UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHRISTOPHER MOEHRL, MICHAEL COLE, STEVE DARNELL, VALERIE NAGER, JACK RAMEY, SAWBILL STRATEGIC, INC., DANIEL UMPA, and JANE RUH, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, THE LONG & FOSTER COMPANIES, INC., RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	Civil Action No.: 1:19-cv-01610 Judge Andrea R. Wood Magistrate Judge M. David Weisman **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL**

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTRODUCTION

Plaintiffs brought this lawsuit based on the unsupported and untested hypothesis that a rule requiring real estate brokers representing home sellers to offer compensation to buyer brokers is all that stands between our current system and the things they claim to observe in certain cherry-picked markets outside the United States. Instead of the current system, Plaintiffs offer a radical proposal: Plaintiffs would have the Court embrace an amalgamation of the real estate systems in three somewhat random countries—Australia, the United Kingdom, and the Netherlands—as the way homes should be sold in the United States, and (according to Plaintiffs) would be if not for the rules of the National Association of REALTORS® ("NAR") they challenge in this case. If Plaintiffs' hypothesis was correct, the practices prevailing in those countries would replace the manner in which residential real estate has been sold in the United States for more than 100 years, a system that aligns the interests of home sellers and home buyers alike, helps cash-constrained and first-time buyers achieve the dream of home ownership, and is supported by sound economic principles. But Plaintiffs offer no reliable evidence, much less evidence common to the class of home sellers they purport to represent, to support their hypothesis that the NAR rules they challenge caused any home seller or his or her real estate broker to offer to pay the buyer broker's commission, or was the source of any of the market characteristics they like less than what they claim to see overseas.

Plaintiffs' case generally, and their class certification motion specifically, suffers from many defects. At the outset, the NAR rule challenged by Plaintiffs has ***nothing whatsoever*** to do with the ***amount*** of commission charged by listing brokers. This NAR rule—the "Cooperative Compensation Rule"—does not require listing brokers to make any specific offer of compensation; compensation offers as low as one penny or one dollar are permitted. Plaintiffs nonetheless claim that this Rule is somehow responsible for uniformly inflating the commissions

every home seller in twenty widely different geographic areas agreed to pay to their listing brokers—without regard to the facts of any specific transaction.

Not only do Plaintiffs demand a wholesale change to the United States residential real estate system because of a rule that does not require any specific level of compensation, they also seek to certify a massive class covering perhaps millions of home sellers and seek to recover upwards of $40 billion. Plaintiffs' class action gambit is doomed. Plaintiffs face an insurmountable class certification hurdle in establishing antitrust impact with common class-wide evidence. Most critically, how will Plaintiffs establish that, in the absence of the Cooperative Compensation Rule, sellers in the putative class would have acted differently? In other words, how will Plaintiffs prove at a class trial that class members would not have offered the same cooperative compensation to the buyer's broker short of a mini-trial with questions posed to each seller? On this key issue Plaintiffs have failed to provide a trial plan showing how the Court might try these claims on a class-wide basis. And this is not some hypothetical concern. That is because every real estate transaction is unique. Every buyer and seller are unique, every property is unique, every home is unique, and every transaction (including the negotiation over commission amount) is unique. Plaintiffs' effort to try to characterize a highly localized and individualized process implemented by hundreds of thousands of independent contractor real estate agents as a supposedly common, uniform course of conduct, in which all agents and consumers make precisely the same decisions and evaluate homes, pricing, contract terms, and service offerings in the same way, will not be able to run the gauntlet of obstacles that Rule 23 poses here.

Thinking about the proofs needed in an individual plaintiff case helps illustrate the impossible task facing the Court if the class were certified. To connect the Cooperative

Compensation Rule to a home seller's alleged "overpayment," an individual plaintiff would need to show that the Rule affected the behavior of at least four different, and independent, parties: (1) Plaintiff home sellers themselves; (2) the sellers' listing brokers; (3) the individual buyers who bought Plaintiffs' homes; and (4) the individual buyer brokers. Each Plaintiff would need to show that, absent the Rule, he or she would have demanded that the listing broker accept a smaller commission than what the plaintiff actually agreed to pay, ***and*** that each Plaintiff's listing broker would have acceded to that demand. Each Plaintiff would also need to show that, absent the Rule, his or her listing broker would have agreed to list the house for sale without an offer of cooperative compensation to the buyer broker; that the purchaser of each of their homes would have agreed to compensate his or her buyer broker out of the buyer's own pocket (or would have forgone using a buyer broker entirely); ***and*** that each purchaser had the means to do so and complete the purchase at the same ultimate purchase price. Defendants would be entitled to introduce evidence of their own on all of these topics, including testimony from each of the brokers and purchasers involved in the sale transactions that give rise to each of the Plaintiffs' claims. Trying just the claims of the handful of named Plaintiffs would require days of inherently individualized evidence.

This factual complexity cannot be ignored just because Plaintiffs want to proceed on behalf of a class. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 458 (2016) (class certification cannot give "plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action"). And Plaintiffs have utterly failed—in fact, not even really tried—to show how these claims could be tried on behalf of their massive proposed class based on common evidence. Plaintiffs' motion is completely silent on how the ***facts*** underlying their

claims might be introduced or adjudicated on behalf of the class as a whole; indeed, Plaintiffs have not even addressed the facts underlying each of their own, personal claims.

Nor do the opinions of Plaintiffs' proposed experts, Einer Elhauge and Nicholas Economides, supplant the need for individualized inquiries into antitrust impact from the Cooperative Compensation Rule. First, as Defendants establish in their separate motion, neither of those expert reports is admissible under *Daubert*. Second, even if those reports are admissible, they fall far short of the standard that Plaintiffs need to satisfy to obtain class certification. Neither Elhauge nor Economides purports to analyze the actual facts and data presented in this case as "proof" that the Rule had an actual effect on the commissions paid by each named Plaintiff and each and every putative class member. Instead, both experts simply provide lengthy argument that U.S. residential real estate purchases and sales ***should*** operate differently when it comes to broker compensation, and if they did operate differently, Plaintiffs would have been better off. But the opinions of Plaintiffs' experts do not resolve the issue of antirust impact. Even those experts admitted that in their imagined but-for world some sellers would compensate the buyer's broker. And there is no way of figuring out whether any given seller in the proposed class would have done so without individual evidence from each class member. That individualized inquiry into whether a seller would have offered cooperative compensation if his or her agent were not required to do so under MLS rules would overwhelm common evidence and Plaintiffs' expert testimony is no substitute for such individualized proof. Because Plaintiffs cannot establish predominance as well as other Rule 23 requirements, Plaintiffs' motion should be denied.[1]

[1] It is of no moment that a damages class was recently certified by the Western District of Missouri in *Burnett v. National Association of Realtors*, No. 19-cv-00332-SRB. While that case addresses the same Cooperative Compensation Rules in four Missouri MLSs, the decision is not persuasive, is based on

STATEMENT OF FACTS[2]

I. Residential Real Estate in the United States.

Consumers in the United States typically use real estate agents or brokers when they buy or sell a home.[3] Sellers retain a listing broker to help them sell their home quickly, price the home competitively, market to potential buyers, suggest ways to improve the home before sale, and help find a buyer for the home, among other tasks.[4] The listing broker is typically compensated by the seller based on a percentage of the home's sale price.[5]

Listing brokers will typically list the home on a Multiple Listing Service ("MLS")[6] and make an offer of cooperative compensation to the broker who provides a buyer for the property, either as a percentage of the home's sale price or as a flat dollar amount. In the NAR-governed MLSs at issue in this case, an offer of cooperative compensation is required although that offer can be as little as one cent.[7] It is up to the listing broker, in consultation with the seller, to determine how much cooperative compensation to offer.

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different and in fact wildly inconsistent expert opinions and conclusions, and cannot be used to patch over the many holes in Plaintiffs' motion. *See* text *infra* at Section V.

[2] Citations in the form of "Ex. _" are exhibits to the Declaration of Suzanne L. Wahl in Support of Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification and Appointment of Class Counsel. Citations in the form of "Stiroh Report ⁋ _" are to the Expert Report of Lauren Stiroh, Ph.D., attached as Exhibit 1 to the Wahl Declaration. Citations in the form of "Elhauge Report ⁋ _" and "Economides Report ⁋ _" are to the Expert Reports of Dr. Elhauge and Professor Economides attached to Plaintiffs' Memorandum in Support of Class Certification and Appointment of Class Counsel (Dkts. 306-7, 306-9).

[3] Ex. 30, 2021 Profile of Home Buyers and Sellers (hereinafter "2021 HBS") at p. 8 (87% of buyers used an agent or broker); p. 9 (90% of sellers used an agent or broker).

[4] *Id*. at Ex. 7-7, p. 138.

[5] *Id*. at Ex. 7-10, p. 140.

[6] *See* www.nar.realtor/mls-online-listings.

[7] Ex. 13, 2021 Handbook on Multiple Listing Policy at p. 34 (Section 7.23).

These offers of cooperative compensation by listing brokers directly benefit their seller clients. First, offers to buyer brokers can provide an incentive to other brokers in the MLS to find a buyer (even one who may not already be their client).[8] According to Plaintiffs, these offers of cooperative compensation are so compelling that they lead to "steering," or buyer brokers promoting listings to their buyers that offer more cooperative compensation over those that offer less. Elhauge Report ¶ 188. To the extent that that is true (and Defendants dispute it), then offers of cooperative compensation are inherently valuable to sellers, as they increase interest in their homes, and that increased interest generally should lead to more, earlier, and higher purchase offers than they otherwise would have received.[9]

Second, purchasing a home is often a cash-intensive undertaking, and buyers often have difficulty saving for a down payment.[10] When a seller pays the buyer broker, buyers who otherwise would have had to put their limited cash towards paying for a buyer broker are able to use that money for a down payment, which allows more buyers the opportunity to compete to buy the seller's property.[11] To the extent the buyer is paying commission in the form of an increased purchase price, the commission can be rolled into the buyer's mortgage. Increased interest in the seller's listing should lead to more and higher offers and shorter time on market.[12]

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[8] Ex. 47, Rutherford (The Rutherford Group) Decl. ¶ 6 (observing benefit of having "a whole army of other agents working to sell my clients' homes"); Ex. 43, Schmid (Edina Realty) Decl. ¶¶ 22-24 (explains why it helps bring higher prices and/or quicker sales to sellers); Ex. 40, Vincent (Coldwell Banker Realty) Decl. ¶ 7; Stiroh Report ¶ 101.

[9] Stiroh Report ¶¶ 100-108.

[10] Ex. 30, 2021 HBS at Ex. 5-8 (showing buyers delayed by median four years while saving).

[11] *See* Ex. 47, Rutherford (The Rutherford Group) Decl. ¶ 11; Ex. 49, Reynolds (The Reynolds Team) Decl. ¶ 8; Ex. 41, McLaughlin (KW Realty Austin SW) Decl. ¶ 13; Ex. 46, Mesa (BHHS Florida Properties) Decl. ¶21 cash-constrained buyers are able to handle a higher purchase price when sellers pay for buyer broker commission).

[12] Stiroh Report ¶¶ 100-108. Compensating buyer brokers increases the likelihood that the buyer will have his or her own representative, which also benefits sellers. Buyer brokers can work with listing

These benefits exist independently of the NAR rules challenged in this case. The incentives that Plaintiffs claim lead to steering will exist as long as any seller in a relevant market is offering cooperative compensation, and cash-constrained buyers will continue to prefer listings that include buyer broker compensation.[13]

Given these seller incentives, it is unsurprising that the practice of the seller paying the buyer-side commission has existed for more than 100 years, long before any of the NAR rules challenged in this lawsuit.[14] Even Plaintiffs' expert acknowledges this, stating that "[t]he practice of subagency [in which the seller compensated the subagent] was formalized by NAR in the 1970s, ***but had been widely practiced for decades prior***." Elhauge Report ⁋ 30 (emphasis added).

II. The National Association of REALTORS® and the Challenged Rules.

NAR is a professional association of real estate brokers and agents.[15] NAR members belong to one or more of approximately 1,200 local associations or boards, and 54 state and territory associations of REALTORS®.[16] The NAR rules challenged by Plaintiffs and described below ("Challenged Rules") are promulgated by NAR's Board of Directors and found in NAR's Code of Ethics and its Handbook on Multiple Listing Policy (the "NAR Handbook").[17] The NAR

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brokers to resolve unexpected issues that arise during the course of transactions and with their clients to calm emotional responses that can imperil the completion of transactions. Ex. 49, Reynolds (The Reynolds Team) Decl. ⁋ 7; Ex. 41, McLaughlin (KW Realty Austin SW) Decl. ⁋ 8; Ex. 40, Vincent (Coldwell Banker Realty) Decl. ⁋ 7.

[13] Ex. 30, 2021 HBS at Ex. 6-38 (74% of sellers offer no additional incentives to attract buyers)

[14] Ex. 35, Gansho (NAR) Decl ⁋ 12.

[15] Because Corporate Defendants are primarily franchisors or holding companies of real estate brokerages and are not themselves brokers or agents, *none* are members of NAR, *none* participate in MLSs, and therefore *none* are subject to the NAR Rules that Plaintiffs challenge in this case.

[16] Ex. 35, Gansho (NAR) Decl. ⁋ 2.

[17] Ex. 35, Gansho (NAR) Decl. ⁋⁋ 4-5.

Handbook compiles rules and other provisions for the operation of MLSs that are owned or operated by REALTOR® associations.[18]

A. MLS Policy Statement 7.23

Plaintiffs primarily challenge Policy Statement 7.23 of NAR's Handbook (hereinafter the "Cooperative Compensation Rule" or the "Rule")[19], which provides in relevant part:

> In filing property with the multiple listing service, participants make blanket unilateral offers of compensation to the other MLS participants and shall therefore specify on each listing filed with the service the compensation being offered by the listing broker to the other MLS participants. This is necessary because cooperating participants have the right to know what their compensation will be prior to commencing their efforts to sell.
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> * * *
>
> The listing broker retains the right to determine the amount of compensation offered to . . . buyer agents . . .[20]

The Cooperative Compensation Rule thus requires that a broker posting a listing indicate some positive amount of compensation to cooperating MLS participants for producing a buyer. The Rule does not require that listing brokers place any specific value in the "cooperative compensation" field, and permits cooperative compensation offers as low as one cent.[21]

B. Standards of Practice ("SOPs") 16-16 and 3-2

Plaintiffs also challenge two provisions from the NAR Code of Ethics:

SOP 16-16. SOP 16-16 prohibits a buyer broker from "us[ing] the terms of an offer to purchase[] to attempt to modify the listing broker's offer of compensation."[22] This SOP

[18] Ex. 35, Gansho (NAR) Decl. ¶ 6.

[19] Plaintiffs refer to this rule, inaccurately, as "the Buyer-Broker Commission Rule," or sometimes simply the "Buyer-Broker Rule."

[20] Ex. 13, Handbook on Multiple Listing Policy at pp. 37-38.

[21] Ex. 12, Economides Dep. 94:3-14.

[22] Ex 35, Gansho (NAR) Decl ¶ 15.

prohibits a buyer broker from telling a listing broker, "I have an offer for that house, but I'll only share it with you if you agree to increase your offer of compensation."[23] SOP 16-16 does ***not*** prevent negotiations between brokers over cooperative compensation in any other scenario. Nor does it prevent (i) the listing and buyer brokers from collectively negotiating a change in the cooperative fee[24] or (ii) home sellers or buyers from seeking a reduction in cooperative compensation from their broker, or from negotiating a credit from the other party.[25]

SOP 3-2. SOP 3-2 provides that, once a buyer broker has presented an offer to purchase a property, the listing broker may not "attempt to ***unilaterally*** modify" the offer of compensation made in that listing.[26] This SOP thus prevents listing brokers from using the "bait-and-switch" tactic of making one offer of compensation in an MLS listing and then, after a buyer broker has procured a potential buyer and submitted an offer, insisting that the buyer broker accept a smaller amount of compensation. It does not prohibit brokers from negotiating over offers of compensation, and indeed, SOP 3-3 expressly states that "Standard of Practice 3-2 does not preclude the listing broker and cooperating broker from entering into an agreement to change cooperative compensation."[27]

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[23] *See, e.g.,* Ex. 16, NAR Interpretations of the Code of Ethics, 31st Edition #16-15 at NARSITZER0000005157 (finding that a broker who submitted a purchase offer contingent on an increase in the offer of compensation had violated Article 16). *See also id* ¶ 16. Plaintiffs claim that Case Interpretation #16-15 requires that cooperating broker compensation be completed prior to the showing of the property. Pl. Br. at 16. As explained in the accompanying Declaration of Rodney Gansho (Ex. 35 ¶ 19), Plaintiffs are simply misreading that Case Interpretation. While the panel that issued that Interpretation did note that it is best practice for cooperating broker compensation to be settled prior to showing a property, it is not required by any NAR rule.

