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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

THE PLS.COM, LLC, a California limited liability company,

Plaintiff,

vs.

THE NATIONAL ASSOCIATION OF REALTORS; BRIGHT MLS, INC.; MIDWEST REAL ESTATE DATA, LLC; and CALIFORNIA REGIONAL MULTIPLE LISTING SERVICE, INC.,

Defendants.

Case No. 2:20-cv-04790-PA-RAO

DEFENDANTS BRIGHT MLS, INC.'S AND MIDWEST REAL ESTATE DATA, LLC'S NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES
[Fed. R. Civ. P. 12(b)(6)]

Date: September 14, 2020
Time: 1:30 p.m.
Dept.: Courtroom 9A
Judge: Hon. Percy Anderson

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Monday, September 14, 2020, at 1:30 p.m., or as soon thereafter as the matter may be heard in Courtroom 9A of the above-entitled Court, located at 350 W. 1st Street, 9th Floor, Los Angeles, California 90012, Defendants Bright MLS, Inc. and Midwest Real Estate Data, LLC will and hereby do move the Court for an Order dismissing the First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). This Motion is based on the fact that Plaintiff fails to state details plausibly demonstrating that the moving defendants were part of a conspiracy, fails to allege antitrust injury, and fails to define the relevant geographic market, as required under Section 1 of the Sherman Act and Section 16720 of the Cartwright Act.

This motion is made following two conferences of counsel pursuant to Local Rule 7-3, which took place on July 10 and July 27, 2020.

This Motion is supported by the attached Memorandum of Points and Authorities, the matters identified in the accompanying Request for Judicial Notice, the records and file herein, and on such evidence as may be presented at or before the hearing of this Motion.

Dated: August 13, 2020

Respectfully submitted,

ARENT FOX LLP

By: */s/ Jerrold Abeles*
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Attorneys for Defendants
BRIGHT MLS, INC. and MIDWEST REAL ESTATE DATA, LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff The PLS.com, LLC attempts to connect Defendants Bright MLS and Midwest Real Estate Data ("MRED") to a purported antitrust conspiracy based solely on alleged public advocacy that a trade association in which they are not a member adopt a policy – known as the "Clear Cooperation Policy" ("Policy") – that (a) Bright had already adopted, and (b) MRED never adopted. Plaintiff fails in its First Amended Complaint ("FAC") to sufficiently allege how those facts could form an antitrust conspiracy, erroneously equating advocacy for the Policy – conduct protected by the First Amendment – with a conspiracy to restrain trade. Plaintiff furthermore fails to plead the requisite elements of its antitrust claims: Plaintiff touts its own anticompetitive business model while failing to plead facts showing that the Policy reduces competition. Plaintiff also fails to define the relevant market being harmed, and instead alleges inherently contradictory and non-specific markets.[1]

Plaintiff has failed to state a claim upon which relief could be granted, and cannot do so. The Court should dismiss the FAC as to Bright and MRED with prejudice.

II. STATEMENT OF FACTS

A. Nature of the Residential Real Estate Industry.

According to Plaintiff, in the residential real estate industry, licensed real estate professionals assist buyers and sellers in the purchase and sale of homes. (ECF No. 46 ¶ 27.) These real estate professionals often participate in their local multiple listing service ("MLS"). (*Id.* ¶ 32.) An MLS, such as Bright and MRED, is a service providing a database for home listing information that facilitates

[1] Bright and MRED join in the separate Motions to Dismiss to be filed by NAR and CRMLS, which are expected to address the antitrust issues in more detail.

efficient sharing of listing information. (*Id.*) Licensed real estate professionals who are customers of a regional MLS submit their listing information and have access to the other MLS customers' listings. (*Id.*)

The innumerable benefits that MLSs provide to the real estate industry as a whole are well established.

