

1 CHRISTOPHER G. RENNER (*Pro Hac Vice Forthcoming*)
chrisrenner@dwt.com
2 DOUGLAS E. LITVACK (*Pro Hac Vice Forthcoming*)
dougiltvack@dwt.com
3 DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., NW; Suite 800
4 Washington, DC 20006
Telephone: (202) 973-4200
5 Facsimile: (202) 973-4499

6 JOHN F. MCGRORY, JR. (*Pro Hac Vice Forthcoming*)
johnmcgrory@dwt.com
7 DAVIS WRIGHT TREMAINE LLP
1300 SW Fifth Avenue; Suite 2300
8 Portland, OR 97201
Telephone: (503) 241-2300
9 Facsimile: (503) 778-5299

10 EVERETT W. JACK, JR. (SBN 313870) (*Application Pending*)
everettjack@dwt.com
11 SCOTT R. COMMERSON (SBN 227460)
scottcommerson@dwt.com
12 DAVIS WRIGHT TREMAINE LLP
865 South Figueroa Street; 24th Floor
13 Los Angeles, California 90017-2566
Telephone: (213) 633-6800
14 Facsimile: (213) 633-6899

15 Attorneys for Plaintiff The PLS.com, LLC

16 UNITED STATES DISTRICT COURT
17 CENTRAL DISTRICT OF CALIFORNIA
18 WESTERN DIVISION
19

20 The PLS.com, LLC, a California limited
21 liability company,

22 Plaintiff,

23 vs.

24 The National Association of Realtors;
Bright MLS, Inc.; Midwest Real Estate
25 Data, LLC; and California Regional
Multiple Listing Service, Inc.,

26 Defendants.
27
28

Case No. 2:20-cv-04790

COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff The PLS.com, LLC, (“PLS”), by and through its undersigned
2 attorneys, brings this action for trebled compensatory damages and injunctive relief
3 under the antitrust laws of the United States, and under the laws of the State of
4 California, against the above-named Defendants, demanding a trial by jury. For its
5 Complaint against Defendants, PLS alleges the following:

6 **NATURE OF THE CASE**

7 1. For over 50 years, residential real estate in the United States has been
8 primarily marketed through the multiple listing services (“MLSs”) owned by
9 members of the National Association of Realtors (“NAR”).

10 2. NAR, by itself and through its affiliates, controls competition in the
11 residential real estate brokerage industry through its members’ ownership of most
12 of the nation’s MLSs.

13 3. NAR has frequently used its control over MLSs to exclude new and
14 disruptive market entrants to the benefit of NAR members, and the detriment of
15 consumers. NAR and its members have abused the market power conferred upon
16 them by control over the MLS system time and time again.

17 4. NAR’s ability to control competition in the residential real estate
18 brokerage industry rests on the market power of the MLSs operated by its members.

19 5. In recent years, the edifice on which NAR’s ability to control
20 competition was built had begun to crumble. For the first time in the life of most
21 Americans, an alternative to the NAR-affiliated MLS system had emerged,
22 promising a wave of innovation, competition, and new entry.

23 6. Home sellers have for years sought to retain the services of licensed
24 real estate professionals to market their homes outside of the NAR-affiliated MLS
25 system. Sellers sought these services for a number of reasons. Many sellers desired
26 for reasons of privacy or security to market their home without the wide exposure
27 that comes from listing a property in NAR-affiliated MLSs. Many sellers desired to
28 test the market for their home without the stigma that comes from listing and then

1 delisting the property on a NAR-affiliated MLS.

2 7. Listings marketed by licensed real estate professionals outside the
3 NAR-affiliated MLS system are sometimes called “pocket listings.” Demand for
4 pocket listing services has skyrocketed in recent years, particularly in large and
5 competitive real estate markets such as Los Angeles, San Francisco, Miami, and
6 Washington D.C. In some of these markets, 20 percent or more of residential real
7 estate was being sold outside the NAR-affiliated MLS system, primarily as pocket
8 listings. NAR recognized in 2018 that NAR members were competing with one
9 another to meet consumer demand for pocket listing services.

10 8. As consumer demand for pocket listing service grew, so did the need
11 for a centralized, searchable repository of pocket listings. PLS was formed as the
12 “Pocket Listing Service” to meet this need. Pocket listings had historically been
13 marketed bilaterally by licensed real estate professionals, face to face, through
14 phone calls, or by email. By joining PLS, licensed real estate professionals could
15 privately share pocket listings with other licensed real estate professionals while
16 avoiding the exposure of those listings through the NAR-affiliated MLSs. For
17 home sellers and the licensed real estate professionals serving those home sellers,
18 the PLS offered all of the benefits of the NAR-affiliated MLSs while retaining the
19 privacy and discretion that would be lost by listing with NAR-affiliated MLSs. For
20 home buyers and the licensed real estate professionals serving those home buyers,
21 the PLS offered an opportunity to learn about properties that were not widely
22 marketed.

23 9. The surge in consumer demand for pocket listings, and the rise of a
24 listing network to market pocket listings effectively, was a competitive threat to the
25 viability of the NAR-affiliated MLS system. These market changes also threatened
26 NAR’s ability to control competition in the residential real estate brokerage
27 industry.

28 10. NAR-affiliated MLSs were aware of this competitive threat.

1 Competing MLS systems met together privately and through NAR to discuss this
2 threat and formulated a common plan to eliminate that competitive threat.

3 11. In September 2019, the largest NAR-affiliated MLSs, including
4 Defendants California Regional Multiple Listing Service, Bright MLS, and
5 Midwest Real Estate Data, jointly authored and published a white paper on pocket
6 listings and the future of the NAR-affiliated MLS system. The white paper
7 provided that “The multiple listing service as we know it is in jeopardy and this
8 call-to-action serves as an impassioned plea to brokers and MLSs to take immediate
9 action.” The white paper identified the declining share of properties listed in NAR-
10 affiliated MLSs due to the “persistent, and increasing, presence of off-MLS home
11 marketing” as among the “largest challenges MLSs face[.]” The white paper
12 further noted the risk that one or more private listing networks would obtain a
13 critical mass of pocket listings that “could fuel the trend to power private listing
14 databases in general” which “will soon exceed, or circumvent, the service MLSs
15 offer.”