[24] Ex. 15, NARSITZER0000744708.

[25] *See* Ex. 31, 2022 NAR Code of Ethics (hereinafter "2022 NAR COE") at 3-3.

[26] *See id.*at 3-2 (emphasis added).

[27] *Id.* at 3-3. *See also* Ex. 4, Milligan (NAR) Dep at 73:7-9 ("it's not uncommon for two brokers to negotiate at some point prior to the closing of the transaction to affect the compensation level"); Ex. 47,

C. "One Sided Commission Transparency" and Steering.

Plaintiffs also claim that the alleged wrongdoing was "facilitated" by other NAR rules that "made offered commissions easily viewable and filterable by brokers while hiding them from consumers." Pl. Br. at 16. But Plaintiffs provide no facts to substantiate their theories concerning these other rules and show that all class members were affected by the alleged practices. Plaintiffs have offered no evidence to support their claim that buyer brokers routinely "filter" listings so that buyers see only listings with large offers of compensation.[28] Plaintiffs' claim that NAR rules allow buyer brokers to hide their payments from their clients is similarly meritless. Plaintiffs point to NAR Model MLS rules that address situations in which MLS information is syndicated to third parties. But nothing in these rules prevents member buyer brokers from telling their clients how much cooperative compensation they are being offered. On the contrary: NAR SOPs 1-12 and 1-13 affirmatively ***require*** listing and member buyer brokers to discuss cooperative compensation with their clients when entering into listing broker or buyer broker agreements.[29] And evidence in this case confirms that those conversations do in fact occur.[30]

Rutherford (The Rutherford Group) Decl. ⁋ 8 (describing instances in which listing and buyer agents agree to modify commissions to ensure completion of an otherwise troubled transaction).

[28] Ex. 44, Docktor (BHHS Fox & Roach) Decl. ⁋ (explaining how Bright MLS did not know it had filtering feature and when it investigated it found very little use of that feature and eliminated it in 2019.)

[29] SOP 1-12 requires brokers entering into a listing contract with a home seller to "advise sellers[] . . . [about] company policies regarding cooperation and the amount(s) of any compensation that will be offered" to buyer brokers. Ex. 31, 2022 NAR COE at 1-12. Similarly, SOP 1-13 requires brokers entering into a buyer broker agreement to disclose their compensation to their clients, including "the potential for . . . compensation from other brokers, from the seller . . . or from other parties . . ." *Id*. at 1-13. Plaintiffs' claim that NAR rules allow or encourage member brokers to hide cooperative compensation information from their clients is simply incorrect.

[30] *See, e.g.*, Ex. 49, Reynolds (The Reynolds Team) Decl. ⁋⁋ 2-3; Ex. 40, Vincent (Coldwell Banker Realty) Decl. ⁋ 15.

D. The "Free" Rule

Finally, Plaintiffs claim that former SOP 12-1 and 12-2 "expressly permitted and encouraged buyer-brokers to represent that their services were 'free.'" Pl. Br. at 17. But SOP 12-1 and 12-2 were, in fact, limitations on when a broker could represent their services as free.[31] In addition, none of the named Plaintiffs testified that, when the Plaintiffs were buyers, their buyer brokers claimed that their services were free, or thought that their buyer brokers would work for free.[32]

III. Plaintiffs' Experts' Theories of Harm.

Despite their great length, both the Elhauge and Economides reports boil down to the same simple and speculative notion that if the U.S. residential real estate industry had developed differently during the second half of the 20th century, then it would also be different today, in a way that would benefit the putative class. Specifically, Elhauge claims that an "anticompetitive equilibrium" was established in U.S. residential real estate based on practices that existed for at least two decades ***before*** the Challenged Rules were adopted by NAR in the 1990s. Elhauge Report ¶¶ 172-243. In the system that prevailed from the 1970s to the 1990s, home sellers were represented by brokers who owed them a fiduciary duty; home buyers were usually represented

[31] Ex. 18, 2019 NAR Code of Ethics at 12-1, 12-2 (NARSITZER0000004852). In 2019, SOP 12-1 stated that a REALTOR® could use the term "free" "provided all terms governing the availability of the offered product or service are clearly disclosed at the same time," and SOP 12-2 stated that a REALTOR® could advertise their services as "free" even if they expected to get paid from a source other than their client "provided that the potential for the REALTOR® to obtain a benefit from a third party is clearly disclosed at the same time." *Id*.

[32] *See, e.g.*, Ex. 6, Moehrl Dep. at 133:3-5 (buyer agent did not say his services were free); Ex. 5, Umpa Dep. Vol.I at 77:2-7 (understood that seller would pay the commission); Ex. 8, Ramey Dep. at 176:23-177:13 (same); Ex. 9, Darnell Dep. at 84:14-20 (agreeing that buyer agent should not have worked for free). Currently, SOP 12-1 states "REALTORS® must not represent that their brokerage services to a client or customer are free or available at no cost to their clients, unless the REALTOR® will receive no financial compensation from any source for those services." Ex. 31, 2022 NAR COE at 12-1.

by "subagents," so called because they worked for the listing broker, not the buyer, and owed their fiduciary duties to the seller rather than the buyer.[33] *Id.* ¶¶ 174-185. During this seller-subagency period, MLS rules typically required MLS listings to be accompanied by a blanket offer of subagency—that is, an offer to share a portion of the listing commission with any MLS participant who located a buyer, became the seller's subagent, and helped close the sale. *Id.*

In the 1990s, the U.S. residential real estate industry moved away from seller subagency in favor of the current practice of buyer agents who are retained by, and owe their fiduciary duties to, the home buyer. As seller subagency fell out of favor, NAR changed its MLS rules to permit listings to be made with blanket offers of subagency ***or*** blanket offers of cooperative compensation, the latter of which was paid to brokers working as buyer agents rather than seller subagents.[34]

Elhauge argues that, in spite of the lengthy history of equivalent practices that preceded it, this 1990s NAR rule change somehow produced an enhanced and extended "anticompetitive equilibrium" in which (1) home buyers typically retain buyer brokers and (2) those buyer brokers are typically paid by the listing broker sharing a portion of his or her listing commission. Elhauge Report ¶¶ 172-243. Elhauge claims that in his but-for world, "buyers would be much less likely to use buyer-brokers" and "sellers and seller-brokers would usually not have to incur the costs of paying for buyer-brokers." *Id.* ¶ 237.[35] But Elhauge has not performed any kind of

[33] Elhauge acknowledges that subagency (and the practice of the seller compensating the subagent) existed long before the 1990s, stating that "[t]he practice of subagency was formalized by NAR in the 1970s, ***but had been widely practiced for decades prior***." Elhauge Report ¶ 30 (emphasis added).

[34] Ex. 48, Millet Dep. at 18:22-48:5 (describing work of NAR group that made proposal that led to rule change); Ex. 48, NARSITZER0000629288, Millet Dep. Ex. 18 (Report of the Presidential Advisory Group on Agency).

[35] At his deposition, Elhauge conceded that his conclusion that the use of buyer brokers would be "rare" allows for up to 20% of buyers who would choose to use buyer brokers. Ex. 11, Elhauge Dep. Vol. I

qualitative or quantitative economic analyses to support these claims. *See* Defendants' *Daubert* Motion, Dkt. 318.

Elhauge's opinion that class members are injured, and that such injury can be proved on a class-wide basis with common evidence, is further undermined by his admission that sellers, in the actual world, receive the benefit of higher home prices that include the purported "tax" of the buyer broker commission. Ex. 11, Elhauge Vol. I Dep. 79:14-82:17. Thus, applying Elhauge's own economic logic, to assess whether individual class member sellers were harmed by the Challenged Rules, the Court would need to engage in an individualized analysis of each seller, the price of the home in the actual world, the price of the home in the but-for world, the commission paid in the actual world, and the commission paid in the but-for world to determine whether that seller did better or worse in the actual world than he or she would have in the but-for world. Plaintiffs offer no means of performing that analysis, which would be necessary to establish whether fact of injury can be determined on a class-wide basis. *Suchanek v. Sturm Foods, Inc*., 764 F.3d 750, 756 (7th Cir. 2014); *Messner v. Northshore Univ. Health Sys*., 669 F.3d 802, 815 (7th Cir. 2012); *Riffey v. Rauner*, 910 F.3d 314, 319 (7th Cir. 2018).

Economides's proffered common "proof" of impact is similarly threadbare. He relies entirely on Elhauge for the latter's supposed "findings" that any structural differences between buyer representation practices in each of the U.S. areas served by each of the twenty subject MLSs, on the one hand, and buyer representation practices in a handful of foreign countries, on the other, are ***necessarily*** the result of defendants' anticompetitive behavior.[36] Economides

135:18-24. He did not, however, offer any opinion about how to identify which of these one in five buyers would choose to use a buyer broker or why.

[36] In an example of the circular reasoning that pervades Plaintiffs' experts' analyses, Elhauge then claims that Economides' analysis of benchmark countries "confirm[s]" Elhauge's conclusion that the Challenged

Report ¶¶ 9, 53. Based solely on Elhauge's (nonexistent) "findings," he then concludes that the people who bought homes from the putative class members would not have used buyer representatives any more frequently than residential real estate purchasers in Australia, the Netherlands, or the U.K. typically do. *Id.* ¶¶ 9; 56. Economides thus opines that in the but-for world, 5-20 percent of putative class members would have sold their homes to buyers who were using buyer brokers, but that those buyer brokers would have been paid less than they were in the actual world. *Id.* ¶¶ 56-57.

Economides' analysis then takes a baffling and, for purposes of this motion, fatal turn. Although his opinions are based on (1) Elhauge's liability "finding" that, but for defendants' supposedly illegal conduct, buyers would have made much less frequent use of buyer-brokers, and (2) his own "yardstick" analysis supposedly showing that buyer brokers would be used in only 5-20% of home sales, Economides nonetheless offers an impact and damages model that departs from both positions and presumes that buyer brokers would have been used in ***every*** sale made by a putative class member. *Id.* ¶¶ 84-85. He claims that in every one of those sales, the buyer broker would have received cooperative compensation of 1.55%, rather than what they actually received. *Id.* ¶¶ 83, 95.

This but-for buyer-broker commission level finds no support in the record evidence. It is simply a mishmash of the buyer commission levels that Economides claims to be typical in Australia, the Netherlands and the UK. *Id.* ¶¶ 82, 91 and Table 4. None of this has anything to do with Plaintiffs' liability theory that, in the but-for world, buyer brokers would be largely

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Rules incentivize overuse of buyer brokers and elevate buyer broker commissions. Elhauge Report ¶¶ 148, 175, 235. But Economides' justification for using international benchmarks is itself based on Elhauge's opinion that buyer broker commissions are inflated in the first place. Economides Report ¶ 9. Their Escher-esque reports are therefore invalid and unreliable. Stiroh Report ¶ 69.

absent and not paid for by sellers, and not, as his damages model hypothesizes, equally present but just paid less by sellers. Economides justifies this blatant guesswork—which is rooted in neither the record evidence, nor even in his or Elhauge's liability theories—as acceptable because it is, supposedly, "conservative." *Id.* ¶¶ 81-85.[37]

IV. The Natural Experiments of Northwest MLS, West Penn MLS, and REBNY.

Northwest Multiple Listing Service is one of the largest MLSs in the country, serving more than 33,000 brokers in Washington State.[38] Because it is not affiliated with NAR or owned by a board of REALTORS®, it is not required to follow the rules set out in the NAR Handbook that Plaintiffs challenge in this lawsuit.[39] In July 2019, Northwest MLS announced that, effective October 2019, it would change its rules to no longer require that MLS listings include an offer of compensation to buyer brokers.[40] Northwest MLS also changed its rules to permit brokers to publicly disclose offers of compensation with the other information about listed properties published on public websites.[41]

The West Penn MLS, which serves Pittsburgh and the surrounding areas, is also not affiliated with NAR. It has not required offers of cooperative compensation since at least 2013. As set forth in the publicly available West Penn MLS Rules and Regulations, "The section of the

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[37] Stiroh Report ¶ 145 ("Dr. Economides' claim that his proposed class-wide model is conservative is wrong; with no basis to support his view of the but-for world, there is no basis to assert that the damages model is conservative relative to it.").

[38] Ex. 35, Gansho (NAR) Decl. ¶ 20.

[39] Ex. 35, Gansho (NAR) Decl. ¶ 21.

[40] Ex. 35, Gansho (NAR) Decl. ¶ 23.

[41] Ex. 35, Gansho (NAR) Decl. ¶ 24. Prior to 2022, NAR-governed MLSs were also able to choose to display or not display offers of compensation. *Id.* ¶ 25. Since 2022, NAR-governed MLSs are required to include the offer of compensation on their consumer facing websites. *Id.* ¶ 26. At all relevant times, those offers have always been available at the request of buyers and sellers working with a broker. *Id.* ¶ 25.

Property Input Statement . . . requires the insertion of the compensation being offered by the Listing Broker to the selling [buyer's] Broker. . . . ***A zero (0) is an acceptable answer***."[42] The Real Estate Board of New York ("REBNY") Listing Service ("RLS"), another MLS that is unaffiliated with NAR and that serves the New York City area, also expressly permits offers of $0 compensation to a buyer's broker.[43]

As discussed further in the expert report submitted by Defendants' expert economist, Dr. Lauren Stiroh, *see* Stiroh Report ¶¶ 59-66, Northwest MLS's rule changes had no material effect on the offers of cooperative compensation made by brokers in the Seattle area. In direct contrast to what Plaintiffs predict would occur in the absence of the Cooperative Compensation Rule, listing brokers in the Seattle area continue to offer compensation to buyer broker at essentially the same rates as before their rule changes. In fact, over 99 percent of sellers continued to make a non-zero offer of cooperative compensation, despite there being no requirement that they do so, and 99 percent of those offers are above the yardstick rate proposed by Plaintiffs' expert. *Id.* ¶¶ 63-64.

V. Home Services of America

HomeServices of America, Inc. ("HSoA") is a holding company with direct or indirect holdings that include dozens of real estate brokerage subsidiaries, the franchisor of the Berkshire Hathaway HomeServices" ("BHHS") real estate brand, and a number of other intermediary

[42] Ex. 32, West Penn Multi List, Inc. Rules and Regulations (Eff. Apr. 2013) at 24 (emphasis added); *see also* Ex. 33, West Penn Multi List, Inc. Rules and Regulations (Eff. Aug. 16, 2021) at 46-47 ("These areas on the input sheet are required fields and MUST be completed. . . . It should be a decimal figure or dollar amount of what will be paid from the sales price to the selling office at the time of closing and zero (0) is an acceptable answer.").

[43] *See* Ex. 34, RLS Universal Co-Brokerage Agreement Rules and Regulations Art. IV § 1 (Oct. 13, 2021).

holding companies.[44] HSoA's holdings include HSF Affiliates, LLC ("HSF Affiliates"), BHH Affiliates, LLC ("BHH Affiliates"), and The Long & Foster Companies, Inc. ("LFC") (collectively, with HSoA, the "HomeServices Defendants" or the "HSDs").[45] HSF Affiliates and LFC are holding companies; HSF Affiliates owns BHH Affiliates, the franchisor of the BHHS brand; and LFC owns a real estate brokerage in the mid-Atlantic that trades under the Long & Foster name.[46]

HSoA's philosophy is to support its operating subsidiaries without getting in their way, and thus it does not dictate their operational policies, including what listing commissions to charge or what offers of cooperative compensation to make or accept.[47] HSoA has not issued any directive, training material, or guidance to its brokerage subsidiaries concerning commission or offers of cooperative compensation.[48]

BHH Affiliates likewise does not dictate such matters—or the day-to-day real estate brokerage operations—with respect to BHHS franchisees.[49]

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[44] Ex. 50, Strandmo (HSoA) Decl. ⁋ 2.

[45] *See id*.

