QUINN EMANUEL URQUHART & SULLIVAN, LLP
Ethan Glass (Bar No. 216159)
ethanglass@quinnemanuel.com
William A. Burck (*pro hac vice* pending)
williamburck@quinnemanuel.com
Michael D. Bonanno (*pro hac vice* pending)
mikebonanno@quinnemanuel.com
1300 I St. NW, Suite 900
Washington, District of Columbia 20005
Telephone: (202) 538-8000
Facsimile: (202) 538-8100

Attorneys for Defendants
National Association of REALTORS®,
California Association of REALTORS®, Inc., and
San Francisco Association of REALTORS®

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TOP AGENT NETWORK, INC.,

Plaintiff,

v.

NATIONAL ASSOCIATION OF REALTORS, CALIFORNIA ASSOCIATION OF REALTORS, INC., and SAN FRANCISCO ASSOCIATION OF REALTORS,

Defendants.

Case No. 3:20-CV-03198-VC

DEFENDANTS' MOTION TO DISMISS TAN'S COMPLAINT FOR FAILURE TO STATE A CLAIM – FED. R. CIV. P. 12(B)(6)

Hearing Date: September 17, 2020
Time: 10:00 a.m.
Place: Courtroom 4, 17th Floor
Judge: Hon. Vince Chhabria

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 17, 2020, at 10:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Vince Chhabria, in Courtroom 4 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, California, 94102, Defendants National Association of REALTORS®, California Association of REALTORS®, Inc., and San Francisco Association of REALTORS® will and hereby do move this Court for an order granting their Motion to Dismiss the Complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6). Pursuant to Standing Order ¶ 8, counsel for Defendants conferred with opposing counsel prior to filing this motion, and they agreed September 17, 2020 was a convenient date for the motion to be heard. The motion is based on this Notice of Motion, the Memorandum of Points and Authorities, the Court's files in this action, the oral argument of counsel at the hearing, and on such materials and evidence as may be presented to the Court.

RELIEF REQUESTED

Defendants request that the Court dismiss Plaintiff's Complaint with prejudice, in its entirety, on the ground that Plaintiff fails to state a claim upon which relief can be granted.

DATED: July 10, 2020

Respectfully submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By */s/ Ethan Glass*

Ethan Glass (Bar No. 216159)
William A. Burck (*pro hac vice* pending)
Michael D. Bonanno (*pro hac vice* pending)
1300 I St. NW, Suite 900
Washington, District of Columbia 20005
Telephone: (202) 538-8000
Facsimile: (202) 538-8100

Attorneys for Defendants National Association of REALTORS®, California Association of REALTORS®, Inc., and San Francisco Association of REALTORS®

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PRELIMINARY STATEMENT

The Complaint shows that TAN has no valid claims. The Clear Cooperation Policy benefits competition, buyers, and sellers by ensuring broad public access to homes for sale in a particular city or town. Unlike Defendants, which are non-profit organizations, Plaintiff Top Agent Network, Inc. ("TAN") wants to restrict access to certain listings (presumably the most valuable ones), choosing who can see them and who cannot, in exchange for "substantial income from dues/fees paid by their membership/participants." Compl. ¶ 43. In this lawsuit, TAN invokes the antitrust laws to pursue that goal. But that is not how the antitrust laws work. They exist to protect consumers, not TAN's profitability, and TAN has failed to plead facts showing that the Policy reduces competition and harms consumers. *Pool Water Prod. v. Olin Corp.*, 258 F.3d 1024, 1036 (9th Cir. 2001) ("[R]educed profits from lower prices and decreased market share is not the type of harm" the antitrust laws were "meant to protect against."). TAN therefore has not alleged it suffered antitrust injury and does not have standing to pursue its antitrust claims. And even if it did incur an antitrust injury, TAN has also failed to allege the requisite elements of its antitrust claims and made concessions that undermine its ability to ever state a viable antitrust claim.

TAN's unfair competition or tort claims are equally flawed. Simply stated, the Policy only provides that agents who want to participate in a multiple listing service must publish all of their listings there (unless a seller wants to privately market her property through an office exclusive listing). Nothing in the Policy is unlawful, unfair, or fraudulent, and it does not require agents to break their contracts or relationships with TAN.