16 12. PLS was the listing network that NAR-affiliated MLSs feared. Having
17 amassed nearly 20,000 members, PLS had or would have soon attracted a critical
18 mass of members and listings to create a powerful network effect that was likely to
19 quickly lead to substantial market share as new members joined, bringing new
20 listings, attracting in turn more new members and more new listings in a virtuous
21 and self-sustaining cycle. The more competitive future that the NAR-affiliated
22 MLSs feared had arrived.

23 13. Acting through NAR, the NAR-affiliated MLSs moved swiftly to
24 eliminate the competitive threat from listing networks aggregating pocket listings.
25 In November 2019, NAR promulgated a mandatory rule governing all NAR-
26 affiliated MLSs. The rule, called the Clear Cooperation Policy, requires NAR
27 members participating in NAR-affiliated MLSs to submit their listings to the MLS
28 within one business day of marketing the property to the public. For purposes of

1 the Clear Cooperation Policy, NAR defines marketing a property to the public to
2 include listing on private “multi-brokerage listing sharing networks” such as PLS.
3 NAR members that violate the Clear Cooperation Policy face discipline and
4 punishment by other NAR members.

5 14. The Clear Cooperation Policy eliminates the viability of the private
6 network of pocket listings that the MLS Defendants and other NAR-affiliated MLSs
7 had identified as a competitive threat. By eliminating the threat to NAR-affiliated
8 MLSs, NAR cements its ability to control competition in the market for residential
9 real estate brokerage services.

10 15. Through the Clear Cooperation Policy, the Defendants eliminated the
11 possibility of a more competitive future in the market for residential real estate
12 listing network services. A once-in-a-lifetime opportunity for competition in a
13 monopolized market has been lost. Defendants’ conduct has harmed competition
14 and consumers, and is illegal.

15 **PLAINTIFF**

16 16. Plaintiff PLS is a California Limited Liability Company headquartered
17 in Los Angeles, California. At the time the Clear Cooperation Policy was adopted,
18 PLS operated the largest network of licensed real estate professionals marketing
19 pocket listings in the United States.

20 **DEFENDANTS**

21 17. Defendant NAR is a trade association headquartered in Chicago,
22 Illinois, that establishes and enforces policies and professional standards for its over
23 1.4 million members. NAR is incorporated under the laws of Illinois. Its 54 state
24 and territorial associations and over 1,200 local associations are members of, and
25 are overseen by, NAR. NAR promulgates rules governing the operation of the
26 approximately 600 MLSs that are affiliated with NAR through their ownership or
27 operation by NAR’s state, local and territorial associations. NAR is registered to do
28 business as a non-profit in the state of California and advertises and solicits

1 members in the state. It has more than 185,000 members in California, derives
2 revenue from California, and holds meetings in California. NAR also directs its
3 California-based members to follow rules it promulgates.

4 18. Defendant California Regional Multiple Listing Service, Inc.
5 (“CRMLS”) is the largest MLS in the United States with over 100,000 members
6 who have access to more than 70 percent of listings for sale in California. CRMLS
7 is owned and controlled by NAR members operating through 39 local associations
8 of NAR throughout the State of California. CRMLS is headquartered in Chino
9 Hills, California, and is incorporated under the laws of California. CRMLS is a
10 NAR-affiliated MLS governed and controlled by NAR rules.

11 19. Defendant Bright MLS, Inc. (“Bright MLS”) is a MLS serving the
12 Mid-Atlantic region of the United States with over 88,000 members. Bright MLS is
13 owned and controlled by NAR members operating through 43 local associations of
14 NAR members operating through local associations of NAR throughout the States
15 of New Jersey, Delaware, Maryland, Pennsylvania, West Virginia, the
16 Commonwealth of Virginia, and the District of Columbia. Bright MLS is
17 headquartered in Rockville, Maryland, and is incorporated under the laws of
18 Delaware. In a typical year, Bright MLS will facilitate approximately \$70 billion in
19 residential real estate transactions. Bright MLS is a NAR-affiliated MLS governed
20 and controlled by NAR rules.

21 20. Defendant Midwest Real Estate Data, LLC (“MRED”) is a MLS
22 serving northern Illinois, southern Wisconsin, and northwest Indiana with over
23 45,000 members. MRED is owned and controlled by NAR members operating
24 through 15 local associations of NAR throughout the States of Illinois, Wisconsin,
25 and Indiana. MRED is headquartered in Lisle, Illinois, and organized under the
26 laws of the Illinois. MRED is a NAR-affiliated MLS governed and controlled by
27 NAR rules.

28

JURISDICTION, STANDING AND VENUE

1
2 21. Plaintiff brings this action to recover damages, including treble
3 damages, cost of suit, and reasonable attorney's fees, as well as injunctive relief,
4 arising from Defendants' violations of Section 1 of the Sherman Antitrust Act, 15
5 U.S.C. § 1.

6 22. This Court has subject matter jurisdiction of Plaintiff's federal law
7 claims pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1337
8 (commerce and antitrust regulation).

9 23. Plaintiff has standing to bring this action under Sections 4 and 16 of
10 the Clayton Act, 15 U.S.C. §§ 15, 26.

11 24. This Court has subject matter jurisdiction of Plaintiff's pendent state
12 law claims pursuant to 28 U.S.C. § 1367. Plaintiff's state law claims arise out of
13 the same factual nucleus as Plaintiff's federal law claims.

14 25. This Court has personal jurisdiction over each Defendant and venue is
15 proper in the Central District of California and this division under Sections 4 and 12
16 of the Clayton Act, 15 U.S.C. §§ 15, 22, and 28 U.S.C. § 1391, because NAR and
17 CRMLS regularly transact business within the Central District of California, and
18 because Bright MLS and MRED formulated, led and joined a conspiracy among
19 NAR members and NAR-affiliated MLSs that expressly aimed their intentional and
20 anticompetitive conduct at California. All of the Defendants knew and specifically
21 intended that their conspiracy would be formulated, negotiated, and implemented in
22 California, would exclude competition in California (where they knew PLS was
23 based), and would harm consumers in California. The Defendants worked in
24 concert to effect NAR's adoption of the Clear Cooperation Policy at a 2019 NAR
25 Convention in California, and each Defendant committed overt acts in furtherance
26 of the Defendants' conspiracy in California. CRMLS, Bright MLS and MRED
27 (together, the "MLS Defendants") were among the NAR-affiliated MLSs that
28 caused the September 2019 white paper, setting forth the competitive threat from

1 pocket listings and the need for collective action among NAR-affiliated MLSs, to
2 be published from San Juan Capistrano, California.

