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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Grady Hillis, et al.,

Plaintiffs,

vs.

National Association of REALTORS®, et al.,

Defendants.

Case No. 3:21-cv-08194-SPL

DEFENDANT NATIONAL ASSOCIATION OF REALTORS'® MOTION TO DISMISS AMENDED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 8 AND 12(b)(6)

Oral Argument Requested

(Assigned to The Hon. Steven P. Logan)

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 2

A. The Amended Complaint Is Not a Short, Plain Statement of Plaintiffs' Claims 2

1. The Amended Complaint Is Excessive, Repetitive and Conclusory, and Does Not Describe What, If Anything, NAR Did to Harm Plaintiffs 2

2. The Amended Complaint Rests on Impermissible Group Pleading 3

B. The Amended Complaint Does Not State a Valid Claim 4

1. Plaintiffs' Breach of Contract Claims Fail Because They Do Not Allege NAR Contracted With Plaintiffs for the Services at Issue 4

2. Plaintiffs' Antitrust Claims Fail Because They Ignored the Elements 5

a. Plaintiffs Have Not Pleaded Antitrust Injury, Which Is Required for All Antitrust Claims 7

b. Plaintiffs Do Not Allege an Agreement, Which Is Required for a Section 1-Based Claim 8

c. Plaintiffs Do Not Allege a Relevant Antitrust Market or Market Power, Which Are Required for Their Antitrust Claims 8

C. Plaintiffs Cannot State First Amendment Claims Against NAR, a Private Actor 9

D. Plaintiffs Do Not State Any Negligence Claims Against NAR 11

E. Plaintiffs Do Not State Any Tortious Interference Claims Against NAR 11

F. Plaintiffs Do Not State an Aiding and Abetting Claim Against NAR 12

III. CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Adobe Sys. Inc. v. Blue Source Grp., Inc.,
125 F. Supp. 3d 945 (N.D. Cal. 2015) 3, 4

Alegria v. United States,
No. 11-809, 2012 WL 12842258 (D. Ariz. Nov. 20, 2012) 11

Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California,
190 F.3d 1051 (9th Cir. 1999) 7

Antwerp Diamond Exch. of Am., Inc. v. Better Bus. Bur. of Maricopa County, Inc.,
637 P.2d 733, 740 (Ariz. 1981) 11

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 4, 6, 11

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 4, 7

Best v. Mosely,
No. 10-0700, 2011 WL 4857770 (Ariz. Ct. App. Oct. 13, 2011) 12

Big Bear Lodging Ass'n v. Snow Summit, Inc.,
182 F.3d 1096 (9th Cir. 1999) 9

Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.,
637 F.3d 1047, 1058 (9th Cir. 2011) 2

Contreras v. Brown,
No. 17-8217, 2019 WL 1980837 (D. Ariz. May 3, 2019) 11

Dancesport Videos LLC v. Kunitz,
No. 11-1850, 2012 WL 5381421 (D. Ariz. Nov. 1, 2012) 11

Dent v. Lotto Sport Italia S.p.A.,
No. 17-651, 2018 WL 11318189 (D. Ariz. Feb. 12, 2018) 12

Doe v. Camp Pendleton & Quantico Hous. LLC,
No. 20-224, 2020 WL 1890576 (S.D. Cal. Apr. 16, 2020) 3

Eversource Cap. LP v. Fimrite,
No. 18-2583, 2019 WL 11638377 (D. Ariz. May 21, 2019) 4

Gorney v. Arizona Bd. of Regents,
No. 13-23, 2013 WL 5348304 (D. Ariz. Sept. 24, 2013) 12

GRK Holdings, LLC v. First Am. Title Ins. Co.,
No. 10-50, 2010 WL 3940575 (D. Ariz. Oct. 6, 2010) 5

Hatch v. Reliance Ins. Co.,
758 F.2d 409 (9th Cir. 1985) 2

Hicks v. PGA Tour, Inc.,
897 F.3d 1109 (9th Cir. 2018) 9

Hudgens v. NLRB,
424 U.S. 507 (1976) 10, 11

United States v. Joyce,
895 F.3d 673 (9th Cir. 2018) 8

Kendall v. Visa U.S.A., Inc.,
518 F.3d 1042 (9th Cir. 2008) 6, 8

Knapp v. Hogan,
738 F.3d 1106 (9th Cir. 2013) 2

Landers v. Quality Commc'ns, Inc.,
771 F.3d 638 (9th Cir. 2014) 6

Larson v. Johnson,
No. 07-63, 2007 WL 3390883 (D. Ariz. Nov. 13, 2007) 4

Lee v. Katz,
276 F.3d 550, 554 (9th Cir. 2002) 10

LiveUniverse, Inc. v. MySpace, Inc.,
304 F. App'x 554 (9th Cir. 2008) 7

Marsh v. Alabama,
326 U.S. 501 (1946) 10

McHenry v. Renne,
84 F.3d 1172 (9th Cir. 1996) 2, 3

Mothershed v. Justices of Supreme Ct.,
410 F.3d 602 (9th Cir. 2005) 5

Nevijel v. North Coast Life Ins. Co.,
651 F.2d 671 (9th Cir. 1981) 2

Newcal Indus., Inc. v. Ikon Office Solution,
513 F.3d 1038 (9th Cir. 2008) 9

Ohio v. Am. Express Co.,
138 S. Ct. 2274 (2018) 7, 8

Pool Water Prods. v. Olin Corp.,
258 F.3d 1024, 1036 (9th Cir. 2001) 7

Rebel Oil Co. v. Atl. Richfield Co.,
51 F.3d 1421 (9th Cir. 1995) 7

Robles v. Am. Zurich Ins. Co.,
No. 19-5863, 2020 WL 9813476 (D. Ariz. Aug. 3, 2020) 12, 13