For all these reasons, TAN has failed to state a claim upon which relief could be granted.

BACKGROUND

A multiple listing service is a searchable "database of properties listed for sale in a particular geographical region." Compl. ¶ 27. "[O]nce a seller's property is placed on that

database, specific information regarding that home is widely available to . . . thousands of people." *Id*. ¶ 31. For example, SFAR operates the multiple listing service in San Francisco. *Id*. ¶ 28. In that database, agents, sellers, and buyers can search for properties that are currently listed for sale in San Francisco. *Id*.

In recent years, however, so-called "pocket listings" have been increasing, becoming "the growing rage among San Francisco real estate."[1] *See* Compl. ¶ 35 ("On information and belief, in San Francisco, for example, Off-MLS sales increased 68% between 2010 and 2018."). With pocket listings, a seller's agent "either keep[s] available properties off of the Multiple Listing Service or delay[s] in putting them on the MLS, making them available not to anyone who can spell Z-i-l-l-o-w but instead to a select, targeted pool of potential buyers." Rosen, *Examiner* Article (cited at Compl. ¶ 32 n.1). In addition to limiting public access to listings (on the multiple listing service or firms like Zillow), pocket listings can harm consumers:

(1) They can "compromise agents' fiduciary duty to their clients, ignoring oceans of potential buyers in favor of a targeted few";

(2) "Pocket listings also sidestep potentially revealing data like days on the market (DOM) and recorded price changes, withholding information most buyers would find helpful — and most market analysts would find important";

(3) "There's . . . a small issue with double-agency, in which one Realtor acts as agent for both the seller and the buyer. It's generally frowned-upon in the real estate world . . . and generally easier to pull off behind the semi-closed doors of a pocket listing"; and

(4) "There's also an assumption that pocket listings are a way for agents to prey on sellers, which is likely true in some cases."

Id. In light of the problems caused by, and the increasing use of, pocket listings, NAR publicly proposed, discussed, and ultimately adopted the Policy, which specifically states:

[1] Larry Rosen, "Will the ban on real estate 'pocket listings' help or hurt?" *San Francisco Examiner*, December 3, 2019 ("Rosen, *Examiner* Article") (cited at Compl. ¶ 32 n.1).

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

Galicia Decl., ECF 17-6, Ex. E, at 32 (cited at Compl. ¶ 70).

The Policy recognizes that "the public marketing of a listing indicates that the MLS participant has concluded that cooperation with other MLS participants is in their client's best interests." Galicia Decl., ECF 17-5, Ex. D, at 3 (cited at Compl. ¶ 64). NAR also considered that there are reasons a seller may not want to broadly market her property to the public (for example, celebrities and public figures may not wish to broadly publicize their listings). *See* Compl. ¶¶ 32-33. To accommodate the interests of that small group of sellers, the Policy does not prohibit so-called "office exclusive" listings, which are "direct promotion of the listing between the brokers and licensees affiliated with the listing brokerage, and one-to-one promotion between these licensees and their clients." Galicia Decl., ECF 17-5, Ex. D, at 5 (cited at Compl. ¶ 64). The Policy therefore gives a seller complete control over how her home is marketed: (1) she can choose to publicly market the property and engage a broker who uses a multiple listing service; or (2) she can forgo the benefits of a multiple listing service and market her property to a limited group of potential buyers (through an office exclusive or working with a real estate agent who is not a member of the local multiple listing service). *See* Compl. ¶ 86 (recognizing that under the Policy a seller can choose the agent who meets her needs).

ARGUMENT

I. TAN's Allegations Do Not Establish Antitrust Injury

Antitrust injury is necessary to bring antitrust claims. *Pool Water*, 258 F.3d at 1034, 1036; *Korea Kumho Petrochemical v. Flexsys Am. LP*, 2007 WL 2318906, at *3-4 (N.D. Cal. Aug. 13,

2007). "[P]rivate plaintiffs can be compensated only for injuries that the antitrust laws were intended to prevent," and "the antitrust laws are only concerned with acts that harm allocative efficiency *and* raise the price of goods above their competitive level or diminish their quality." *Pool Water*, 258 F.3d at 1034. "It is not enough to show that one's injury was caused by illegal behavior." *Id*.