3 26. Defendants are engaged in, and their activities substantially affect,
4 interstate trade and commerce. Billions of dollars flow across state lines in the
5 mortgage market to finance the sales of residential real estate facilitated by the MLS
6 Defendants.

7 **RESIDENTIAL REAL ESTATE BROKERAGE**

8 27. State law regulates entry into the residential real estate brokerage
9 services industry. There are two licensee categories: (i) the real estate broker; and
10 (ii) the individual real estate licensee or agent. Brokers supervise agents who work
11 directly with consumers. Agents solicit listings, work with homeowners to sell their
12 homes, and show buyers homes that are likely to match their preferences. Brokers
13 often provide agents with branding, advertising, and other services that help the
14 agents complete transactions.

15 28. Although there is no legal impediment to consumers buying and
16 selling homes on their own, the large majority of consumers choose to work with a
17 real estate broker. The substantial majority of residential real estate transactions
18 involve the services of licensed real estate professionals. According to NAR, in
19 2017, 92 percent of sellers sold their home and 87 percent of buyers purchased their
20 home with the assistance of a real estate broker.

21 29. The vast majority of licensed real estate professionals active in the
22 residential real estate brokerage services industry are NAR members.

23 30. NAR promulgates rules and codes of conduct for its members and for
24 its state, territorial and local associations. These associations, in turn, are required
25 to adopt NAR's rules and bylaws and to enforce NAR-promulgated rules upon the
26 licensed real estate professionals comprising the associations.

27 31. Until recently, with the surge in consumer demand for pocket listings,
28 NAR-affiliated MLSs facilitated the vast majority of residential real estate

1 transactions.

2 32. MLSs are joint ventures among virtually all licensed real estate
3 professionals operating in local or regional areas. Licensed real estate professionals
4 regard participation in their local MLS as critical to their ability to compete with
5 other licensed real estate professionals for home sellers and buyers. The MLS
6 combines its members' home listings information into a database, usually in
7 electronic form. The MLS then makes these data available to all licensed real estate
8 professionals who are members of the MLS. By listing in the MLS, a licensed real
9 estate professional can market properties to a large set of potential buyers. By
10 searching the MLS, a licensed real estate professional representing a buyer can
11 provide that buyer with information about all the listed homes in the area that match
12 the buyer's housing needs. An MLS is thus a market-wide joint venture of
13 competitors that possesses substantial market power: to compete successfully, a
14 licensed real estate professional must be a member; and to be a member, a licensed
15 real estate professional must adhere to any restrictions that the MLS imposes.

16 33. The state, territorial and local associations of NAR (sometimes referred
17 to as "Realtor® associations") own NAR-affiliated MLSs. NAR requires each of
18 these associations to comply with the mandatory provisions in NAR's Handbook on
19 Multiple Listing Policy.

20 34. NAR does not require that licensed real estate professionals be NAR
21 members to participate in NAR-affiliated MLSs. In Alabama, California, Florida,
22 and Georgia, NAR-affiliated MLSs are prohibited by law from promulgating any
23 such requirement. As a result, many licensed real estate professionals that are not
24 NAR members participate in NAR-affiliated MLSs.

25 35. NAR-affiliated MLSs, including the MLS Defendants, must adopt new
26 or amended NAR policies. NAR's Handbook on Multiple Listing Policy states that
27 NAR-affiliated MLSs "must conform their governing documents to the mandatory
28 MLS policies established by the National Association's Board of Directors to

1 ensure continued status as member boards and to ensure coverage under the master
2 professional liability insurance program.”

3 36. One of the many benefits that NAR provides to its state, territorial and
4 local associations and the MLSs owned by those associations is professional
5 liability insurance. To be eligible for this insurance, associations and their MLSs
6 must comply with the mandatory provisions in the Handbook on Multiple Listing
7 Policy. NAR threatens to withhold these valuable insurance benefits from
8 associations and MLSs that fail to comply with these mandatory provisions. NAR’s
9 Handbook states that “[t]hose associations or multiple listing services found by the
10 National Association to be operating under bylaws or rules and regulations not
11 approved by the National Association are not entitled to errors and omissions
12 insurance coverage and their charters are subject to review and revocation.”

13 37. NAR reviews the governing documents of its state, territorial and local
14 associations to ensure compliance with its rules. NAR requires its state, territorial
15 and local associations to demonstrate their compliance with these rules by
16 periodically sending their governing documents to NAR for review.

17 **THE NAR-AFFILIATED MLS SYSTEM**

18 38. For decades, the NAR-affiliated MLSs have often been regarded as a
19 permanent, unavoidable, and inevitable feature of the residential real estate
20 brokerage industry. NAR-affiliated MLSs have for decades enjoyed durably high
21 market shares in markets across the country.

22 39. The majority of NAR-affiliated MLSs, including the MLS Defendants,
23 are managed as for-profit enterprises that serve as the primary revenue stream for
24 their owners, the state, territorial and local associations of NAR, whose
25 shareholders use the funds for other purposes.

26 40. All NAR-affiliated MLSs are actual or potential competitors with other
27 NAR-affiliated MLSs. NAR-affiliated MLSs frequently have overlapping service
28 areas and licensed real estate professionals may choose to pay for access to only one

1 of several available NAR-affiliated MLSs.

2 41. NAR-affiliated MLSs charge licensed real estate professionals for
3 access to each MLS. The prices charged by NAR-affiliated MLSs to licensed real
4 estate professionals for access to the MLS are excessive, above competitive levels,
5 and unrelated to the MLSs' cost of service.

6 42. NAR-affiliated MLSs have been slow to innovate and unresponsive to
7 consumer demand. According to NAR-affiliated MLSs writing in 2019, "the
8 software used in most MLSs has become obsolete."

9 43. According to a white paper commissioned by NAR-affiliated MLSs in
10 2017, "Almost everyone interviewed for this study feels that the MLS industry has
11 meandered aimlessly for over a decade. There are of course various reasons, but the
12 dominant contributing factor is the fact that most MLS organizations are owned and
13 governed by Realtor® associations. And Realtor® associations, and their
14 fragmentally managed committee structure, are simply not geared to compete in
15 today's new, bold, fast-paced technology arena."