> The use of [MLSs] has … had a significant positive impact on the individual sales transaction. The transactional benefits are fairly evenly distributed among the broker, the buyer, and the seller. In the absence of the [MLS], a seller has three alternatives: first, he can sell the property himself, a course of action requiring facilities and expertise which most home owners do not possess; second, he can use an open listing [to pay any broker who comes along with a buyer]; third, he can give a broker the exclusive right to sell. The [MLS] allows him to combine the advantages of the last two alternatives and to avoid the dangers of the first. The buyer benefits from the wider selection of purchase opportunities than would be available from the office of a single broker. . . . The broker is particularly benefited by having immediate access to a large number of listings and at the same time by being furnished with a method for quickly and expansively exposing his own listing to a broader market.

U.S. v. Realty Multi-List, Inc., 629 F.2d 1351, 1356 (5th Cir. 1980) (citation omitted). These long-recognized benefits are why MLSs are ubiquitous, as Plaintiff acknowledges. (ECF No. 46 ¶ 1.) This case largely addresses the last of the listed benefits: a seller's ability to expansively expose listings to a broad market.

B. <u>The Clear Cooperation Policy.</u>

The National Association of REALTORS® ("NAR") is a trade association of real estate professionals (not MLSs) that, among other things, promulgates policies and professional standards for the operation of MLSs that are owned and operated

by NAR members' local REALTOR® associations. (*Id.* ¶ 17.) These NAR-affiliated MLSs are required to adopt and follow NAR's policies. (*Id.* ¶¶ 30, 35.) Not all MLSs, though, are affiliated with NAR.

In November 2019, NAR promulgated the Clear Cooperation Policy. (*Id.* ¶ 13.) The Policy states:

> 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. (Adopted 11/19) (*Id.* ¶ 89.)

The Policy does not impose any criteria that limits competition. On its face, the Policy requires only that real estate professionals that publicly market a home for sale place the listing in the MLS, making clear to potential buyers what properties are being sold. Because the Policy, like any NAR policy, applies only to NAR-affiliated MLSs (*id.* ¶ 13), the Policy has no effect on MLSs that are not NAR-affiliated and the real estate professionals who subscribe to those MLSs or who choose not to subscribe to an MLS. And because the Policy applies only to "public" marketing, it does not apply when real estate professionals market a property only to those within their own brokerage, i.e., not to the public. Such non-public marketing is sometimes referred to as a "pocket listing" or "private listing," and is patently permitted under the Policy.

C. Defendant Bright's Multiple Listing Service.

Bright is an MLS serving real estate professionals in the Mid-Atlantic region of the United States. (*Id.* ¶ 19.) Bright is a NAR-affiliated MLS; it follows NAR's rules but does not have a vote in promulgating NAR's rules. (*Id.* ¶¶ 19, 71, 86.)

Prior to and *independent of* NAR's adoption of the Clear Cooperation Policy, Bright adopted a policy that is similar to NAR's Policy. (*Id.* ¶ 76.) Plaintiff does not allege that any of its customers have been affected in any way by Bright's policy – Plaintiff does not (and cannot) allege that its customers cannot use Plaintiff's services in Bright's regional market. Plaintiff merely alleges that it cannot make the same claims of secrecy.

D. Defendant MRED's Multiple Listing Service.

MRED is an MLS that serves Illinois and surrounding areas. (*Id.* ¶ 20.) Contrary to allegations in the original complaint – later corrected in the FAC – MRED is not an NAR-affiliated MLS and is not owned by an NAR-affiliated association. (*Id.* ¶ 20.) As such, MRED is not bound to adopt NAR's rules or policies. In the FAC, Plaintiff now takes pains to distinguish MRED from NAR-affiliated MLSs. (*See, e.g., id.* ¶¶ 11, 39, 70, 71, 72, 78, 95, 98, 101, 115).

Contrary to allegations in the original complaint – again corrected in the FAC – MRED *did not* adopt the Clear Cooperation Policy. In 2016, before Plaintiff even existed, MRED adopted a policy for subscribing real estate professionals in MRED's territory to address fair housing and other issues specific to its regional market. MRED's policy states as follows:

> Midwest Real Estate Data accepts listings of real properties, … which shall be placed into Midwest Real Estate Data's MLS (PLN (Private Listing Network) or SLN (Standard Listing Network) (hereinafter referred to as the "Service") within 48 hours of the effective listing date or within 24 hours after the real estate broker advertises the real property to the general public through a website or utilizes any publicly accessible print advertisements, including for sale signs, whichever is earlier.