Short v. Noble Mountain Cmty. Ass'n,
No. 10-8237, 2012 WL 466915 (D. Ariz. Feb. 14, 2012) 10

SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc.,
88 F.3d 780 (9th Cir. 1996) 6

Snowdon v. Preferred RV Resort Owners Ass'n,
379 F. App'x 636 (9th Cir. 2010) 10

Somers v. Apple, Inc.,
729 F.3d 953 (9th Cir. 2013) 7

Trinidad v. BioLife Plasma Servs., L.P.,
No. 20-2496, 2021 WL 4805325 (D. Ariz. Oct. 14, 2021) 11

Wedgewood Inv. Corp. v. Int'l Harvester Co.,
613 P.2d 620 (Ariz. 1979) 5

Wells Fargo Bank v. Arizona Laborers, Teamsters, and Cement Masons Local No. 395 Pension Trust Fund,
38 P.3d 12 (Ariz. 2002) 12

Statutory Authorities

15 U.S.C. § 1 ..... 6, 8
A.R.S. § 44-1402 8
A.R.S. § 44-1412. 5

I. INTRODUCTION

Defendant National Association of REALTORS® (NAR) respectfully requests that the Court dismiss Plaintiffs' First Amended Complaint, ECF 11, because it does not satisfy the minimum pleading requirements of Rule 8 or state a valid claim under Rule 12.

Rule 8. Plaintiffs purport to assert 1,013 distinct claims against all Defendants, in a pleading spanning 1,295 pages (excluding exhibits), with 4,662 separate paragraphs. Almost all claims are premised on improper group pleading, and none of them describe any actions taken by NAR that purportedly harmed Plaintiffs. From the face of the Amended Complaint, NAR cannot understand the nature of the claims Plaintiffs are asserting against NAR, discern Plaintiffs' legal theories, or meaningfully admit or deny Plaintiffs' repetitive and confusing allegations. The Amended Complaint therefore fails to provide the "short and plain" statement of Plaintiffs' claims that is required under Rule 8.

Rule 12. Moreover, what is clear from the Amended Complaint is that Plaintiffs have failed to address the essential elements of each of the "counts" asserted against NAR in their Amended Complaint, and therefore have failed to state a claim for relief against NAR under Rule 12. Plaintiffs assert breach of contract claims against NAR, but they never identify a contract between a Plaintiff and NAR that could have been breached. Plaintiffs assert antitrust claims against NAR, but they fail to make any of the required factual allegations: (1) they do not define a relevant market; (2) they do not identify an allegedly anticompetitive agreement; and (3) they do not describe any way in which NAR's alleged actions harmed competition. Plaintiffs assert First Amendment claims against NAR, but NAR is not a government actor. Plaintiffs assert negligence claims, but they identify no duty owed to them by NAR. And Plaintiffs assert tortious interference and aiding and abetting claims, but they allege no facts showing NAR took any action to induce a breach of Plaintiffs' contracts or aid any other tortious conduct. These substantive defects are fatal to Plaintiffs' claims under Rule 12.

NAR respectfully moves the Court for an order dismissing the Amended Complaint.

II. ARGUMENT

A. The Amended Complaint Is Not a Short, Plain Statement of Plaintiffs' Claims

Federal Rule of Civil Procedure 8(a) "requires that a complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011) (quoting Fed. R. Civ. P. 8(a)(2)). "Each allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). These rules are "violated . . . when a pleading says *too much*." *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013). Complaints fail to meet the requirements of Rule 8 when they are "argumentative, prolix, replete with redundancy, and largely irrelevant," *McHenry v. Renne*, 84 F.3d 1172, 1177–80 (9th Cir. 1996), when they are over "70 pages in length," and "confusing and conclusory," *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 415 (9th Cir. 1985), or when they are "verbose, confusing and almost entirely conclusory," *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981). A plaintiff's failure to comply with Rule 8 "is a basis for dismissal independent of Rule 12(b)(6)." *McHenry*, 84 F.3d at 1179.

1. The Amended Complaint Is Excessive, Repetitive and Conclusory, and Does Not Describe What, If Anything, NAR Did to Harm Plaintiffs

At 1,295 pages of text—and over 900 pages of attached exhibits—the Amended Complaint is far from a "short and plain statement." Indeed, it is longer than numerous complaints the Ninth Circuit has held were correctly dismissed under Rule 8. *See, e.g.*, *McHenry*, 84 F.3d at 1174, 1179 (affirming dismissal of a 53-page complaint); *Hatch*, 758 F.2d at 415 ("The district court did not abuse its discretion in concluding that appellants' complaints, which, including attachments, exceeded 70 pages in length, were confusing and conclusory and not in compliance with Rule 8.").