16 44. A Chief Executive Officer of one NAR-affiliated MLS stated in 2017,
17 "As an industry, we have outdated technology that is the result of the community
18 we represent resisting change. There are perhaps 30 to 40 MLSs across the country
19 that have it right or are moving toward the right direction, but there are also 650
20 MLS organizations that are continuing to rest on how they have done it for decades.
21 They are ignoring the fact that the marketplace and the needs of the user have
22 changed, and their failure to respond is spiraling the MLS industry to the bottom."

23 45. Another Chief Executive Officer of a NAR-affiliated MLS stated in
24 2017, "The MLS has a business model problem. The industry has forgotten who
25 their customers are. The industry's longstanding 'product in a box' solution is no
26 longer valid and the platform it is delivered on is antiquated. In essence, the MLS is
27 still trying to operate as a gatekeeper and continues to block real estate
28 professionals from having access to the best-in-class products they need to help

1 | them do their job.”

2 | 46. The regionally-fragmented system of NAR-affiliated MLSs is
3 | inefficient and imposes unnecessary and redundant costs on licensed real estate
4 | professionals. According to an executive of a large real estate brokerage in 2017,
5 | “Mid-sized and large brokerages that operate across states and regions face unique
6 | challenges in having to belong to multiple MLSs, and that can be costly, redundant
7 | and inefficient.” According to a 2015 study commissioned by NAR, “An estimated
8 | \$250-\$500 million in MLS fees are attributable to duplication, redundancy, and
9 | excess among MLSs every year. If economies of scale were implemented
10 | nationwide, MLS fees would be significantly less.”

11 | 47. There is consumer demand for a listing network aggregating listings
12 | nationwide. According to a 2015 study commissioned by NAR, “A national MLS
13 | has been talked about for decades, but never before has the likelihood of it actually
14 | becoming a reality been so high.”

15 | **POCKET LISTINGS CREATE THE OPPORTUNITY FOR COMPETITION**

16 | 48. MLSs, like other networks, exhibit what economists call “network
17 | externalities,” meaning the value of the network services is a function of the number
18 | of trading partners connected by the network.

19 | 49. The dominance of NAR-affiliated MLSs is a function of the percentage
20 | share of listings submitted to NAR-affiliated MLSs by licensed real estate
21 | professionals. When all or almost all listings are submitted to the NAR-affiliated
22 | MLSs, the possibility of effective competition to those MLSs is nil. Conversely,
23 | when listings are not submitted to the MLS and are marketed by licensed real estate
24 | professionals in other ways, the possibility of competition to the MLSs emerges.
25 | And when a critical mass of listings becomes available for a competing listing
26 | network, the possibility of head-to-head, network-to-network competition becomes
27 | real.

28 | 50. The dominance of NAR-affiliated MLSs is neither inevitable nor

1 efficient. The surge in consumer demand for pocket listings created, for the first
2 time in living memory, the possibility of competition for the NAR-affiliated MLSs.
3 Pocket listings presented the opportunity for a competing listing network to
4 aggregate a critical mass of listings that could support a listing network competing
5 with the NAR-affiliated MLSs.

6 51. According to a 2015 study commissioned by NAR, “Off-MLS listings
7 may contribute to the unraveling of the MLS as we know it, and its replacement by
8 a private network that serves to benefit a certain group of participants.”

9 52. There is substantial and unmet demand among licensed real estate
10 professionals, and among the customers they serve, for an alternative to the NAR-
11 affiliated MLSs.

12 53. According to a 2015 study commissioned by NAR, “A number of
13 industry initiatives suggest that the current MLS-centric era might be coming to an
14 end. After half a century of operating as the only gateway, there is a strong
15 likelihood that the MLS may lose its exclusive positioning as the principal source of
16 real estate listings.”

17 54. According to the President and Chief Executive Officer of a network of
18 large real estate brokerage firms in 2017, “MLS has been of great value to agents,
19 but their loyalty to the MLS is waning ... For the first time, the industry has entered
20 a world where there are realistic and legitimate attempts to create alternatives to the
21 MLS that exists today.”

22 55. As one licensed real estate professional wrote after the NAR Clear Co-
23 operation Policy was adopted, “I long for the day when a private company decides
24 to create an MLS platform that competes with association-owned MLSs freeing us
25 from the clutches of NAR.”

26 **PLS WAS A COMPETITIVE THREAT TO NAR’S MLS SYSTEM**

27 56. PLS was formed in 2017 to address the demand of licensed real estate
28 professionals, and for the consumers they serve, for an alternative to the NAR-

1 affiliated MLS system.

2 57. Like the NAR-affiliated MLSs, PLS is a private network limited to
3 licensed real estate professionals.

4 58. The PLS, like the NAR-affiliated MLSs, is a means for licensed real
5 estate professionals to cooperate in the sale of residential real estate. Like the
6 NAR-affiliated MLSs, PLS operates an electronic database of listings submitted by
7 PLS members with an offer of compensation to other PLS members that can find a
8 buyer. Like the NAR-affiliated MLSs, PLS then makes these data available to all
9 licensed real estate professionals who are members of the PLS.

10 59. Unlike the NAR-affiliated MLSs, licensed real estate professionals
11 listing on PLS could share as much or as little information about the listing as their
12 client desired. In this way, the PLS combined the powerful network efficiencies of
13 the MLS with the privacy and discretion of the pocket listing.

14 60. Before PLS was launched, there was no place for licensed real estate
15 professionals to privately list, search, organize and share information about pocket
16 listings.

17 61. PLS's fees to licensed real estate professionals would have been
18 substantially lower than the fees charged for similar services to licensed real estate
19 professionals by the NAR-affiliated MLSs.

20 62. PLS was designed and marketed as a national platform, unlike the
21 fragmented NAR-affiliated MLS system that imposes duplicative and burdensome
22 fees on brokerages operating in multiple geographic markets.

23 63. PLS was an actual or potential competitor to every single NAR-
24 affiliated MLS, including each MLS Defendant. At the time the Clear Cooperation
25 Policy was adopted, PLS had members across the country, including in the service
26 areas of the MLS Defendants.