[46] *Id*.

[47] *Id*; *see also* Ex. 43, Schmid (Edina Realty) Decl. ⁋ 7 (leader of Edina, a longtime Minnesota brokerage subsidiary, confirming her company's operational independence); Ex. 44, Docktor (BHHS Fox & Roach) Decl. ⁋ 4 (same, on behalf of leader of Fox & Roach brokerage subsidiary in the eastern U.S.); Ex. 46, Mesa (BHHS Florida Properties) Decl. ⁋ 7 (leader of BHHS Florida, a more recent HSoA brokerage subsidiary in Florida, confirming same for his company.)

[48] Ex. 50, Strandmo (HSoA) Decl. ⁋ 3; Ex. 43, Schmid (Edina Realty) Decl. ⁋ 34; Ex. 44, Docktor (BHHS Fox & Roach) Decl. ⁋⁋ 24, 27; Ex. 46, Mesa (BHHS Florida Properties) Decl. ⁋ 27

[49] Ex. 45, Warner (BHH Affiliates) Decl. ⁋⁋ 5-7; Ex. 42, Jungman (BHHS Rocky Mountain) Decl. ⁋⁋ 6, 9, 16 (BHHS Rocky Mountain, an independently owned BHHS franchisee in Colorado); Ex. 44, Docktor (BHHS Fox & Roach) Decl. ⁋ 27 (Fox & Roach, an HSoA-owned brokerage, has been a BHHS franchisee since 2013); Ex. 46, Mesa (BHHS Florida Properties) Decl. ⁋ 27 (same re BHHS Florida Realty).

Likewise, neither HSoA nor BHH Affiliates requires the brokerages under in the BHHS franchise arrangement and/or HSoA's ownership to join NAR, local realtor associations, or an MLS.[50] The brokerages make such determinations on their own.[51] Indeed, when a brokerage is acquired by HSoA, the record shows that very little changes in how the company operates.[52]

VI. Keller Williams

Keller Williams Realty, Inc. ("Keller Williams") is a privately held real estate franchise and technology company with headquarters in Austin, Texas.[53] Keller Williams franchises more than 750 independently owned and operated franchisee real estate brokerages in the United States, approximately 300 of which operate in the areas served by the Covered MLSs.[54]

Over 170,000 independent contractor real estate agents are affiliated currently with Keller Williams' franchisee brokerages in the United States and Canada.[55] Keller Williams is known as being built "by agents, for agents,"[56] and the company culture built around that description is one of the principal reasons that agents choose to affiliate as independent contractors with one of Keller Williams' franchisee brokerages.[57] Consistent with that culture, neither Keller Williams

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[50] Ex. 50, Strandmo (HSoA) Decl. ¶¶ 6-7; Ex. 45, Warner (BHH Affiliates) Decl. ¶ 2.

[51] *See, e.g.*, Ex. 46, Mesa (BHHS Florida Properties) Decl. ¶¶ 9, 34; Ex. 43, Schmid (Edina Realty) Decl. ¶ 36; Ex. 44, Docktor (BHHS Fox & Roach) Decl. ¶ 32; Ex. 42, Jungman (BHHS Rocky Mountain) Decl. ¶¶ 10, 17-19.

[52] *See, e.g.* Ex. 42, Jungman (BHHS Rocky Mountain) Decl. ¶¶7, 10, 16; Ex. 43, Schmid (Edina Realty) Decl. ¶¶ 7, 34, 36; Ex. 46, Mesa (BHHS Florida Properties) Decl. ¶ 7; Ex. 44, Docktor (BHHS Fox & Roach) Decl. ¶¶ 4, 23-24, 27.

[53] Ex. 36, Gardner (Keller Williams) Decl. ¶ 2.

[54] *Id*.

[55] *Id.* ¶ 3.

[56] *See* Ex. 19, KWRI_00546895; Ex. 36, Gardner (Keller Williams) Decl. ¶ 4.

[57] *See id.*; Ex. 20, KWRI_00730258 (survey results identifying "culture" as the number one reason agents affiliate with Keller Williams).

nor its franchisees dictates how affiliated agents operate their businesses, including the commission rates they charge or cooperative compensation offers they extend through MLSs.[58] Keller Williams is not a member of the National Association of Realtors or any of the Covered MLSs and does not require its franchisee brokerages or affiliated agents to comply with the NAR Handbook.[59]

VII. Realogy

Realogy owns and operates residential real estate brokerages throughout the United States and licenses its brands to independently owned and operated real estate brokerage franchisees.[60] Realogy's diverse brand portfolio includes: Better Homes and Gardens® Real Estate, CENTURY 21®, Coldwell Banker®, Corcoran®, ERA®, and Sotheby's International Realty®.[61] Realogy operates company-owned brokerage offices within the alleged Covered MLSs and is affiliated with approximately 650 independently owned and operated franchisees that license the use of one of the trademarks of real estate brands that are owned or licensed by Realogy or one of its wholly owned subsidiaries.[62] Those independently owned and operated

[58] *See* Ex. 36, Gardner (Keller Williams) Decl. ⁋ 5; Ex. 21, KWRI_00586732 (describing franchisee intrusion on an agent "charg[ing] whatever commission they want" as "so far outside of our culture it isn't even funny"); *see also* Ex. 49, Reynolds (The Reynolds Team) Decl. ⁋ 12 (describing the "complete autonomy" under which she is permitted to operate within the Keller Williams system, including in her practices relating to commissions and cooperative compensation); Ex. 47, Rutherford (The Rutherford Group) Decl. ⁋ 5 (describing Keller Williams' "operating philosophy" as "allowing agents to operate their real estate businesses as they see fit, . . . which extends to how I set my commission rates"); Ex. 41, McLaughlin (KW Realty Austin SW) Decl. ⁋ 7 ("[M]y commissions are not dictated or influenced in any way by NAR, by my [brokerage], or by Keller Williams Realty, Inc. (the franchisor of my [brokerage].").

[59] Ex. 36, Gardner (Keller Williams) Decl. ⁋ 6.

[60] Ex. 37, Gorman (Realogy Brokerage Group) Decl. ⁋ 3.

[61] Ex. 37, Gorman (Realogy Brokerage Group) Decl. ⁋ 4.

[62] *See* Ex. 38, Yannaccone (Realogy Franchise Group) Decl. ⁋⁋ 3-4.

franchisees operate over 1,550 franchisee brokerage offices within the Covered MLSs.[63] Realogy does not control the day-to-day operations of these independently owned and operated franchisees.[64]

Realogy has been consistently recognized as one of the World's Most Ethical Companies by Ethisphere, a global leader in defining and advancing the standards of ethical business practices.[65]

Realogy is not a member of NAR,[66] and Realogy does not require that any of its employees, brokers, or independent contractor sales agents affiliated with its company-owned brokerages, or any brokers or independent contractor sales agents affiliated with any independently owned and operated franchisees that license one of Realogy's brands, become members of NAR.[67] Nor does Realogy require any of the same to become members of any local MLS, including the Covered MLSs,[68] or to participate in governance of NAR, any local realtor association, or any local MLS.[69]

Of all of the various NAR rules, guidelines, and handbooks, the only one that Realogy requires its company-owned brokerages and independently owned and operated franchisees that

[63] *See* Ex. 38, Yannaccone (Realogy Franchise Group) Decl. ¶ 3.

[64] *See* Ex. 38, Yannaccone (Realogy Franchise Group) Decl. ¶¶ 4, 6.

[65] Realogy, Realogy Celebrates 11th Year as One of the World's Most Ethical Companies, (March 15, 2022), https://www.realogy.com/2022/03/15/123914/.

[66] Ex. 37, Gorman (Realogy Brokerage Group) Decl. ¶ 5.

[67] Ex. 37, Gorman (Realogy Brokerage Group) Decl. ¶¶ 5, 8; Ex. 52, Schneider Dep. (Sitzer) at 80:16-23; 82:13-21.

[68] Ex. 37, Gorman (Realogy Brokerage Group) Decl. ¶ 8; Ex. 52, Schneider Dep. (Sitzer) at 80:16-23; 82:13-21.

[69] Ex. 37, Gorman (Realogy Brokerage Group) Decl. ¶ 8.

license one of its brands to follow is the NAR Code of Ethics.[70] Realogy does not require compliance with NAR's Handbook on Multiple Listing Policy.[71]

Realogy does not control or dictate the commissions that independent contractor sales associates affiliated with company-owned brokerages or independently owned and operated franchisees negotiate and/or charge buyers or sellers.[72] Nor does Realogy train its franchisees or its independent contractor sales associates to negotiate and/or charge a specific commission rate.[73]

VIII. RE/MAX, LLC

RE/MAX, LLC ("RMLLC") is a franchisor that offers independently owned and operated businesses the opportunity to use the RE/MAX® brand and operate real estate brokerages as part of the RE/MAX network. RMLLC does not own or operate any real estate brokerages, does not employ any individuals in their capacity as residential real estate agents, does not represent either

[70] Ex. 37, Gorman (Realogy Brokerage Group) Decl. ⁋ 7; *see also, e.g.*, Ex. 22, Realogy-Moehrl-00000298-647 (Coldwell Banker® Franchise Disclosure Document requiring adherence only to NAR's Code of Ethics); Ex. 23, Realogy-Moehrl-00000648-966 (ERA® Franchise Disclosure Document requiring adherence only to NAR's Code of Ethics); Ex. 24, Realogy-Moehrl-00000967-1241 (Better Homes and Gardens® Real Estate Franchise Disclosure Document requiring adherence only to NAR's Code of Ethics); Ex. 25, Realogy-Moehrl-00002132-433 (Sotheby's International Realty® Franchise Disclosure Document requiring adherence only to NAR's Code of Ethics); Ex. 26, Realogy-Moehrl-00004348-729 (CENTURY 21® Franchise Disclosure Document requiring adherence only to NAR's Code of Ethics).

[71] *See supra* n. 67.

[72] Ex. 52, Schneider Dep. at 100:7-17; Ex. 52, Schneider Dep. (Sitzer) at 98:15-99:5; Ex. 38, Yannaccone (Realogy Franchise Group) Decl. ⁋ 6 (pursuant to its Franchise Agreements, Realogy "has no right or obligation to … determine or limit … the commission rates [franchisees] charge"); Ex. 40, Vincent (Coldwell Banker Realty) Decl. ⁋⁋ 12-13.

[73] Ex. 52, Schneider Dep. (Sitzer) at 98:15-99:5; Ex. 2, Crane Dep. at 35:2-11; 36:1-36:11; 60:3-9; Ex. 38, Yannaccone (Realogy Franchise Group) Decl. ⁋ 6.

sellers or buyers in real estate transactions, and is not involved in the purchase or sale of residential real estate in the United States.[74] RMLLC is also not a member of NAR.[75]

RMLLC prides itself on its innovative, entrepreneurial culture affording franchisees and their agents the flexibility to operate their businesses with great independence.[76] To that end, RMLLC's franchisees are all independently owned and operated real estate brokerages that associate themselves with real estate agents, typically as independent contractors of the brokerage.[77] RMLLC is not involved in the day-to-day operations of its franchisees and does not dictate how those franchisees conduct their business, outside of the contractual provisions in the Franchise Agreement.[78] For instance, RMLLC does not require brokerages or agents to charge any specific level of commissions for the sale or purchase of residential real estate. Instead, individual brokerages and their independent contractor agents have discretion regarding the commission rates charged to clients.[79] Indeed, the only requirement RMLLC imposes with respect to commission rates or fees relates to how they are advertised, requiring that if a brokerage or a real estate agent affiliated with the brokerage elects to advertise commission rates

[74] *See, e.g.*, Ex. 27, RMLLC-WDMO-00013346, at RMLLC-WDMO-00013349, RMLLC-WDMO-00013359. RMLLC is also not a member of NAR.

[75] *See* Ex. 39, Bailey (RMLLC) Decl. ¶ 2.

[76] *Id*. at RMLLC-WDMO-00013349.

[77] *See id*. at RMLLC-WDMO-00013349, RMLLC-WDMO-00013359; *see also* Ex. 28, RMLLC-WDMO-00013959, at RMLLC-WDMO-00013964 ("Each RE/MAX office is an independently owned and operated business and is solely responsible for its day-to-day conduct and activities.").

[78] *See, e.g.*, Ex. 28, RMLLC-WDMO-00013959.

[79] *See* Ex. 39, Bailey (RMLLC) Decl. ¶ 3; *see also* Ex. 29, RMLLC-WDMO-00211830, at RMLLC-WDMO-00211888.

or fees, the advertisement must clearly state that other RE/MAX brokerages or agents may charge different rates or fees, or offer different listing and marketing services.[80]

ARGUMENT

Plaintiffs cannot certify a damages class for several reasons because they have failed to show that common issues will predominate under Rule 23(b)(3):

- They cannot show that all class member sellers would have paid less cooperative compensation or lower listing commissions in the but-for world than they did in the real world; nor do they provide the Court with any methodology to accurately assess which class members have been injured, if any, and which have not (Section I.A);
- They cannot show class-wide evidence of conspiracy, as there are individualized defenses (Section I.B);
- They have proposed a fatally flawed damages model (Section I.C);
- They cannot prove their case, as it pertains to impact or damages, without a series of minitrials (Section I.D); and
- They wrongly assert that *per se* analysis is appropriate (Section I.E).

They have also failed to meet the Rule 23(a) requirements of commonality and typicality, thereby dooming both their damages and injunctive relief classes. Finally, they have failed to satisfy the separate requirements of Rule 23(b)(2) and cannot certify their injunctive relief class.

I. Plaintiffs Have Failed To Meet Their Burden to Prove That Common Issues Predominate Over Purely Individual Issues.

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. To come within the exception, a party seeking to maintain a class action must affirmatively demonstrate his compliance with Rule 23." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (internal citations and quotation marks omitted).

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[80] *See* Ex. 39, Bailey (RMLLC) Decl. ¶ 4; *see also* Ex. 29, RMLLC-WDMO-00211830, at RMLLC-WDMO-00211888 (providing that "if a RE/MAX Broker/Owner elects to advertise the office's commission rates or fees—or permits Sales Associates to do so—the advertisement must include" a notice that other RE/MAX franchisees may offer different commission rates, fees, and listing and marketing services).

Class certification under Rule 23(b)(3) is an "adventuresome innovation" that is proper only when the rule's "demanding" predominance requirement is met. *Id.* at 34. To win certification of a Rule 23(b)(3) damages class, Plaintiffs must show that "common proof will predominate with respect to ***each element*** of [plaintiffs'] claims," including antitrust impact and damages. *Reed v. Advocate Health Care*, 268 F.R.D. 573, 581 (N.D. Ill. 2009) (emphasis added). Plaintiffs "must affirmatively show how common evidence and a single, reliable methodology will prove [these] element[s] on a simultaneous, class-wide basis." *In re Steel Antitrust Litig.*, No. 08-C-5214, 2015 WL 5304629, at *5 (N.D. Ill. Sept. 9, 2015). If essential questions about the putative class members' claims could be resolved only by considering varying evidence, then common issues do not predominate. *Suchanek*, 764 F.3d at 756; *Messner*, 669 F.3d at 815. The critical question in considering predominance is thus whether essential questions can be resolved without a "highly individualized inquiry." *Riffey*, 910 F.3d at 319.

Predominance is not "a mere pleading standard." *Kleen Products LLC v. Int'l Paper Co.*, 831 F.3d 919, 922 (7th Cir. 2016). Plaintiffs must instead "demonstrate (not merely allege) that there is proof common to all class members," and whether they have adequately done so necessitates "a careful look at the evidence." *Id.* at 922, 926; *see also Comcast*, 569 U.S. at 34 (stating that the court has a "duty" to take a "close look" at whether common issues predominate). Courts must conduct a "rigorous analysis," which may "overlap with the merits of the plaintiff's underlying claim," to determine whether the requirements of Rule 23 are met. *Id.* at 33-34. "If there are material factual disputes, the court must receive evidence . . . and resolve the disputes before deciding whether to certify the class." *Messner*, 669 F.3d at 811 (internal quotations omitted).

