IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Thomas L. Logue, on behalf of himself and others similarly situated,	)	
Plaintiff,	)	Civil Action No. 2:10-cv-451
	)	**Hon. Arthur J. Schwab**
vs.	)	
West Penn Multi-List, Inc.; Howard Hanna Real Estate Services, Inc.; Coldwell Banker Real Estate LLC; Freeman Realty Company; Everest Consulting Group LP d/b/a/ Northwood Realty Services; and Prudential Preferred Realty,	)	*ELECTRONICALLY FILED*
Defendants.	)	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO DISMISS COMPLAINT

Defendants West Penn Multi-List, Inc. ("WPML"), Howard Hanna Real Estate Services, Inc. ("Howard Hanna"), NRT Pittsburgh LLC d/b/a Coldwell Banker Real Estate Services, improperly denominated as Coldwell Banker Real Estate LLC ("Coldwell Banker"), Freeman Realty Company ("Freeman Realty"), Everest Consulting Group LP d/b/a Northwood Realty Services ("Northwood Realty"), and Prudential Preferred Realty ("Prudential") (collectively "Defendants"), hereby submit the within Memorandum of Law in Support of Motion to Dismiss the Complaint.

I. SUMMARY OF ARGUMENT

There are four legal reasons why Plaintiff's Complaint is fundamentally flawed and should be dismissed with prejudice.[1]

A. *Plaintiff Lacks Antitrust Standing*

First, Plaintiff lacks antitrust standing. While lack of standing may be predicated on various grounds, including, among others, the indirectness of plaintiff's injury, a lack of proximate causation, a lack of antitrust injury, or the failure to be an "efficient enforcer" of the antitrust laws, the result is the same and is predicated on the same flaw in this case: Plaintiff fails to sufficiently plead injury directly caused by an antitrust violation by these Defendants. Plaintiff's claim requires this Court to engage in speculative conclusion after speculative conclusion: *if* the WPML rules had not been in existence, *then* "discount/innovative brokers"[2] would have entered the marketplace, and *then* these brokers would not have engaged in the same or similar practices as WPML and subsequently *would have presumably* passed along the alleged savings to consumers. This type of "trickle-down" theory has no foundation in antitrust law. In lieu of evidentiary facts, the Complaint asks this Court to engage in guesswork and speculation into the minds of unidentified "discount brokers" and their theoretical business practices. At best, Plaintiff has been indirectly harmed by the allegedly anticompetitive behavior of

[1] In this case, leave to amend would be futile. *See Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000) (noting that futility is a ground to deny leave to amend a complaint). It is apparent that Plaintiff has marshaled all of the "facts" at his disposal in this first Complaint, and falls woefully short of the required showing. Moreover, because the Complaint is deficient as a matter of law -- Plaintiff lacks antitrust standing, and *Copperweld* applies -- no amount of additional "facts" would prevent dismissal. An attempt to file yet another deficient pleading would serve only to waste judicial resources and cause Defendants to incur unnecessary attorney's fees and costs in moving to once again dismiss an amended Complaint.

[2] The Complaint refers to both "discount" and "innovative" brokers interchangeably. For purposes of this brief, Defendants' reference to either shall mean both discount and/or innovative brokers.

Defendants -- up to three or four steps removed -- and is assuredly not the "efficient enforcer" required by the antitrust laws.

B. *Plaintiff Has Not Alleged a Conspiracy under Copperweld*

Second, the purported conspiracy by WPML Board members via the WPML "conduit" fails as a matter of law under *Copperweld v. Independence Tube Corp.*, 467 U.S. 752 (1984). *Copperweld* instructs that in order to bring a Section 1 conspiracy claim, a plaintiff must sufficiently plead at least two actors. For purposes of the antitrust laws, a corporation and its officers and directors are considered a single entity, which are incapable of conspiring with one another. The Complaint alleges that representatives of the Defendant brokerages that serve on the Board of WPML are the conspirators. Moreover, as the Complaint alleges, WPML is the only entity implementing and enforcing the rules and regulations. As a result, under *Copperweld*, there can be no antitrust conspiracy, and Plaintiff's claim should be dismissed.

While there is a narrow exception to the application of Copperweld where (1) a separate and independent economic interest for each Board member that (2) is contrary to the interests of the corporation for which they serve as Board members can be demonstrated, Plaintiff here has failed to plead sufficient facts to claim the rare exception. Rather, Plaintiff merely pleads a conclusion in a single sentence that an independent interest exists with respect to each WPML Board member, provides no factual detail which would support this conclusion, and fails to explain how this alleged independent interest is in competition with WPML's interests. As a result, there is but a "single entity," and any antitrust claim fails as a matter of law.

C. *Plaintiff Has Not Satisfied the Pleading Standards of Twombly and Iqbal*

Third, although muddled, Plaintiff also attempts to alternatively plead a conspiracy among unspecified "Defendants" separate from the WPML Board activities. Although there are over eighty paragraphs spanning twenty-three pages, it is readily apparent that the Plaintiff has not satisfied the pleading requirements necessary to state a valid antitrust claim with respect to such a conspiracy between the brokerage Defendants. Rather, the Complaint is littered with conclusory allegations regarding unsubstantiated "conspiracies" and "illegal conduct" without the necessary evidentiary facts which would support these ultimate conclusions. The Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), make clear that to state a claim in federal court, actual facts must be pled. Supreme Court precedent also demonstrates that conclusory statements and hazy suggestions of possible misconduct, all of which are contained in Plaintiff's Complaint, are insufficient to prevent dismissal. Consequently, Plaintiff's Complaint lacks evidentiary facts necessary to set forth a conspiracy between the brokerage Defendants outside of their roles as WPML Board members.

D. *Plaintiff's Claim is Time-Barred*

Finally, the purported class representative brings a time-barred claim on behalf of himself as well as many of the purported class members. Any alleged class member who purchased brokerage services in connection with the purchase or sale of real estate before April 6, 2006 is time-barred, as Sherman Act claims must be brought within four years.

