar overriding self-interest in protecting any of their copyrighted works or any copyrighted works of their broker members.

Relatedly, it was also in the self-interest of Sandicor to ensure that any entity it granted unfettered access to its data would guarantee as much or better security as Sandicor and "would not compromise the integrity of the database." *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1155 (9th Cir. 2003), as *amended on denial of reh'g* (Apr. 24, 2003). "Online databases, like the MLS, are a prime target for data scrapers because of their wealth of information." Kathryn S. Robinson*: Protecting Brokers, Sellers, and Consumers*, 15 J. Marshall Rev. Intell. Prop. L. 318, 326 (2016). Certainly, permitting Plaintiff, an admittedly new entrant to the market, was a threat to Sandicor because it would increase Sandicor's exposure to legal action for any breaches in the security of such data.

Lastly, it would be in Sandicor's legitimate business interest to not saturate the

market with another source of MLS data. The TAC states that the MLS data feed is provided to the Union Tribune and to syndicators who provide the data to websites such as Zillow and Redfin. TAC ¶ 75. Either Sandicor, or the Association Defendants could independently make the rational business determination that it would not want to further saturate the market with yet another consumer facing source of MLS data.

Each of these alternative motivating business decisions necessarily renders this plus factor as merely conceivable, but not plausible, that a conspiracy existed.

b. Plaintiff's Market Allocation Agreement Allegations Are Conclusory

Plaintiff's allegations that Association Defendants agreed not to compete between themselves for members restate the very allegations of conspiracy and agreement which the Supreme Court has condemned. In pertinent part, Plaintiff states, "[Association Defendants … have only been able to [share membership records] through a market allocation agreement amongst themselves whereby they have agreed to not recruit each other's' members." TAC, ¶ 72. Such "conclusory allegation[s] of agreement at some unidentified point do[] not supply facts adequate to show illegality." *Twombly*, 550 U.S. at 557. Absent the conclusory allegations, Plaintiff does not allege any facts supporting this purported agreement not to compete. While Plaintiff tries to weave a market allocation agreement from the shared services agreement, Plaintiff still does not illustrate how the shared services agreement indicates a market allocation agreement. Furthermore, Plaintiff's allegation is also factually inconsistent with Plaintiff's allegation that all three associations "fiercely compete with one another for a nearly finite group of broker members." TAC, ¶ 64. If the Associations "fiercely compete" for members, the allegation that Association Defendants do not compete among themselves is implausible. In sum, Plaintiff fails to provide anything beyond conclusory allegations that Plaintiff actually agreed not to compete for members.

c. Association Defendants' Members' Self-Interest Is Separable From Association Defendants' Self-Interest

Plaintiff again fails to explain how Association Defendants' members' varied self-interest in having their data listed on Plaintiff's portal relates to the Association Defendants' self-interest for purposes of alleging this "plus factor." While the broker members' general interest aligns with their organization's in other contexts, for purposes of pleading this plus factor, Plaintiff must advance allegations that show that Association Defendants (and not Sandicor – a party not accused of being a part of the conspiracy) acted against *their* self-interest in engaging in the parallel conduct alleged in the TAC. *Zoslaw*, 693 F.2d at 884.("[C]ourts also require that the plaintiff demonstrate that the allegedly parallel acts were against *each conspirator's* self-interest[.]") (emphasis added). Because Plaintiff does not allege that the Association Defendants' members were part of the conspiracy, their self-interest is irrelevant for purposes of assessing this plus factor.

Even if Plaintiff could somehow relate the members' varied self-interests to Association Defendants, it was in the self-interest of members of Association Defendants to deny Plaintiff access to their MLS data which would be utilized by Plaintiff to develop a product that Plaintiff's members would use to compete against them. *See e.g*. TAC, ¶ 20 (noting that members across the different associations "compete amongst themselves"); TAC, ¶¶ 117, 134 (noting that Plaintiff intended to create the product for its members).