A. Plaintiffs Have Proposed No Valid Method of Proving Class-Wide Impact Using Common Proof.

Analysis of predominance under Rule 23(b) begins with the elements of the underlying cause of action. *Messner*, 669 F.3d at 815. The essential elements of a Section 1 claim are (1) violation of antitrust law; (2) individual injury or impact caused by the violation; and (3) measurable damages. *In re Steel Antitrust Litig.*, 2015 WL 5304629 at *5 (citing *Reed*, 268 F.R.D. at 581). Even if Plaintiffs could prove an antitrust violation (which they cannot), they cannot prove the second element of their cause of action—antitrust impact—with common evidence. *See, e.g. In re Steel Antitrust Litig.*, 2015 WL 5304629 at *6.[81] "[E]stablishing causation, or fact of damage, requires the plaintiff to demonstrate a causal connection between the specific antitrust violation at issue and an injury to the antitrust plaintiff. Where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance." *Reed*, 268 F.R.D. at 582 (citing *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003)). Plaintiffs have not and cannot demonstrate that the element of antitrust impact is "capable of proof at trial through evidence that is common to the class rather than individual to its members." *Comcast*, 569 U.S. at 30.

[81] Defendants do not concede the existence of a conspiracy or that Plaintiffs have set forth class-wide evidence of a conspiracy—particularly where Plaintiffs allege a sweeping conspiracy that purports to reach independent contractor real estate agents of independently owned and operated franchisees—multiple steps removed from the Corporate Defendants who are franchisors and/or holding companies. However, for present purposes, Defendants focus on the lack of class-wide evidence of impact on the thousands of individually negotiated transactions, which are subject to individual business practices. For example, as explained by Pat Vincent, a real estate agent affiliated with Coldwell Banker Realty (a Realogy company-owned brokerage), Ms. Vincent would have advised Plaintiff Steve Darnell to make an offer of cooperative compensation in connection with his home sale regardless of the Challenged Rules. *See* Ex. 40, Vincent (Coldwell Banker Realty) Decl. ¶¶ 8, 17; Ex. 46, Mesa (BHHS Florida Properties) Decl. ¶ 23; Ex. 44, Docktor (BHHS Fox & Roach) Decl. ¶ ¶ 30-31.

"Demonstrating that impact can be proved commonly is a separate showing from demonstrating that the amount of damages can be proved commonly." *Reed*, 268 F.R.D at 582 (citing *Bell*, 339 F.3d at 302-03). Put another way, Plaintiffs must show that they can prove through common class-wide evidence the fact of ***actual impact*** to all class members—that all class members were in fact injured by the Challenged Rules—separate from showing the ***amount of damages*** (though they must also be able to show that damages can be calculated on a class-wide basis using evidence common to the class that would not result in overwhelming individualized inquiries).

1. Plaintiffs Have No Class-Wide Evidence to Show They Are "Forced" to Offer Cooperative Compensation By the Challenged Rules.

Plaintiffs' theory of class-wide impact depends on the idea that, in the but-for world, all (or nearly all) class members would have paid little, or no, compensation to buyer brokers. According to Plaintiffs, this is because most buyers would not use brokers, and even when they did, sellers would no longer be "forced" to pay for them. Pl. Br. 37-38. But Plaintiffs have no common, class-wide evidence to support their theories. Indeed, the named Plaintiffs themselves do not offer any record evidence that ***they*** would have paid less if not for the Challenged Rules. Their respective declarations contain only the most basic details about their home sales.[82] None of those declarations claims—much less offers any facts showing—that the Challenged Rules had any effect on the listing commissions that the named Plaintiffs paid to their listing broker, or on the offers of compensation that their listing brokers made to the buyer brokers. Thus, the named Plaintiffs have failed to provide evidence showing that their own cooperative compensation offers were impacted by the Challenged Rules, let alone proved that such impact

[82] See Dkt. 302-4 (Moehrl Decl. ¶ 2, Darnell Decl. ¶ 1 [duplicate], Cole Decl. ¶ 1 [duplicate], Ruh Decl. ¶ 2, Ramey Decl. ¶ 2, Umpa Decl. ¶ 2).

can be "affirmatively demonstrate[d]" with evidence common to the class for all the members of their putative class. *Comcast*, 569 U.S. at 33.

Of course, even if one of the named Plaintiffs had offered proof that the Challenged Rules somehow caused them to pay more cooperative compensation than they otherwise would have done, that proof would not establish that fact for anyone else in the class. The other named Plaintiffs and absent class members would still have to offer their own proof that, absent the Challenged Rules, they and their listing brokers would have opted not to offer any compensation to the buyer's broker and that the class member would have paid lower commissions as a result. If a class member would have offered cooperative compensation to incentivize brokers to work to sell his or her home, the Challenged Rules could not have caused any claimed harm to that seller. Proof of whether the Challenged Rules caused any class member to offer cooperative compensation would necessarily entail an individualized inquiry into each class member's motives and needs for selling, the type and condition of their home, the then-prevailing market conditions, and whether the absence of the Challenged Rules would have had any effect on their willingness to offer cooperative compensation.[83] It would also require an inquiry into how each class member's listing broker would have behaved in the absence of the Challenged Rules, since listing brokers have their own economic incentives and business strategies independent of the Challenged Rules that affect both the commissions they charge their clients and the cooperative

[83] *See* Ex. 40, Vincent (Coldwell Banker Realty) Decl. ¶¶ 8, 17 ("Even if the Cooperative Compensation Rule were not mandatory, I would continue to follow my practice of recommending that sellers offer compensation to buyer's brokers to incentivize brokers and agents representing buyers to search for and present qualified buyers because I think this is in the seller's best interest … Consistent with my personal practice and regardless of any rules, I would have recommended that that [Plaintiff Steve Darnell and his ex-wife] make [an] offer of compensation of [redacted] to incentivize brokers and agents representing buyers to search for and present qualified buyers."); see also Ex. 46, Mesa (BHHS Florida Properties) Decl. ¶ 26 (even without the NAR and MLS Rules at issue listing agents would still offer commissions to buyer brokers because it facilitates the sale of the home and helps both seller and buyer.

compensation they offer to buyer brokers.[84] Plaintiffs have failed to show how any of this could be done on a class-wide basis with common proof. *Hettinger v. Glass Specialty Co., Inc.*, 59 F.R.D. 286, 294 (N.D. Ill. 1973) (certification denied where individual questions "would necessitate a plethora of mini trials"); *Tseng v. Nordstrom, Inc.*, No. 2:11-CV- 08471-CAS, 2014 WL 174946, at *7-8 (C.D. Cal. Jan. 15, 2014) (certification denied where mini-trial required) (collecting cases); *Truesdell v. Thomas*, 889 F.3d 719, 726 (11th Cir. 2018) (certification denied where reason for accessing personal information varied for each class member).

a) Plaintiffs' "Steering" Theory Cannot Serve As Class-wide Proof Of Impact.

Rather than point to facts that support their claim that the Challenged Rules cause sellers and listing brokers to make cooperative compensation offers, Plaintiffs resort to general economic theorizing about purported economic incentives that they claim apply uniformly to all class members. But that theorizing only confirms the individualized nature of these issues. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 29 (1st Cir. 2008) (rejecting "intuitive appeal" of theory that national pricing would necessarily impact prices paid by individual consumers). Plaintiffs rely heavily on the idea that listing brokers are incentivized to offer "uniformly supracompetitive commissions to keep buyer brokers from steering buyers to other homes offering the standard commission" because "buyer-brokers, like people generally, respond to incentives." Pl. Br. at 31; Elhauge Report ¶ 188. But neither Plaintiffs nor their experts assert—or have any basis to assert—that this incentive would vanish without the Challenged Rules. Even absent the Challenged Rules, listing brokers would be free (as they

[84] Ex. 40, Vincent (Coldwell Banker Realty) Decl. ¶¶ 8, 17; Ex. 49, Reynolds (The Reynolds Team) Decl. ¶¶ 2-3; Ex. 44, Docktor (BHHS Fox & Roach) Decl. ¶ 30; Ex. 43, Schmid (Edina Realty) Decl. ¶¶ 22-23.

always have been) to offer compensation to buyer brokers, and there is every reason to believe that many or most of them would do so because they recognize that such offers induce buyer brokers to bring prospective purchasers to the property.[85] If Elhauge is correct about the motivations of buyer brokers and listing brokers, those motivations will continue to exist even without the Challenged Rules. Indeed, under Elhauge's own logic, buyer brokers will still want to be paid more rather than less, and listing brokers will respond by offering cooperative compensation at the same levels they do today.[86] Since the economic incentives associated with steering were not created by the Challenged Rules and would persist in the but-for world, and since neither Elhauge nor Economides have done any work to assess the amount by which the incentives associated with steering are impacted by the Challenged Rules, their steering "analyses" cannot serve as class-wide proof of impact. *See, e.g., In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d at 28 ("Establishing liability, however, still requires showing that ***class members were injured at the [individual] level.***") (emphasis added); *Reed*, 268 F.R.D. at 593 (finding that model that left "up to half of the causes of the differences in real-world wages unexplained… falls far short of satisfying plaintiffs' legal burden"); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018-19 (7th Cir. 2002) (reversing class certification when putative class members bought subject to variations in pricing); *Gumwood HP Shopping*

[85] *See* Ex. 41, McLaughlin (KW Realty Austin SW) Decl. ⁋ 15 (stating that, even if not mandated by rule to extend offers of compensation he would recommend to seller clients that he continue to do so and that he expected they would agree); Ex. 47, Rutherford (The Rutherford Group) Decl. ⁋ 9 (same); Ex. 44, Docktor (BHHS Fox & Roach) Decl. ⁋⁋ 30-31 (same); Ex. 46, Mesa (BHHS Florida Properties) Decl. ⁋⁋ 23-26 (same).

[86] Sellers' and listing brokers' cooperative compensation offers would be subject, as today, to market forces that cause them to vary depending on market conditions. *See, e.g.*, Ex. 49, Reynolds (The Reynolds Team) Decl. ⁋ 9 (describing how cooperative compensation offers vary today between "hot," low-inventory localities and other areas where conditions appear to be cooling).

Partners, LP v. Simon Prop. Group., Inc., 221 F. Supp. 3d 1033, 1043 (N.D. Ind. 2016) (excluding opinion that failed to separate lawful and unlawful competition).[87]

b) The Evidence Contradicts Plaintiffs' Claims of Class-wide Impact.

Moreover, the record evidence contradicts Plaintiffs' theory that eliminating the Challenged Rules would eliminate or reduce all or nearly all cooperative compensation offers. If, as Plaintiffs contend, the Challenged Rules were responsible for sellers and listing brokers making cooperative compensation offers, one would expect to see no offers being made in MLSs that lack an equivalent to the Cooperative Compensation Rule. A recent natural experiment disproves this proposition.

Specifically, in July 2019, Northwest MLS, an MLS that is unaffiliated with NAR and that does not follow NAR rules, announced that (effective October 2019) listing brokers and agents would no longer be required to include an offer of cooperative compensation when posting a listing on that MLS. Despite this rule change, and the option it gave listing brokers *not* to extend offers of compensation, listing brokers still continue to make offers of compensation to buyer brokers in nearly all listings posted on that MLS, and at largely the same percentages as before the rule change. Stiroh Report ⁋⁋ 60-66. Since the rule change went into effect, 99.75 percent of sellers continue to make a non-zero offer; only 643 of the 255,796 transactions made a

[87] *See also In re Steel*, 2015 WL 5304629 at *9 (rejecting overcharge model that failed to capture the "realities of the steel industry"); *Blades v. Monsanto*, 400 F.3d 562 (8th Cir. 2005); *Concord Boat Corp. v. Brunswick Corp*., 207 F.3d 1039, 1056 (8th Cir. 2000) (rejecting common impact model that "was not grounded in the economic reality" of the market); *In re Optical Disk Drive Antitrust Litig*., 303 F.R.D. 311, 317 (N.D. Cal. 2014); *In re Photochromic Lens Antitrust Litig*., 2014 WL 1338605, at *22 (M.D. Fla. April 3, 2014*); In re Graphics Processing Units Antitrust Litig*., 235 F.R.D. 478, 490-91 (N.D. Cal. 2008); *Exhaust Unlimited, Inc. v. Cintas Corp.*, 223 F.R.D. 506, 513-14 (S.D. Ill. 2004) (finding predominance not satisfied when but-for price required individualized inquiry into "factors affecting market price").

"zero" offer.[88] *Id.* ¶ 63. 99 percent of the offers of cooperative compensation were greater than the 1.55% posed by Economides, with 39 percent of offers above 2.5% and 95 percent of offers above 2%. *Id.* ¶ 64, Figure 2. Additionally, a higher share of buyers used their own buyer broker after the rule change than before. *Id.* ¶ 65.

Similar market outcomes are observed in the West Penn MLS, which serves Pittsburgh and the surrounding areas. The West Penn MLS has not required offers of cooperative compensation since at least 2013, yet, as explained by Dr. Stiroh, there have been thousands of transactions in which cooperative compensation was offered. Stiroh Report ¶ 67.[89]

The Northwest MLS experience provides strong evidence that sellers and their listing brokers have reasons independent of the Cooperative Compensation Rule to make offers of compensation to buyer brokers, and that many or most class members would have done so even without the Challenged Rules. As a result, the reason ***why*** any class members' listing brokers decided to offer cooperative compensation is an inherently individualized question: were they "forced" to do so by the Challenged Rules, or were they simply responding to market forces in the manner they deemed most likely to sell their clients' homes. That question cannot be answered using common evidence; and without an answer to that question, there can be no finding of antitrust impact. *See, e.g.*, *Exhaust Unlimited, Inc. v. Cintas Corp.*, 223 F.R.D. 506, 513-14 (S.D. Ill. 2004) (common proof cannot establish antitrust injury without showing "the

[88] 507 of those 617 zero offers were for newly constructed properties, and 498 of those zero offers were by one particular builder. *Id.* ¶ 63. It is also worth noting that, whether an offer of compensation is listed as zero in the MLS, that would not necessarily mean that ultimately the listing broker did not actually compensate the buyer broker for the services provided toward the successful close of the transaction.

[89] [redacted] Stiroh Report ¶ 67. [redacted] *Id.*

causal link between the antitrust violation and the damages suffered"); *Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416, 424 (5th Cir. 2004) (finding that "evidence regarding each purported class member and his transaction . . . would destroy any alleged predominance"); *In re Wholesale Grocery Prod. Antitrust Litig.*, No. 09-MD-2090 ADM/AJB, 2012 WL 3031085, at *9 (D. Minn. Jul. 25, 2012), *aff'd in rel. part*, 752 F.3d 728 (8th Cir. 2014), *aff'd*, 946 F.3d 995 (8th Cir. 2019) ("When prices vary, each customer may have to establish its own 'but-for' price as well as price ultimately paid—both individual inquiries."); *In re Flash Memory Antitrust Litig.*, No. C-070086, 2010 WL 2332081, at *8 (N.D. Cal. Jun. 9, 2010) ("As a general matter, antitrust claims predicated on negotiated transactions, as opposed to purchases based on list prices, often entail consideration of individualized proof of impact.").

2. Plaintiffs Have No Class-Wide Evidence that Buyers Would No Longer Use Buyer Brokers or that Sellers Would No Longer Be Incentivized to Pay For Them.

Plaintiffs' theory of class-wide impact predicts that, in the but-for world, most home buyers would not use brokers, and those who did would pay for them directly. Plaintiffs' theory depends on this prediction being true because, if buyers continue to use their own brokers, sellers and listing brokers will have the same incentives they have to today to continue to offer cooperative compensation. Pl. Br. at 38. But Plaintiffs have no way of proving on a class-wide basis that buyers would stop using buyer brokers.

a) Buyers Would Still Use Buyer Brokers.

First, Plaintiffs have failed to meet their burden in showing through common evidence that, but-for the Challenged Rules, class members would have uniformly sold their homes to buyers unrepresented by brokers. This is a critical failure of common, class-wide evidence, because Plaintiffs' entire theory of class-wide antitrust injury depends on the notion that, but-for

the alleged wrongdoing, none (or very few) of the buyers of class members' homes would have been represented by buyer brokers. Pl. Br. at 38; Elhauge Report ¶ 246. But Plaintiffs have provided no evidence (let alone class-wide evidence) to support this theory, and even their own experts equivocate on this component of their opinions. Economides admits that, even in his extreme view of the but-for world, up to 20 percent of transactions would still use a buyer broker. Economides Report ¶ 56.[90] Economides's admission that, even in his but-for world, a significant portion of the class would have sold their homes to buyers who used brokers is fatal to Plaintiffs' ability to prove class-wide impact. Plaintiffs have proposed no class-wide method for resolving the individualized issues that would necessarily result from some, but not all, of the class sales transactions continuing to involve buyer brokers in the but-for world.[91]

Elhauge argues that the but-for world would feature virtually no use of buyer brokers, supposedly because buyers would refuse to use brokers if they had to pay for their services directly. Elhauge Report ¶¶ 147-151, 214-221. But he has no factual support for these assertions, and both record evidence and Plaintiffs' own testimony contradict him.[92]

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[90] Other areas in Economides's benchmark countries have even higher percentage usage rates of buyer brokers. Economides Report ¶ 67.