Beyond its excessive length, Plaintiffs' Amended Complaint is full of the defects that Rule 8 guards against. The pleading is "replete with redundancy." *McHenry*, 84 F.3d at 1174. Plaintiffs repeat the same allegations in hundreds of different claims. *See, e.g.*, ECF 11 ¶¶ 47, 55, 59, 63, 67, 71, 75, 79, 83, 87, 91, 103, 115, 127. The Amended Complaint also is "confusing and almost entirely conclusory." *Nevijel*, 651 F.2d at 674. The antitrust claims,

for example, consist of allegations repeated from breach of contract claims, *see*, *e.g.*, ECF 11 ¶¶ 183-84, quotations from statutes, *id.* ¶¶ 185-88, and a conclusory allegation that "Defendants restricted commerce and excluded competition," *id.* ¶ 189.

"Prolix, confusing complaints," like Plaintiffs' Amended Complaint, "impose unfair burdens on litigants and judges." *McHenry*, 84 F.3d at 1179. Under Rule 8, the Court and the parties are entitled to know what exactly Plaintiffs are putting at issue in this case, and Plaintiffs' Amended Complaint fails to provide the requisite, fair notice to Defendants.

2. The Amended Complaint Rests on Impermissible Group Pleading

Litigants and judges are also entitled to know "who is being sued for what." *McHenry*, 84 F.3d at 1179. "[W]hen a pleading fails to allege what role each Defendant played in the alleged harm, this makes it exceedingly difficult, if not impossible, for individual Defendants to respond to Plaintiffs' allegations." *Adobe Sys. Inc. v. Blue Source Grp., Inc.*, 125 F. Supp. 3d 945, 964 (N.D. Cal. 2015) (quotation marks omitted). Rule 8 therefore "requires allegations in a complaint to be specific enough to place the opposing party on notice so that they can defend themselves." *Doe v. Camp Pendleton & Quantico Hous. LLC*, No. 20-224, 2020 WL 1890576, at *7 (S.D. Cal. Apr. 16, 2020). "Lumping multiple defendants with broad allegations does not provide such notice and is prohibited." *Id.* (collecting cases).

The Amended Complaint fails to clear this bar. Plaintiffs are asserting 1,013 counts against all Defendants collectively, and their allegations refer almost exclusively to all "Defendants" as a group. Those allegations do not provide NAR any way to understand who Plaintiffs allege to have taken any of the complained-of actions.

The problems with Plaintiffs' impermissible attempt to "[l]ump[] multiple defendants with broad allegations," *Doe*, 2020 WL 1890576, at *7, were compounded on February 11, when Plaintiffs voluntarily moved to dismiss "all named defendants who have not been served." ECF 16 at 1. Those Defendants are now out of the case. ECF 17. And it is not at all clear whether the conduct described in the Amended Complaint is allegedly attributable to any of the dismissed Defendants or any of those that remain. To answer to the Amended Complaint as written, NAR will need to admit or deny 4,662 paragraphs of allegations without

any way to determine "what role each Defendant played in the alleged harm." *Adobe Sys.*, 125 F. Supp. 3d at 964. That is not consistent with the requirements imposed by Rule 8.

B. The Amended Complaint Does Not State a Valid Claim

A complaint must be dismissed under Federal Rule of Civil Procedure 12(b)(6) if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. A plaintiff must allege "well-pleaded facts" that "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). None of the "counts" asserted against NAR are supported with sufficient factual allegations that, taken as true, amount to a legally valid claim against NAR.

1. Plaintiffs' Breach of Contract Claims Fail Because They Do Not Allege NAR Contracted With Plaintiffs for the Services at Issue

Without an allegation of "the existence of a contract between the plaintiff and the defendant," a complaint does not state a claim for breach of contract. *Eversource Cap. LP v. Fimrite*, No. 18-2583, 2019 WL 11638377, at *3 (D. Ariz. May 21, 2019); *see also id.* at *4 ("Because Eversource has not alleged the existence of a contract between Eversource and Non-Corporate Defendants, Eversource has failed to state a claim for breach of contract against Non-Corporate Defendants.").[1]

The Amended Complaint is missing these key allegations regarding NAR. Plaintiffs never allege they entered any contract with NAR. Nor do they allege they contracted with NAR to obtain the services that were the subject of the alleged breach. *See e.g.*, ECF 11 ¶ 42 (alleging an agreement with "defendants . . . to provide advertising through an MLS service and access to homes through lockboxes"). That is sufficient reason to dismiss every breach of contract claim against NAR. *See Larson v. Johnson*, No. 07-63, 2007 WL 3390883, at *5 (D.

[1] Because no contract is alleged, it is not possible to determine what state's law would apply to the hypothetical contract. But "Arizona law . . . parallels the law in other jurisdictions" on this point. *See Eversource Cap.*, 2019 WL 11638377, at *3 n.5.

Ariz. Nov. 13, 2007) ("Plaintiff states a claim against Kittleson for breach of contract, but not against Johnson and Swanson because no contract is alleged to exist.").