Recognizing his statute of limitations problem, Plaintiff attempts to plead the doctrine of equitable tolling by alleging fraudulent concealment. However, to plead fraud, a plaintiff must come forward with facts including details such as the time, place, and location of the alleged

fraud. Plaintiff's Complaint is woefully silent on such specifics, thereby providing another basis for the Court to dismiss this action. Moreover, Plaintiff admits that the allegedly illegal WPML rules and regulations were publicly available and posted online during the relevant class period, and that each of the purported class members received the allegedly illegal service contracts. Plaintiff has pled himself out of any possible "fraudulent concealment" claim by admitting he was aware of the relevant facts which this Complaint is predicated upon.

In sum, Plaintiff should not be permitted to advance past the motion to dismiss stage and cause Defendants to proceed with protracted and expensive discovery. Rather, the Court should dismiss the Complaint with prejudice.

II. RELEVANT FACTUAL ALLEGATIONS

A. *The Parties Are a Residential Seller, WPML and Selected Brokerages*

The named Plaintiff, Thomas L. Logue ("Logue"), is a resident of Pennsylvania and allegedly purchased real-estate brokerage services from Defendant Howard Hanna in connection with the sale of his home on March 30, 2006. Complaint, ¶ 1. Although Mr. Logue is a residential purchaser of real-estate brokerage services, he nevertheless brings this lawsuit on behalf a purported class comprised of "all individuals **or businesses** that purchased the brokerage defendants' real-estate brokerage services in the West Penn MLS Service Area from February 13, 2005 through February 13, 2009." (emphasis added). Complaint, ¶ 63. There is no allegation in the Complaint that Logue attempted to purchase from Defendant Howard Hanna anything less than their full array of brokerage services and was prohibited by Defendant Howard Hanna or by Defendant WPML from doing so.

Defendant West Penn Multi-List, Inc. ("WPML") is alleged to be a Pennsylvania corporation with more than 6,800 real-estate professionals. *Id.* at ¶ 2. During the relevant time

period, various representatives from Defendants Howard Hanna, Coldwell Banker, Freeman Realty, Northwood Realty, and Prudential served as WPML Board members. *Id.* at ¶¶ 3-8.

B. *The Services Offered By WPML Benefit Buyers and Sellers of Real Estate*

WPML provides member brokers "access to an electronic database of supply, pricing and property-characteristics information relating to past and current real-estate listings in the West Penn MLS Service Area." *Id.* at ¶ 13. As Plaintiff admits, WPML "provide(s) an efficient means of exchanging information on real-estate listings," benefiting real estate buyers and sellers. *Id.* at ¶ 16. "[V]irtually all for-sale properties in the West Penn MLS Service Area are listed" on WPML. *Id.* at ¶ 16. The WPML database "allows its members, including defendants, to communicate information among themselves regarding listing properties, including the asking price, address, and property details . . . . " *Id.* at ¶ 15.

Membership in WPML "is necessary to provide effective and competitive real-estate brokerage services to buyers and sellers of real estate in the West Penn MLS Service Area. Among other services, West Penn MLS provides its members the pooling and dissemination of information on virtually all properties available for sale" in that area. *Id.* at ¶ 31. "By listing information about a property for sale with West Penn MLS, a brokerage can market the property efficiently to a large number of potential buyers." *Id.* at ¶ 33. As Plaintiff concedes, WPML provides an efficient and effective means for consumers to buy and sell real estate.

C. *Plaintiff's Allegations Of Misconduct Focus on WPML's Membership Criteria*

At the heart of Plaintiff's Complaint is the allegation that Defendants -- WPML and the named Defendant brokerage companies, as a result of having members on the WPML Board during the purported class period -- controlled the Board and used WPML as "a conduit to create

restrictive rules, governing West Penn Multi-List members' conduct and business practices and have set standards for admitting new members." *Id.* at ¶ 18. Plaintiff challenges allegedly unlawful rules, policies, and procedures of WPML that Plaintiff claims caused the purported class to pay higher prices for real estate brokerage services than they would otherwise have paid. *Id.* at p.1, "Introduction."

In particular, Logue claims he paid more for real estate brokerage services than he would have paid without the allegedly unlawful rules, policies, and procedures of WPML. *Id.* at ¶ 1. Logue challenges the WPML rules that allegedly prevented members from offering less than the full array of brokerage services; required members to use a standard agreement; and prevented publication on WPML's approved website listings other than exclusive right to sell listings. *Id.* at ¶ 19. Noticeably absent from the Complaint is any allegation by Logue that he attempted to retain the services of a discount broker and was unable to do so because that broker was not a member of WPML. Primarily, however, Logue challenges the WPML membership criteria:

> But perhaps more egregious -- and certainly most germane to Plaintiff's Complaint -- defendant-imposed West Penn MLS rules enforce unreasonable criteria for West Penn MLS membership and contain subjective standards for admission to membership that *allow West Penn MLS representatives to deny membership to brokerages who they might expect to compete more aggressively or in more innovative ways than West Penn MLS members, including defendants, would prefer.* Instead, West Penn MLS rules *exclude* innovative or highly competitive brokerages or otherwise deter brokerages that offer such services from seeking West Penn MLS membership.

Id. at ¶ 20.

In sum, Plaintiff's claim flows from the allegedly exclusionary membership rules and regulations put in place by WPML, although Logue is not and has never been a broker eligible to become a WPML member. These regulations allegedly excluded other unidentified brokers who would have possibly discounted their brokerage services by offering less than full service or

allowed the commission normally paid to the seller's broker to be avoided if the seller himself found a buyer. Plaintiff's claim is that innovative brokerages, particularly since 2000, would have provided competitive options in the West Penn MLS Service Area, thereby placing downward pressure on prices: "If defendants hadn't restricted these innovative brokerages from competing in the West Penn MLS Service Area, these brokerages would have provided West Penn MLS Service Area customers of real-estate-brokerage services with competitive options and, in the process, placed downward pressure on prices charged by the brokerage defendants." *Id.* at ¶¶ 39-40. Plaintiff alleges the WPML rules excluded these theoretical innovative brokerages from joining WPML and therefore from gaining access to the listings database. *Id.* at ¶ 41. Had these theoretical brokerages not been excluded, the purported class members would have paid less. *Id.* at ¶ 54.