See MRED's Rules and Regulations – Midwest Real Estate Data, Section 1, p. 9, (adopted 3/2/2016) (dated 3/23/2020).[2] Plaintiff does not allege that MRED's different policy has any anti-competitive effects, like those it attributes to the Clear Cooperation Policy, or that Plaintiff's customers cannot use Plaintiff's services in MRED's regional market because of MRED's policy.

E. Plaintiff The PLS.com's Business Model.

Plaintiff alleges that its customers include agents who subscribe to NAR-affiliated MLSs but who wish to market listings only to a limited set of other real estate professionals and not to all those who subscribe to the MLS. (ECF No. 46 ¶¶ 61, 65). As referenced above, property subject to this type of restricted marketing may also be referred to as "pocket listings." Plaintiff allows its members to "privately" market their clients' properties, sharing in secret only as much or as little information about a listing as they desire, with only the other agents who are Plaintiff's customers. (*Id.* ¶¶ 61, 62). Instead of enhancing information sharing and the ability for sellers and agents to gain visibility into the residential housing market, Plaintiff's business model limits exposure and deprives the market of information. (*Id.* ¶¶ 6, 8).

F. The Subject Market.

Antitrust claimants need to identify the relevant market affected by the challenged activity. Plaintiff alleges that there are two relevant, though contradictory, geographic markets. One is nationwide. (*Id.* ¶ 100). Plaintiff alleges that licensed real estate professionals and their customers seek listing network services that aggregate listings nationwide, from across the United States.

[2] https://www.mredllc.com/comms/resources/MREDRulesAndRegulations.pdf. By its terms, MRED's policy permits pocket listing services such as Plaintiff's to forgo listing properties on MRED's MLS. MRED requests that the Court take judicial notice of MRED's policies on its website. The policy is publicly-available and not reasonably subject to dispute, and is thus subject to judicial notice.

(*Id.*). The residential real estate market is inherently local – the well-known saying "location, location, location" is premised on the fact that valuation of real estate is intrinsically tied to its physical location more than any other trait. Unlike automobiles, water bottles, or laundry detergent, real property cannot be used anywhere other than where it physically exists. None of the defendants, though, are alleged to provide nationwide services, and nor are the *hundreds* of other MLSs that provide similar services in regions across the country named as defendants.

In the alternative, Plaintiff also alleges that each and every regional market of a NAR-affiliated MLS, including the regions of each MLS Defendant, is a relevant geographic market. (*Id.*). Plaintiff does not, though, allege that any anti-competitive conduct occurred in any particular regional market area.

G. Allegations against Bright and MRED.

Plaintiff does *not* allege that MRED adopted or enforced the Policy in its market area. Plaintiff also does not allege that Bright adopted the Policy in concert with any entity, or because it was required to do so by NAR.

Plaintiff instead alleges that Bright and MRED participated and acted in a conspiracy in violation of 15 U.S.C. § 1 (the Sherman Act) and Cal. Bus. & Prof. Code § 16720 (the California Cartwright Act) through the following conduct:

- Co-drafting and publishing a white paper in September 2019 that allegedly supported adoption of the Policy. (*Id.* ¶¶ 11, 75).
- Participating in private communications about the Policy through a trade association for MLSs (the Council of Multiple Listing Services ("CMLS")). (*Id.* ¶¶ 73,74).
- Voicing support for the Policy at a CMLS conference in Salt Lake City, Utah, on October 17 and 18, 2019. (*Id.* ¶¶ 78, 80-85).
- Being present for a vote to recommend the adoption of the Policy at the NAR Convention in San Francisco, California. (*Id.* ¶ 71).

- Publishing (MRED only) a statement supporting the adoption of the Policy. (*Id.* ¶ 77).
- Adopting (Bright only) a version of the Policy, prior to NAR promulgating the Policy, "before having any obligation under NAR rules or otherwise to do so." (*Id.* ¶ 76).

III. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face . . . . allow[ing] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A] plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). (internal quotations omitted). To state a claim under Section 1 of the Sherman Act:

> [C]laimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition.

Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008). Additionally, "[e]xcept when alleging a per se antitrust violation, Plaintiffs must identify the relevant geographic and product market in which Plaintiffs and Defendants compete and allege facts demonstrating that Defendants' conduct has an anticompetitive effect on those markets." *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1104-05 (9th Cir. 1999).

To maintain a cause of action for a combination in restraint of trade under the Cartwright Act, the complaint must allege (1) the formation and operation of the conspiracy, (2) the illegal acts done pursuant thereto to restrain trade, and (3) the damage caused by such acts. *G.H.I.I. v. MTS, Inc.,* 147 Cal. App. 3d 256, 265 (1983). The analysis under California's antitrust law mirrors the analysis under federal law because the Cartwright Act was modeled after the Sherman Act. *Cty. of Tuolumne v. Sonora Cmty. Hosp*., 236 F.3d 1148, 1160 (9th Cir. 2001).

IV. ARGUMENT

A. Plaintiff Fails to Sufficiently Allege the Existence of a Conspiracy that Involves Bright or MRED.

To allege an agreement between antitrust co-conspirators, the complaint must allege facts such as:

> a "specific time, place, or person involved in the alleged conspiracies" to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin. A bare allegation of conspiracy is almost impossible to defend against, particularly where the defendants are large institutions with hundreds of employees entering into contracts and agreements daily.

Kendall, 518 F.3d at 1047 (quoting *Twombly*, 550 U.S. at 565 n.10).

1. Plaintiff's allegations of parallel conduct are insufficient to infer conspiracy.

Plaintiff fails to plead any facts to plausibly support its allegation that Bright or MRED conspired with each other or any other entity to restrain trade. Plaintiff instead asserts conclusory statements about alleged parallel conduct. (ECF No. 46 ¶¶ 71, 73, 74, 78, 80-85). Mere conclusions alone are insufficient. In *Kendall,* the Ninth Circuit considered similar, conclusory allegations against defendant banks that were members of associations that set credit card interchange fees. The court concluded that allegations that the banks engaged in a conspiracy to fix interchange

fees were inadequately conclusory, having merely alleged that (1) each bank defendant "participates in the management of and has a proprietary interest in" the associations; (2) the banks adopted the associations' policies by charging the association-set fees; and (3) there was an agreement among all financial institutions to charge a minimum fee set by the associations. 518 F.3d at 1048.

Here, Plaintiff does not even allege that Bright and MRED formed an agreement of any kind related to the purported conspiracy. Plaintiff merely alleges that Bright and MRED participated in private communications through another trade association (CMLS) about the Policy (ECF No. 46 ¶¶ 73, 74), voiced support for the Policy at a conference in Salt Lake City (*Id.* ¶¶ 78, 80-85), and were present for a vote recommending that NAR adopt the Policy in the future (*Id.* ¶ 71). These allegations of parallel, independent conduct do not reflect a meeting of the minds between or among Bright, MRED, and any other entity. *Bay Area Surgical Mgmt. LLC v. Aetna Life Ins. Co.,* 166 F. Supp. 3d 988, 992 (N.D. Cal. 2015) (insufficient to plead conspiracy based upon bare allegation that insurers and surgical centers engaged in a conspiracy in restraint of trade through a "continuous stream of communications" and "numerous writings, conversations and meetings").

In fact, Bright and MRED are even further removed than the banks in *Kendall*. Neither Bright nor MRED is a member of the subject association, NAR. MRED never adopted or enforced the NAR Policy, and Bright had independently adopted a rule similar to the Policy, prior to NAR doing so.

Plaintiff's cursory conspiracy allegations are facially insufficient to establish a plausible basis to infer the existence of an agreement to restrain trade. The limited, independent actions taken by MRED and Bright indicate that there was no conspiracy at all. "Mere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement." *In re Musical Instruments & Equip. Anti. Litig.*, 798 F.3d 1186, 1194 (9th Cir. 2015) (no inference of an agreement based upon allegations of parallel

conduct in conjunction with "plus" factors such as a shared common motive to conspire, acting against self-interest, adopting substantially similar policies, participating in functions of trade association, and prices climbing despite falling demand). Indeed, not only did MRED not adopt the Policy and Bright not follow NAR's lead, but all they are accused of doing is voicing support for a policy by a trade association, i.e., exercising their First Amendment rights.