[91] Stiroh Report ¶ 90; *see also* Ex. 6, Moehrl Dep. at 198:22-199-1 (stating that he would expect to use a buyer broker in future home purchases, just as he did in his purchase of his prior homes). Plaintiff Umpa also testified that he was assigned a buyer broker by a real estate investor auction site, showing that buyer brokers are used in transactions outside of the MLS and NAR Rules. Ex. 5, Umpa Dep. Vol. II at 18:14-23 (explaining that Roofstock Realty is an investor auction site for buyers looking to bid on investment properties); 19:4-20:8 (for transaction in Georgia, did not use a buyer broker on Roofstock); 24:6-17 (for transaction in South Carolina, in-house Roofstock buyer broker was assigned by Roofstock); 28:12-29:10 (for transaction in Texas, buyer broker was assigned by Roofstock); 33:11-35:25 (assigned buyer broker for Texas transaction was from Keller Williams).

[92] In a survey, 22 percent of buyers reported that they alone paid their own real estate agent. Ex. 30, 2021 HBS Ex. 4-7 (22% said that only the buyer paid for the buyer agent; 12% of buyers said that their agent was paid for by the buyer and seller).

Plaintiffs testified that they understood that their buyer brokers were paid by the seller. Ex. 6, Moehrl Dep. at 132:14-133:5 (Moehrl signed a contract agreeing to pay his buyer broker 2.7%; understood that

As Plaintiffs admit, 87 percent of buyers use a buyer broker today. Elhauge Report ¶ 15 n.6. Even with increasing technological resources, buyers still report that buyer brokers provide valuable services, including guidance on houses and neighborhoods, purchase offer and closing contract negotiation, and referrals to service providers such as mortgage providers and home inspectors that are helpful (and sometimes necessary) to facilitating a successful home purchase.[93] Indeed, 51 percent of buyers stated that what they wanted most from a real estate agent was help finding the ***right*** home to purchase. Ex. 30, 2021 HBS Ex. 4-8.[94] These benefits do not depend on the Challenged Rules. Even if the Rules did not exist, buyers would continue to benefit from guidance from buyer brokers in all of the same ways they have benefited for decades. Stiroh Report ¶¶ 89-99. Plaintiffs recognize that up to 20 percent of buyers would continue to use these services, but provide no explanation for why the balance of buyers would not. Even if some buyers would decide not to use a buyer broker (in what is often the single largest financial transaction in a buyer's lifetime) if the Challenged Rules did not exist, that

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"the seller would end up paying in the end"; and did not think his buyer broker was working for free); Ex. 5, Umpa Dep. Vol. 1 at 77:2-7 (understood that seller would pay the commission). Plaintiff Cole also testified that, when he was the buyer, that he understood that "technically" the seller paid for his buyer broker, that Cole actually paid, as it was paid out of the purchase price that Cole, as the buyer, paid. Ex. 7, Cole Dep. at 97:1-19. *See also* Ex. 6, Moehrl Dep. at 152:25-153:10 ("I would say that the commission is already kind of built into the price of the home, you know, how the seller sets the price of the home").

[93] *See* Ex. 30, 2021 HBS Ex. 4-11 (listing benefits of buyer brokers identified by buyers). *See also id.* Exs. 3-9 and 4-11 (showing that home searches now often begin online, but buyers reported that buyer brokers provided assistance by expanding or narrowing the buyer's search area and by improving the buyer's knowledge of the search area, with 28 percent of buyers reporting that they ultimately found the house they purchased not online, but via a real estate agent).

[94] *See also* Ex. 6, Moehrl Dep. at 133:17-139:24 (buyer agent showed houses to Moehrl, made recommendation on what to offer, helped negotiate through issues, and generally advocated for him); Ex. 49, Reynolds (The Reynolds Team) Decl. ¶ 11 (describing her extensive prospecting for properties not on the market or advertised publicly and how those efforts led to 462 purchases by her buyer clients in the past two years); Ex. 41, McLaughlin (KW Realty Austin SW) Decl. ¶ 9 ("I frequently find buyers disenchanted with homes they identified through their own research and thrilled with other homes I show them (based on my own extensive local knowledge) that they overlooked or had initially ruled out in their search").

would not mean that all or nearly all buyers would make the same decision. That question would depend on each buyer's individual circumstances, including the buyer's level of sophistication, experience with real estate transactions, familiarity with the local real estate market, and other factors.

Sellers' experience usefully informs the question of whether buyers in the but-for world would continue to retain their own brokers. Like the buyers in Plaintiffs' but-for world, they typically pay for their own real estate agent. But they have emphatically ***not*** responded to the advent of Zillow, Realtor.com, and similar online services through which sellers can market their properties by abandoning full-service real estate agents. Instead, the vast majority of sellers continue to engage listing brokers who provide a broad range of services.[95] Further, most sellers report that they only contacted one agent before making a choice of which agent to hire, suggesting that Elhauge's supposition that buyers would force buyer brokers to compete on price is also baseless.[96] Elhauge Report ¶¶ 214-221. Even if Plaintiffs were correct that some buyers would have to pay for some or all of their own brokers in the but-for world, the actual experience of sellers demonstrates that one cannot simply assume that all buyers would not be willing to do so, or that they would no longer demand these services.

Plaintiffs have failed to demonstrate that they can prove, on a class-wide basis, which of their but-for sales transactions would have included a buyer broker, and which would not. The

[95] Ex. 30, 2021 HBS Exs. 7-6 (showing that 88% of sellers who used an agent chose one who offered a broad range of services) and 8-1 (showing only 8% of sales were for-sale-by-owner in 2020); *see also* Ex. 8, Ramey Dep. at 52:4-56:23 (interviewed Redfin agent who would have charged a 1% sellers commission), 60:4-61:8 (did not use Redfin because he was in a hurry to sell house and thought Century 21 broker would be faster); Ex. 7, Cole Dep. at 101:22-102:16 (did not consider selling without an agent); Ex. 6, Moehrl Dep. at 160:20-25 (did not consider selling home himself), 198:2-9 (would not try to do a for sale by owner in the future); Ex. 5, Umpa Dep. Vol. 1 at 87:14-88:6 (heard "nothing but horror stories" about selling without an agent).

[96] Ex. 30, 2021 HBS Ex. 7-3 (77% contacted one agent).

question whether any particular class member might have sold to a buyer using a buyer broker in the but-for world is an inherently individualized one and cannot be resolved in a class action.

The existence of individual issues such as these have prevented certification in past cases. In *Nichols v. Mobile Board of Realtors, Inc.*, 675 F.2d 671, 677-78 (5th Cir. 1982), the plaintiffs asserted that the defendant real estate brokers fixed real estate commissions and offered evidence in support of their motion for class certification that commissions were either six or seven percent in 86.5 percent of class members' transactions. The Fifth Circuit, however, found that evidence that commissions across all class members' transactions ranged from one to twelve percent raised sufficient questions concerning the impact of defendants' alleged conduct on individual class members, and prevented questions common to the class from predominating over individual ones. *Id.* at 678-79. As is the case here, individualized characteristics of the broker, seller, and circumstances surrounding their real estate transaction were "more significant determinants of the commission rate charged." *Id.* at 678; *see also Seals v. Nashville Bd. of Realtors,* No. 79-3245-NA-CV, 1980 WL 1896, at *1-2 (M.D. Tenn. May 5, 1980) (denying class certification motion by seller plaintiffs alleging price-fixing of sales commissions on residential property in certain counties in Tennessee in an antitrust lawsuit against the Nashville Board of REALTORS®, and observing that "[i]t is clear that there is no typical residential sale"); 6 *Newberg on Class Actions* § 20:23 (5th ed.) (noting that courts have repeatedly found that class certification is improper where the allegations involve "non-fungible products" such as real estate services).

The Eighth Circuit's decision in *Blades*, 400 F.3d 562, is also instructive. There, a class of plaintiff farmers alleged a conspiracy to charge supra-competitive price premiums on genetically modified (GM) seeds. *Id.*at 565. The *Blades* plaintiffs, like the Plaintiffs here,

claimed to have evidence that the alleged conspiracy applied uniformly to all class members, specifically "evidence suggesting that appellees adhered to a price-fixing agreement that raised the average price of GM seeds." *Id*. at 573. But the Eighth Circuit held that class treatment was inappropriate because, in addition to wide variation in prices of GM seeds, "some farmers paid negligible premiums or no premiums at all." *Id.* at 572. In other words, even if the conspiracy alleged by the plaintiffs were to require uniform conduct by all alleged conspirators—in *Blades*, price fixing by sellers of GM seeds; here, MLS rules applicable to all brokers participating in the MLS—a class cannot be certified unless the ***impact*** of that conduct can be established with common, class-wide evidence. *Id.* at 573. Without such evidence, common issues could not predominate, because the district court would be required to engage in an individualized inquiry to determine whether any particular class member was actually injured by the conspiratorial conduct. *Id.* at 573-74.

Blades is directly on point here. Plaintiffs allege the existence of common conduct (the NAR Rules at Issue), but just like in *Blades*, the injuries alleged by Plaintiffs—*i.e.*, class members allegedly paying too much in commissions—raise a host of individualized issues that cannot be resolved on a class-wide basis.

b) Because Sellers Would Be Incentivized To Offer Cooperative Compensation Even Without the Rule, Individual Issues Predominate.

Nor have Plaintiffs met their burden of providing class-wide proof that, in their but-for world, sellers would never be willing to compensate buyer brokers. This failure, too, is fatal to their motion, since their theory of class-wide injury depends on the notion that, in the but-for world, those few class members who sold to buyers using buyer brokers would have uniformly refused to contribute to the buyer brokers' compensation. Pl. Br. at 38; Elhauge Report ¶ 246.

Again, Plaintiffs have proffered no evidence, class-wide or otherwise, to support this theory, and the record contradicts it. As explained in the Stiroh Report, buyers' desire to use a broker, combined with their frequent lack of available cash to pay for a broker out of pocket, gives sellers a strong incentive to offer to cover the buyer's brokerage costs. Stiroh Report ¶¶ 100-108. Home purchases typically require a buyer to save a significant sum of money to use as a down payment, and at least some buyers would not be able to come up with additional funds to cover the expense of a buyer broker.[97] Sellers would therefore be incentivized to cover that expense – just as they currently do with many other buyer-side expenses[98] – in order to attract more buyers and help the transaction get finalized. Stiroh Report ¶¶ 100-108. These incentives to offer cooperative compensation have nothing to do with the Challenged Rules, and Plaintiffs have proposed no class-wide method of accounting for these independent incentives when determining which class members were impacted by the Challenged Rules and which were not.

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[97] While none of the named Plaintiffs could recall having difficulty coming up with a down payment, they did understand that other home buyers might and that those home buyers might be better off under the current system. *See* Ex. 8, Ramey Dep. at 182:5-183:12; Ex. 9, Darnell Dep. at 60-4-25 (agreeing a cash-constrained buyer might have to pay a lender additional insurance); 71:12-72:12 (a cash-constrained buyer might decide to purchase a cheaper house). Other evidence confirms that many buyers save enough to cover a down payment on the home in their price range but not additional funds to pay their own broker. *See* Ex. 41, McLaughlin (KW Realty Austin SW) Decl. ¶ 13; Ex. 47, Rutherford (The Rutherford Group) Decl. ¶ 11; Ex. 46, Mesa (BHHS Florida Properties) Decl. ¶ 21 (explaining why it is good for sellers when buyers work with a buyer agent and how paying the buyer broker commission helps ensure that buyers with little capacity to bear out of pocket costs can participate and increase their buying power.); Ex. 49, Reynolds (The Reynolds Team) Dec. ¶ 8.

[98] Ex. 30, 2021 HBS Ex. 6-38.

When the named Plaintiffs were sellers, they often paid some of the buyers' costs. *See* Ex. 6, Moehrl Dep. at 125:21-127:2 (Moehrl paid $3,000 of buyer's closing costs); Ex. 8, Ramey Dep. at 127:7-23 (Ramey paid buyers $10,000 as "an enticement to close the transaction"); Ex. 10, Ruh Dep. at 70:2-8 (Ruh paid $5,000 to buyer for closing costs).

And when the named Plaintiffs were the buyers, the sellers sometimes paid some of their costs. *See* Ex. 6, Moehrl Dep. at 147:7-21 (received a credit of $2,500); Ex. 8, Ramey Dep. at 183:18-24 (seller offered to pay for home warranty), 185:9-25 (Ramey asked seller to cover $6000 in closing costs); Ex. 5, Umpa Dep. Vol. I at 138:2-16 (seller paid $15,000 subsidy); Ex. 5, Umpa Dep. Vol. II at 32:24-33:3 (seller paid $3,500 credit).

Indeed, Economides even admits that he "cannot determine exactly which transactions would be impacted." Economides Report ¶ 63. Because class members who would have made the same offer of cooperative compensation to a buyer absent the Challenged Rules are not injured, Stiroh Report ¶¶ 161-163, this failure is fatal to Plaintiffs' motion.

Plaintiffs have failed to demonstrate that they can prove, using common evidence, that any class member who sold to a buyer using a buyer broker would have refused to help the buyer compensate that broker. The question whether any particular class member might have agreed to offer cooperative compensation in the but-for world is an inherently individualized one and cannot be resolved in a class action. *Blades*, 400 F.3d at 574.

3. Plaintiffs Have Not Met Their Burden in Providing Class-Wide Evidence That Uninjured Sellers Don't Exist, But Instead, Only Offer the Unreliable Say-So Of Their Experts.

The Elhauge and Economides reports are not sufficient to plug the factual holes discussed above. Neither of those reports is admissible under *Daubert*, and even if they were, they are far too speculative—and divorced from the record evidence—to support certification.

a) The Elhauge and Economides Reports Cannot Be Considered Because They Are Inadmissible under *Daubert.*

It is settled law in this Circuit that "[w]hen an expert's report or testimony is 'critical to class certification' . . . a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification." *Messner*, 669 F.3d at 812 (citing *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) and finding district court's refusal to rule on *Daubert* motion was error). This is because courts considering a class certification motion "cannot simply take [expert] declarations on faith; Rule 23 requires [courts] to conduct a 'rigorous analysis.'" *Reed*, 268 F.R.D. at 589; *see also In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 193-194 (3d Cir. 2020) (the Court

must "scrutinize the evidence to determine what was credible and could be used in the expert analysis;" this scrutiny may include "multi-leveled microeconomic analyses of what each Defendant would or would not have possibly done in the but-for world"); *In re Rail Freight Surcharge Antitrust Litig.*, 775 F.3d 244, 255 (D.C. Cir. 2013) ("Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance – the rule commands it.").

As Defendants establish in their *Daubert* motion, Elhauge has failed to employ a reasonable methodology to determine class-wide impact, and his resulting opinions are inadmissible. *Daubert* brief, Dkt. 319 at 9-17. He has no reliable basis on which to say that buyer-broker use would be "rare"[99] in the but-for world, *id.* at 9-13; that sellers would refuse to pay buyer-broker commissions, or that the risk of steering would disappear, *id.* at 13-15; or that buyer-broker commissions would be lower in the but-for world than they are today, *id.* at 15-17. Elhauge's opinions about class-wide impact are based on nothing more than his own say-so and should be disregarded.

Economides' yardstick analysis is similarly unreliable. *Id.* at 18-30. His selection of yardstick countries was arbitrary and self-serving, *id.* at 18-22; he failed to account for variations in brokerage practices both within and among his yardstick countries, *id.* at 22-23; he ignored a key confounding difference between the Covered MLSs and his yardsticks (namely, the historical prevalence of buyer-broker usage in the United States predating the Challenged Rules), *id.* at 23-25; he provides no rationale for estimating demand and commissions using national averages; *id.* at 25-27; he provides no rationale for comparing rates across countries (i.e.,

[99] Elhauge's definition of "rare" is up to twenty percent. Ex. 11, Elhauge Dep. Vol. I 135:18-24; 140:5-16.

percentage of home price) instead of commission amounts (i.e., the actual value received by the brokers), *id.* at 27-28; and his use of a 1.55 percent commission rate for calculating damages is arbitrary and does not fit Plaintiffs' liability theory, *id.* at 28-30.