D. *The FTC Consent Order is a Negotiated Order and Not an Admission*

The Complaint cites to and relies heavily upon a Consent Order WPML entered into with the Federal Trade Commission (attached to the Complaint as Exhibit B). Plaintiff relies upon the Consent Order as though it were a fully litigated judicial or administrative finding. *Id.* at ¶ 55. Contrary to the allegations in the Complaint, Exhibit B makes clear (1) it was a negotiated consent order; (2) involved only WPML and not any of the named Defendant brokerage firms or individual WPML Board members; (3) awarded no damages but rather resulted solely in limited rule changes; and (4) does not constitute an admission of any kind. There was no claim of an alleged conspiracy of the WPML Board members (the FTC Complaint which accompanied the negotiated Consent Order is Exhibit A to the Complaint). As is evident, there was no adjudication. WPML simply settled with the Government, and standing alone, this settlement cannot be bootstrapped into a viable lawsuit by Plaintiff.

III. ARGUMENT IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A. *Legal Standard Governing Dismissal of Complaints Under Fed. R. Civ. P. 12(b)(6)*

A complaint must be dismissed under Fed. R. Civ. Proc. 12(b)(6) where it does not allege "enough facts to state a claim to relief that is plausible on its face." *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). Under the Supreme Court's decisions in *Twombly* and *Iqbal*, to survive a 12(b)(6) motion, a claim for relief must include "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555; *Iqbal*, 129 S.Ct. at 1949.

The "plausibility standard" in *Iqbal* requires that there be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* A plaintiff's "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are not entitled to any assumption of truth for purposes of a 12(b)(6) motion. *Id.* Nor will a court "accept bald assertions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations, no matter how many pages the Complaint runs." *West Penn Allegheny Health System, Inc. v. UPMC*, 2009 WL 3601600, at *17, Civ. No. 09-0480 (W.D.Pa. October 29, 2009) (Schwab, J.). Importantly, where even "well-pleaded facts do not permit the court to infer more than a mere possibility of misconduct, the complaint has alleged -- but it has not 'show[n]' -'that the pleader is entitled to relief.'" *Id.*, *quoting* Fed. R. Civ. Proc. 8(a)(2).

In the context of complex modern litigation -- particularly in the antitrust context -- *Iqbal* and myriad other courts have recognized the important "gatekeeper" function which trial courts must serve. *See Associated General Contractors of Cal., Inc. v. Carpenters*, 495 U.S. 519, 528 n. 17 (1983) (noting that "a district court must retain the power to insist" upon some specificity

before permitting a massive factual controversy to proceed); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (finding that the "cost of modern antitrust litigation" counsels against sending the parties into discovery where there is no reasonable likelihood of a viable claim); *Asahi Glass v. Pentech Pharmaceuticals, Inc.*, 289 F.Supp.2d 986, 995 (N.D. Ill. 2003) (requiring a threshold of plausibility prior to permitting an antitrust case to proceed into "inevitably costly and protracted discovery phase") (Posner, J., sitting by designation).

In short, given the obvious and extraordinary costs associated with modern antitrust litigation, "the importance of the Court's role in acting as a gatekeeper, especially in antitrust cases, cannot be understated." *West Penn Allegheny*, at 2009 WL 3601600 at *19.

B. *Because Plaintiff Lacks Antitrust Standing, the Complaint Should Be Dismissed*

1. *Lack of Antitrust Standing is Properly Raised at the Motion to Dismiss Phase*

Along with Article III standing, a Sherman Act plaintiff must also establish, if challenged, "antitrust standing" at the motion to dismiss phase. Antitrust standing has been established by courts as a threshold requirement in antitrust cases to avoid "over deterrence resulting from the use of [the antitrust law's] somewhat draconian treble damage award." *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1449 (11th Cir. 1991). *See also Gregory Marketing Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 98 (3d Cir. 1986) (the lure of treble recovery would result in overkill due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress), *citing Mid-West Paper Products Co. v. Continental Group*, 596 F.2d 573, 587 (3d Cir. 1979). Antitrust standing "examines the connection between the asserted wrongdoing and the claimed injury to the class of potential plaintiffs to those who

are in the best position to vindicate the antitrust infraction." *Greater Rockford Energy and Technology Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993).

The relevant factors a court must examine to determine antitrust standing were first set forth by the Supreme Court in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983), which is the seminal case in assessing the question of antitrust standing. The *Associated General* Court found that antitrust standing inquiry focuses upon the causal connection between the alleged improper conduct and harm to plaintiff, the directness of the injury, the speculative nature of the damages claimed, and the risk of duplicative recovery. *Id.* at 534-545.

The Third Circuit has collected and synthesized these factors, requiring a court in this Circuit to consider the following factors in reviewing an antitrust standing challenge:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm; (2) whether the plaintiff's alleged injury is of the type for which antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Barton & Pittinos, Inc. v. Smithkline Beecham Corp., 118 F.3d 178, 181 (3d Cir. 1997). In considering the relevant factors set forth in *Associated General* and subsequent Third Circuit decisions, the Complaint (1) fails to the establish the "causal connection" between the alleged violation and the harm to plaintiff; (2) fails to establish the necessary "directness" of the injury; (3) concedes the existence of more "efficient enforcers" of the antitrust laws for the alleged violation; and (4) results in the potential for a speculative apportionment of damages[3] as well as

[3] Without specific facts identifying the supposed class of excluded brokers and their practices with respect to consumers, the Court has no basis to determine damages.

potential for duplicative recovery for the same alleged violations. As a result, Plaintiff lacks antitrust standing.

2. *The Representative Plaintiff (A Residential Purchaser) Only Has an Indirect Injury as the Allegations in the Complaint Point to Direct Injury to Discount and Innovative Brokers, Whom Are Not Alleged to be Class Members*

The primary basis for the alleged injury to Plaintiff is that had WPML not instituted the allegedly anticompetitive rules, "discount" brokers would have entered the marketplace and potentially provided brokerage services for less than the prices provided by the Defendant brokerages. As a result, in order to prove harm to justify antitrust standing, Plaintiff must show that a discount/innovative broker was excluded from WPML, as it is the *sine qua non* of the alleged injury. Plaintiff does not do so, failing to identify a single actual instance of a discount broker having been excluded from the marketplace as a result of the allegedly exclusionary policies of WPML. This failure alone should result in a denial of antitrust standing.