2. Plaintiff seeks to chill Bright's and MRED's rights to free speech and association.

Plaintiff alleges that Bright and MRED co-drafted and published a white paper, and that MRED published a statement supporting adoption of the Policy. (ECF No. 46 ¶¶ 11, 75, 77). Such advocacy concerning an issue of public interest is constitutionally protected speech, indistinguishable from speech concerning how a person should vote on a ballot measure or which restaurant to patronize. Through this litigation, Plaintiff not only seeks an injunction that restrains Defendants' future speech on the issue, but claims $100,000,000 in damages, clearly to intimidate others from weighing in on the same issue with an opinion contrary to Plaintiff's. Such restraints and intimidation are wholly inappropriate. *See Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1110 (9th Cir. 2003) (association's protected speech consisted of publication of a manual and its public advocacy activities in connection with the use of particular drug); *Chavers v. Gatke Corp.,* 107 Cal. App. 4th 606, 619 (2003), as modified (Apr. 25, 2003) (requiring a manufacturer "'to stand trial for civil conspiracy and concert of action predicated solely on its exercise of its First Amendment freedoms could generally chill the exercise of the freedom of association by those who wish to contribute to, attend the meetings of, and otherwise associate with trade groups and other organizations that engage in public advocacy and debate.'").

The fact that Plaintiff's motivation is to silence speech is apparent from its selection of defendants and description of purported wrongdoing. Neither Bright

nor MRED is alleged to have voted for NAR's adoption of the Policy – no such allegations could be made because neither is alleged to be a member of NAR. Nor does Plaintiff allege that Bright adopted the Policy because of NAR's actions, for Bright had already adopted its own policy. Further, Plaintiff does not – and admittedly cannot – allege that MRED either adopted the Policy or enforces it in its regional market, for MRED is not affiliated with NAR. Instead, Plaintiff focuses exclusively on Bright's and MRED's exercise of their rights to free speech. The speech at issue did not incite immediate harm, reveal trade secrets, or defame or disparage a person or product, yet Plaintiff uses that speech, and only that speech, as a basis for liability. The conspiracy allegations are not only patently insufficient, but are premised on conduct that is manifestly protected from liability.

3. Plaintiff's allegations of conspiracy between and among Bright and its "members" are grossly insufficient.

Plaintiff separately alleges that Bright (but not MRED) entered into an unlawful agreement or concerted action "between and among" its members. (ECF No. 46 ¶ 104). Plaintiff offers not a single fact to support its alternative conspiracy theory of an agreement among Bright, as an NAR-affiliated MLS, and any real estate professionals. Plaintiff fails to allege which agents engaged in concerted action with Bright that harmed competition, when they purportedly formed an agreement, or how they did so. Plaintiff instead alleges only that an agreement exists because Bright is owned by trade associations that are, in turn, controlled by competing real estate brokers. (FAC ¶ 104) Such bare allegations are inadequate. *Kendall*, 518 F.3d at 1047-1048 (failing to plead necessary evidentiary facts to support legal conclusions of conspiracy is insufficient).

Beside resting upon a one-line conclusory allegation, Plaintiff's assertion of a conspiracy between Bright and its "members" is contradicted by other allegations in the FAC. Plaintiff's theory seems to be that the real estate agents who subscribe to Bright conspired with Bright to exclude Plaintiff from the regional market by

adopting the Policy. But Plaintiff also alleges that regional, NAR-affiliated MLSs like Bright are required to adopt NAR policies, necessarily meaning that the local "members" had no role in that decision. (ECF No. 46 ¶¶ 30, 35, 90.). And Plaintiff makes no effort to square the allegation of a real estate agent-led conspiracy with its allegation that Plaintiff has customers in Bright's regional market who desire to use Plaintiff's secret marketing services. (*Id.* ¶¶ 66, 112-13.). Why would Plaintiff's own customers who purportedly want to secretly market properties also collude with Bright to support a policy that Plaintiff alleges stops them from secretly marketing properties? Plaintiff's alternative conspiracy theory makes no sense.