Furthermore, Plaintiff's own allegations reflect Association Defendants' self-interest in resisting Plaintiff's attempts at soliciting their members. For example, Plaintiff alleges that the launch of its Just Knock product would lead to the loss of members for Association Defendants. TAC, ¶¶19, 44 (d), 65, 109, 116. Plaintiff further alleges that neither of Association Defendants had a product such as Plaintiff's and neither had the resources to develop such a product. TAC, ¶109. Taking Plaintiff's own allegations as true, Association Defendants had reason

enough, individually, to resist any effort of Plaintiff gaining access to the aggregated MLS data which Plaintiff would use to lure away each of their members. Even Plaintiff's own allegations indicate that *each* of Association Defendants disregarded benefits to their members for the "greater goal of eliminating competition by Plaintiff." TAC, ¶ 95.[2] While conclusory, this allegation advances each Association Defendants' plausible self-interest in resisting Plaintiff's attempts to receive the aggregated MLS data feed. Moreover, such allegations only show the existence of parallel conduct. As aptly noted in *Twombly*, "if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing." *Twombly*, 550 U.S. at 566.

In addition, Sandicor's decision to reject Plaintiff's offer to pay for the data is backed by each of Association Defendants' legitimate business reasons. *See e.g.*, *Orson, Inc. v. Miramax Film Corp*., 79 F.3d 1358, 1369-70 (3d Cir. 1996) (rejecting the plaintiff's argument that defendants acted against their self-interest by declining the plaintiff's offer of higher pay). As this Court has noted, "[a] decrease in supply could increase all Defendants' margins. Such actions could therefore be described as 'rational, legal business behavior.'" *Persian Gulf Inc., v. BP West Coast Products LLC et al.,* No. 3:15-CV-01749-L-BGS, 2016 WL 4574357, at *4 (S.D. Cal. July 14, 2016). Consequently, taking Plaintiff's allegations as true, by Plaintiff not supplying its additional resource of data through the Just Knock product, either of Association Defendants could, individually, benefit from a limited supply of data through Sandicor's aggregated MLS resource. As Plaintiff alleges, Sandicor makes money from selling such data to third parties. TAC, ¶¶ 86, 87. As this Court has previously noted, Sandicor also makes money from selling MLS subscriptions to agents (and thereby reimbursing service support centers like either of Association Defendants for

[2] "Instead, they *each* elected to forego these short-run benefits for the greater goal of eliminating competition by Plaintiff." TAC, ¶ 95(emphasis added).

the support services they provide to such agents). *Freeman*, 322 F.3d at 1156. In light of Plaintiff's own admission, and this Court's recognition of Sandicor's monetization, it was rightly in the self-interest of each of Association Defendants to instruct Point2 to stop supplying their member's MLS data to an entity that was increasing the output of such data, and thereby lowering or diverting Sandicor's and each of Association Defendants' benefit from the supply of such data.

In all, while Plaintiff attempts to identify possible factors that indicate that Association Defendants entered into a conspiracy because they took actions against their self-interest, Plaintiff does not identify any "individual action" that "would be so perilous in the absence of advance agreement that no reasonable firm would make the challenged move without such an agreement." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d at 1195. At most, Plaintiff's allegations only show that each of the Association Defendants individually wished to resist Plaintiff's dominance in the market. But such "self-interested independent parallel conduct in an interdependent market" is not indicative of actions against "self-interest" in the antitrust context. *Id.* Ascribing antitrust liability to what is merely parallel and normal business behavior of resisting competition from a "dominant player" in a market is unwarranted.

2. Association Defendants' Purported Interfirm Communications and Opportunities to Conspire Are Insufficient to Support Plaintiff's Conspiracy Allegations (Plus Factor No. 2)

Participation in an organization's meetings does not suggest an illegal agreement. *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d at 1196 ("[M]ere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement."); *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 911 (6th Cir.2009) ("[A] mere opportunity to conspire does not, standing alone, plausibly suggest an illegal agreement because [the defendants'] presence at such trade meetings is more likely explained by their lawful, free-market behavior."); *Evergreen Partnering Grp., Inc.*

v. Pactiv Corp., No. 15-1839, 2016 WL 4087783, at *10 (1st Cir. Aug. 2, 2016) (same). Yet Plaintiff's allegations offer no more than the fact that Association Defendants had an opportunity to conspire in an industry where such meetings are routine.