Even indulging Plaintiff's theory, it necessarily follows that the theoretical broker is the party injured by the alleged conduct, and the proper party to bring a claim, as the allegedly excluded broker would be the party with direct injury. As Plaintiff alleges, "if defendants hadn't restricted these innovative brokerages from competing . . . these brokerages *would have* provided . . . competitive options and, *in the process*, placed downward pressure on the prices charged . . . ." Complaint, ¶ 40. Had these discount/innovative brokerages been allowed to become WPML members, WPML membership "*would have allowed them [the opportunity] to compete effectively*" against "Defendants and other real estate brokerages who were [WPML] members. *Id.* at ¶ 42. The Complaint candidly concedes that the purported class of Plaintiffs have been indirectly injured; that WPML's allegedly anticompetitive rules and procedures are not the direct

proximate cause of their injury; and that the excluded brokers are the plaintiffs best suited to bring this action.

The Complaint requires the Court to engage in a series of speculative assumptions: (1) other brokers would have entered the market; (2) these other brokers would have elected to adopt practices and procedures different from WPML regulations (which regulations Plaintiff concedes result in market efficiencies); and (3) would have subsequently passed along unidentified and unquantifiable savings to consumers rather than keeping these presumed profits for themselves. As a result, Plaintiff lacks antitrust standing, and the Complaint should be dismissed.

3. ***Under Similar Facts, the Second Circuit Granted a Motion to Dismiss Because the Plaintiff Lacked Antitrust Standing***

The facts of this case are almost identical to those in *Paycom Billing Services, Inc. v. Mastercard Int'l, Inc.*, 467 F.3d 283 (2d Cir. 2006). In *Paycom*, the Second Circuit upheld the dismissal of a complaint based on a lack of antitrust standing. *Id.* at 285. The plaintiff in *Paycom* alleged that rules and regulations enacted by Defendant MasterCard relating to the nature of fees associated with certain credit card transactions were a result of a secretive conspiracy to eliminate competition and fix prices — precisely what is alleged in this case. *Id.* at 291.

The rules at issue in *Paycom* concerned two different types of credit card transactions: card-present ("CP") transactions and card-not-present ("CNP") transactions.[4] The defendant in *Paycom*, MasterCard, is comprised of over 20,000 member banks, who compete with one another for the issuance of payment cards and the acquisition of merchants' transactions. *Id.* at

[4] A CP transaction is the traditional brick and mortar transaction, where a consumer physically provides the credit card to the merchant. *Id.* at 286-287. In contrast, a CNP transaction takes place over the phone or via the Internet, and the merchant does not see the card used to purchase goods or services. *Id.*

286. The member banks agree to abide by certain regulations and bylaws. *Id.* WPML is akin to Mastercard, and its real estate professionals (brokers and real estate agents) are akin to the member banks. The plaintiff in *Paycom* was a middleman or a payment processor.[5] *Id.* at 287.

Paycom alleged in the Complaint that the regulations and "chargeback" fees imposed by MasterCard for CNP transactions disputed by a consumer -- for example, in the case of fraud -- were the result of a conspiracy to prevent competition with respect to the costs and risks associated with CNP transactions. *Id.* at 288. Where a party had fraudulently used a credit card as part of a CNP transaction, Paycom and other payment processors were debited the amount of the fraudulent transaction despite having paid fees to MasterCard for the transaction in the first instance. *Id.* Similarly, Paycom alleged that the rules regarding the imposition of these chargeback fees reflected an effort by MasterCard and its member banks to fix the prices that payment processors like Paycom were required to pay for the fraud. *Id.* Finally, Paycom also alleged that membership rules in place limited competition by excluding non-US banks from contracting with Paycom and other payment processors, thereby allocating the market for these services and foreclosing competition. *Id.* at 289. In the instant case, Paycom is akin to Logue or purchasers of real estate brokerage services. The exclusion of non-US banks is akin to the alleged exclusion of discount brokerage as a result of the "development, implementation, enactment and enforcement" of the WPML Rules.

The Second Circuit concluded that, based on these allegations, Paycom lacked antitrust standing. The Court stressed the initial impact of the MasterCard rules on the member banks

[5] Once a consumer provided the relevant credit card information as part of a CNP transaction, plaintiff would, on behalf of the merchant, submit this information to the MasterCard member bank with whom it had contracted. *Id.* at 287. Once the member bank authorized payment, plaintiff would credit the merchant in the amount of the transaction, minus its own processing fees for arranging and coordinating the transaction. *Id.* All of plaintiff's transactions were CNP transactions. *Id.*

rather than the payment processors: "[E]ven if one hundred percent of the chargebacks, fines, and penalties were passed-on, Paycom, as an indirect payor of the chargebacks and chargeback fines and penalties, would still lack antitrust standing." *Id.* at 291-92. *See also Temple v. Circuit City Stores*, 2007 WL 2790154 at *4, No. 06-5303 (E.D.N.Y. September 25, 2007) ("The dealer who purchases illegally tied good or services suffers a direct antitrust injury, but the consumer who transacts with that dealer does not, because the consumer's damages flow from the dealer's pass-on of an overcharge").

As to plaintiff's additional argument alleging a horizontal conspiracy among the member banks to charge back agents such as Paycom (identical to the supposed horizontal conspiracy of the brokerage houses in this case), the Court found the allegations insufficient: "While [plaintiff] asserts the legal conclusion that acquiring banks have "conspired" not to compete with regard to the risks and costs of CNP fraud, the facts alleged show only largely parallel behavior in response to the relatively higher costs of CNP transactions." *Id.* at 292. The obvious and plausible business motivations surrounding the banks' actions in Paycom are perfectly analogous to the efficiencies and benefits in the real estate market which the WPML rules and regulations provide, and which the Complaint concedes exist.

In addition, the allegations in the *Paycom* Complaint -- much like this case -- were conclusory in nature, and would have required the Second Circuit to assume that plaintiff could prove facts conspicuously not pled:

> The missing element is an allegation that the acquiring banks pass these costs to CNP merchants because the banks have agreed jointly to do so. Nothing in Paycom's complaint sufficiently alleges that MasterCard rules or an agreement among acquiring banks have prevented Paycom from negotiating with acquiring banks to create an individualized solution to Paycom's costs of fraud. [citation omitted] That omission is fatal. It is improper "to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Associated General*, 459 U.S. at 526, 103 S.Ct. 897.