27 64. PLS launched successfully and grew quickly. At the time the Clear
28 Cooperation Policy was adopted, nearly 20,000 licensed real estate professionals

1 were cooperating to sell billions of dollars of residential real estate listings
2 nationwide.

3 65. PLS was a serious competitive threat to the NAR-affiliated MLS
4 system.

5 66. NAR and the NAR-affiliated MLSs, including the MLS Defendants,
6 were aware of this competitive threat to the NAR-affiliated MLS system and acted
7 through the Clear Cooperation Policy and otherwise to eliminate this threat.

8 **NAR AND ITS AFFILIATES EXCLUDE COMPETITION**

9 67. For the NAR-affiliated MLSs, pocket listings are a form of lost market
10 share. The NAR-affiliated MLSs were concerned that a critical mass of pocket
11 listings could be aggregated in a competing listing network, making possible for the
12 first time network-to-network competition to the MLS system.

13 68. NAR-affiliated MLSs recognized that they could not unilaterally
14 eliminate the competitive threat that pocket listings posed, in part because pocket
15 listings are a national phenomenon and could create the possibility of a nationwide
16 competitor to the MLS system. NAR-affiliated MLSs recognized the need for
17 collective action among NAR-affiliated MLSs, in the form of a change to the
18 mandatory provisions in NAR's Handbook on Multiple Listing Policy that would
19 require all NAR-affiliated MLSs to take action to stamp out the possibility of
20 competitive entry presented by the rise of pocket listings.

21 69. In August 2019, NAR's MLS Technology and Emerging Issues
22 Advisory Board voted to recommend the adoption of what would become the Clear
23 Cooperation Policy at the upcoming NAR Convention in San Francisco, California.
24 The members present for this vote included executives of NAR-affiliated MLSs,
25 including Defendant MRED.

26 70. NAR admits that the Clear Cooperation Policy was formulated and
27 advanced by the NAR-affiliated MLSs. According to NAR, "The association's
28 MLS Technology and Emerging Issues Advisory Board, a group made up

1 of brokers and MLS executives, developed the proposal in consultation with
2 brokerage and MLS leaders across the industry.”

3 71. NAR-affiliated MLSs around the country communicate frequently and
4 privately among themselves regarding pocket listings, using internet forums and
5 social media, and through the Council of Multiple Listing Services (“CMLS”), an
6 association of approximately 200 NAR-affiliated MLSs.

7 72. MRED’s Chief Executive Officer admits that these private interfirm
8 communications among NAR-affiliated MLSs, including MRED and the other MLS
9 Defendants, were the means by which the Clear Cooperation Policy was formulated
10 and advanced.

11 73. In September 2019, Bright MLS, MRED, and CRMLS were among the
12 signatories of the white paper issued by the largest NAR-affiliated MLSs that called
13 for collective action to address the threat to the MLS system presented by the rise of
14 pocket listings and the prospect of a competing listing network that would aggregate
15 such listings.

16 74. On October 16, 2019, Defendant Bright MLS adopted a version of
17 what would become the Clear Cooperation Policy, before having any obligation
18 under NAR rules or otherwise to do so.

19 75. On or around the same day, Defendant MRED published a statement
20 supporting adoption by NAR of the Clear Cooperation Policy at the upcoming NAR
21 Convention.

22 76. On October 17 and 18, 2019, NAR-affiliated MLSs, including the
23 MLS Defendants, met at a CMLS conference in Salt Lake City, Utah to discuss the
24 competitive threat presented by pocket listings and the need for NAR to take action
25 at the upcoming NAR Convention to eliminate that threat through adoption of the
26 Clear Cooperation Policy.

27 77. On October 17, 2019, the Chief Executive Office of MRED addressed
28 the assembled representatives of the NAR-affiliated MLSs at the CMLS conference.

1 MRED's Chief Executive Officer, who had attended the August NAR meeting
2 where the Clear Cooperation Policy was first proposed and recommended,
3 explained that the Clear Cooperation Policy was motivated by concerns that pocket
4 listings were "making the MLS less valuable." At this October 2019 CMLS
5 conference, representatives of the assembled NAR-affiliated MLSs were provided
6 with copies of MRED's published statement in support of the Clear Cooperation
7 Policy and urged to review it.

8 78. On October 17, 2019, the Chairman of Bright MLS addressed
9 representatives of the NAR-affiliated MLSs at the CMLS conference, recited the
10 fact that Bright MLS the day before had adopted a policy banning pocket listings,
11 and urged the assembled NAR-affiliated MLSs to adopt similar policies. The
12 Chairman of Bright MLS also urged the representatives of the NAR-affiliated
13 MLSs to attend the upcoming NAR Convention, and to work as a group at that
14 meeting to ensure NAR's adoption of the Clear Cooperation Policy.

15 79. Among other things, the Chairman of Bright MLS stated "Now, the
16 people who want to do pocket listings? They're a little pissed. They'll get over it.
17 We need to not worry about it. Because that's bad for our industry, right? All right,
18 let me tell you what we all need to do. We have an opportunity in front of us to
19 make, put this policy into effect in November. And Bright adopted it yesterday,
20 MRED's already adopted it, other people are already doing it, but we really need to
21 get it through."

22 80. The Chairman of Bright MLS continued on: "So what do we need to
23 do? We need to go back and talk to your Boards of Directors, talk to your big
24 brokers, and make sure that they understand we're talking pocket listings and not
25 everything else and make sure that they understand. And then you need to make a
26 policy statement. What are you guys going to do? And then you need to come to
27 that MLS forum, and you need to line up at the microphone and say 'Bright MLS,
28 we're all in. 8.0. Go.'" What would become the Clear Cooperation Policy was

1 referred to at this time as MLS Statement 8.0.

2 81. The Chairman of Bright MLS explained to the representatives of the
3 assembled NAR-affiliated MLSs that he anticipated a degree of resistance to
4 passage of the Clear Cooperation Policy at the upcoming NAR Convention, in part
5 from NAR members who wished to continue to offer pocket listings.

6 82. The Chairman of Bright MLS urged the representatives of the
7 assembled MLSs to contact members of their MLS who were on NAR's Board of
8 Directors to advocate for the adoption of the Clear Cooperation Policy at the
9 upcoming NAR Convention.