Plaintiff's allegations of "interfirm communications and an opportunity to conspire" are simply that directors and various members of Association Defendants' leadership attended Sandicor meetings and functions and had an opportunity to conspire at those meetings. TAC, ¶ 10. Plaintiff also alleges that at other unknown meetings, at some unknown time or place, Association Defendants also had similar opportunities to conspire because Association Defendants created joint committees and took steps to align their operations after the failed merger attempt. *Id*; TAC, ¶¶ 67, 68. Plaintiff further alleges that the structure of the industry forced Plaintiff to disclose its plans to release the Just Knock product early and that Association Defendants therefore had ample time, opportunity and motive to conspire to prevent Plaintiff from launching its product. TAC, ¶ 106.

Plaintiff's allegations that Association Defendants had an opportunity to meet and conspire at Sandicor meetings or at any other meetings outside Sandicor are insufficient. *Souza v. Estate of Bishop*, 821 F.2d 1332, 1335 (9th Cir. 1987) (mere existence of social contacts insufficient to establish a conspiracy); *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 527 (9th Cir. 1987) (meetings among banks did not support inference for antitrust conduct where such meetings were a necessary part of business operations); *Ralph C. Wilson Indus., Inc. v. Chronicle Broad. Co.*, 794 F.2d 1359, 1365 (9th Cir. 1986) (social and business contacts among defendants concerning their business not sufficient to support an inference of conspiracy); *Zoslaw*, 693 F.2d at 885 (in absence of any agreement, allegations that merely show evidence of industry meetings are not sufficient to illustrate a conspiracy), *cert. denied*, 460 U.S. 1085 (1983); *Oreck v. Whirlpool Corp.*, 639 F.2d 75, 79 (2d Cir. 1980) ("A mere showing of close relations or frequent meetings

between the alleged conspirators [to violate antitrust laws] will not sustain a plaintiff's burden absent evidence which would permit the inference that those close ties led to an illegal agreement.").

Moreover, it is telling that Plaintiff does not allege that Association Defendants did not meet as regularly at such Sandicor meetings and or other locations *prior to* the purported conspiracy. Absent such an allegation, Plaintiff's alleged plus factor is just as consistent with the regular business conduct and does not support Plaintiff's allegations of an agreement or conspiracy.

Plaintiff's allegations that Association Defendants met at some other unknown place and at such meetings came up with joint "task forces" are similarly insufficient because they lack the context that tends to suggest that a preceding agreement was entered into to restrain trade. In all, Plaintiff's allegation simply states that the "task forces" must have resulted from a joint agreement, and therefore Association Defendants must have met at some prior time and place to come up with such "task forces." *See* TAC, ¶¶ 51, 52, Plaintiff's allegations are simply too conclusory, attenuated and merely consistent with Plaintiff's allegation of conspiracy.

Even meeting and talking about Plaintiff and its business conduct is not indicative of a conspiracy or an agreement in restraint of trade. *See e.g., Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810, 827 (11th Cir. 1990), overruled in part on other grounds by *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365 (1991) ("That the defendants might have talked among themselves about [Plaintiff's conduct] is also insufficient to permit an inference of conspiracy."); *Cooper v. Forsyth County Hosp. Authority, Inc.*, 789 F.2d 278, 281 (4th Cir. 1986) (discussion at a meeting of the association did not support an inference of conspiracy). Here, Plaintiff alleges that PSAR and NSDCAR and members from all associations (including Plaintiff) met at events either at PSAR or NSDCAR's epicenter, and at each time had a discussion of "the other association" and its efforts to take their members' data. TAC, ¶ 68. Merely having discussions about Plaintiff's efforts to

obtain the data, apparently in the presence of Plaintiff's members, does not support a conspiracy allegation.