Paycom, 467 F.3d at 292-293. As previously set forth herein, because the Complaint fails to identify (beyond a conclusory fashion) the plausibility of a conspiracy; the facts giving rise to a conspiracy; or the identity of the alleged discount brokers excluded, it too fails to confer antitrust standing.

Additionally, the *Paycom* Court found the plaintiff failed to show "direct" injury as required to demonstrate antitrust standing. In particular, the Court found plaintiff's injuries to be indirect because competing payment-card network service providers like Discover and American Express were the entities directly harmed, as these entities were prevented from using MasterCard member banks to issue their payment-cards. *Id.* at 293. Because any injuries suffered by plaintiff were derived from reduced volume or lack of transactions by competing payment-card networks (substitute "brokerage houses" in this case for "payment card-networks"), plaintiff's injuries were indirect and flowed from the injuries (if any) suffered by Discover and American Express (or, in this case, unidentified "discount brokers"). *Id.* As a result, Paycom was not the "efficient enforcer" required to enforce the antitrust laws, and therefore lacked standing. An "efficient enforcer" of an alleged antitrust violation is the party who has directly suffered the harm and is in a proper position to seek vindication through enforcement of the antitrust laws. *Id.*

As in *Paycom*, the Complaint in this case alleges harm that is simply too speculative and subject to myriad intervening factors and market forces to confer antitrust standing. *Id.* ("[N]o one can state" that absent the regulations in question, "increased competition from Discover and American Express would have forced MasterCard to adopt policies more favorable to [plaintiff]"). As a result, Plaintiff in this case is not the "efficient enforcer" of the alleged antitrust violation and, therefore, lacks standing. *See also Associated General*, 459 U.S. at 542

("Partly because it is indirect, and partly because the alleged effects on the [plaintiff] may have been produced by independent factors, the [plaintiff's] damages claim is also highly speculative."); *International Business Machines Corp. v. Platform Solutions, Inc.*, 658 F.Supp.2d 603, 613 (S.D.N.Y. 2009) (finding lack of antitrust standing and concluding "it would be impossible to apportion damages" between those directly harmed and the indirect harm suffered by the plaintiff).

Plaintiff's lack of antitrust standing may be predicated on a host of grounds: a lack of proximate cause between the alleged violation and the harm, the indirect nature of the harm alleged, the existence of more "efficient enforcers" of the antitrust laws for the alleged violation; and/or the necessarily speculative nature of the damages claimed as well as potential for duplicative recovery. The end result is the same: the Complaint should be dismissed for lack of antitrust standing.

C. *The Supreme Court's Decision In Copperweld Supports Dismissal As There Are Not Two Actors*

It is of course axiomatic that in order to prove an antitrust conspiracy, multiple actors are required. For purposes of the antitrust laws, a corporation and its officers and directors are considered a single entity that is incapable of conspiring with itself. *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 769 (1984). In *Copperweld*, the Supreme Court held that as a matter of law, officers or employees of a corporation cannot conspire with the corporation itself for purposes of Section 1 of the Sherman Act. *Id*. at 769. *See also Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1131-1132 (3d Cir. 1995) (citing to *Copperweld* and noting that officers and directors of the same company cannot conspire with one another for purposes of the Sherman Act).

In reaching this conclusion, the Court noted that "[i]n any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." *Copperweld*, 467 U.S. at 769. Conduct within a corporate family is more akin to unilateral activity, which is not regulated by Section 1. *Id.* at 775-76. An internal corporate agreement to implement a single firm's policies "does not raise the antitrust dangers that Section 1 was designed to police." *Id.* at 769. As a result, coordination within a firm does not provide the plurality of actors necessary for a Sherman Act Section 1 conspiracy. *See also Nichols v. Mahoney***,** 608 F. Supp.2d 526, 543 (S.D.N.Y. 2009) (noting that per *Copperweld*, no Section 1 claim would lie where "all the alleged anticompetitive activity was committed by defendants in the course of running their own business").

Here, the Complaint concedes that the rules and policies in question are those of WPML, and not those of any of the individual Defendant brokerages. *See generally* Complaint. Similarly, the Complaint admits that the individual Defendant brokerages provided representation to the **Board** of WPML. *Id.* at ¶¶ 3-7. The gravamen of the Complaint are the WPML rules and membership criteria. As a result, WPML is the only "actor" in this conspiracy, and pursuant to *Copperweld*, no antitrust claim lies.

Where the alleged conspirators are officers of the organization, *Copperweld* would ordinarily apply unless independent interests contrary to those of the corporation can be demonstrated, which would result in the necessary plurality of actors. As a result, and in an effort to avoid the holding in *Copperweld*, Plaintiff alleges in conclusory fashion that such "independent interest exists," but provides no facts in support of this allegation. Nor does Plaintiff explain how this alleged independent interest is in competition with WPML, as required in this Circuit. *See Siegel Transfer, Inc. v. Carrier Express, Inc.*, 856 F.Supp. 990, 999 (E.D.Pa.

1994) ("while plaintiffs make reference to alleged personal interests of the four men which are distinct from those of [defendant], plaintiffs have alleged no interest on their part *in competition* with [defendant]") (emphasis in original), *aff'd* 54 F.3d 1125 (3d Cir. 1995).

For example, with respect to the portion of the Complaint detailing the involvement of each of the named Defendant brokerages and their WPML Board representatives, each Defendant receives a boilerplate description:

> 3. Defendant Howard Hanna Real Estate Services, Inc. is a licensed real-estate brokerage doing business in the West Penn MLS Service Area, with its principal place of business at 119 Gamma Drive, Pittsburgh, Pennsylvania 15238. During the class period, various Howard Hanna employees were members of West Penn MLS' Board of Directors. While these Howard Hanna employees served as West Penn MLS board members, they - for the sole benefit of and as specifically instructed by Howard Hanna - agreed with the board members employed by and similarly working as instructed by the other brokerage defendants to develop, implement, enact, and enforce unlawful West Penn MLS rules, policies, and procedures intended to cause Plaintiff and other class members to pay higher prices for real-estate brokerage services than they would have paid absent defendant's illegal conduct. Howard Hanna had a financial interest in the outcome of the conspiracy separate from West Penn MLS's financial interest in the conspiracy in that Howard Hanna received higher prices for its real-estate brokerage services on account of the conspiracy that it would have received absent the conspiracy.