10 83. The Chairman of Bright MLS urged the representatives of the
11 assembled NAR-affiliated MLSs to take collective action in the State of California
12 to effect the adoption of the Clear Cooperation Policy. Specifically, the Chairman
13 of Bright MLS said "I look forward to seeing you in San Francisco. I look forward
14 to us, in this room, getting this through."

15 84. In November 2019, the Defendants gathered in San Francisco to take
16 action on the Clear Cooperation Policy. On November 9, 2019, NAR's Multiple
17 Listing Issues and Policies Committee approved the Clear Cooperation Policy by a
18 voice vote, sending the Policy to NAR's Board of Directors. Executives of the
19 NAR-affiliated MLSs, including Bright MLS and MRED, attended this meeting and
20 spoke in support of the Clear Cooperation Policy. As had been discussed and
21 planned at the October CMLS conference, other NAR-affiliated MLSs did the
22 same. At this meeting, elimination of competition to NAR-affiliated MLSs from
23 networks aggregating pocket listings was cited as a reason for passage of the Clear
24 Cooperation Policy.

25 85. NAR's Executive Committee reviewed and discussed the Clear
26 Cooperation Policy at the San Francisco meeting on November 10, 2019. NAR's
27 Board of Directors approved the Clear Cooperation Policy at the San Francisco
28 meeting on November 11, 2019.

1 86. NAR adopted the Clear Cooperation Policy over the complaints of
2 some NAR members, who informed NAR that the policy was anticompetitive and
3 likely illegal.

4 87. The text of the Clear Cooperation Policy provides:

5 “Within one (1) business day of marketing a property to the public, the
6 listing broker must submit the listing to the MLS for cooperation with
7 other MLS participants. Public marketing includes, but is not limited
8 to, flyers displayed in windows, yard signs, digital marketing on public
9 facing websites, brokerage website displays (including IDX and
10 VOW), digital communications marketing (email blasts), multi-
11 brokerage listing sharing networks, and applications available to the
12 general public. (Adopted 11/19).”

13 88. The Clear Cooperation Policy was effective January 1, 2020, and was
14 included as a mandatory rule in the 2020 version of the NAR Handbook on Multiple
15 Listing Policy. NAR required that all NAR-affiliated MLSs, including each MLS
16 Defendant, modify their rules to conform to the Clear Cooperation Policy by May 1,
17 2020. NAR admits that all NAR-affiliated MLSs, including each MLS Defendant,
18 must adopt and enforce the Clear Cooperation Policy. According to NAR, “By
19 establishing a national policy, it is mandatory that all REALTOR® Association
20 MLSs adopt the policy and have the same consistent standard.”

21 89. NAR admits that there are no exceptions for properties that are
22 “publicly marketed.” According to NAR, “The new policy does not include an ‘opt
23 out.’ Any listing that is ‘publicly marketed’ must be filed with the service and
24 provided to other MLS Participants for cooperation within (1) one business day.”

25 90. Previously, NAR-affiliated MLSs had generally allowed members to
26 withhold listings from the MLS if the seller of the property so desired. The Clear
27 Cooperation Policy eliminates this possibility, and in that way renders the provision
28 of residential real estate brokerage services unresponsive to consumer demand.

1 91. The Clear Cooperation Policy does, however, have an exception that
2 allows brokerages to maintain so-called “office listings,” or listings marketed
3 entirely within a brokerage firm, without submission of those listing to the MLS.

4 92. NAR-affiliated MLSs, including each MLS Defendant, enforce the
5 Clear Cooperation Policy by monitoring adherence to the policy, encouraging MLS
6 members to report their colleagues using pocket listings, and through fines for non-
7 compliance. For example, one MLS in South Florida, a market where consumer
8 demand for pocket listings is high, describes the penalties it levies for violations of
9 the Clear Cooperation Policy as “severe,” including maximum fines of up to
10 \$15,000 and possible suspension or termination of access to the MLS. The
11 penalties imposed by the NAR-affiliated MLSs for violations of the Clear
12 Cooperation Policy are intended to, and in fact do, make violations of the Clear
13 Cooperation Policy cost-prohibitive for NAR members, and are a constructive
14 refusal to offer MLS services to NAR members that violate the Clear Cooperation
15 Policy.

16 93. Since the adoption of the Clear Cooperation Policy, NAR-affiliated
17 MLSs, including MRED, have operated, or planned to operate, their own private
18 listing networks, effectively allowing their members to market off-MLS listings
19 under the auspices of the NAR-affiliated MLSs without violation of the Clear
20 Cooperation Rule.

21 94. NAR-affiliated MLSs and CMLS have admitted that the purpose of the
22 Clear Cooperation Policy was to maintain the market dominance of the NAR-
23 affiliated MLS system, and specifically to exclude PLS.

24 **RELEVANT MARKET**

25 95. PLS and the NAR-affiliated MLSs, including the MLS Defendants,
26 compete to offer listing networks that facilitate the sale of residential real estate
27 listings among licensed residential real estate professionals in the United States.

28 96. The provision of listing network services to licensed real estate

1 professionals for the sale of residential real estate listings is a relevant antitrust
2 market. Consumers of listing network services for the sale of residential real estate
3 listings view these networks, including the NAR-affiliated MLSs and PLS, as
4 substitutes for each other.

5 97. One relevant geographic market is the United States. Licensed real
6 estate professionals and their customers seek listing network services that aggregate
7 listings nationwide, from across the United States. In the alternative, each and
8 every service area of a NAR-affiliated MLS, including the service areas of each
9 MLS Defendant, is a relevant geographic market.

10 98. The Defendants collectively have substantial market power in the
11 relevant market or markets, however defined. Substantial barriers to entry exist to
12 protect that market power, as shown by the durably high market shares enjoyed by
13 the NAR-affiliated MLSs and NAR's ability to exclude competition. NAR and
14 NAR-affiliated MLSs, including the MLS Defendants, have the power to profitably
15 elevate the prices paid by licensed real estate professionals for access to NAR-
16 affiliated MLSs above the competitive level, and to impose onerous conditions of
17 access on licensed real estate professionals, including the Clear Cooperation Policy.

18 **DEFENDANTS' UNLAWFUL CONDUCT**

19 99. The Defendants agreed with one another to exclude PLS. The
20 Defendants had a conscious commitment to a common scheme to prevent the
21 emergence of a viable competitor to NAR-affiliated MLSs, to exclude PLS from the
22 relevant market, and to eliminate PLS as an effective competitor. Defendants took
23 overt acts in furtherance of this conspiracy.