Plaintiffs do allege that they entered contracts with Defendant FLEXMLS, Defendant Supra, and various buyers and sellers of homes. But none of those people or entities are NAR. The only connection between any of those entities and NAR claimed in the Amended Complaint is in footnote 3, where Plaintiffs allege, "On information and belief FBS and FLEX are contracted with either NAR, AAR and/or WMAR to provide MLS services to real estate brokers and agents." ECF 11¶ 12 n.3. Even if those alleged contractual relationships between FLEX and NAR exist, which NAR will assume solely for the purpose of Plaintiffs' motion to dismiss, they do not establish a contractual relationship between NAR and any ***Plaintiff***.

Because Plaintiffs do not allege there was a contractual relationship between Plaintiffs and NAR regarding "redact[ions to] information [in] Plaintiffs['] listing[s]," ECF 11 ¶ 49, "lockboxes," *id.* ¶ 53, "fine[s] . . . for not putting the owner's name in" listings, *id.* ¶ 57, or any other conduct allegedly related to a breach, every breach of contract count asserted against NAR should be dismissed. *See GRK Holdings, LLC v. First Am. Title Ins. Co.*, No. 10-50, 2010 WL 3940575, at *6 (D. Ariz. Oct. 6, 2010) ("To prevail on a breach of contract claim, a plaintiff must prove the existence of a contract between the plaintiff and defendant . . . .").

2. Plaintiffs' Antitrust Claims Fail Because They Ignored the Elements

"The Arizona Uniform State Antitrust Act is interpreted in conformity with the federal antitrust laws." *Mothershed v. Justices of Supreme Ct.*, 410 F.3d 602, 609 (9th Cir. 2005) (cleaned up); *see also Wedgewood Inv. Corp. v. Int'l Harvester Co.*, 613 P.2d 620, 623 (Ariz. 1979) ("The Arizona legislature clearly intended to strive for uniformity between federal and state antitrust laws."); A.R.S. § 44-1412. Accordingly, Plaintiffs' state and federal claims are subject to the same pleading standards. NAR respectfully submits Plaintiffs' antitrust claims should be dismissed for failing to meet those standards.

The Amended Complaint selectively quotes from the Sherman Act and Arizona antitrust law, *see, e.g.*, ECF 11 ¶¶ 1495-98, and asserts that "Defendants restricted commerce and excluded competition" by (1) "unlawfully and systematically redacting and excluding and

interfering with information in the Plaintiff's advertisements and limiting access to Plaintiff's lockboxes on the homes and requiring that particular lockbox on the homes Plaintiffs had for sale," *id.* ¶ 1499; (2) "threatening to fine Plaintiffs and limiting access to Plaintiffs listing," *id.* ¶ 3174; (3) "unlawfully and systematically controlling Plaintiff's relationship with his client and the ultimate terms of the contract between parties unrelated in any way to the defendants by conducting an unlawful grievance process without lawful authority," *id.* ¶ 3370; and (4) "unlawfully adding an electronic button that required the broker or agent to agree to NAR Policy Statement 8.0 and WMAR Rules and Regulations Section 2.15 before they could access Flex (MLS)," *id.* ¶ 4584. These labels and conclusions are not enough for a federal or state antitrust claim to pass muster at the pleading stage.

A plaintiff cannot simply quote the language of the statute to state a valid claim. *See Iqbal*, 556 U.S. at 678*; Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638, 644 (9th Cir. 2014) ("[W]e do not agree that conclusory allegations that merely recite the statutory language are adequate."). Nor is it enough for an antitrust complaint to simply assert that the complained-of conduct harmed competition. *See SmileCare Dental Grp. v. Delta Dental Plan of Cal., 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 marks omitted)). An antitrust plaintiff must allege specific facts that plausibly suggest competition has been harmed by the defendants' conduct; mere labels and conclusions are not enough. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) ("To state a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, claimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts . . . ."). Plaintiffs have failed to meet that burden.

The fact the Plaintiffs have advanced only conclusory allegations is sufficient to dispose of their antitrust claims under Rule 12. *See Twombly*, 550 U.S. at 557 ("[A] conclusory allegation . . . does not supply facts adequate to show illegality."). But even

beyond those flaws in their pleading, they also have failed to plead foundational elements of their antitrust claims.

a. Plaintiffs Have Not Pleaded Antitrust Injury, Which Is Required for All Antitrust Claims

"It is well established that the antitrust laws are only intended to preserve competition for the benefit of consumers." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999). For that reason, a private plaintiff can sustain an antitrust claim only when it has suffered an "antitrust injury," which is an injury caused by "acts that harm 'allocative efficiency *and* raise[] the price of goods above their competitive level or diminish[] their quality.'" *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034, 1036 (9th Cir. 2001) (alterations in original) (quoting *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995)). In other words, to plead antitrust injury, an antitrust plaintiff must allege facts that plausibly suggest competition has been harmed by the defendant's actions. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 343-44 (1990) ("The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.").