While TAN alleges "actual injury," in the form of "the loss of TAN members and membership dues," Compl. ¶¶ 95, 103, 110, 117, 125, 131, that is not sufficient to plead *antitrust* injury. "Shifting [the plaintiff's] sales to . . . other competitors in the market does not directly affect consumers and therefore does not result in antitrust injury." *Pool Water*, 258 at 1036; *see also Surf City Steel, Inc. v. Int'l Longshore & Warehouse Union*, 2017 WL 5973279, at *9 (C.D. Cal. Mar. 7, 2017) ("The fact that one competitor took the place of another competitor in the relevant market does not, on its own, constitute harm to competition."). In fact, financial harm to an alleged competitor is generally not sufficient to show antitrust injury. *See Bay Area Surgical Mgmt. LLC v. Aetna Life Ins. Co.*, 2016 WL 3880989, at *11 (N.D. Cal. July 18, 2016) ("Plaintiffs[] still have not adequately alleged injury to competition and continue to focus on the injury to themselves."); *AFMS, LLC v. United Parcel Serv. Co.*, 2011 WL 13128436, at *16 (C.D. Cal. Nov. 23, 2011) ("The only allegation that any party has suffered concrete harm concerns AFMS's monetary losses; as noted, however, injury to a single competitor does not suffice to support a Section 1 claim."). An antitrust plaintiff must plead facts that show its injuries were caused by a reduction in competition, and TAN has not done so.

TAN cannot avoid dismissal by pointing to parts of the Complaint where it simply mouths conclusory, unsupported statements that the Policy hurts competition by reducing consumer choice or causing prices to increase. The Court is not "required to accept as true allegations that are

merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see also Hip Hop Beverage Corp. v. Monster Energy Co.*, 733 F. App'x 380, 381 (9th Cir. 2018) (affirming dismissal of complaint and holding the "conclusory assertion that consumer prices had been driven upward was insufficient because [the plaintiff] did not allege any specific pricing data or explain how the market price supposedly increased"); *Eastman v. Quest Diagnostics Inc.*, 108 F. Supp. 3d 827, 835 (N.D. Cal. 2015) (plaintiff's allegations that the defendant charged "monopoly prices" or "above-competitive prices" without alleging what the defendant's "prices are or how they compare to competitive prices" were insufficient to establish antitrust injury); *SmileCare Dental Grp. v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996) ("Dismissal for failure to state a claim is appropriate where the complaint states no set of facts which, if true, would constitute an antitrust offense, notwithstanding its conclusory language regarding the elimination of competition and improper purpose." (quotation omitted)); *ChriMar Sys., Inc v. Cisco Sys., Inc.*, 72 F. Supp. 3d 1012, 1019 (N.D. Cal. 2014) (dismissing antitrust counterclaim because "Defendants fail to allege any *facts* which, if true, would demonstrate an antitrust injury").

In any event, as TAN's allegations confirm, the Policy actually *increases* consumer choice and competition by giving a seller complete control over how her home is marketed. A seller decides whether she wants broad marketing or values privacy and then chooses the agent that best addresses her needs, considering factors such as whether the agent belongs to a multiple listing service, is a member of TAN's network, or markets "office exclusives." TAN's complaint—that it might lose in that competition—is the opposite of antitrust injury. Because TAN has not alleged the Policy harmed consumers through higher prices, reduced output, or reduced quality, it has not satisfied its burden to plead antitrust injury, and its antitrust claims should be dismissed.