Each of the named Defendants received a practically **identical** form description of their alleged role in the "conspiracy." Complaint, at ¶¶ 3-8.

Therefore, Plaintiff's challenge to WPML's rules which the brokerage Defendants allegedly "colluded to promulgate" as WPML Board members fails to plead the necessary facts to escape the strictures of *Copperweld*. Complaint, ¶ 21. As a matter of law, WPML and its Board members are a single entity for purposes of Section 1 unless Plaintiff pleads **facts** that make it plausible that the Board members engaged in a conspiracy to institute WPML rules for the separate and independent economic gain of their brokerage employer, and **not** as WPML Board members carrying out their fiduciary duties to WPML. Plaintiff does not satisfy this

burden by merely stating in conclusory fashion that the brokerage Defendants' WPML Board members had a distinct economic interest, while also failing to explain how this alleged distinct interest is in competition with WPML as required by the law. As the Complaint makes plain, WPML itself provides a unique product separate and distinct from brokerage services.

Nor does Plaintiff challenge the creation of WPML; to the contrary, he acknowledges the pro-competitive effect resulting from WPML's efficient sharing of information. Were Plaintiff's Complaint sufficient to assert a conspiracy among a corporation and its Board members, then every internal corporate decision that "harms" a consumer is open to a Sherman Act Section 1 claim.[6] Accordingly, Plaintiff's Complaint may be dismissed on this basis as well.

D. *Plaintiff's Conspiracy Claim As To All Defendants Fails Under Twombly And Iqbal As It Lacks The Necessary Evidentiary Facts To State A Claim*

Plaintiff has failed to demonstrate that WPML itself constitutes "multiple actors" so as to state a valid claim for an antitrust conspiracy. However, reading the Complaint in a light most favorable to the Plaintiff, and assuming that the Complaint also intended to allege a conspiracy among the brokerage Defendants themselves, Plaintiff nonetheless has failed to state a claim upon which relief can be granted.

[6] The Supreme Court's recent decision in *American Needle, Inc. v. National Football League*, --- S.Ct. ----, 2010 WL 2025207 (May 24, 2010) does not alter the *Copperweld* analysis in this case. In *American Needle*, plaintiff challenged the corporate entity, NFL Properties ("NFLP"), created to develop, license and market the intellectual property of each of the NFL teams. The Court concluded that NFLP was not a "single entity" in that NFLP was acting with respect to the *separately owned property* of each football team, with separate economic interests (i.e., the Pittsburgh Steelers compete to sell more Steelers-branded merchandise with the other NFL franchises). Unlike the individual NFL football teams which competed in the sale of their respective intellectual property, the brokerage defendants in this case do not compete for multi-list services. If the NLFP did not involve the licensing of the team's respectively owned intellectual property but, rather, a new product only created by the combination, the analysis would be completely different. The existence of the multi-list itself in this case is that new product, and is wholly separate from the brokerage defendants' competition for real estate purchases and sales, which continues unabated. Because WPML is a separate entity offering a separate product, it requires board members and officers to carry out its unique function. *Copperweld* applies with full force.

To state a claim under Section 1 of the Sherman Act, a plaintiff must plead not just ultimate facts (such as "conspiracy") but evidentiary facts which, if true, illustrate: (1) concerted action or agreement; (2) a resultant unreasonable restraint of trade in the relevant market; (3) accompanying injury; and (4) that the plaintiff's injury was the proximate result of the alleged concerted action. *Untracht v. Fikiri*, 454 F.Supp.2d 289, 311 (W.D.Pa. 2006). In attempting to meet this burden, Plaintiff presumes conspiracies with no factual support beyond his own speculation. The mere "possibility of misconduct" raised by the Complaint does not state a claim upon which relief can be granted after *Twombly* and *Iqbal.*

1. ***Plaintiff Has Not Pled Evidentiary Facts to Illustrate Concerted Action or Agreement Amongst All Defendants***

The allegations in this case concerning an alleged conspiracy among the Defendants is precisely the kind of conclusory, bare-bones pleading which the *Twombly* and *Iqbal* courts sought to eradicate via their heightened pleading standards. As in *Twombly*, the allegations in this case "mention no specific time, place, or person involved in the alleged conspiracies" and provides "no clue" as to which of the multiple defendants "supposedly agreed, or when and where the illicit agreement took place." *Twombly*, 550 U.S. at 565 n.10.

Rather, the Complaint repeatedly chants a chorus of antitrust buzzwords and phrases such as "colluded," "restrain[ed] competition," and "anticompetitive conduct" without the necessary facts in support of these conclusions. Plaintiff does not identify a single meeting or action that any Defendant took that indicates the "secret, sinister, and illegal conspiracy" which the Complaint is based upon. The only "fact" pled in the Complaint is that WPML has certain rules and regulations for its membership which generally were "develop[ed], implement[ed], enact[ed], and enforce[d]." The number of conclusory allegations in the Complaint is staggering:

> 25. Defendants (and with regard to the brokerage defendants, through their West Penn MLS board member employees) agreed to adopt, maintain, and enforce rules affecting the way West Penn MLS members provide real-estate brokerage services; participate in West Penn MLS; and again access to West Penn MLS services, including critical access to the West Penn MLS database. ***Accordingly, West Penn MLS rules are the result of agreements and concerted action among defendants to restrain competition and adversely affect Plaintiffs and the class members.***
>
> * * * * *
>
> 41. But before and during the class period, defendants did not let these innovative brokerages compete in the West Penn MLS Service Area. ***Instead, the West Penn MLS rules that defendants colluded to promulgate*** forbade these innovative brokerages from joining West Penn MLS and from gaining access to the West Penn MLS listings database.
>
> * * * * *
>
> 44. ***The West Penn MLS rules that defendants colluded to promulgate harmed competition in multiple ways.*** As a result of these rules, customers of real-estate brokerage services in the West Penn MLS Service Area had fewer choices among types of brokerages and paid higher fees for those services than customers in other areas of the country.
>
> * * * * *
>
> 46. ***Instead, the West Penn MLS rules that defendants colluded to promulgate*** unreasonably (1) raised entry barriers for potential competitors by imposing burdensome prerequisites for membership; (2) provided a means of identifying potentially aggressive competitors so defendants could exclude them from West Penn MLS membership; (3) stabilized the price of real-estate brokerage services through the prospect of price controls; (4) deterred the emergence of internet-based brokerages or other non-traditional brokerage models; (5) stabilized the price of, and reduced customers options for, real-estate brokerage services by dictating that all brokerages in the West Penn MLS Service Area had to provide; and (6) discouraged entry of potential competitors. (emphasis supplied throughout).