B. Plaintiff Fails to Establish Antitrust Injury to Competition.

To allege antitrust injury, Plaintiff must establish both (1) that Defendants have market power and (2) injury to competition beyond the impact upon Plaintiff. *See Rebel Oil Co., Inc. v. Atl. Richfield Co.,* 51 F.3d 1421, 1444 (9th Cir. 1995) ("To show antitrust injury under Sherman Act § 1, a plaintiff must show that the predator has market power."); *McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 811 (9th Cir. 1988) (plaintiff must allege "injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged"). The FAC fails at least on the second prong.

1. Plaintiff alleges economic injury only to itself.

Indispensable to any Section 1 claim is an allegation that competition, rather than mere competitors, has been injured. *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1338 (9th Cir. 1983). While Plaintiff alleges that the Policy injured it by causing its listings to be removed, its agent participation to decline, and its access to capital to be constrained, thereby foreclosing it from opportunities (ECF No. 46 ¶ 121), these are exclusively impacts to Plaintiff, not antitrust injury to competition. Injury to the plaintiff alone is not sufficient to prove injury to competition itself, through higher consumer prices, higher real estate professional prices, and reduced market output. *See Robert's Waikiki U-Drive, Inc. v. Budget*

Rent-a-Car Sys., Inc., 491 F. Supp. 1199, 1213 (D. Haw. 1980), *aff'd,* 732 F.2d 1403, 1406 (9th Cir. 1984) ("[p]laintiffs have not alleged that they went out of business because of the fly-drives. They have not alleged that anyone else went out of business because of the fly-drives. They have not alleged that because of the fly-drives consumers were forced to pay more within the car rental market. They have not alleged that because of the fly-drives Budget achieved a market position that allowed it to impose onerous terms on consumers of rented cars. They have shown no diminution in competition.").

Plaintiff fails to allege that any competition in the residential real estate market has in any way suffered by the adoption of the Policy – much less that competition in either Bright's or MRED's regional markets has in any way been affected. There are no allegations, or even suggestions, that anyone has or imminently will be forced out of business, that consumers pay more, that real estate professionals pay more, or that any consumers in the regional market areas suffer based on Bright's or MRED's alleged actions. There are no such allegations because they cannot be made, in particular where MRED never adopted the Policy. Similarly, because participation in an MLS is voluntary, agents who do not like the rules may simply quit. Plaintiff fails to allege diminution in competition. *See also Cascade Cabinet Co. v. W. Cabinet & Millwork Inc.,* 710 F.2d 1366, 1373 (9th Cir. 1983) (holding that although plaintiff complains of its business losses, economic injury to a competitor does not equal injury to competition and that "'[i]t is injury to the market, not to individual firms, that is significant.'" (citing *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1292 (9th Cir.1983))).

2. Plaintiff's business model is itself anticompetitive.

The anticompetitive effects of *Plaintiff's* business model renders the FAC as the ultimate ironic pleading. Plaintiff's customers represent both buyers and sellers in real estate transactions. (ECF No. 46 ¶ 60). A real estate seller's interest is to maximize the sale price, an outcome that any economist – and common sense – will

confirm can be best achieved by presenting a property to as large a pool of potential buyers as possible. That way, many qualified purchasers have an opportunity to bid for a property, and perhaps outbid a competing buyer. *See Realty Multi-List*, 629 F.2d at 1368 ("A critical imperfection [in a perfectly competitive real estate market] arises from the immobility of the product – real property is, of course, immovable. This insurmountable geographical imperfection magnifies the importance of communicating useful sales data.") (citation omitted). Similarly, buyers in the market for residential real estate need as much information as possible about the properties on the market and about recent sales to ensure they do not overpay for a property. A buyer with multiple options can more effectively negotiate a better price. Both buyers and sellers, and other participants in the real estate market such as lenders and appraisers, need complete information about recent sales and proposed transactions to be able to value each property and determine if an offer should be made or accepted, and whether financing should be extended for a purchase. *Id.* (a real estate broker "can reduce the level and impact of these [market] imperfections. … One method of achieving a further reduction of imperfections is by resort to the trade exchange format of the multiple listing service.").