II. TAN Has Not Pleaded Valid Sherman Act and Cartwright Act Claims

TAN has asserted claims under Section 1 and Section 2 of the Sherman Act, and the Cartwright Act (which is modeled after Section 1 of the Sherman Act and governed by the same substantive pleading standards, *County of Tuolumne v. Sonora Community Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001)). Under Section 1 of the Sherman Act, "[t]ypically, the determination of whether a particular agreement in restraint of trade is unreasonable involves a factual inquiry commonly known as the 'rule of reason,'" which "weighs legitimate justifications for a restraint against any anticompetitive effects." *United States v. Joyce*, 895 F.3d 673, 676 (9th Cir. 2018) (quotation omitted). The same "rule of reason" standard also applies to cases brought under Section 2 of the Sherman Act. *California Computer Prod., Inc. v. Int'l Bus. Machines Corp.*, 613 F.2d 727, 737 (9th Cir. 1979); *Transamerica Computer Co. v. Int'l Bus. Machines Corp.*, 698 F.2d 1377, 1382 n.2 (9th Cir. 1983). "The rule of reason inquiry, however, is inapplicable if the restraint falls into a category of agreements which have been determined to be per se illegal." *Joyce*, 895 F.3d at 676 (quotation omitted). Certain types of conduct, such as price-fixing between horizontal competitors, are illegal per se because they "always or almost always tend to restrict competition and decrease output." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979). In a per se case, because the conduct is "presumed to be unreasonable, the [plaintiff] is relieved of any obligation to prove the unreasonableness of the specific scheme at issue and any business justification for the defendant's conduct is neither relevant nor admissible." *Joyce*, 895 F.3d at 677. TAN has not pleaded facts that can sustain a valid antitrust claim under either standard.

A. TAN Has Not Pleaded a Valid Per Se Case

TAN claims the Policy is a group boycott that is illegal per se. Compl. ¶ 90. But the Supreme Court has held that "[t]he mere allegation of a concerted refusal to deal does not suffice" to invoke the per se rule "because not all concerted refusals to deal are predominantly

anticompetitive." *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 298 (1985). The Ninth Circuit interpreted *Northwest Wholesale* to "identif[y] three characteristics as indicative of per se illegal boycotts." *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1030 (9th Cir. 1988). Those are: "(1) the boycott cuts off access to a supply, facility, or market necessary to enable the victim firm to compete; (2) the boycotting firm possesses a dominant market position; and (3) the practices are not justified by plausible arguments that they enhanced overall efficiency or competition." *Id*. TAN has failed to allege sufficient facts that, taken as true, would satisfy these elements.

1. TAN's Allegations Do Not Show It Has Been "Cut Off"

To establish a per se illegal boycott, the plaintiff must allege the defendant took actions that prevented it from accessing the relevant market or a key source of supply. *See Surf City Steel*, 2017 WL 5973279, at *5. When a plaintiff has continued to compete in the relevant market following the implementation of the alleged "boycott," this requirement is not satisfied. *See id*. (dismissing complaint and holding that per se treatment is inappropriate because "Plaintiffs . . . do not allege that [Defendant] prevents them from competing for *all* relevant work").

TAN has not alleged it has been "cut off" from the market. Rather, TAN admits that it has continued to market and sell its services since the Policy was adopted, Compl. ¶¶ 36-40, and it does not allege the Policy has in fact "cut off" TAN from anything. The Policy merely requires agents to list a property on the multiple listing services to which they belong, ***in addition to*** any other means they have used to publicly market the property. TAN does not allege the Policy bars it from offering its services to brokers and agents. TAN does not allege the Policy prevents brokers and agents from joining TAN. And TAN does not even allege the Policy prevents brokers and agents from using TAN's platform to discuss specific properties so long as they also put listings into the local multiple listing service within one business day. Moreover, according to TAN's own

allegations, many "experienced agents have established their own networks and created methods outside of the MLS to service their clients," making them "less reliant on the MLS as a percentage of their overall business." *Id.* ¶ 4. The Policy does not prevent TAN from competing for the business of those agents, who "frequently conduct 'Off-MLS' sales." *Id*. And TAN does not allege that the Policy prevents those agents from withdrawing from NAR and their local REALTOR® association-owned multiple listing service to exclusively work with TAN.

2. TAN's Allegations Do Not Show Defendants Have Market Power

In the context of an alleged boycott, "the per se approach has generally been limited to cases in which firms ***with market power*** boycott suppliers or customers in order to discourage them from doing business with a competitor." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986) (emphasis added). As the Ninth Circuit has explained:

> Market power may be demonstrated through either of two types of proof. One type of proof is direct evidence of the injurious exercise of market power. If the plaintiff puts forth evidence of restricted output and supracompetitive prices, that is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power. The more common type of proof is circumstantial evidence pertaining to the structure of the market. To demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run.

Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) (citations omitted).