Because Plaintiffs have offered no common proof of impact other than the inadmissible opinions of their experts, their class certification motion must be denied.

b) Even If Considered, The Elhauge and Economides Reports Do Not Support Class Certification.

Even if considered, the Elhauge and Economides reports are insufficient to show class-wide antitrust impact because they fail to establish that the Challenged Rules caused the purported "anticompetitive equilibrium." *See Reed*, 268 F.R.D. at 582 ("[E]stablishing causation, or fact of damage, requires the plaintiff to demonstrate a causal connection between the specific antitrust violation at issue and an injury to the antitrust plaintiff.") (internal quotations omitted); *Exhaust Unlimited*, 223 F.R.D. at 512-13 (common proof cannot establish antitrust injury without showing "the causal link between the antitrust violation and the damages suffered"); *see also In re Aluminum Warehousing Antitrust Litig.*, 336 F.R.D. 5, 49 (S.D.N.Y. 2020) (an expert model that "measures harm not attributable to the conspiracy, yields false positives, masks uninjured class members by using an averaging mechanism to allocate injury across the class, or otherwise fails to demonstrate with scientific rigor that class-wide impact can be established through common proof" cannot support class certification) (internal citations and quotations omitted). As noted above, Plaintiffs' "showings" of common impact are little more than an assumption that, in the but-for world, home buyers would typically not be represented by brokers, and would never demand that sellers pay for buyer broker services. But Plaintiffs' experts have failed to demonstrate ***any*** means to show on a class-wide basis that it was the Challenged Rules that caused each class member to make an offer of compensation to the buyer

broker, rather than other independent economic incentives. This failure makes their reports insufficient to support certification of the class.

Rather than engage in any kind of actual analysis, both experts—but especially Elhauge—describe market practices that pre-date the Challenged Rules and economic incentives that do not depend on the existence of the Challenged Rules. Elhauge repeatedly states that "economics would predict" the but-for world he puts forth. However, he has little formal training as an economist (Ex. 11, Elhauge Vol. I Dep. 147:1-151:13) and in any event, has done no economic work to connect the Challenged Rules to his conclusions. Moreover, the record testimony regarding why listing brokers offer the commissions that they do—and the evidence of what happened when the Northwest MLS removed the requirement to offer cooperative compensation—decisively refute Elhauge's baseless theorizing and show the necessity of analyzing the experience of each potential class member. An expert's opinions are not transformed into reliable evidence simply on the expert's say-so. *Kenosha Liquor Co. v. Heublein, Inc.*, 895 F.2d 418, 420 (7th Cir. 1990) ("Expert opinions are worthless without data and reasons.").

(i) Plaintiffs Lack the Common Evidence to Show that Buyers Would Not Use Buyer Brokers in the But-For World that Would Be Required for Class Certification.

Elhauge claims that without the Challenged Rules, "[t]he lion's share of sellers would have paid zero buyer broker commissions, because in the but-for world buyers would usually have done without buyer-brokers." Elhauge Report ¶ 246. But Elhauge lacks any class-wide evidence to show that the Challenged Rules cause buyers to use buyer brokers.

First, Elhauge claims that the "Buyer Broker Commission Rule" was an extension of the prior NAR rules regarding seller subagency, but he admits that subagency was not created by

NAR. Elhauge Report ¶¶ 29-33. Rather, he states that "[t]he practice of subagency was formalized by NAR in the 1970s, ***but had been widely practiced for decades prior***." Elhauge Report ¶ 30 (emphasis added). Elhauge therefore concedes that the practice of a seller broker compensating a cooperating broker working with the buyer predates the Challenged Rules and is, in fact, a longstanding characteristic of U.S. residential real estate practices. Elhauge fails to explain why, in his but-for world, the practice of a seller compensating the broker working with the buyer all of a sudden would cease to be standard practice, as it was before the introduction of NAR rules regarding subagency or the Cooperative Compensation Rule.

Plaintiffs try to obscure this issue by arguing that the Challenged Rules "were not the natural consequence of the free market" but "followed an extensive history of anticompetitive conduct." Pl. Br. at 17. But Plaintiffs have challenged specific NAR Rules that were in effect after March 6, 2015, Pl. Br. at 20; they must show that they can answer the question of whether sellers would act any differently in a world without those Rules using common proof. In constructing their but-for world, they cannot reimagine the entire 20th century and reconstruct the U.S. real estate industry as if there were an entirely clean slate to suit their preferences. *DePaepe v. GMC*, 141 F.3d 715, 720 (7th Cir. 1998) ("[T]he whole point of *Daubert* is that experts can't 'speculate.' They need analytically sound bases for their opinions."); *Kenosha Liquor Co.*, 895 F.2d at 420 ("Expert opinions are worthless without data and reasons"); *Elorac, Inc. v. Sanofi-Aventis Canada, Inc.*, No. 14-C-1859, 2017 WL 3592775 at *13 (N. D. Ill. Aug. 21, 2017) (excluding expert opinion "based on unrealistic assumptions").

Moreover, Elhauge has done no work to show that there is common evidence that buyers would desire buyer broker services any less in a world without the Challenged Rules.[100] Elhauge has provided no evidence that the Challenged Rules created demand for buyer broker services, which were provided to buyers before the Challenged Rules were implemented, or any class-wide proof to show that buyers would not still desire these services in the but-for world.[101] He therefore fails to show that there is class-wide evidence of common impact related to buyers' use of buyer brokers.

(ii) Plaintiffs Lack the Common Evidence to Show that "Steering" Would Not Exist Absent the Challenged Rules or Has a Class-Wide Impact Necessary for a Class to be Certified.

Elhauge claims that the Challenged Rules increase buyer-broker commissions by "incentivizing and facilitating steering." Pl. Br. at 31 (citing Elhauge Report ¶¶ 186-206). He states that "buyer-brokers, like people generally, respond to incentives," and therefore are incentivized to promote listings to their buyers that offer higher cooperative compensation over those that offer less. Elhauge Report ¶ 188. Elhauge claims that listing brokers are then incentivized to offer "uniformly supracompetitive commissions to keep buyer brokers from steering buyers to other homes offering the standard commission." Pl. Br. at 31. This is true, according to Elhauge, even if steering is rare in either the real world or the but-for world, because the perception of steering as a "potential threat" alone is sufficient to incentivize "supracompetitive buyer-broker commissions." Pl. Br. at 31 (citing Elhauge Report ¶ 189).

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[100] Ex. 30, 2021 HBS Exhibit 4-11 (listing benefit of buyer brokers identified by buyers); *see also* Ex. 11 Elhauge Dep. Vol. I 56:10-57:9.

[101] Elhauge's suggestion that the NAR "free" rule somehow generated demand for buyer broker services in the real world that would not exist in the but-for world gets him nowhere, because there is no evidence that any of the buyer brokers in any transactions involving the named Plaintiffs advertised their services as free. *See, e.g.*, Ex. 6, Moehrl Dep. at 133:3-5 (buyer agent did not say his services were free).

As discussed above (*supra*, Section I.A.3.a), these opinions only further compel this Court to hold that class certification is not proper. Elhauge offers no basis for concluding that eliminating the Challenged Rules would eliminate steering (i.e., the incentive of a seller to offer compensation to induce buyer brokers to steer buyers to the seller's property). And he certainly offers no basis for concluding that these incentives would disappear across the board for all sellers and buyers, such that no individual proof would be needed regarding what particular sellers (and their brokers) or buyers would do.[102]

The individualized nature of the incentives created by steering are illustrated by the evidence of differing commissions rates. Elhauge points to some "clustering" of offered commission rates at specific values (Elhauge Report ¶ 201); he concludes that this so-called "clustering" is evidence of sellers' defensively pricing to reduce the risk of steering, but fails to explain why there is substantial variation in this "clustering" between and among the Covered MLSs. He has no answer for why roughly 95% of listing brokers offer the same rate in Houston, but only about 40% do in Ohio and West Virginia. *See* Stiroh Report ¶ 73 (showing that the "most common rate" occurs about 95% of the time in the HAR MLS but only about 40% of the time in the Yes_Now MLS). He does not explain why steering leads to offers of 2.4% in some Covered MLSs but 3% in others (a 25% difference), even though they are subject to same Challenged Rules. *Id.* ¶ 74. This evidence shows that individual sellers perceive the value of buyer brokers differently, even with the Challenged Rules in place. There is no basis in the record for concluding that these differences would evaporate in the absence of the Challenged Rules. He fails to account for the fact that individual buyer brokers have little incentive or actual

[102] Stiroh Report ¶¶ 109-112 ("As long as sellers are permitted to make commission offers to any buyer broker able to deliver a buyer in the but-for world, the same 'steering' incentives that Professor Elhauge claims exist in the actual world would have remained in place in the but-for world.").

ability to steer their buyers away from suitable properties and risk upsetting or alienating their buyer, as the brokers know that their buyers can see available properties on internet aggregators;[103] that high-quality listing brokers engage in marketing that will ensure that buyers know about listed properties, making efforts to steer ineffectual and dangerous for buyer agents;[104] that brokers only get the cooperative compensation if the transaction goes through; and that their industry runs on repeat clients and referrals.[105] *Id*. ⁋⁋ 75-79. Plaintiffs have failed to account for these variations among MLSs and individual buyer brokers, and thus, cannot show that steering had a common impact.

(iii) Plaintiffs Lack Common Evidence to Show that the Challenged Rules Cause Commission "Hogging."

Elhauge claims that the typical listing agreement allows the listing broker to keep the full listing commission if the buyer has no representation. He refers to this as "hogging" and asserts

[103] Ex. 6, Moehrl Dep. at 134:14-23; Ex. 7, Cole Dep. at 90:4-91:8; Ex. 5, Umpa Dep. Vol. 1 at 133:5-14.

[104] *See* Ex. 49, Reynolds (The Reynolds Team) Decl. ⁋ 4 ("I do not advise sellers that reducing compensation will cause buyer agents to steer their buyers away from the home because . . . the best listing agents (like the Reynolds Team) will know how to market homes to make sure that . . . buyers . . . know about their listings and become interested in them. If buyer agents were reluctant to show our listed properties, buyers would call our agents directly—and I believe that other agents understand that and would not steer buyers away from my clients' listings, regardless of the cooperative compensation our seller clients decide we should offer.").

[105] *See* Ex. 41, McLaughlin (KW Realty Austin SW) Decl. ⁋ 14 (stating that because he generates 100 percent of his business from repeat customers and referrals and regards as essential maintaining a reputation as honest and ethical, he "never consider[s]" cooperative compensation in deciding homes to show to buyer clients; "I put my buyer clients' interests first and want them to feel confident they have seen every home in which they might have an interest"); Ex. 44, Docktor (BHHS Fox & Roach) Decl ⁋ 20 (to same effect); Ex. 47, Rutherford (The Rutherford Group) Decl. ⁋ 10 ("I have not and would not consider my compensation when deciding what homes to show to my buyer clients or attempt in any way to dissuade them from looking at or purchasing a home based on the offered compensation" because 65 percent of his business comes from repeat customers and referrals; "[w]hen I pursue my client's best interests, it results in a win-win for both my clients and my business"). Additionally, steering a buyer away from a suitable property would be contrary to the NAR Code of Ethics. Ex. 31, 2022 NAR COE at Article 1 ("Best Interest").

that it shows that commission rates are artificially inflated. Elhauge Report ¶¶ 207-213; *see also* Economides Report ¶ 21. But Elhauge admits that this supposedly common provision is not required by any NAR Challenged Rule and that at least 10.8% of transactions listed in the Covered MLSs had no "hogging" term in the listing agreement, but instead, actually contained variable listing broker commissions depending on whether the buyer used a buyer broker.[106] Elhauge Report ¶ 208. Indeed, the listing agreement between the seller and the listing broker is always negotiable, and 85 percent of sellers reported that they knew that they could negotiate with their listing broker. Ex. 30, 2021 HBS Exhibit 7-11.[107]

Every seller is always free to seek out a broker who charges a lower commission (though only 4% reported that their agent's commission was the most important factor in choosing a real estate agent) or to not retain a listing broker at all.[108] Plaintiffs fail to offer any means by which, using common class-wide evidence, they could identify which Plaintiffs would have, in the but-for world, entered into listing agreements with offers of compensation that were variable based on the participation of a buyer broker. That failure shows that this is yet another individualized inquiry that would need to be conducted by the Court as part of the requisite "rigorous" class certification analysis in order to determine which sellers might have actually been negatively

[106] *See, e.g.*, Ex. 10, Ruh Dep. at 94:23-97:9 (listing agent would be paid 6%; but if listing agent or her husband found the buyer, the rate would be 5%; if Ruh found a buyer, the rate would be 5%; and if two pre-identified individuals bought the property, the listing agent would receive 3.5%).

[107] *See* Stiroh Report ¶ 113-15. It is also far from obvious why it would be anticompetitive for a listing broker to receive both portions of the commission if she is performing services that would typically be performed by a combination of the listing broker and the buyer broker. Stiroh Report ¶¶ 86-88.

[108] Ex. 30, 2021 HBS Ex. 7-8; *see also* Ex. 8-2 (7% of sales are for-sale-by-owner) and 7-6 (8% of sellers who used an agent chose agents who offered a limited set of services and 6% chose agents who listed the home on the MLS and provided few if any additional services).

impacted. An expert cannot just opt to "ignore evidence" that undermines his conclusion. *Cates v. Whirlpool Corp*., 2017 WL 1862640, at *15 (N.D. Ill. May 9, 2017).

(iv) Economides' International "Yardsticks" Fail To Support Class-Wide Impact, Which is a Necessary Prerequisite to a Class Being Certified.

Economides purported to conduct a "yardstick" analysis, but he did so in a way that completely defeats the point of such analysis. Yardstick analysis works by comparing markets that are similar in all ways except for the presence of allegedly illegal conduct. Stiroh Report ¶ 125. In order to conduct a proper yardstick analysis, then, Economides needed to find markets comparable to the Covered MLSs in all ways except for the presence of the Challenged Rules, and ***only*** the Challenged Rules. He did not do so. Instead, he attempted to imagine what U.S. residential real estate might have looked like if it had developed both without the Challenged Rules ***and*** without rules and conduct that are ***not*** challenged in this case. Stiroh Report ¶¶ 53-58. His analysis is therefore worthless from the start.

It gets worse. Economides included and excluded countries from his analysis based on arbitrary criteria. He included only countries that have a GDP per capita of within 30% of the U.S., rather than using a purchasing-power-adjusted measure of GDP that would account for the difference in purchasing power in different countries. Doing so allowed him to exclude France, where two-third of sellers paid their real estate agent a commission ranging from four to six percent, comparable to the total commission paid to listing brokers in the Covered MLSs. Stiroh Report ¶ 135. He included only countries with more than ten million people, claiming that this ensures that the comparator countries will include large metropolitan areas and a mix of different kinds of residential properties, even though many of the Covered MLSs do not have more than ten million people or do not have a mix of residential areas. Stiroh Report ¶ 136. This allowed

him to exclude Singapore, where listing agents offer cooperative compensation to buyer brokers in private-sale transactions. *Id.* He excluded Germany because buyers there typically pay half or all of the seller broker commission, a market characteristic inconsistent with the but-for world Economides apparently hoped to find and describe. *Id.* ¶ 137. This handful of examples demonstrates the absurdity of Economides' criteria: rather than identifying countries with similar characteristics to the Covered MLSs and asking what their market outcomes are, Economides started with the but-for world he wants and carved out countries until he got there.