Plaintiffs failed to plead any facts suggesting competition (and consumers) have been harmed by NAR's actions—in the form of higher prices, lower quality, reduced output, or otherwise. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) ("*Amex*") (evidence of harm to competition includes "reduced output, increased prices, or decreased quality in the relevant market"). Plaintiffs have therefore failed to plead a necessary element of their antitrust claims. *See Somers v. Apple, Inc.*, 729 F.3d 953, 967 (9th Cir. 2013) (affirming dismissal of a complaint in part because plaintiff's "alleged inability to play her music freely is not an 'antitrust injury' that affects competition"); *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 557 (9th Cir. 2008) ("LiveUniverse's failure to allege causal antitrust injury, which 'is an element of all antitrust suits,' serves as an independent basis for dismissal." (quoting *Rebel Oil*, 51 F.3d at 1433, 1445)).

b. Plaintiffs Do Not Allege an Agreement, Which Is Required for a Section 1-Based Claim

Plaintiffs purport to assert claims under Section 1 of the Sherman Act, but they never identify the specific agreement that allegedly restrains trade, the parties to that alleged agreement, or when it was struck. An agreement is an essential element of a Section 1 antitrust claim. *See* 15 U.S.C. § 1 (prohibiting "contract[s], combination[s] in the form of trust or otherwise, or conspirac[ies], in restraint of trade"); A.R.S. § 44-1402 (prohibiting "contract[s], combination[s] or conspirac[ies] between two or more persons in restraint of, or to monopolize, trade"). That is reason enough to dismiss Plaintiffs' Section 1 antitrust claims and their state law counterparts. *See Kendall*, 518 F.3d at 1047 (9th Cir. 2008) ("To state a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, claimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove . . . a contract, combination or conspiracy . . . .").

c. Plaintiffs Do Not Allege a Relevant Antitrust Market or Market Power, Which Are Required for Their Antitrust Claims

"Section 1 [of the Sherman Act] prohibits only agreements that *unreasonably* restrain trade." *United States v. Joyce*, 895 F.3d 673, 676 (9th Cir. 2018). "Restraints can be unreasonable in one of two ways." *Amex*, 138 S. Ct. at 2283. "A small group of restraints are unreasonable *per se* because they always or almost always tend to restrict competition and decrease output." *Id.* (quotation marks omitted). Because Plaintiffs do not allege that NAR did anything that falls into the "small group of restraints are unreasonable *per se*," *id.*, their antitrust claims must plead facts to support a valid claim under the Rule of Reason.

Under the Rule of Reason, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Id.* at 2284. Carrying that burden requires "proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market" or "proof of market power plus some evidence that the challenged restraint harms competition." *Id.* The Amended Complaint does not address any of these elements.

Plaintiffs do not identify the relevant consumers or allege facts suggesting consumers were harmed by NAR's alleged conduct. They do not define a relevant antitrust product market. They never define a geographic market. Indeed, they never, in 1,295 pages of allegations, use the phrase "relevant market."

These omissions are all fatal. "Antitrust law requires allegation of both a product market and a geographic market." *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 n.4 (9th Cir. 2008). So "Plaintiffs must plead a relevant market to state an antitrust claim under the Sherman Act, unless they assert a *per se* claim." *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018); *see also Newcal*, 513 F.3d at 1045 ("There are . . . some legal principles that govern the definition of an antitrust 'relevant market,' and a complaint may be dismissed under Rule 12(b)(6) if the complaint's 'relevant market' definition is facially unsustainable."). Plaintiffs made no attempt to do this, so their antitrust claims should all be dismissed.

Similarly, to the extent Plaintiffs intended to allege a monopolization claim against NAR under Section 2 of the Sherman Act and its analog under Arizona law, it suffers from the same defects. "Monopolization claims can only be evaluated with reference to properly defined geographic and product markets." *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1104 (9th Cir. 1999). Because "Plaintiffs do not sufficiently identify the markets affected by [NAR's] alleged antitrust violations," their monopolization claims should likewise be dismissed. *Id.*

C. Plaintiffs Cannot State First Amendment Claims Against NAR, a Private Actor

NAR is not a government actor that may be sued for a constitutional violation. Plaintiffs effectively concede this. They acknowledge, "[g]enerally, First Amendment protection requires a 'Government Actor' and it usually involves a state or federal statute that infringes on free speech." ECF 11 ¶ 34. Plaintiffs nevertheless raise First Amendment claims on the theory that "the Defendants . . . attempt to assume [the] role [of the Arizona Department of Real Estate] and are 'quasi-governmental.'" *Id.* ¶ 35. According to Plaintiffs,

"[t]his case is arguably a case of first impression because the 'Government Actor' in this case is not employed by the government." *Id.*

Plaintiffs' theory is not novel. There are well-defined standards for determining when a private actor engages in state action. Plaintiffs' allegations do not satisfy them.

"State action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002) (quotations marks omitted). A private actor may, for example, be subject to a constitutional suit if it "perform[s] the traditional and exclusive public function of municipal governance." *Snowdon v. Preferred RV Resort Owners Ass'n*, 379 F. App'x 636, 637 (9th Cir. 2010) (citing *Marsh v. Alabama*, 326 U.S. 501 (1946)). This is a high bar. It requires that the defendant "'assum[e] . . . all of the attributes of a state-created municipality' and 'exercise . . . semi-official municipal functions as a delegate of the State.'" *Id.* (quoting *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976)).