TAN has not alleged sufficient facts to satisfy either standard. TAN's Complaint is devoid of any specific factual allegations concerning how the Policy has harmed consumer welfare through increased prices, reduced output or reduced product quality. *See supra* § I. TAN therefore has not pleaded any facts that plausibly constitute direct evidence that Defendants possess market power. Its allegations with respect to indirect evidence fare no better. To establish market power using indirect proof, "a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and

show that existing competitors lack the capacity to increase their output in the short run." *Rebel Oil*, 51 F.3d at 1434. TAN has not pleaded sufficient facts to satisfy these elements.

a. TAN's Relevant Market Allegations Are Facially Unsustainable

In an antitrust case, the plaintiff must allege plausible product and geographic markets. *See Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001). "[A] complaint may be dismissed under Rule 12(b)(6) if the complaint's 'relevant market' definition is facially unsustainable." *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008).

Product market. Even if TAN's naked allegations are taken as true, TAN's putative product markets—"professional affiliation in organizations targeted at real estate agents" and "residential real estate listing services"—are facially unsustainable because they do not account for the commercial realities of the residential real estate industry. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law."). Because multiple listing services "offer[] different products or services to two different groups [homebuyers and sellers] who both depend on the platform to intermediate between them," *Amex*, 138 S. Ct. at 2280, they are a classic example of what economists call two-sided markets with network effects. That means any relevant antitrust market in which multiple listing services compete must be defined to "include both sides of the platform," *Amex*, 138 S. Ct. at 2286, *i.e.*, buyers and their agents on one hand, and sellers and their agents on the other. TAN concedes that its putative markets have "network effects," *see*, *e.g.*, Compl. ¶ 41, but it has made no effort to undertake a two-sided market analysis and account for those network effects in its putative antitrust markets. That means it has failed to properly define its relevant product markets to reflect "market realities."

Geographic market. TAN contends the relevant geographic market "for professional affiliation for real estate agents" is "nationwide," Compl. ¶ 47, and it alleges that "NAR, and NAR-

affiliates, like CAR and SFAR, are engaged in this market," *Id.* ¶ 42. That claim is facially unsustainable. SFAR and the NAR-affiliates in other parts of the country are not competitors in any way. TAN cannot plausibly allege facts showing that SFAR, a professional real estate association for agents located in San Francisco, competes for members with local associations of REALTORS® on the east coast, such as the Dulles Area Association of REALTORS®, a professional real estate association for agents located in Loudoun County, Virginia. Indeed, TAN concedes real estate is "a localized product" and that its local affiliates "allow[] members to associate and share property information with professionals operating within the same geographic area." *Id.* ¶ 47. TAN's claim based on a "national" market "for professional affiliation for real estate agents" should therefore be dismissed, and even if there were such a national market, it would be irrelevant to C.A.R. and SFAR, because they do not have national operations.

b. TAN's Market Share Allegations Do Not Show Defendants Have Market Power

To withstand a motion to dismiss using indirect proof of market power, TAN must allege facts that are sufficient to show that Defendants have a significant market share in the alleged relevant antitrust markets. *See Rebel Oil*, 51 F.3d at 1434 (a plaintiff must "define the relevant market," then "show that the defendant[s] own[] a dominant share of that market"); *see* also *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, 2013 WL 5694452, at *12 (N.D. Cal. Oct. 18, 2013) ("[T]he plaintiffs allege that Aetna 'insures approximately 9% of the U.S. population.' However, they do not state Aetna's market share in any of the five product and geographic markets identified in the FAC. . . ."). TAN has only offered conclusory allegations concerning Defendants' "market dominance," which are not enough to withstand scrutiny in a motion to dismiss. *See Prime Healthcare Servs., Inc. v. Serv. Employees Int'l Union*, 2013 WL 3873074, at *15 (S.D. Cal. July 25, 2013) (bare allegation that defendant was a "dominant force" held to be insufficient

where there were "no other factual contentions in the amended complaint that support this conclusory statement"); *Bay Area Surgical Mgmt.*, 2016 WL 3880989, at *10 ("The fact that Defendants are 'goliaths' or 'dominant players' are nothing more than conclusory allegations. . . ."). "Courts generally require a 65% market share to establish a prima facie case of market power." *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997). And TAN has not pleaded specific facts that come close to meeting that standard. *See Redbox Automated Retail, LLC v. Buena Vista Home Entm't, Inc.*, 399 F. Supp. 3d 1018, 1029 (C.D. Cal. 2019) ("[T]he FAC alleges that Disney's share of the home movies market is something 'greater' than fifty percent. Even if true, however, that fact is not sufficient to establish Disney's market power in the home movies market." (quotation omitted)).