These paragraphs are little more than legal conclusions and assumptions masquerading as factual allegations. Plaintiff cannot make generalized allegations that unidentified defendants took unspecified steps to "collude" and survive a motion to dismiss. *See Twombly*, 550 U.S. at 565 n.10 (where the allegations provided "no clue" as to the who, what, where, and when of the alleged conspiracy, the complaint would be dismissed). By way of example, Plaintiff does not identify any of the following:

- which Defendants were involved in the agreements;
- how many agreements there were and between whom;
- when and where those agreements occurred;
- the nature or specifics of the agreements;
- which Defendants engaged in collusion; and
- when and where this collusion occurred.

As a result, Plaintiff's Complaint is deficient and should be dismissed.

2. ***In re Elevator Antitrust Litigation* Compels Dismissal Of Plaintiffs' Complaint**

Numerous other courts have dismissed antitrust claims when faced with similarly bare-boned and conclusory pleadings. For example, in the case of *In re Elevator Antitrust Litigation*, 502 F.3d 47 (2d Cir. 2007), the Court of Appeals for the Second Circuit affirmed the dismissal of Section 1 and 2 conspiracy claims where plaintiff's factual detail concerning the alleged conspiracy was that defendants "participated in meetings in the United States and Europe to discuss pricing and market division"; "agreed to fix prices"; "rigged bids for sales"; "exchanged price quotes"; "allocated markets for sales"; "collusively" required customers to enter into long-term contracts; and "collectively took actions to drive independent repair companies out of business." *Id.* at 51 n.5. The allegations in *Elevator Antitrust* are practically identical to Plaintiff's allegations detailed above.

The Second Circuit concluded that including "every type of conspiratorial activity that one could imagine…in entirely general terms without any specification of any particular activities by any particular defendant" was deficient under *Twombly* and required dismissal. *Id.* at 50. The basis for Plaintiff's Complaint is this: WPML has certain rules; these rules are allegedly anticompetitive; defendants are Board members of WPML; therefore, a "conspiracy"

occurred. The Complaint is nothing more "than a list of theoretical possibilities, which one could postulate without knowing any facts whatever." *Id.*

The Complaint does not provide any facts supporting the conclusory statements that "defendants" committed violations of the law. *Twombly* requires notice to a defendant concerning the "specific time, place, or person" involved in the alleged conspiracies. *Twombly*, 550 U.S. at 564 n. 10. Without the requisite detail, which would permit defendants to identify the who, what, where, and when of the alleged conspiracy, this Complaint is a little more than a plea to engage in a fishing expedition in the form of expensive and invasive discovery. *Id.* at 555, 558. These generalized, non-specific allegations are insufficient under the law to make out a viable claim at the motion to dismiss stage, and cannot "unlock the doors of discovery." *Iqbal*, 129 S.Ct. at 1949.

Indeed, Plaintiff concedes that WPML services provide a more efficient and informed real estate market in the relevant area, in essence admitting there is a perfectly plausible and lawful basis for WPML's conduct, which benefits consumers, but which Plaintiff then concludes in summary fashion is illegal. *See Iqbal*, 129 S.Ct. at 1952 (between an "obvious alternative explanation" for business conduct and the inference of an unlawful conspiracy, the unlawful conspiracy "is not a plausible conclusion"); *West Penn Allegheny*, 2009 WL 2009 WL 3601600, at *29 (dismissing Complaint and finding that "[a]t most, Plaintiff's allegations set forth examples of parallel conduct with speculations as to the existence of a conspiracy"). Accordingly, the Complaint should be dismissed pursuant to the pleading standards articulated in *Twombly*, *Iqbal*, and their progeny.

E. *The Sherman Act's Four-Year Statute Of Limitations Bars The Named Plaintiff And Part Of The Purported Class From Bringing Their Claims*

1. *Logue's Claim is Time-Barred*

The Sherman Act provides for a four-year statute of limitations for any alleged Section 1 violation. *See* 15 U.S.C. § 15(b). Logue purchased real-estate brokerage services in connection with the sale of his home on March 30, 2006. Complaint ¶ 1. Under the four-year statute, Logue was required to file his Section 1 claim no later than March 30, 2010. He failed to do so. Consequently, Logue's claim is time-barred, and he cannot be the class representative.

2. *Claims Accruing From February 13, 2005 Until April 5, 2006 Are Also Time-Barred*

According to the Complaint, Logue brings this Complaint on behalf of individuals and businesses that purchased Defendants' brokerage real estate services from February 13, 2005 through February 13, 2009. Complaint ¶ 63. The four-year statute of limitations prohibits the formation of the class as stated, as those individuals and businesses that purchased Defendants' brokerage real estate services from February 13, 2005 until April 5, 2006 have claims that are also time-barred.

3. *Plaintiff's Attempt to Toll the Four-Year Statute by Asserting Fraudulent Concealment is Fatally Flawed*

Plaintiff's attempt to escape the four-year statute of limitations by claiming that Defendants "fraudulently concealed" the "conspiracy" to harm consumers through the WPML rules and regulations is fatally flawed. To prove fraudulent concealment, a plaintiff must establish (1) an affirmative act of concealment; (2) which misleads or relaxes the plaintiff's inquiry, who (3) exercised due diligence in investigating his cause of action. *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1178-79 (3d Cir. 1993).