Plaintiff's allegations that the structure of the industry also facilitated collusion are implausible and warrant no consideration from this Court. While associations like Association Defendants, Plaintiffs and even Sandicor, which bring together individuals in the same industry often involve collective action, they are not a "walking conspiracy." *Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758, 764 (5th Cir. 2002). As the Ninth Circuit has noted, "membership in an association does not render an association's members automatically liable for antitrust violations committed by the association." *Kendall*, 518 F.3d at 1048. Neither does "participation on the association's board of directors." *Id*. The allegation that Association Defendants were part of meetings where Plaintiff revealed its business plans does not support Plaintiff's allegations that Association Defendants entered into a conspiracy. Nor does it discount the alternative inference that each of the Association Defendants present at such meetings were independently opposed to the idea proposed by Plaintiff, and knowing their voting ability, each Association Defendant individually decided to vote against the idea. Parallel conduct is not sufficient to show that Association Defendants engaged in concerted action to violate the antitrust laws. *Wilcox v. First Interstate Bank of Oregon, NA*, 815 F.2d 522, 526 (9th Cir. 1987). Even if each of Association Defendants was conscious of the other's likely position, mere conscious parallelism is not sufficient to support Plaintiff's allegations of conspiracy or agreement in restraint of trade.

3. Association Defendants' Purported Strong Motives to Enter into the Alleged Conspiracy Are Insufficient to Support Plaintiff's Conspiracy Allegations (Plus Factor No. 3)

The presence of a common motive to enter into an antitrust conspiracy is of very little probative value to the existence of the conspiracy. *In re Musical Instruments & Equip. Antitrust Litig*., 798 F.3d at 1195 ("Thus, alleging "common motive to conspire" simply restates that a market is interdependent[.]"). Such

"allegations of parallel conduct—though recast as common motive—[are] insufficient to plead a § 1 violation." *Id.*; *In re Late Fee and Over-Limit Fee Litigation*, 528 F. Supp. 2d 953 (N.D. Cal. 2007) (noting that motive to conspire is never enough to show an agreement). Plaintiff's allegation of Association Defendants' strong motive to enter into the alleged conspiracy essentially asserts that: (1) Plaintiff is the dominant power who controls 2/3 of the relevant market for broker-members and was developing a product which was "highly-sought after"; (2) Association Defendants were suffering high rates of attrition; and (3) Association Defendants did not have resources to develop a product such as Just Knock and were independently powerless to prevent Plaintiff from rolling out its product. TAC, ¶ 109.

Association Defendants' purported inadequacy of resources to individually develop a product that was like Plaintiff's does not indicate a motive to conspire. This is especially so in this case where Plaintiff does not allege that either of Association Defendants wished to or attempted to individually develop such a product for their respective associations. As *Twombly* notes, companies do not pursue every opportunity that other companies may regard as profitable. *See Twombly*, 550 U.S. at 569. It is too speculative then for this Court to infer that because Association Defendants did not individually have the resources to create a product that "competes with" Just Knock, they must have been motivated to violate the antitrust laws.

Furthermore, even if any one of the two Association Defendants decided to independently withhold its MLS data, Plaintiff's Just Knock product would still effectively be crippled. There was thus no need to conspire in order to defeat Plaintiff's interests.

At most, Plaintiff's allegations only advance that the Association Defendants acted in a similar manner, to defeat Plaintiff's attempts at powering up its Just Knock product with the aggregated MLS data and that they further acted in a similar manner

to create a web portal for Sandicor as a whole. But such "allegations of parallel conduct—though recast as common motive—[are] insufficient to plead a § 1 violation." *In re Musical Instruments & Equip. Antitrust Litig*., 798 F.3d at 1195.

4. Association Defendants' Purported Actions Were Merely Independent Competitor's Reactions to the Same Stimuli and Were Not A Result of a Complex Orchestration (Plus Factor No. 4)

Taking nearly identical actions in response to the same stimulus is not indicative of a conspiracy. *Twombly*, 550 U.S. at 557 n. 4; *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d at 1196. Yet Plaintiff's allegations offer no more. Plaintiff here alleges that after Sandicor decided to restrict Plaintiff's access to the unrestricted MLS data feed, NSDCAR and PSAR took nearly identical actions in short order by sending identical instructions to Point2 to eliminate their members' listings from the syndicated data feed. TAC, ¶ 111.