As Plaintiff describes its business model, Plaintiff wants the Court to allow Plaintiff's customers in Bright's and MRED's territories to intentionally withhold from segments of other agents information about a seller's property so Plaintiff's customers can market the property privately – i.e., not through the local MLS. (ECF No. 46 ¶¶ 8, 62). The effects on the local market are readily apparent: a seller's property would be exposed only to a segment of potential buyers, rather than to tens of thousands of real estate agents representing potentially thousands of possible buyers. This creates the opposite of an efficient market, and deprives sellers of information about the true value of the property because there is limited competition among buyers. Similar detrimental effects are suffered by buyers, who

not only will be deprived of knowledge about properties on the market but who will also lack information about comparable sales, and thus will have incomplete information required to make a fair offer. The implications for discriminatory home sales are obvious.[3]

These are not theoretical impacts on hypothetical sellers and buyers, but are the stated goals for Plaintiff's business. "By joining PLS, licensed real estate professionals could privately share pocket listings with other licensed real estate professionals while avoiding the exposure of those listings through the NAR-affiliated MLSs." (*Id.* ¶ 8). Plaintiff wants to keep information about seller's properties secret, not available on the local MLS, specifically so there are fewer buyers able to learn about the particular properties – "[f]or home sellers and the licensed real estate professionals serving those home sellers, the PLS offered all of the benefits of the NAR-affiliated MLSs while retaining the privacy and discretion that would be lost by listing with NAR-affiliated MLSs." (*Id.*). Plaintiff's business model does not support a free market with open information and competition; it does the opposite.

While Plaintiff is free to create a business model that minimizes available information – assuming of course that its clients are informed about the limitations

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[3] Pocket listings like those facilitated by Plaintiff are well known for their potential to facilitate violations of federal and state fair housing laws. *See* National Fair Housing Alliance, *Fair Housing Solutions: Overcoming Real Estate Sales Discrimination* (Dec. 2019), https://nationalfairhousing.org/wp-content/uploads/2019/12/Fair-Housing-Solutions-Overcoming-Real-Estate-Sales-Discrimination-2.pdf ("Pocket listings can make it easy to support discrimination by shielding properties that are available for sale from most potential buyers. Sellers or real estate agents who want to engage in discrimination can use this tactic easily to hide properties from borrowers of color, in violation of both the Civil Rights Act of 1866 and the Fair Housing Act. The real estate industry should adopt systems and rules to bring pocket listings into the open to ensure that all eligible buyers, irrespective of race or national origin, have a fair opportunity to submit bids.").

presented – there is simply no reason why that model must be adopted throughout the real estate industry. If Plaintiff's customers do not want to share information with the regional market when marketing their client's properties, they do not need to subscribe to the local MLS (or, for Bright's subscribers, they may market the property within their brokerage). Participation with MLSs is voluntary, so every one of Plaintiff's customers who is a member of a local MLS is there because they want access to property information, buyers, and all of the other benefits of participation.

The same issues are currently being litigated by another pocket listing service against NAR in the United States District Court for the Northern District of California. In *Top Agent Network, Inc. v. NAR*, 3:20-cv-03198-VC (N.D. Cal. 2020), the plaintiff sought a preliminary injunction preventing application of NAR's Clear Cooperation Policy on the grounds that it was anticompetitive. On July 16, 2020, Judge Vince Chhabria denied the plaintiff's request for a preliminary injunction, saying the plaintiff "has not raised serious questions on the merits of its claims, much less a likelihood of success," and concluded that "an injunction would not serve the public interest." Order Den. Mot. For Prelim. Inj., 3:20-cv-03198-VC, ECF No. 43, at 1. Top Agent Network's business model and antitrust allegations relating to NAR's Policy are nearly identical to the ones Plaintiff asserted here. As Judge Chhabria ruled:

> According to the policy, brokers who join a NAR-affiliated listing service must post properties that they have marketed elsewhere onto the NAR database within one day. Because Top Agent Network operates separate databases of properties that are available only to select buyers and sellers, its members are understandably resistant to the policy. But that does not mean that NAR has "boycotted" these agents: members of Top Agent Network are free to join any NAR listing service and enjoy its benefits, and they are free to withdraw if

> they do not like the policies. Antitrust law does not give them a right to benefit from the contributions of fellow NAR members while withholding listings of their own.