In determining whether a Complaint sufficiently alleges fraudulent concealment in the context of a motion to dismiss, a court must determine (1) whether "accepting the allegations in the Complaint as true, the plaintiffs have stated a claim for fraudulent concealment" and (2) "whether the plaintiffs have alleged underlying acts of fraudulent concealment with particularity as required by the heightened pleading standard for fraud claims provided for" by Fed. R. Civ. Proc. 9(b). *In re Elec. Carbon Prod. Antitrust Litig.*, 333 F.Supp. 2d 303, 315 (D.N.J. 2004). In order to satisfy the heightened pleading requirements of Rule 9(b), a plaintiff must "state the circumstances of the alleged fraud with particularity to place the defendants on notice of the precise misconduct with which it is charged." *Federico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007). Further, where multiple defendants are involved, "the complaint should inform each defendant of the nature of his alleged participation in the fraud." *Tredennick v. Bone*, 2008 WL 5397753, at *1, No. 07-04830 (3d Cir. Dec. 29, 2008).

4. ***Plaintiff Has Admitted That The WPML Rules and Service ContractsWere Publicly Available and/or Actually Provided, Precluding Any Claim For Fraudulent Concealment***

According to the Complaint, WPML posted its rules and regulations online during the relevant class period of February 13, 2005 through February 13, 2009.[7] Complaint, ¶¶ 63, 74. Additionally, WPML and named Defendants provided to all purported class members from February 15, 2005 through February 13, 2009 the WPML service contracts, which Plaintiff claims are violative of the Sherman Act and contain illegal terms. *Id.* ¶¶ 63, 74. These allegations alone speak volumes about whether Plaintiff has pleaded enough to escape the operation of the four year statute of limitations. These allegations show that WPML and the named Defendant brokerages did not conceal their alleged "illegal Rules and contracts," but did

[7] The rules are available at http://www.westpennmls.com/index2.html.

the exact opposite. Defendants made their rules available to the public and provided purchasers with the service contracts.

Unfortunately, Plaintiff has bastardized the doctrine of fraudulent concealment by arguing that this Plaintiff (Logue) and the purported class could not have known that the WPML rules and contracts were illegal because "never once did defendants reveal these Rules were the product of a secret, sinister, and illegal conspiracy intended solely to overcharge class members for real-estate services." *Id.* This argument misses the mark.

Logue's (and the other time-barred class members) failure to recognize that the facts they **admittedly were aware of** could give rise to a claim does not toll the statute of limitations. What is relevant is their knowledge of facts giving rise to a claim, as "[a]ll citizens are presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130 (1985). Plaintiff admits that the WPML rules -- the facts which form the basis of their Complaint -- were publicly available online during the relevant class period. Plaintiff similarly admits that purported class members were provided with the very documents which supposedly violate the Sherman Act. The alleged activities which form the basis of Plaintiff's claims were openly discussed and publicly available.[8] Simply because Plaintiff did not appreciate that he could have brought suit, does not mean that Defendants "fraudulently concealed" the facts giving rise to the claim in this lawsuit. Those purported class members who failed to bring their claims within the four-year time period cannot claim they did not have the necessary facts to bring their (now untimely) claims.

[8] The allegation that the "conspiracy" itself was "concealed" suffers from the same defects identified in the preceding section analyzing the Complaint under *Twombly/Iqbal*. There are no facts pled in the Complaint concerning the "conspiracy" beyond noting the existence of WPML and its rules and regulations.

5. *Plaintiff Fails To Satisfy The Requirements Of Rule 9(b)*

Plaintiff must plead the alleged affirmative acts of fraudulent concealment with the specificity required by Rule 9(b), including the "who, what, when, where and how" of the fraudulent act. *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842, 878 (D.N.J. 2008) (quoting *Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534 (3d Cir. 1999)). A plaintiff may not lump together in general terms "all defendants" without explaining the specific details of the alleged fraudulent conduct. *See Kemezis v. Matthew*, 2008 WL 5191587, at *2, No. 07-5086 (E.D.Pa. Dec. 10, 2008) (holding that in the Third Circuit, the requirements of Rule 9(b) are not met by "conclusory allegations that '[d]efendants' collectively engaged in fraudulent or deceitful acts" and where the allegations do not indicate who took such actions).

Plaintiff has failed to satisfy these requirements. Much like the rest of the Complaint, the allegations concerning fraudulent concealment are long on words and short on substance:

> 73. Defendant never told Plaintiff or other class members that they were fixing the prices of real-estate services. Accordingly, Plaintiffs and class members could not have even suspected the violations alleged herein at least until the FTC announced on February 13, 2009 that West Penn MLS had agreed to settle charges brought by the FTC[9] — which announcement did not even identify the brokerage defendants but only identified West Penn MLS — because defendants conducted their conspiracy secretly; concealed the nature of their illegal conduct; and fraudulently concealed their activities through various other means and methods designed to avoid detection, such as (a) meeting secretly to discuss fixing prices of real-estate services in the West Penn MLS Service Area during the class period; (b) using methods of communication in furtherance of the alleged conspiracy that were designed to avoid detection; (c) giving pretextual reasons for costs of real-estate services in the West Penn MLS Service Area during the class period; and (d) agreeing among themselves at meetings and in communications not to discuss or otherwise reveal the nature and substance of the acts and communications in furtherance of their illegal scheme.

[9] Again, the Consent Order is not an admission of any illegal conduct on the part of WPML.

Plaintiff provides zero factual detail in support of these conclusory allegations. Plaintiff does not identify when these clandestine meetings took place, who participated, and what was discussed. Plaintiff does not identify the "methods of communication in furtherance of the alleged conspiracy," nor who made such communications and when they were made. Plaintiff does not identify the "pretextual reasons" which served to conceal the conspiracy, nor who made these statements and to whom they were made. Plaintiff does not identify when or where the meetings at which unidentified defendants took an unspecified oath to keep the conspiracy a secret took place. Plaintiff have nothing more than an abundance of intricate conspiracy theories that are unsupported by factual allegations.

Under Rule 9(b), which is a pleading and not an evidentiary rule, Plaintiff must do more in order to toll the statute of limitations. On its face, the Complaint is time-barred and should be dismissed as there is no representative Plaintiff before this Court with a cognizable claim.

IV. CONCLUSION

As this Court is well aware, antitrust lawsuits are both time consuming and expensive. Based upon the numerous legal deficiencies contained in the Complaint, Defendants believe that the appropriate remedy here is for the Court to dismiss the Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served this 21st day of June, 2010 via the Court's ECF filing and/or email as follows:

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