Even assuming that Association Defendants contacted Point2 with "identical" instructions within a short period of time, this merely indicates that Association Defendants were reacting to the decision of the board of directors of Sandicor.[3] Tellingly, Plaintiff does not allege that the Association Defendants contacted Point2 *prior to* Sandicor allegedly deciding to restrict Plaintiff's access to the MLS data feed. Indeed, Plaintiff alleges to the contrary: "*After* [Association Defendants] collectively voted to reject Plaintiff's request for a data feed from Sandicor [and] *[a]fter* Sandicor's agent reached out to Point2, representatives of both PSAR and NSDCAR *separately* contacted point2 with identical instructions." TAC,¶ 111. (emphasis added).

The obvious alternative explanation is that in response to Sandicor's decision, Association Defendants independently took steps to ensure that their members' data was no longer a part of the syndicated data feed received by Plaintiff. As the Third

[3] Note that Plaintiff failed to provide what those "identical instructions" were. Such specificity is required for courts to evaluate whether antitrust claims are plausible.

Circuit has noted, adoption of a trade group's suggestions or decisions does not plausibly suggest conspiracy among the adopters. *In re Ins. Brokerage Antitrust Litig*., 618 F.3d 300, 349 (3d Cir. 2010).

5. The TAC Does Not Actually Allege that Either of Association Defendants Admitted Any Anticompetitive Intent for the Alleged Conduct (Plus Factor No. 5).

Plaintiff's final plus factor begins and ends with a conclusory and substantively insufficient allegation that the Association Defendants do not deny that their actions were anticompetitive. TAC, ¶ 113. What Plaintiff points to as an admission of anticompetitive intent is a statement by *Sandicor*'s chair, in response to an inquiry by Plaintiff's representatives, *at a Sandicor* meeting. In that statement, Sandicor's chair (who was coincidentally a member of PSAR) stated that Sandicor provided aggregated MLS data to third parties (and not to Plaintiff) because the third parties (unlike Plaintiff) were not competing with Sandicor. TAC, ¶¶ 113, 92. Nothing in this statement indicates any admission *by* PSAR or NSDCAR of any anticompetitive intent. Plaintiff has not presented any allegations that suggest that the inquiry was directed to either NSDCAR or PSAR. The allegations indicate quite the opposite; that the chair of Sandicor's board of directors is speaking in his capacity as the chair of the board of directors of Sandicor. Ascribing his statement to any entity other than Sandicor is not supported by any non-conclusory allegations. This includes the conclusory allegations that the Sandicor directors were hand-picked and operated at the will of PSAR and NSDCAR. TAC, ¶ 100.

In conclusion, when stripped of the conclusory recitals of "plus factors," the TAC does not identify any "economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d at 1194. Absent additional allegations of such actions and outcomes, Plaintiff's allegations of antitrust conduct fail.

B. Plaintiff's Other Allegations That Association Defendants Entered into Any Agreement In Restraint of Trade Are Conclusory, Implausible and are Not Entitled to Any Presumption of Truth

After four attempts to plead its antitrust claims, Plaintiff's claims are still the classic representation of statements that are consistent with liability but factually deficient of context suggesting any agreement or conspiracy in restraint of trade. The TAC does not contain any facts that "reasonably tends to prove that the [defendant] and others had 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).

One of the principle allegations in the TAC is a new allegation that after a failed merger attempt, PSAR and NSDCAR *ultimately decided* to abandon the formal attempt to merge because they realized that they had greater power and would remain in control of Sandicor's board of directors if they maintained the "fiction of separateness." TAC, ¶ 70. Plaintiff also asserts that Association Defendants conspired to push a "task force" through Sandicor's board without giving Plaintiff notice. TAC, ¶ 51. Elsewhere, Plaintiff asserts that Association Defendants entered into a market allocation agreement. TAC, ¶¶ 69, 72. Plaintiff further asserts that Association Defendants agreed to cut-off the critical data supply Plaintiff needed. TAC, ¶¶ 83, 84, 86. However, phrases like "ultimately decided" and "colluded" are equivalent to terms like "conspiracy," or even "agreement," which *Twombly* aptly referred to as border-line. *Twombly*, 550 U.S. at 557. The Court is not required to accept such allegations as a sufficient basis for Plaintiff's antitrust claim. *Id*.