24 100. NAR is a combination or conspiracy among its members, who are
25 licensed real estate professionals who compete with one another. The members of
26 NAR, as a group and through the Board they elect and the staff they indirectly
27 employ, have agreed to, adopted, maintained, and enforced rules, including the
28 Clear Cooperation Policy, affecting how members compete to provide brokerage

1 services, participate in NAR-affiliated MLSs, and access MLS services. NAR's
2 members agree (and adhere) to NAR's code of ethics, bylaws, and rules as a
3 condition of membership. NAR's rules, including the Clear Cooperation Policy, are
4 therefore the product of agreements and concerted action among its members,
5 including the owners of the NAR-affiliated MLSs that operate and control the MLS
6 Defendants.

7 101. The adoption and enforcement of the Clear Cooperation Policy by the
8 MLS Defendants is also the product of agreements and concerted action (i) among
9 the MLS Defendants and (ii) between each MLS Defendant and their members.
10 Each MLS Defendant is owned and controlled by associations of competing real
11 estate brokers, who collectively have the power to admit new members, propose
12 bylaws, and enact rules for members. The MLS Defendants' rules are an agreement
13 among competitors that define the way in which they will compete with one
14 another.

15 102. The Clear Cooperation Policy and the overt acts taken by NAR and
16 NAR-affiliated MLSs, including the MLS Defendants, in formulating, adopting,
17 implementing, and enforcing that Policy, are unreasonable restraints of trade.

18 103. The Clear Cooperation Policy imposes an "all or nothing" term on
19 licensed real estate professionals that seek to use listing networks: the licensed real
20 estate professional must either submit all such listings to the NAR-affiliated MLSs,
21 or risk losing access to the NAR-affiliated MLSs.

22 104. The "all or nothing" term imposed on licensed real estate professionals
23 by the Clear Cooperation Policy is exclusionary.

24 105. Because licensed real estate professionals generally believe that they
25 must submit at least a portion of their listings to NAR-affiliated MLSs to serve their
26 customers, the Clear Cooperation Policy predictably ensures that all listings are
27 submitted to NAR-affiliated MLSs.

28 106. By ensuring that all listings are submitted to NAR-affiliated MLSs, the

1 Clear Cooperation Policy eliminates the ability of listing networks that compete
2 with the NAR-affiliated MLSs to feature listings that are not on the NAR-affiliated
3 MLSs, and ensures that the NAR-affiliated MLSs will always offer a superset of the
4 listings available on any listing network.

5 107. By ensuring that the NAR-affiliated MLSs will always offer a superset
6 of the listings available on any listing network, the Clear Cooperation Policy
7 degrades the quality of competing listing networks, reduces the incentives of
8 licensed real estate professionals to use those competing listing networks, and
9 makes those competing listing networks less effective competitors to the NAR-
10 affiliated MLSs.

11 108. By ensuring that the NAR-affiliated MLSs will always offer a superset
12 of the listings available on any listing network, the Clear Cooperation Policy
13 imposes a penalty on the use of competing listing networks and creates strong
14 economic incentives for licensed real estate professionals to purchase listing
15 network services exclusively from NAR-affiliated MLSs. By ensuring that licensed
16 real estate professionals accessing listings through a competing listing network pay
17 twice for access to the same listings, the Clear Cooperation Policy creates strong
18 economic incentives for licensed real estate professionals to exclusively use NAR-
19 affiliated MLSs to avoid the surcharge imposed by the Clear Cooperation Policy on
20 the use of competing listing networks.

21 109. The Clear Cooperation Policy has had actual and substantial
22 anticompetitive effects by eliminating the ability and incentive of licensed real
23 estate professionals to market pocket listings through PLS or any other listing
24 network, thereby harming competition in the market for the provision of listing
25 network services to licensed real estate professionals.

26 110. By eliminating the ability and incentive of licensed real estate
27 professionals to market pocket listings through PLS or any other listing network,
28 the Clear Cooperation Policy forecloses competing listing networks from access to

1 a critical mass of listings necessary to obtain significant network effects and
2 compete with the NAR-affiliated MLSs in the relevant market(s). All or nearly all
3 active licensed real estate professionals depend upon access to NAR-affiliated
4 MLSs.

5 111. Through the Clear Cooperation Policy, NAR and the NAR-affiliated
6 MLSs maintained the cost of listing network services for residential real estate
7 listings above a competitive level, and otherwise stifled competition in the market
8 for listing network services for residential real estate listings. In that way, the
9 conduct of NAR and the NAR-affiliated MLSs harmed (i) real estate professionals
10 serving both buyers and sellers of residential real estate services that desired to use
11 listing networks other than those operated by the NAR-affiliated MLSs, and also (ii)
12 those buyers and sellers of residential real estate.

13 112. The Clear Cooperation Policy also harmed consumers and competition
14 by eliminating from the market a form of real estate brokerage services desired by
15 consumers, and which lowered barriers to entry for listing networks competing with
16 the NAR-affiliated MLSs. There was substantial consumer demand for pocket
17 listings. Before the Clear Cooperation Policy, licensed real estate professionals,
18 including but not limited to NAR members, competed to offer pocket listings, and
19 listing networks that competed with the NAR-affiliated MLSs were formed.
20 Through the Clear Cooperation Policy, NAR restrained the ability of licensed real
21 estate professionals to offer those services. Because NAR and its members
22 collectively have market power, NAR's restraint on the ability of licensed real
23 estate professionals to offer pocket listings has excluded competition in the relevant
24 market(s), restricted output of residential real estate brokerage services and
25 rendered the provision of those services unresponsive to consumer demand.

26 113. There is no cognizable or plausible procompetitive justification for the
27 Defendants' unlawful conduct, or one that outweighs its anticompetitive effects.
28 NAR's tolerance of off-MLS listings when privately marketed by NAR members

1 that do not compete with the NAR-affiliated MLSs as listing networks (the “office
2 listing” exclusion) or under the auspices of NAR-affiliated MLSs shows that NAR’s
3 asserted justifications for the Clear Cooperation Policy are pretext, and illuminate
4 the purpose and effect of the Clear Cooperation Policy as the elimination of
5 competition to the NAR-affiliated MLSs in the relevant market(s) from PLS and
6 other licensing networks not affiliated with NAR.