Beyond its conclusory allegations, TAN has made no effort to measure market shares in the 24 putative local markets "for professional affiliation for real estate agents," to identify the market competitors, or to specify the market share held by each competitor in each of the local markets it has identified. And while it alleges "[t]he overwhelming majority of TAN members are also members of NAR and its applicable local affiliate" and "in San Francisco, nearly 100% of TAN's members are also members of SFAR," Compl. ¶ 50, those statistics are irrelevant because they do not show the market shares of any particular market participant (including Defendants, TAN, or others). Thus, TAN simply has not pleaded any facts to establish market shares in the market "for professional affiliation for real estate agents."

TAN also has not alleged facts showing Defendants have market power in its alternative local markets "for residential real estate listing services." TAN concedes there is no "NAR-affiliated MLS" in four of its local markets, Compl. ¶¶ 48, 55, which means NAR cannot have market power in those areas. TAN acknowledges that SFAR does not operate in 23 of its putative

local markets, *id*. ¶¶ 25, 29, 48, which means that SFAR cannot have market power in those areas. And TAN admits that C.A.R. does not participate in any market for "residential real estate listing services" because it does not allege C.A.R. owns or operates a multiple listing service; therefore, C.A.R. does not have market power in any market for "residential real estate listing services" and that alleged market is not relevant to C.A.R.

Even for the parts of the country where there is a "NAR-affiliated" multiple listing service, such as San Francisco, TAN has made no effort to plead facts sufficient to plausibly allege the market share held by each "NAR-affiliated" multiple listing service. TAN simply alleges that "[r]oughly 80-90% of residential real estate put up for sale in the United States is listed on an MLS." Compl. ¶ 54. But such aggregate allegations, even if credited, do not shed any light on the nature of competition in TAN's putative local markets or the market shares held by Defendants in each of those local markets. *See Garnica v. HomeTeam Pest Def., Inc.*, 230 F. Supp. 3d 1155, 1157 (N.D. Cal. 2017) (facts concerning "market conditions in the aggregate" do not answer "key questions about monopoly power in the 32 markets"). Thus, TAN has fundamentally failed to plead facts concerning the market shares held by Defendants in each of its alleged local markets for "residential real estate listing services."

c. TAN's Allegations Do Not Show There Are Barriers to Entry

"Entry barriers are additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants, or factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." *Rebel Oil*, 51 F.3d at 1439 (quotation omitted). And "To justify a finding that a defendant has the power to control prices, entry barriers must be significant . . . ." *Id*. Even if a defendant has 100% market share, that fact alone does "not demonstrate that [it] had the power to control prices or exclude competition in the absence of any

evidence that it could prevent entry of other market participants." *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1425 (9th Cir. 1993).

TAN's only allegations concerning barriers to entry are conclusory and insufficient as a matter of law. Compl. ¶¶ 52, 57. Specifically, for its "professional association" market, TAN contends network effects are a barrier to entry because "[a]ny new entrant must have the capital and staying power to survive the initial period in which its membership is low and the value the association can offer is at its minimum." Compl ¶ 52. But short-run costs are not barriers to entry. *See Los Angeles Land Co.*, 6 F.3d at 1428 ("The mere fact that entry requires a large absolute expenditure of funds does not constitute a 'barrier to entry'; a new entrant is disadvantaged only to the extent that he must pay more to attract those funds than would an established firm."). TAN must allege specific facts showing the "disadvantage of new entrants as compared to incumbents," which is "the hallmark of an entry barrier." *Id*. It has not done so.