Plaintiff moreover does not supply any facts that tend to explain the "who, what, when, where or how" of these agreements. *Kendall*, 518 F.3d at 1048. An antitrust plaintiff must allege how each defendant participated in the alleged conspiracy. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008). Who came up with the suggestion to create or maintain these agreements: the "market allocation agreement," the agreement to maintain a "fiction

of separateness," the agreement to form a "task force" to advance Association Defendants' interests, and other conclusory agreements presented by Plaintiff. When did such party come up with the suggestion? Did the other association immediately agree to the suggestion or later? How did Association Defendants concretize the agreements? Where did the parties agree to these suggestions? But for conclusory assertions and supposition, Plaintiff neither answers these questions nor alleges any nonconclusory facts which suggest any preceding agreement to enter into these agreements in restraint of trade. Because Plaintiff fails to allege any of these crucial factors in the TAC, Plaintiff's new allegations are only as strong as those in the Second Amended Complaint which this Court stated "failed to plead context suggesting an agreement between the Association Defendants to carry out their allegedly unlawful conduct[.]" Doc. No. 50, p.2:17-18.

C. Plaintiff Does Not Allege Any Facts That Sufficiently Rebut the Innocent Explanations for the Alleged Conduct

Plaintiff must allege something more to discount the obvious alternative explanation for the alleged conduct. *In re Century Aluminum Co. Secs. Litig.,* 729 F.3d 1104, 1108 (9th Cir.2013) ("When faced with two possible explanations for a defendant's behavior, a plaintiff cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the defendant's alternative explanation."). Without this, Plaintiff's antitrust allegations fail. *See e.g*., *Iqbal,* 556 U.S. at 682 (discrimination was not plausible explanation for arrests of suspected terrorists where arrests were justified by non-discriminatory law enforcement purposes); *Twombly,* 550 U.S. at 567-68 (alleged conspiracy of telecommunications companies not to compete was not plausible where "obvious alternative explanation" was maintaining the status quo from their tradition of local monopolies); *Somers v. Apple, Inc.*, 729 F.3d 953, 965 (9th Cir. 2013) (plaintiff had to allege something more than the obvious alternative explanation for music pricing); *Cafasso v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1057 (9th Cir. 2011)

(declining to consider the implausible allegations since the plaintiff had failed to identify and address the obvious alternative explanation); *In re Late Fee and Over-Limit Fee Litigation*, 528 F. Supp. 2d 953, 965 (N.D. Cal. 2007) (allegations of antitrust violations not adequate where plaintiff did not attempt to identify or challenge the other "natural explanations" for the increases in late fees); *In re Century Aluminum Co. Securities Litigation*, 729 F.3d 1104, 1108 (9th Cir. 2013) (noting that the plaintiff's allegations remained in "neutral territory" under *Twombly* because they did not tend to exclude the possibility that Plaintiff's shares came from the pool of previously issued shares); *In re Fresh & Process Potatoes Antitrust Litig*., 834 F. Supp. 2d 1141, 1174 (D. Idaho 2011) (declining to find a conspiracy where there was "an obvious alternative, independent explanation for [the antitrust defendant's] entry into [a] joint venture.").

Here, there are "obvious alternative explanations" other than the conclusory allegations presented by Plaintiff. The obvious alternative explanation for the shared services agreement is that Association Defendants agreed to cooperate on certain matters in order to increase their efficiencies. As shown in the document Plaintiff based its allegations on, and in the shared services agreement each of the Association Defendants would continue to operate independently notwithstanding the shared services agreement. *See* Request for Judicial Notice, Exh. 1. Certainly, the antitrust laws do not outlaw cooperation or joint ventures that are not in restraint of trade. *Freeman*, 322 F.3d at 1157. Similarly, the obvious alternative explanation for voting against Plaintiff in its bid to obtain the "critical data supply" from Sandicor is that each of Association Defendants, individually, disagreed with Plaintiff's claim to entitlement of such data and thereby, individually voted against Plaintiff's interests to ensure that Plaintiff would not have unrestricted use of Sandicor's data.