Economides' arbitrary criteria leave him with the Netherlands, Australia, and the United Kingdom as yardsticks, but he failed to investigate whether the services provided by real estate professionals in those countries are analogous to those provided by brokers in the Covered MLSs, such that comparing international professionals to U.S. brokers makes any economic sense.[109] This is like comparing "automobile prices" without investigating whether there might be differences in automobile features and performance that could drive price differentials, on the way to concluding that the price of Porsches must be artificially inflated. In all three countries, for example, listing brokers typically show properties to prospective buyers, whereas that is the role of the buyer broker in the Covered MLSs. Stiroh Report ¶ 132. In the Netherlands, notaries perform some of the services of an American buyer broker, including advising the buyer on questions regarding the purchase agreement. Stiroh Report ¶ 131. Economides excluded Belgium for just this reason but appears to have overlooked the Netherlands. In some Australian

[109] Economides also failed to compare seller class members in the covered MLSs to sellers in the three benchmark countries. Instead, he simply took an average of sellers in the United States and an average of sellers in the three benchmark countries without any individualized analysis as to the similarities or differences with the covered MLSs. (i.e. how does a seller in Utah in a Covered MLS compare with a seller in Hobart, Australia – are the markets similarly hot? Similar urban v. rural mix? Same number of brokers?). Economides Report ¶¶ 34-45; Ex. 12, Economides Dep. Vol. I 175:20- 179:14; 231:5 – 237:21; 257:14-21.

markets, up to 30% of transactions are auctions, which can reduce the services needed from brokers. *Id.* ¶ 132. And in the U.K. and the Netherlands, there is no licensing requirement for real estate agents, whereas U.S. agents must receive licensing and training. *Id.* ¶ 133. Economides has not attempted to account for any of these differences.

Economides then took his arbitrary group of incongruent countries and assumed that any differences between them and the Covered MLSs are the result of the Challenged Rules, rather than a century of differing real estate practices, differently credentialed brokers who are providing different services, different regulatory environments, or any other factor that might distinguish the Covered MLSs from his hand-picked selection of international markets.[110] This assumption makes no sense, not least because Australia, the Netherlands, and the United Kingdom do not have consistent market outcomes, even as to each other, though it is not disputed that none of them have the Challenged Rules. Economides himself recognizes that average buyer broker rates are more than 70 percent higher in Australia than in the Netherlands, and that buyer brokers are used four times more often in the Netherlands than in Australia or the United Kingdom. Stiroh Report ¶ 126 (citing Economides Report at Table 4 and ¶¶ 42, 56). Economides has no explanation for these differences, and admits that he has no basis to claim that any of these countries is a more accurate yardstick than the others. Economides Report ¶ 91. Rather than engage with this diversity, he flattens it into an average, ignoring the very variation that an economic analysis of class certification is intended to evaluate.

[110] *See, e.g.*, Damien Cave, How Australia Saved Thousands of Lives While Covid Killed a Million Americans, THE NEW YORK TIMES, May 15, 2022, *available at* https://www.nytimes.com/2022/05/15/world/australia/covid-deaths.html (discussing how cultural differences between Australians and Americans likely led to different responses to the pandemic).

Stiroh did engage with this variation. She compared average buyer broker commissions in the Covered MLSs, Australia, the United Kingdom, and the Netherlands based on Economides' report, using purchasing power parity dollars. Stiroh Report ¶ 127, Figure 11. Her analysis shows that buyer brokers in Australia are paid significantly more than their counterparts in the United Kingdom and Netherlands—and more than the average buyer broker in all but five of the twenty of the Covered MLSs. Stiroh Report ¶ 127. This variation both among the international benchmarks and among the Covered MLSs shows the final fault in Economides' analysis. Even if one ignores all the failings of Economides' model—and one should not, *see People Who Care v. Rockford Bd. Of Educ., Sch. Dist. No. 205*, 111 F.3d 528, 537-38 (7th Cir. 1997) (stating that a model must account for "salient explanatory variables")—the model ultimately does not show that buyer brokers in markets where the Challenged Rules exist are uniformly paid more than buyer brokers in markets without the Rules. Without such a showing, his model cannot show class-wide harm to sellers.

(v) Plaintiffs' Experts Ignore Northwest MLS.

As discussed above, Plaintiffs' experts ignore the natural experiment of Northwest MLS. Unlike the international markets considered by Economides, Northwest MLS is part of the U.S. real estate tradition. And, unlike Elhauge's suppositions about what might happen, Northwest MLS shows what ***did*** happen when a U.S. MLS made offers of compensation optional. Nearly all listing brokers continued to make an offer of compensation. Stiroh Report ¶ 62. Nearly all of the offers were greater than the 1.55% proposed by Economides. *Id.* ¶ 63. Plaintiffs' experts cannot simply disregard evidence inconsistent with their theories, but that is exactly what they

did.[111] *Barber v. United Airlines, Inc.*, 17 F. App'x 433, 437 (7th Cir. 2001) (excluding expert because a "selective use of facts fails to satisfy…*Daubert*"); *Chen v. Yellen*, 2021 WL 4192078, at *5 (N.D. Ill. Sept. 15, 2021) (excluding expert who failed to consider "potentially contrary evidence"); *Cates*, 2017 WL 1862640 at *15 (excluding expert because "[i]gnoring relevant data is not a scientifically valid method").

Plaintiffs' experts' unsupported opinions cannot discharge Plaintiffs' burden to present "evidentiary proof" in support of their class certification motion, particularly when contradicted by actual record evidence. Expert testimony is meant to help a fact-finder understand facts; it cannot substitute for those facts altogether. *See, e.g.*, *Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007) ("Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible.") (citation omitted).

4. Plaintiffs Have No Common, Class-wide Proof that Class Members Would be Better Off in the But-For World.

Even if Plaintiffs had class-wide proof that they would have paid lower listing commissions in the but-for world, they have provided no class-wide method of showing that they suffered a net economic injury. Plaintiffs assume that sellers would retain the entire benefit of any lower commission and that nothing else would have changed in the but-for world. This assumption fails to account for, or even consider, how reassigning the cost of buyer broker services from the seller to the buyer would change the dynamics of the home sale transaction.

Plaintiffs' overly simplistic models of antitrust impact and damages fail to address the myriad ways in individual class members may have benefitted from the Challenged Rules, and

[111] Plaintiffs' experts may argue that too little time has passed since the Northwest MLS rule changed in 2019 to see an effect. But Plaintiffs have done no analysis to show how much time would be needed, and such an argument is contrary to their argument that the Challenged Rules are the only reason that offers of compensation are made.

would be harmed from their removal in the but-for world. Plaintiffs' failure to propose a method whereby these individualized questions could be addressed at trial on behalf of the class as a whole is another reason they have failed to demonstrate that common issues will predominate over individual ones.

For example, in Plaintiffs' but-for world, buyers would have to cover their broker's fee as an additional out-of-pocket expense at or around the time of the closing (or proceed without the assistance of a buyer broker at all in what is, for most people, the largest financial transactions of their lives and represents their biggest economic investment). Buyers would no longer be able to effectively add their buyer broker's fee to the cost of the home in order to finance that fee through their mortgage.[112] Liquidity-constrained buyers might delay their home purchases while they save for down payments and a buyer broker fee, have less purchasing power resulting in a changed demand dynamic that could negatively impact sellers, or drop out of the market altogether. Stiroh Report ¶¶ 103-105.[113] This additional broker cost would impact different buyers in different ways, with the greatest impact likely to be on cash-constrained buyers with lower income or savings. Plaintiffs make no effort to analyze those impacts or propose any class-wide method for assessing them.

[112] Elhauge assumes that mortgage brokers would be willing to allow buyer broker commissions to be financed but provides no support for that assumption. Elhauge Report ¶ 257. Among the issues that such an assumption ignores is (i) whether and to what extent such financing would create mortgage loans with higher Loan to Value ratios (LTVs) and appraisal issues which could often result in buyers not being able to be qualified for such loans; whether if such loans could be made, how they could possibly comply with the Qualified Mortgage safe harbor the CFPB put in place after the last mortgage crisis and be eligible for purchase by Fannie Mae or Freddie Mac; and (iii) how the remaining capital market investors would regard such loans and the premium price (i.e. higher interest rate) if any, they would demand in order to purchase such loans.

[113] *See also* Ex. 30, 2021 HBS at Ex. 3-10 (reporting that 13% of all buyers and 29% of first-time buyers identify "saving for the down payment" as the most difficult step of the home-buying process).

With fewer home buyers in the but-for world, demand for residential real estate would decrease, leading to less competition for homes. The buyers who remained in the market would likely lower their purchase offers, because they would need to reserve some of their cash to pay for a buyer broker. Sellers would be impacted in the but-for world as their homes (1) might not sell at all, (2) might take longer to sell with higher carrying costs, or (3) might sell at a lower price.[114] Stiroh Report ¶¶ 100-102, 144-48. Indeed, one of the key studies on which Economides relies states that housing prices would decrease by 2-3 percent if the financial burden of commissions shifts to buyers. Ex. 12, Economides Dep. Vol. I 149:7-17; Ex. 3, Barwick and Wong p. 21-22. If that is the case, sellers would benefit under the current system compared to the but-for world. Moreover, according to Barwick and Wong, offers of compensation are related to buyer rebates, which are part of the competition on commission. Ex. 3, Barwick and Wong p. 21-22. Economides admitted he did not consider home sale prices or rebates in his analysis. Ex. 12, Economides Dep. Vol. I 307:18-21; Vol. II 9:14-10:4. Thus, Economides ignored home prices and rebates in the but-for world, which necessarily must be considered on a class member-by-class member individualized analysis to determine harm.

Similarly, Elhauge testified that he assumed that home prices in the but-for world would go down, though he did no economic analysis to support this assertion on a class-wide basis. Elhauge Report at ¶ 257; Ex. 11, Elhauge Dep. Vol. I at 80:19-24, 81:9-17. He also did no work to show how much the price of real estate would go down in the but-for world, let alone work to show that such a determination could be made for the class. *Id.* at 81:18-21. And he does not

[114] *See also* Ex. 46, Mesa (BHHS Florida Properties) Decl ¶ 20 (sellers have incentive to pay buyer broker fees just like they often offer closing cost credits — to minimize out of pocket costs for buyers and in particular cash constrained ones); Ex. 40, Vincent (Coldwell Banker Realty) Decl. ¶ 7 ("offering to compensate the buyer broker is in the best interest of the seller because it helps attract a larger pool of ready and will[ing] buyers. Sellers benefit from a larger pool of potential buyers, as this will likely result in a quicker sale and a higher sales price for the property").

ever assert that this impact would be uniform among sellers. Rather, he testified that if a seller saved 3 percent on commission, "something between 0 and 3 percent would be the effect on the home price." *Id.* at 82:11-17. In doing so, Elhauge admits that some sellers would save 3 percent on commission but lose 3 percent on their home price, and therefore would receive the same net proceeds in the real world as the but-for world. Such class members would not be better off in the but-for world, and plaintiffs have no class-wide method of identifying them.

Plaintiffs have also failed to account for the fact that many potential class members were both a buyer and a seller. That means that even if the rule harmed sellers and benefitted buyers, many putative class members would be benefitted in their role as buyers. Stiroh Report ¶¶ 149-53. Identifying these class members will require an individualized inquiry, as any damages calculation must account for all benefits Plaintiffs derived from the alleged effect of the Challenged Rules, and that benefit must be offset against Plaintiffs' alleged damages:

> [T]he ultimate relief awarded must take into account any benefits which would not have been received by plaintiff "but for" the defendant's anticompetitive conduct, or amounts a plaintiff would have expended in the absence of the violation. An antitrust plaintiff may recover only to the "net" extent of its injury; if benefits accrued to it because of an antitrust violation, those benefits must be deducted from the gross damages caused by the illegal conduct.

Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356, 1367 (9th Cir. 1986).[115] Neither Plaintiffs nor their experts have identified any class-wide evidence on which such a determination can be made. For the named Plaintiffs, Defendants had the ability to serve tailored document requests and interrogatories and to take depositions. From this Plaintiff-

[115] *See also Hanover Shoe Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 504 (1968) (approving district court's offsetting from damages the financing costs that plaintiff avoided because of the defendant's antitrust violation); *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 676 F. Supp. 486, 490 (S.D.N.Y. 1987) (requiring damages for alleged manipulation of silver futures positions to be offset by any increase in value that accrued to physical silver holdings).

specific discovery, Defendants learned, for instance, that Plaintiff Christopher Moehrl entered into a listing agreement and buyer representation agreement with his broker on the same day because he expected he would be purchasing and selling in close proximity to one another. In those two transactions, Mr. Moehrl paid $10,530 in buyer-broker commissions on his home sale but avoided $17,550 in buyer-broker commissions on his home purchases, meaning that Mr. Moehrl suffered no harm and instead actually benefitted from the existence of the Cooperative Compensation Rule.[116]

This individualized inquiry cannot be performed on a class-wide basis. For example, if a particular class member purchased a home in an area not covered by the Covered MLSs, there would be insufficient data available about that class member's transactions to assess net injury. And, even within the Covered MLSs, attempting to match the names of sellers and buyers is an imprecise process; even if the names match exactly in the data sources when the individual class member was both a buyer and a seller, the matching can only be done for the subset of transactions for which the Corporate Defendants have the required data (because the MLS data does not include the parties' names). In other words, it can be done only for transactions in which one or more of the Corporate Defendants handled both the purchase and sale transaction for that same individual. Thus, there is no means of performing on a class-wide basis the same analysis that Defendants were able to perform for Mr. Moehrl's transactions, and no class-wide means of identifying which particular class members purchased a home during the class period and benefitted from having his or her brokerage services paid by the listing broker.

A seller who would have paid a lower commission because the listing agent paid no compensation to the buyer's broker but who would have received a lower sales price for the

[116] Ex. 6, Moehrl Dep. at 57:16-59:21, 84:6-22; 149:21-150:17, 151:9-13, 154:12-21.

home in an equal or greater amount than the now-eliminated buyer broker commission suffered no injury.[117] It is unsurprising, therefore, that Plaintiffs have failed to address how this issue could be handled at a class trial.

5. Plaintiffs' Mode of Class-wide Impact Fails to Account for Real-world Variation in Commission.

To the extent that Plaintiffs' model of class-wide impact depends on the assumption that all class members would have paid the "benchmark" cooperative compensation of 1.55%, it fails to account for real-world variation in commission and cooperative compensation levels. In the real world, cooperative compensation varied both within the Covered MLSs and among them. Stiroh Report ⁋ 117 (Table 2 showing variation in frequency of most common rate offered within Covered MLSs); Elhauge Report p. 167 (Table 9 showing variation in offered cooperative compensation from 2.4 to 3%).[118] Plaintiffs' failure to confront this variation dooms their analysis; even if the model correctly identified the average impact of the Challenged Rules, it is not a methodology common to the class that can determine impact with respect to each class member. *See, e.g.*, *Reed*, 268 F.R.D. at 590-91 (rejecting model that relied on averages to establish class-wide impact in wage-suppression case because "[m]easuring average base wage suppression does not indicate whether each putative class member suffered harm from the alleged conspiracy"); *see also In re Aluminum Warehousing*, 336 F.R.D. at 62-63 (rejecting model that attempted to elide complexities in data through averaging).[119]

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[117] *See Riffey*, 910 F.3d at 319 (affirming denial of class certification where individual net injury issue predominated based on whether individuals would have supported union and paid dues).

[118] *See also* Ex. 49, Reynolds (The Reynolds Team) Decl. ⁋ 9 (observing current differences in cooperative compensation offered in "hot" markets like Dallas and cooling markets like Washington, D.C.).

[119] *See also In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d at 192-94 (finding "rigorous analysis" necessary to determine whether use of averages mask individualized inquiry).

B. Plaintiffs' Claimed Common Class-wide Evidence of Conspiracy Ignores Predominant Individualized Issues Raised in Defense.

Plaintiffs posit two theories of conspiracy, each of which differs from a typical horizontal conspiracy claim. First, Plaintiffs posit a fictional "invitation" that NAR supposedly made to each Corporate Defendant to participate in various MLSs and benefit from "supracompetitive pricing" and "protection from competition" so long as they would adhere to and promote the allegedly anticompetitive restraints. Pl. Br. at 9. Plaintiffs present no class-wide common evidence to show any such invitation or acceptance by a Corporate Defendant (which are holding companies or franchisors and which themselves are not NAR members). Plaintiffs' second theory envisions that the Corporate Defendants agreed to have their various respective franchisees and/or subsidiaries, and in turn *their* respective independent contractor sales agents, join the conspiracy. Yet Plaintiffs offer no class-wide means to resolve basic questions needed to prove such a theory. How did each brokerage and agent enter into the purported agreement? For each actor, when and where did this agreement occur and what were the terms? What was done in each case to further the alleged conspiracy? Was there a common anticompetitive purpose?