Id. at 1-2.

Antitrust laws protect competition, not competitors. Plaintiff's complaint should be dismissed because its allegations of injury are grossly insufficient as to an impact on competition, and its own business model is anticompetitive.

C. Plaintiff Fails to Define the Relevant Geographic Market.

The FAC fails to plausibly define the relevant geographic market because it alleges more than one geographic market, it does not clearly define each alleged local market in reasonably concrete geographic terms or their economic boundaries, and the proposed national market is irrelevant because Bright and MRED do not have national operations.

Plaintiff contends the relevant geographic market for the "provision of listing network services to licensed real estate professionals for the sale of residential real estate listings" is "nationwide" or in the alternative "each and every service area of a NAR-affiliated MLS, as well as service areas of each MLS Defendant." (ECF No. 46 ¶¶ 98, 100). These claims are not only contradictory, but they fail to identify concrete geographic terms. As a result, Plaintiff fails to plausibly define the relevant geographic market. *See Sidibe v. Sutter Health,* 4 F. Supp. 3d 1160, 1175 (N.D. Cal. 2013) (allegations fail to plausibly define the relevant geographic markets when (1) it is unclear whether claims are based on a single local market, the six county-wide markets, or an indeterminate number of markets bounded by the areas in which the defendant operates; (2) plaintiff fails to provide factual allegations to support drawing lines at county borders; and (3) plaintiffs fail to identify local markets in reasonably concrete geographic terms).

Further, Bright and MRED operate in different parts of the country and are not alleged to compete with Plaintiff (or one another) in any way. Plaintiff cannot

plausibly allege facts showing that Bright, an MLS serving the Mid-Atlantic region, and MRED, an MLS serving northern Illinois, southern Wisconsin, and northwest Indiana, compete with it in California or even the West Coast. In fact, Plaintiff concedes real estate operates in "local or regional areas" and that "[l]icensed real estate professionals regard participation in their local MLS as critical." (ECF No. 46 ¶ 32). Nowhere does Plaintiff allege that any of its customers are affected by actions taken by Bright or MRED in their region markets.

Plaintiff's claim based on a "national" market or alternatively each defendant's regional market is inherently contradictory and non-specific, and thereby insufficient.

V. PLAINTIFF SHOULD NOT BE AFFORDED LEAVE TO AMEND

Bright and MRED recognize that courts frequently afford plaintiffs the opportunity to replead once a motion to dismiss is granted. At the same time, no such opportunity is required where further amendment is futile. *Abagninin v. AMVAC Chem. Corp.* 545 F.3d 733, 742 (9th Cir. 2008) ("Leave to amend may be denied if a court determines that 'allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.' 'Leave to amend may also be denied for repeated failure to cure deficiencies by previous amendment.'"). Amendment appears futile here. After Plaintiff filed its initial complaint, the four defendants, in three separate Local Rule 7-3 conferences, explained to Plaintiff's counsel the pleading defects and urged Plaintiff to address those defects through an amended complaint. While Plaintiff did file an amended complaint, the revisions from the original were modest, and largely involved remedying factual misstatements about MRED and including conclusory allegations rather than adding needed facts. The defendants again met with Plaintiff's counsel under Rule 7-3, in a joint session, to detail why the inadequacies with the initial complaint largely remained in the amended version. Plaintiff, which had already obtained court permission to file a second amended complaint, elected not to do so.

Plaintiff apparently does not have any additional facts to allege. As such, should this motion be granted, leave to amend should be seen as futile, so the dismissal should be entered with prejudice.

VI. CONCLUSION

Defendants Bright and MRED respectfully request that the Court grant its motion to dismiss all claims in Plaintiff's FAC with prejudice. Plaintiff insufficiently alleges the existence of a conspiracy that involves Bright and MRED, any antitrust injury to competition, or even the relevant market, and Plaintiff does not have the ability to cure any of the deficiencies in its FAC.

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Respectfully submitted,

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