D. Plaintiff's Allegations Relating to the Shared Services Agreement Do Not Support Plaintiff's Conclusory Allegations of a Conspiracy

Plaintiff alleges that Association Defendants acknowledged and entered into a

"shared services agreement" which confirms an "expansion of a relationship between the two Associations that has been in effect since 2013." TAC, ¶ 71. Plaintiff thereon asserts that Association Defendants now share confidential membership records. TAC, ¶ 72. In conclusory fashion, Plaintiff adds that because Association Defendants share confidential membership records, they must have entered into a market allocation agreement. *Id*.

1. Plaintiff's Allegations as to the Shared Services Agreement Do Not Indicate a Preceding Agreement to Engage in Unlawful Concerted Action Because the Shared Service Agreement Post-Dates the Alleged Conduct.

Plaintiff's allegations relating to the shared services agreement suffer a fatal flaw because the allegations relate to conduct that Association Defendants allegedly engaged in long after Plaintiff brought its antitrust claims. Plaintiff brought its antitrust claims on January 14, 2016. The document Plaintiff relies on for their allegation of a shared services agreement is dated July 1, 2016. Because Plaintiff's allegations as to shared services agreement appear to address conduct allegedly engaged in by Association Defendants after Plaintiff brought its claims, they are insufficient to support Plaintiff's allegations of a conspiracy.

2. Plaintiff's Allegation of a Market Allocation Agreement is Implausible Because it is Inconsistent with Plaintiff's Other Allegations

Plaintiff's allegation of a market allocation agreement, which Plaintiff does not plead in the alternative, is wholly contradictory to Plaintiff's assertion that all three associations "fiercely compete with one another for a nearly finite group of broker members." TAC, ¶ 64.[4] The inconsistent factual matter thus renders the allegation implausible. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008)

[4] *Compare* "Plaintiff, PSAR, and NSDCAR are horizontal competitors in the market … are the only three associations in the relevant market, and they fiercely compete with one another for a nearly finite group of broker members." TAC, ¶ 64, *with* Association Defendants have entered into a "market allocation agreement amongst themselves whereby they have agreed to not recruit each other's' members, but rather only members of Plaintiff." TAC, ¶ 72.

(noting that although the pleading rules may permit inconsistences that pertain to a theory of a case, they do not tolerate factual inconsistencies).

3. Plaintiff's Allegations of The Market Allocation Agreement Are Conclusory

Even if Plaintiff could allege the market allocation agreement here, like other antitrust allegations of an agreement, Plaintiff may not simply allege that an agreement was made. Nor may Plaintiff simply allege facts consistent with an agreement being made. Plaintiff fails to explain, even at a foundational level, how sharing "confidential membership records" means Association Defendants entered into a market allocation agreement. While Plaintiff offers opinions and arguments as to why it believes sharing confidential membership records is indicative of the conspiracy to enter into a market allocation agreement, these are not factual allegations which are entitled to any presumption of truth. *Holden v. Hagopian,* 978 F.2d 1115, 1121 (9th Cir.1992). As the courts have repeatedly stated, a plaintiff must allege facts plausibly suggesting that each member consciously committed to pursue a common illegal objective with other members. Allegations that members of a business association agreed to "sharing confidential membership records" do not by themselves meet this standard. " *Twombly*, 550 U.S. at 552; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Where a complaint pleads facts that are 'merely consistent with a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" (quoting *Twombly*, 550 U.S. at 557)).

4. The Shared Services Agreement is Neither Illegal Nor Indicative of Any Agreement or Conspiracy In Restraint of Trade

Even assuming *arguendo* that Plaintiff's allegations are not conclusory, Association Defendants' decision to enter into the shared services agreement does not implicate any antitrust laws. "Antitrust law doesn't frown on all joint ventures among competitors—far from it. If a joint venture benefits consumers and doesn't violate any applicable *per se* rules, it will often be perfectly legal." *Freeman*, 322

F.3d at 1157; SD3, LLC v. *Black & Decker (U.S.) Inc*., 801 F.3d 412, 435 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 2485 (2016) (noting that cooperation among industry players has "decidedly competitive effects"); *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201, 560 U.S. 183, 190 (2010)(noting that Section 1 of the Sherman Act was not enacted to encourage "scrutiny of routine, internal business decisions.").