For its "residential real estate listing services" market, TAN contends network effects are a barrier to entry because "[a] property listing service depends on having sufficient volume and/quality of seller-side listings and buyer-side engagement to justify membership costs." Compl. ¶ 57. But merely reciting the words "network effects" does not establish the existence of a meaningful barrier to entry. Where, as is the case here, network effects do not result in customer "lock-in" that prevents consumers using services provided by new competitors, they are not barriers to entry. *See DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119, 1138 (N.D. Cal. 2010). As the Complaint explains, real estate agents commonly belong to more than one "residential real estate listing service," such as TAN and the local REALTOR® association-owned multiple listing service. Compl. ¶ 50. And where such "multi-homing" occurs, network effects are not a barrier to entry because a new entrant can achieve scale without having to convince

customers to stop using an incumbent platform and switch to its less-established platform. That allows new entrants to achieve scale by offering its services at a lower cost (or even for free), which commonly occurs in platform markets with no switching costs. *See* Aaron S. Edlin & Robert G. Harris, *The Role of Switching Costs in Antitrust Analysis: A Comparison of Microsoft and Google*, 15 Yale J. L. & Tech. 169, 212-13 (2013) (explaining the effects of low switching costs in the market for internet search engines).

3. TAN's Allegations Do Not Show the Policy Does Not Enhance Overall Efficiency or Competition

TAN's nakedly asserts that the justifications for the Policy are "pretextual," Compl. ¶ 101, but it has not offered any facts that would show there are not "plausible arguments" for how the Policy enhances competition. Conclusory assertions, such as, "any alleged benefits to competition or consumers [are] pretextual and designed to justify" the Policy, Compl. ¶ 101, are not enough. *See Brantley v. NBC Universal, Inc.*, 2008 WL 11338585, at *5 (C.D. Cal. Mar. 10, 2008) ("[P]laintiffs do not have to plead facts to counter every possible procompetitive justification for an action by defendants," but "they must provide facts that, if true, would allow a trier of fact to find that the bundling results in (or is a result of) a reduction of competition rather than simply being the natural result of the workings of a competitive marketplace."). And here the procompetitive benefits of the Policy are straightforward: it increases access to listings, increasing sales, ensuring compliance with fair housing laws, promoting transparency, efficiency, and fulfillment of brokers' fiduciary duties, among other things, which are all identified in the documents discussing the Policy that are referenced in TAN's Complaint. *See supra* at 2-3.

B. TAN Has Not Pleaded a Valid Rule of Reason Case

In a rule of reason analysis, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."

Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018). The plaintiff can meet its initial burden using indirect evidence or direct evidence. *Id*. For the same reasons that TAN's allegations do not pass muster under the *Hahn* test, *supra* § II.A, TAN has failed to state a valid claim under the rule of reason. *See Hahn*, 868 F.2d at 1030 n.9 (stating that, for boycott cases, the facts developed in a rule of reason case are substantively the same as whether the conduct is per se illegal).

III. TAN Has Not Pleaded Valid State Unfair Competition or Tort Claims

TAN likewise has not alleged sufficient facts to support an unfair competition claim under California law. TAN's allegations do not show the Policy is "unlawful" under a state or federal antitrust law, nor do they show it is "unfair" because it "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999); *see supra* §§ I-II. And TAN's vague and conclusory allegation that Defendants interfered with "[n]umerous membership contracts," Compl. ¶ 127, is not sufficient to state an intentional interference claim. *See Nexsales Corp. v. Salebuild, Inc.*, 2012 WL 216260, at *4 (N.D. Cal. Jan. 24, 2012) ("Plaintiff generally alleges that a contract existed but fails to identify any terms of the contract, the parties involved, the terms of the contract that were breached, how Defendant would have known of the contract . . . ."). Moreover, even if TAN did identify contract specifics, TAN's members still can participate in TAN as they did before the Policy was adopted; the Policy does not require agents to terminate their relationship with TAN or break their contracts with TAN. The Policy simply requires the agents who want to participate in the multiple listing service to share all of their listings (except office exclusives when desired by their clients). Thus, TAN has failed to state unfair competition and interference claims as a matter of law.

CONCLUSION

Defendants respectfully submit TAN's Complaint should be dismissed.

DATED: July 10, 2020

Respectfully submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By */s/ Ethan Glass*

Ethan Glass (Bar No. 216159)
William A. Burck (*pro hac vice* pending)
Michael D. Bonanno (*pro hac vice* pending)
1300 I St. NW, Suite 900
Washington, District of Columbia 20005
Telephone: (202) 538-8000
Facsimile: (202) 538-8100

Attorneys for Defendants National Association of REALTORS®, California Association of REALTORS®, Inc., and San Francisco Association of REALTORS®