Here, Plaintiffs allege no "close nexus between the State and the challenged action." *Lee*, 276 F.3d at 554. They expressly allege the contrary—that Defendants are not affiliated with and have no power delegated from the state. According to Plaintiffs, regulation of real estate "is a role that is held by statute in Arizona only to the Arizona Department of Real Estate." ECF 11 ¶ 35.

Plaintiffs likewise appear to claim that Defendants are "semi-official municipal functions as a delegate of the State." *Hudgens*, 424 U.S. at 519. For example, Plaintiffs allege that Defendants generally "impose fines and sanctions"—on members of a voluntary, private organization. ECF 11 ¶ 35. But that does not make NAR a delegate of the State. In fact, this Court rejected a similar argument brought against a homeowners' association, which "is not a state actor" under Arizona law. *Short v. Noble Mountain Cmty. Ass'n*, No. 10-8237, 2012 WL 466915, at *9 (D. Ariz. Feb. 14, 2012). Imposing fines within a voluntary organization falls well short of "perform[ing] the full spectrum of municipal powers and st[anding] in the shoes of the State." *Hudgens*, 424 U.S. at 519, 521. Accordingly, "the constitutional guarantee of free expression has no part to play in a case such as this." *Id.* at 521.

D. Plaintiffs Do Not State Any Negligence Claims Against NAR

"In Arizona, to establish a claim for negligence, 'a plaintiff must prove'" it was owed "'a duty requiring the defendant to conform to a certain standard of care.'" *Contreras v. Brown*, No. 17-8217, 2019 WL 1980837, at *6 (D. Ariz. May 3, 2019) (quoting *Alegria v. United States*, No. 11-809, 2012 WL 12842258, at *4 (D. Ariz. Nov. 20, 2012)). The only duty referred to in the Amended Complaint is a purported "duty to not infringe on the Plaintiff's advertising in violation of the First Amendment of the U.S. Constitution, state law and administrative code." ECF 11 ¶ 325. That is not a legally cognizable duty. "[A] statute may only establish a duty of care if it is designed to protect the class of persons, in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation." *Trinidad v. BioLife Plasma Servs., L.P.*, No. 20-2496, 2021 WL 4805325, at *3 n.2 (D. Ariz. Oct. 14, 2021). Neither the First Amendment nor any Arizona law or administrative code discussed in the Amended Complaint creates such a duty.

E. Plaintiffs Do Not State Any Tortious Interference Claims Against NAR

"Under Arizona law, the elements of a claim of tortious interference with contract" include "knowledge of the relationship or expectancy on the part of the interferer." *Dancesport Videos LLC v. Kunitz*, No. 11-1850, 2012 WL 5381421, at *9 (D. Ariz. Nov. 1, 2012) (citing *Antwerp Diamond Exch. of Am., Inc. v. Better Bus. Bur. of Maricopa County, Inc.*, 637 P.2d 733, 740 (Ariz. 1981)). Plaintiffs plead no facts demonstrating that NAR had any knowledge of any contract that was allegedly interfered with.

Plaintiffs do make conclusory claims that "[t]he Defendants"—not NAR, specifically—"had knowledge of [a] relationship and/or business expectancy." *E.g.*, ECF 11 ¶ 1569. But that is the sort of "[t]hreadbare recital[] of the elements of a cause of action" that "do[es] not suffice" to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). There is not a single fact alleged in the Amended Complaint that shows how NAR could have known, much less actually knew, about the "contractual relationship[s] between the Plaintiffs and their client[s] for [particular] listing[s]." ECF 11 ¶ 1569. Nor is there any explanation of how any specific

contracts were breached or "terminated . . . due to the actions" of NAR. *Gorney v. Arizona Bd. of Regents*, No. 13-23, 2013 WL 5348304, at *10 (D. Ariz. Sept. 24, 2013).

Both omissions require dismissal of Plaintiffs' tortious interference claims. Plaintiffs cannot state a claim without alleging plausible facts showing that NAR knew about a specific contract and caused a breach or termination of it. *See id.*; *Dent v. Lotto Sport Italia S.p.A.*, No. 17-651, 2018 WL 11318189, at *4 (D. Ariz. Feb. 12, 2018) (dismissing claim because "Plaintiff fails to allege any facts suggesting Defendant knew of Plaintiff's contractual relationship with GoDaddy"); *Best v. Mosely*, No. 10-0700, 2011 WL 4857770, at *3 (Ariz. Ct. App. Oct. 13, 2011) ("[B]ecause Best fails to allege that a contract was actually breached as a result of Mosley's alleged interference, he has failed to plead a claim for tortious interference with a contractual relationship.").