Here, Plaintiff does not provide a single sustainable allegation that indicates that the shared services agreement was anticompetitive or that it precipitated into a market allocation agreement or any other prohibited conduct. The document Plaintiff relies on to support its allegations regarding the shared services agreement indeed reveals the contrary – that Association Defendants would continue to operate independently.[5] The document at issue illustrates that any cooperation between Association Defendants is laudable conduct between competitors. Courts should be particularly hesitant to ascribe anticompetitive conduct to an agreement "when the object of the agreement has an equally plausible lawful objective-and indeed one that is laudable[.]" *United Steelworkers of America v. Phelps Dodge Corp*., 865 F.2d 1539, 1553 (9th Cir. 1989). *See e.g.*, *In re Fresh & Process Potatoes Antitrust Litig*., 834 F. Supp. 2d 1141, 1174 (D. Idaho 2011) (declining to find a conspiracy where there was "an obvious alternative, independent explanation for [the antitrust defendant's] entry into [a] joint venture."). Because Plaintiff fails to allege nonconclusory facts that tie the shared services agreement to any agreement or conspiracy in restraint of trade, the Court should disregard Plaintiff's allegations regarding the same and should dismiss Plaintiff's antitrust claims.

[5] Plaintiff previously requested that the Court take judicial notice of the document. *See* Doc. No. 48-1, Exh. B (pp. 7-8). The Court did not consider Plaintiff's request as necessary. S*ee* Doc. No. 50, pp.3:10-14. Having alleged matter based on this document, Association Defendants request that the Court consider this matter in determining the plausibility of Plaintiff's allegations, without necessarily converting the motion to one of summary judgment. Request for Judicial Notice, Exh. 1.

II. Plaintiff Fails To Allege The Unreasonable Restraint Element Of Section 1 Of The Sherman Act

Plaintiff fails to allege an unreasonable restraint of trade in the relevant market. Section 1 of the Sherman Act is meant to address only restraints of trade that are unreasonable. *William O. Gilley Enterprises v. Atlantic Richfield Co*., 588 F.3d 659, 662 (9th Cir. 2008). A restraint is "unreasonable" where it restricts production of goods and services, leads to raised prices of such goods and services, or otherwise controls the product market to the detriment of purchasers or consumers of goods and services. *Glen Holly Entertainment, Inc. v. Tektronix Inc.*, 352 F.3d 367, 373 (9th Cir. 2003). Plaintiff does not allege that any of the acts complained of restricted production, raised prices, or otherwise injured purchasers of consumers of goods and services. At most, Plaintiff makes only the conclusory assertion that the conduct of Association Defendants "deprived the market of competition in terms of quality and availability." TAC, ¶ 116. Plaintiff however has not alleged that the consumers or purchasers in the market ended up receiving goods and services of an inferior quality, or that other entities have left the market, or that there are fewer competitors in the market than when the alleged conduct occurred. Merely borrowing antitrust phraseology like "quality" and "availability" is not enough to allege antitrust conduct. *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1189-90 (S.D. Cal. 2002) (noting that a plaintiff's allegations are not bolstered simply by dressing them up in typical antitrust language). Plaintiff cannot merely parrot legal standards but must allege case-specific facts within its knowledge. Conclusory allegations of harm to competition, without sufficient factual indication of how that harm to competition actually happened as a result of a defendant's conduct are not adequate.

CONCLUSION

Despite the length of the TAC, Plaintiff's fourth attempt at pleading its antitrust allegations is anything but sufficient. Plaintiff has still failed to plead nonconclusory facts that show that an agreement or conspiracy in restraint of trade

was ever entered into between Association Defendants. Plaintiff's newly alleged "plus factors" are so conclusory and lacking in factual detail that they do not lend any additional support to Plaintiff's allegations of parallel conduct. Plaintiff thus fails to meet this most crucial factor to its Section 1 claim. Antitrust liability should not be extended to protect all parties whose interests do not prevail in what are regular corporate governance mechanisms.

DATED: September 22, 2016

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on September 22, 2016 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Civil Local Rule 5.2.

/s/ Frederick K. Taylor
Frederick K. Taylor