7 114. For nearly 60 years, NAR’s Bylaws have recognized that forcing NAR
8 members to list properties in the MLS in the routine provision of real estate
9 brokerage services is improper and not reasonably related to any legitimate business
10 justification. Since 1960, Interpretation No. 1 of Article 1, Section 2 of NAR’s
11 Bylaws has provided that “A requirement to participate in a Multiple Listing
12 Service in order to gain and maintain REALTOR® membership is an inequitable
13 limitation on its membership. When a Multiple Listing Service is available, is well
14 operated and properly organized, it is the duty of the REALTOR® to consider
15 thoroughly whether he can serve the best interests of his clients by participating in
16 it. The decision, however, must be his own. As a REALTOR®, it is possible for
17 him to conduct business in an ethical and efficient manner without participating in a
18 Multiple Listing Service. Therefore, his participation must not be a requirement of
19 REALTOR® membership.”

20 115. According to NAR’s handbook on Multiple Listing Policy, “Any
21 multiple listing activity in which it is compulsory that all members of an association
22 of REALTORS® participate and submit information on all designated types of
23 listings would be in direct conflict with the National Association’s bylaws, Article I,
24 Section 2, which bans the adoption by associations of REALTORS® of inequitable
25 limitations on membership.”

26 116. The Clear Cooperation Policy is also overbroad and restrains
27 competition unnecessarily. The Clear Cooperation Policy was passed by NAR
28 members but limits the ability of licensed real estate professionals who are not NAR

1 members to compete using alternative listing network services because even non-
2 NAR members generally depend upon access to the NAR-affiliated MLSs for at
3 least some of their business. NAR has no legitimate business justification for using
4 NAR rules to restrain the ability of non-NAR members to deal with PLS and other
5 listing networks that compete with the NAR-affiliated MLSs. The overbreadth of
6 the Clear Cooperation Policy illuminates its anticompetitive purpose and effect.

7 117. PLS suffered injury and damages as a result of Defendants' unlawful
8 conduct. Adoption and implementation of the Clear Cooperation Policy had the
9 natural and intended effect on PLS's business operations. Listings were removed
10 from PLS and submitted instead to NAR-affiliated MLSs. Agent participation in
11 PLS declined. PLS's access to capital was constrained. PLS was foreclosed from
12 the commercial opportunities necessary to innovate and grow.

13 118. Injury to PLS was the direct, foreseeable and intended result of the
14 Defendants' conduct. The Defendants' conduct simultaneously harmed PLS and
15 consumers in the relevant market by excluding PLS and thereby artificially
16 maintaining or increasing the prices paid by licensed real estate professionals for
17 listing network services for the sale of residential real estate. Although the
18 mechanism of injury to PLS and to licensed real estate professionals (and thereby to
19 consumers) is the same, the damages caused by Defendants' conduct in the form of
20 higher prices is distinct from, and not duplicative of, the damages caused to PLS,
21 which take the form of lost profits and damaged equity and goodwill. PLS is the
22 most direct victim of the Defendants' conduct, and apportionment of the harms
23 suffered by PLS and those suffered by less-direct victims of the Defendants'
24 conduct will not be difficult.

25 //

26 //

27 //

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PLS’S CLAIMS FOR RELIEF

COUNT ONE

(Violation of the Sherman Act)

119. Plaintiff hereby restates Paragraphs 1 through 118 of this Complaint. The Defendants’ conduct as alleged herein are unreasonable restraints of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

120. The Defendants’ conduct has caused injury and damage to PLS in the form of lost profits.

121. The Defendants’ conduct has caused injury and damage to PLS in the form of lost equity and goodwill, diminishing the value of PLS as a going concern.

COUNT TWO

(Violation of the Cartwright Act)

122. Plaintiff hereby restates Paragraphs 1 through 118 of this Complaint. The Defendants’ conduct as alleged herein are unreasonable restraints of trade in violation of the Cartwright Act, Bus. & Prof. Code § 16720(a)-(c).

123. The Defendants’ conduct has caused injury and damage to PLS in the form of lost profits.

124. The Defendants’ conduct has caused injury and damage to PLS in the form of lost equity and goodwill, diminishing the value of PLS as a going concern.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays for relief and judgment against Defendants as follows:

- 1. Enter an Order permanently enjoining the Defendants from enforcing the Clear Cooperation Policy or any variant of that policy;
- 2. Award compensatory and trebled damages in favor of the Plaintiff and against all Defendants, jointly and severally, including all interest thereon;
- 3. Award Plaintiff reasonable costs and expenses incurred in this action, including attorneys’ fees and expert fees; and

1 4. Any other and further relief as the Court deems just and proper.

2 **DEMAND FOR TRIAL BY JURY**

3 Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff
4 hereby demands a trial by jury on all issues so triable.

5
6 DATED: May 28, 2020

DAVIS WRIGHT TREMAINE LLP

7
8 By: /s/ Scott R. Commerson

9 CHRISTOPHER G. RENNER
10 (Pro Hac Vice Forthcoming)
11 chrisrenner@dwt.com
12 DOUGLAS E. LITVACK
13 (Pro Hac Vice Forthcoming)
14 douglitvack@dwt.com
15 DAVIS WRIGHT TREMAINE LLP
16 1919 Pennsylvania Ave., NW; Suite 800
17 Washington, DC 20006
18 Telephone: (202) 973-4200
19 Facsimile: (202) 973-4499

20 JOHN F. MCGRORY, JR.
21 (Pro Hac Vice Forthcoming)
22 johnmcgrory@dwt.com
23 DAVIS WRIGHT TREMAINE LLP
24 1300 SW Fifth Avenue; Suite 2300
25 Portland, OR 97201
26 Telephone: (503) 241-2300
27 Facsimile: (503) 778-5299

28 EVERETT W. JACK, JR. (SBN 313870)
(Application Pending)
everettjack@dwt.com
SCOTT R. COMMERSON (SBN 227460)
scottcommerson@dwt.com
DAVIS WRIGHT TREMAINE LLP
865 South Figueroa Street; 24th Floor
Los Angeles, California 90017-2566
Telephone: (213) 633-6800
Facsimile: (213) 633-6899

*Attorneys for Plaintiff
The PLS.com, LLC*