F. Plaintiffs Do Not State an Aiding and Abetting Claim Against NAR

Plaintiffs also fail to plead facts that would satisfy the elements of an aiding and abetting tortious conduct claim. "In Arizona, 'claims of aiding and abetting tortious conduct require proof of three elements: (1) the primary tortfeasor must commit a tort that causes injury to the plaintiff; (2) the defendant must know that the primary tortfeasor's conduct constitutes a breach of duty; and (3) the defendant must substantially assist or encourage the primary tortfeasor in the achievement of the breach.'" *Robles v. Am. Zurich Ins. Co.*, No. 19-5863, 2020 WL 9813476, at *2 (D. Ariz. Aug. 3, 2020) (quoting *Wells Fargo Bank v. Arizona Laborers, Teamsters, and Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12 (Ariz. 2002)). This means a pleading must describe "two separate actions or sets of factual allegations, the primary tort and the acts made in concert with the primary tort. The acts made in concert with the primary tort must be distinct enough to be separate from the primary tort factually." *Id.*

For the reasons discussed above, Plaintiffs have not adequately alleged any primary torts at all that involve NAR. They also have not alleged a primary tort ***and*** a separate act made by NAR in concert with the primary tortfeasor. Rather, Plaintiffs merely assert "the Defendants substantially assisted or encouraged the primary tortfeasor in the achievement of

the breach," without describing any conduct that could constitute assistance or encouragement. ECF 11 ¶ 1581. Plaintiffs also decline to identify which Defendant is allegedly a primary tortfeasor and which is an alleged aider and abettor. And they never identify actual separate conduct performed by one Defendant but not another in the aiding and abetting allegations. All of those failures mean Plaintiffs have not stated an aiding and abetting tortious conduct claim. *See Robles*, No. 19-5863, 2020 WL 9813476, at *2 (D. Ariz. Aug. 3, 2020) (dismissing claim because "[i]n the Complaint there is no act pleaded against [the alleged aiders and abettors] that is not also pleaded against [the alleged tortfeasor]").

III. CONCLUSION

For the reasons stated herein, NAR respectfully requests that all claims in the Amended Complaint (ECF 11) be dismissed.

DATED: February 24, 2022

s/ *Douglas C. Northup*
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Attorneys for Defendant National Association of REALTORS®

Local Rule 12.1(c) Certification

Pursuant to Local Civil Rule 12.1(c), NAR certifies that its counsel conferred with Plaintiffs' counsel via email correspondence beginning on February 22, 2022. *See* Ex. 1 at 4. NAR's counsel detailed the grounds for this motion in an email sent on February 23. *See id.* at 3-4. Plaintiffs agreed to extend the deadline for NAR to respond to the Amended Complaint, but they did not agree to voluntarily dismiss NAR or provide a second amended Complaint. *See id.* at 1. As no resolution was reached as to the substance of this motion, NAR now respectfully moves the Court for an order dismissing the Amended Complaint.

s/ *Douglas C. Northup*

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EXHIBIT 1

Peter Benson

From: Mike Bonanno
Sent: Thursday, February 24, 2022 12:10 PM
To: eduardocoronado
Cc: Ethan Glass; Peter Benson
Subject: Re: Hills v. NAR et al., 3:21-cv-08194-SPL

Hi Mr. Coronado,

I've copied your email from last night below so that we have all of our correspondence on this issue in one place. Since your clients will be standing on their amended complaint, NAR has decided there is no need for an extension. We will be filing our motion to dismiss today.

Best,

Mike

From: eduardocoronado <eduardocoronado@frontier.com>
Date: Wednesday, February 23, 2022 at 7:13 PM
To: Mike Bonanno <mikebonanno@quinnemanuel.com>
Subject: Hillis v. National Assoc. of Realtors

[EXTERNAL EMAIL from eduardocoronado@frontier.com]

Hello Mike,

My client does not object to a thirty-day extension. He does not stipulate to a dismissal. Have a good night.

Sincerely,

Eduardo H. Coronado, Esq.

Coronado Law Firm, PLLC

4700 W. White Mountain Boulevard, Suite A

Lakeside, Arizona 85929

Tel: (928) 532-4529

Fax: (928) 532-0753

eduardocoronado@frontier.com

From: eduardocoronado <eduardocoronado@frontier.com>
Date: Wednesday, February 23, 2022 at 4:47 PM
To: Mike Bonanno <mikebonanno@quinnemanuel.com>
Cc: Ethan Glass <ethanglass@quinnemanuel.com>, Peter Benson <peterbenson@quinnemanuel.com>
Subject: Re: Hills v. NAR et al., 3:21-cv-08194-SPL

[EXTERNAL EMAIL from eduardocoronado@frontier.com]

Hello Mike,

I have spoken to my client and forwarded your e-mail to him. He will let me know as soon as he can regarding his position. I have encouraged him to agree to the extension. As soon as he gets back to me, I will let you know.

Sincerely,

Eduardo H. Coronado, Esq.

Coronado Law Firm, PLLC

4700 W. White Mountain Boulevard, Suite A

Lakeside, Arizona 85929

Tel: (928) 532-4529

Fax: (928) 532-0753

eduardocoronado@frontier.com

NOTICE: This e-mail (and any attachments) may contain PRIVILEGED OR CONFIDENTIAL information and is intended only for the use of the specific individual(s) to whom it is addressed. It may contain information that is privilieged and confidential under state and federal law. This information may be used or disclosed only in accordance to law, and you may be subject to penalties under law for improper use or further disclosure of the information in this e-mail and its attachments. If you have received this e-mail in error, please immediately notify the person named above by reply e-mail, and then delete the original e-mail. Thank you.

On Wednesday, February 23, 2022, 01:09:11 PM MST, Mike Bonanno <mikebonanno@quinnemanuel.com> wrote:

Mr. Coronado,

I have not received a return phone call or response to my email below, so I will follow-up again here.

I understand from conversations with counsel for the other defendants that you have agreed to extend the deadline for their motions to dismiss by thirty days. The deadline for NAR to file its motion to dismiss is tomorrow. I think it would be most efficient (both for the parties and the Court) for motion to dismiss briefing to be on the same schedule for all defendants. If you agree, we can prepare a stipulation to reflect the extension for all defendants and file it with the Court today.

If Plaintiffs will not agree to provide a 30-day extension to NAR, or we do not hear back from you today, NAR will move to dismiss the amended complaint tomorrow under Rule 8 and Rule 12(b)(6). The grounds for the motion will be:

Rule 8

- At 4,662, repetitive and conclusory paragraphs, the Amended Complaint is not a short and plain statement showing that Plaintiffs are entitled to relief. *See* Fed R. Civ. P 8(a); *McHenry v. Renne*, 84 F.3d 1172, 1177–80 (9th Cir. 1996).
- Moreover, Plaintiffs' allegations impermissibly "[l]ump[] multiple defendants" together and therefore do not "place [each] opposing party on notice" of the specific conduct alleged against it. *Doe v. Camp Pendleton & Quantico Hous. LLC*, No. 20-224, 2020 WL 1890576, at *7 (S.D. Cal. Apr. 16, 2020).
- These violations of Rule 8 are an independent basis for dismissal.

Rule 12

- The Amended Complaint fails to state a breach of contract claim against NAR because it does not allege (a) the existence of any contract between NAR and a Plaintiff; or (b) that NAR breached the contractual duties described in the complaint. *See Eversource Cap. LP v. Fimrite*, No. 18-2583, 2019 WL 11638377, at *3 (D. Ariz. May 21, 2019).
- The Amended Complaint fails to state numerous required elements of an antitrust claim, including antitrust injury, the existence of relevant antitrust markets, and harm to competition. *See Somers v. Apple, Inc.*, 729 F.3d 953, 967 (9th Cir. 2013); *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008).
- The Amended Complaint fails to state a First Amendment claim against NAR because it alleges no facts showing that NAR is a government actor. *See Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002).
- The Amended Complaint fails to state a negligence claim against NAR because it alleges no duty owed by NAR to Plaintiffs. *See Contreras v. Brown*, No. 17-8217, 2019 WL 1980837, at *6 (D. Ariz. May 3, 2019).
- The Amended Complaint fails to state a tortious interference claim against NAR because it alleges no facts showing how NAR could have known about any contract for which breach was allegedly induced. *See Dancesport Videos LLC v. Kunitz*, No. 11-1850, 2012 WL 5381421, at *9 (D. Ariz. Nov. 1, 2012).
- The Amended Complaint fails to state an aiding and abetting claim against NAR because it alleges no separate conduct by a primary tortfeasor and an aider or abettor. *See Robles v. Am. Zurich Ins. Co.*, No. 19-5863, 2020 WL 9813476, at *2 (D. Ariz. Aug. 3, 2020).

Pursuant to Local Rule 12(c), if you believe any of these issues could be cured by an amendment, please let us know promptly and confirm that you will consent to a 30-day extension of the deadline for NAR's motion to dismiss. After we

file a stipulation to reflect that extension, we will make ourselves available at your convenience to meet and confer about your views.

Upon my review of the complaint, it is clear NAR is not a proper party to this suit because Plaintiffs' amended complaint is premised on facts about NAR that are false, as well as legal theories that are objectively frivolous. Most notably, NAR does not have a contract with any of your clients to provide MLS services or lockbox access. In fact, NAR does not operate an MLS or select the lockboxes used by local associations. Nor is NAR a government actor for First Amendment purposes under any objectively reasonable legal theory. To avoid the cost of motion practice concerning these false statements and frivolous claims, it would be best for your clients to simply agree to drop NAR from their lawsuit, with prejudice. If you will agree to do so, please let us know as soon as possible, so we can prepare a stipulation to effect that dismissal.

Best,

Mike

Mike Bonanno | Quinn Emanuel Urquhart & Sullivan, LLP | Direct: (202) 538-8225

From: Mike Bonanno <mikebonanno@quinnemanuel.com>
Date: Tuesday, February 22, 2022 at 3:09 PM
To: eduardocoronado@frontier.com <eduardocoronado@frontier.com>
Subject: Hills v. NAR et al., 3:21-cv-08194-SPL

Mr. Coronado,

I represent the National Association of REALTORS® in the above-captioned matter. I just called your office, and I understand you were away from your desk. Can you please give me a call back at your earliest convenience? I would like to discuss your amended complaint and the schedule for briefing motions to dismiss. You can reach me at (202) 538-8225.

Thanks, and best,

Mike

Mike Bonanno | **Quinn Emanuel Urquhart & Sullivan, LLP** | Direct: (202) 538-8225