Plaintiffs fail to consider the individualized—indeed, often *transaction-specific*—issues bearing on Plaintiffs' ability to establish the required conspiracy element of their claims. *See AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999). For example, the Corporate Defendants as part of their defense have adduced and will continue to adduce evidence that many sales agents were not aware of the challenged rule[120] and, instead,

[120] *See, e.g.*, Ex. 51, Egner (Re/Max) Decl. ¶ 5; (RE/MAX agent unfamiliar with NAR rules re offer of compensation and makes such offers of compensation as a listing agent because it encourages home visits and potential offers); Ex. 43, Schmid (Edina Realty) Decl. ¶¶ 21-14 (to same effect, re HSoA brokerage subsidiary); Ex. 47, Rutherford (The Rutherford Group) Decl. ¶ 9 (Keller Williams agent unaware "that there

generally offer cooperative compensation to help and benefit their seller clients.[121] Defendants also present evidence of individualized issues regarding Corporate Defendant sales training materials that Plaintiffs claim discourages commission negotiation and lower cooperative compensation offers. *See* Pl. Br. at 34-35. In fact, such training are often optional and independent contractor sales agents affiliated with Corporate Defendant franchisees or brokerages (many of whom seek training only from other sources, such as the state) may never engage with such training content at all.[122] Such evidence demonstrates how Plaintiffs' theory, examined rigorously, would require the Court to engage in individualized inquiries related to the practices of each independently owned and operated franchisee or brokerage and its independent contractor sales agents.

Plaintiffs alternatively suggest that there is "common" proof that certain employees of the Corporate Defendants—and, to a much greater extent, certain employees of franchisees, subsidiaries, and/or their affiliated sales agents—met with one another as attendees in various trade association meetings. But mere membership in or attendance at a trade association is insufficient to impose liability. *Kleen Prods. LLC v. Int'l Paper*, 276 F. Supp. 3d 811, 834 (N.D.

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was an NAR or MLS rule that required me to offer compensation to other MLS members" but offers compensation "because it is the right thing to do for my clients"); Ex. 40, Vincent (Coldwell Banker Realty) Decl. ¶ 8.

[121] Ex. 51, Egner (Re/Max) Decl. ¶ 5; Ex. 46, Mesa (BHHS Florida Properties) Decl. ¶ 21; Ex. 44, Docktor (BHHS Fox & Roach) Decl. ¶¶ 28-30; Ex. 40, Vincent (Coldwell Banker Realty) Decl. ¶¶ 7, 13, 17; Ex. 41, McLaughlin (KW Realty Austin SW) Decl. ¶ 15; Ex. 49, Reynolds (The Reynolds Team) Decl. ¶ 6.

[122] *See, e.g.*, Ex. 45, Warner (BHH Affiliates) Decl. ¶ 9 [redacted]; Ex. 42, Jungman (BHHS Rocky Mountain) Decl. ¶¶ 20-21 ([redacted]); Ex. 46, Mesa (BHHS Florida Properties) Decl. ¶¶ 29-31 (to same effect); Ex. 49, Reynolds (The Reynolds Team) Decl. ¶ 13 (stating that Keller Williams does not require that she use its training materials and that she uses Keller Williams training materials, if at all, only as a "starting point" for training she provides to her agents).

Ill. 2017), *aff'd sub nom. Kleen Prods. LLC v. Georgia-Pac. LLC*, 910 F.3d 927 (7th Cir. 2018).[123] Here, as is concretely shown by evidence developed to date by Defendants, individualized examination would be required to examine whether the attendance Plaintiffs cite actually related to a relevant topic or to the claimed overarching scheme with a Corporate Defendant. At this critical juncture in the case, following extensive discovery, Plaintiffs point to no meeting at which the Cooperative Compensation Rule was even discussed. Further, Plaintiffs have offered the Court no class-wide means to confirm whether any given actor not directly employed by a Corporate Defendant took action because of any connection to a Corporate Defendant or to the claimed conspiracy.[124]

The Court may not simply attribute to the Corporate Defendants liability for the conduct of persons who are engaged with independently owned and/or operated real estate brokerages. "It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *See United States v. Bestfoods*,

[123] *See also Marrese v. Am. Acad. of Orthopaedic Surgeons*, No. 80 C 1405, 1991 WL 5827, at *6 (N.D. Ill. Jan. 15, 1991), *aff'd*, 977 F.2d 585 (7th Cir. 1992) (requiring "some evidence of, and participation in, an illegal scheme"); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) (even association board of directors participation is not enough by itself to create liability).

[124] *See, e.g.,* Ex. 37, Gorman (Realogy Brokerage Group) Decl. ¶¶ 5, 8 (Realogy is not a member of NAR and does not require its employees, affiliated brokers, or independent contractor sales associates to become members of NAR or any local MLSs or to participate in the governance of NAR, any local realtor association, or any local MLS); Ex. 50, Strandmo (HSoA) Decl. ¶¶ 2-3, 6-7 and Ex. 45, Warner (BHH Affiliates) Decl. ¶¶ 6-11 (HSoA and BHH Affiliates do not dictate real estate brokerage policies of their respective subsidiaries or franchisees and has not directed how these companies handle cooperative compensation) or directed them to join NAR or any MLS); Ex. 42, Jungman (BHHS Rocky Mountain Dec. ¶¶ 6, 19, 17 (franchisee confirms same) Ex. 46, Mesa (BHHS Florida Properties) Decl. ¶ 9 (leader of HSoA subsidiary had been involved with NAR long before his company came into the HSoA family and did so for personal reasons only).

524 U.S. 51, 61 (1998).[125] Yet there is no class-wide mechanism for adjudicating that issue for each of the operating real estate brokerages and agents relating to the thousands of transactions for which Plaintiffs seek damages.[126] Any such attribution becomes even more complicated and attenuated when the Court considers Plaintiffs' claims that flow from supposed conduct by franchisees and subsidiaries undertaken prior to *any* association with a Corporate Defendant.[127]

In sum, a rigorous analysis of the evidence relating to Defendants' conspiracy defenses raises numerous individualized questions that predominate, including whether the conduct of a given real estate brokerage or agent had anything to do with the Challenged Rules, the claimed conspiracy, or relevant action by a Corporate Defendant—providing another basis to deny class treatment.

C. The Fatal Flaws in Plaintiffs' Class-Wide Damages Model Preclude Class Certification.

Plaintiffs' damages model suffers from multiple flaws that are inconsistent with class certification, including: a lack of cohesion between the theory of liability and the theory of harm;

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[125] *See also In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 55 (2d Cir. 2012) (parent company not liable for alleged conspiracy where "plaintiffs failed to offer sufficient evidence from which a jury could reasonably conclude that [the parent] had any direct involvement" in subsidiary decisions); *In re Dynamic Random Access Memory Antitrust Litig.*, No. M 02-1486 PJH, 2007 WL 9752971, at *5 (N.D. Cal. Feb. 20, 2007) (parent company participation "must be independently proven, either through direct or circumstantial evidence.").

[126] *See, e.g.*, Ex. 50, Strandmo (HSoA) Decl. ¶¶ 2-3 (HSoA does not dictate real estate brokerage policies of its subsidiaries and has not tried to influence how these companies handle cooperative compensation); Ex. 45, Warner (BHH Affiliates) Decl. ¶¶ 4-7 (BHH does not control its franchisees' daily operations and has not directed them on matters of commission or cooperative compensation); Ex. 42, Jungman (BHHS Rocky Mountain) Decl. ¶¶ 6-9, 11, 16 (same); Ex. 38, Yannaccone (Realogy Franchise Group) Decl. ¶¶ 4, 6 (Realogy does not control the day-to-day operations of the independently owned and operated franchisees and pursuant to its Franchise Agreements, Realogy "has no right or obligation to … determine or limit … the commission rates [franchisees] charge").

[127] See, Ex. 42, Jungman (BHHS Rocky Mountain) Decl. ¶¶ 6-10, 17-19 (company makes its own independent decisions including what trade association and MLS to join and these preceded its affiliation with BHH), Ex. 46, Mesa (BHHS Florida Properties) Decl. ¶¶ 8-9 (to same effect); Ex. 45, Warner (BHH Affiliates) Decl. ¶ 11 (same; many franchisees have joined the BHHS network since the beginning of the limitations period in this case).

inclusion in the calculated damages price effects unrelated to the challenged conduct; failure to account for relevant variables and conduct the requisite individualized inquiries; and reliance on assumptions incompatible with, and indeed refuted by, the real world.

1. Plaintiffs' Liability and Damages Theories Fail Under *Comcast.*

Comcast requires that a plaintiff "affirmatively demonstrate his compliance with Rule 23." *Comcast*, 569 U.S. at 33 (citation omitted). A plaintiff must show both a class-wide injury and "that the damages resulting from that injury [are] measurable 'on a class-wide basis' through use of a 'common methodology.'" *Id.* at 30 (quoting district court opinion). This burden demands that "any model supporting a 'plaintiff's damages case must be consistent with its liability case.'" *Id.* at 35 (citation omitted). Plaintiffs have completely failed to offer such a model.

Both Elhauge and Economides state that, in the but-for world, many or most buyers would not use a buyer broker. *See, e.g.*, Elhauge Report ⁋ 219; Economides Report ⁋ 9. Yet Economides' damages model assumes that ***all*** buyers would use a buyer broker and that they would be paid uniform rate of 1.55%. Economides Report ⁋⁋ 83, 95. This damages calculation does not match the but-for world proposed by Plaintiffs' experts where buyer brokers would never be hired, and/or would be paid nothing or next to nothing for their services. Pl. Br. at 4. As in *Comcast*, there is an absence of "fit" between Plaintiffs' liability theory here, on the one hand, and the damages model of Economides, on the other. Plaintiffs' damages model therefore fails to support class certification.

2. Plaintiffs' Damages Model Fails To Consider the Impact of Eliminating the Offer of Cooperative Compensation

Plaintiffs' proposed class-wide damages model also fails to consider the impact of eliminating the offer of cooperative compensation. As even Elhauge and Economides

acknowledge, the commission costs are often incorporated into the sales prices of the house. Stiroh Report ⁋ 147; Ex. 11, Elhauge Vol. I Dep. 33:4-16; 79:14-82:17. Economic literature therefore predicts that, if the buyer broker commission is shifted to the buyer, the price of the house would decrease by a similar amount. *Id.* ⁋ 148. Indeed, the Barwick and Wong paper on which Economides relies predicts as much. Ex. 12, Economides Dep. Vol. I 149:7-17; Ex. 3, Barwick and Wong pp. 21-22. Plaintiffs' experts have failed to account for this effect, which would leave many of the purported class members in the same financial position in the Plaintiffs' but-for world, and thus, uninjured. *Id.* Because Plaintiffs do not account for the change in house price to the class members, even though their experts admit such an impact, their model fails. *See Butler v. Sears, Roebuck & Co.,* 727 F.3d 796, 800 (7th Cir. 2013) (certifying a class where, unlike here, "there is no possibility that damages could be attributed to" anything other than defendant's challenged conduct); *In re Pharmacy Benefit Managers Antitrust Litig.*, No. CV 03-4730, 2017 WL 275398, at *19-21, 31 (E.D. Pa. Jan. 18, 2017) (denying certification where plaintiffs' expert "failed to isolate the difference in reimbursement rates attributable to an alleged antitrust conspiracy from any difference attributable to legitimate bargaining power or other market factors"); *In re POM Wonderful LLC*, No. ML 10-02199 DDP RZX, 2014 WL 1225184, at *4-5 (C.D. Cal. Mar. 25, 2014) (granting motion for decertification because the damages model assumed that 100% of price premium was attributable to plaintiffs' liability theory).

3. Plaintiffs' Damages Model Fails to Account for Individualized Factors That Explain Class Members' Commission Rates

The model advocated by Plaintiffs does not account for other factors that could impact the transactions at issue. In the real world, there is significant variation among buyer broker commission rates, both within and among the Covered MLSs. Stiroh Report ⁋ 117. Further, those rates conceal further variation in actual commissions paid, as average actual commissions

paid can range from roughly $4900 in the Now MLS to nearly $15,000 in the Miami MLS. *Id.* ¶ 118. Yet Economides' damages model assumes away all of this variation in favor of his 1.55% international average of averages commission. *See* Stiroh Report ¶¶ 140-143.

The type of simple damages model relied on by Plaintiffs that is based on averages frequently falls short of establishing anticompetitive harm at the class certification stage. *See Reed*, 268 F.R.D. at 595 (denying class certification where "plaintiffs' 'percentage wage suppression' formula unacceptably relies on averages"); *see also In re Flash Memory Antitrust Litig.*, 2010 WL 2332081 at *12.

Because Plaintiffs' model does not and cannot calculate the damages attributable solely to the alleged unlawful NAR Challenged Rules, their model cannot be used to prove damages. *Comcast*, 569 U.S at 42.

D. Plaintiffs Cannot Show that a Class Action is a Superior Method of Adjudication.

A Rule 23(b) (3) class should only be certified if "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FRCP 23(b) (3); *Riffey*, 910 F.3d at 318. Plaintiffs eschew the varied and localized nature of a real estate transaction and make unsupported assumptions and speculations about how all sellers, buyers, buyer brokers, and listing agents would act in an imagined but for world. Thus, a mini-trial will be required for each class member to determine whether, in his or her unique situation, he or she would have offered cooperative compensation to a buyer broker and, if so, how much; whether any change in the offered commission would have affected the number of buyers, the purchase prices they were willing to offer, or would have affected how long the seller's house was on the market and the price that the seller ultimately received for the house; and whether the individual

class member would have been better off in the but-for world. A class action is not the superior method for adjudicating such fact-intensive questions.

E. Plaintiffs Incorrectly Argue that *Per Se* Analysis is Appropriate Here.

Plaintiffs also suggest that class certification is appropriate because the NAR Challenged Rules represent *per se* violations of the Sherman Act. Pl. Br. at 27-29. This argument is both incorrect and beside the point on this motion. Plaintiffs' argument is incorrect because this is ***not*** a *per se* case. "Per se liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Texaco v. Dagher*, 547 U.S. 1, 5 (2006) (internal citations and quotations omitted). Plaintiffs claim that the Challenged Rules should be treated as *per se* illegal because they are, somehow, properly seen as an illegal horizontal price fixing agreement, Pl. Br. at 27, but that is simply not true. The Cooperative Compensation Rule does not specify any monetary amount, and allows for offers of one cent. *See supra* Fact Section II.A. Given the ability of listing brokers to offer whatever amount of cooperative compensation they each deem to be in the best interest of their seller clients, the notion that the Rule fixes prices is unfounded.[128]

Moreover, Plaintiffs' argument is beside the point because the question whether this is a *per se* case has nothing to do with the question whether the proposed class should be certified. In *per se* cases, like in all antitrust cases, putative classes cannot be certified when plaintiffs fail to provide common proof of antitrust impact. *See, e.g., In re Aluminum Warehousing*, 336

[128] Furthermore, other courts have applied a rule of reason analysis to claims of anticompetitive conduct regarding MLSs and their rules, in recognition that the MLSs have undisputed efficiency-enhancing benefits. *See, e.g., Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 321 (7th Cir. 2006) ("We must review a challenge to Article 16 [of the NAR Code of Ethics] under the rule of reason to determine whether the agreement contributes to competition and productivity."); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1368 (5th Cir. 1980).

F.R.D. at 63. Plaintiffs' failure to do so here dooms their motion, regardless of the standard of review that might be applicable to their underlying antitrust claims.

II. Plaintiffs Have Failed To Satisfy The Rule 23(a) Factors.

Plaintiffs' request to certify a Rule 23(b)(3) and a Rule 23(b)(2) class should also be denied because Plaintiffs have failed to satisfy Rule 23(a)(2)'s commonality and typicality requirements.

A. Plaintiffs Have Failed to Satisfy Commonality.

Plaintiffs have failed to satisfy Rule 23(a)(2)'s commonality requirement for many of the same reasons they have failed to satisfy predominance. To satisfy commonality, Plaintiffs are required to demonstrate the existence of common questions that are "apt to drive the resolution of the litigation." *Suchanek,* 764 F.3d at 756. Plaintiffs have identified five supposedly common issues: whether Defendants conspired; the interpretation and effect of the Challenged Rules; whether the alleged conspiracy injured competition; market definition and power; and whether NAR's Challenged Rules violate the Sherman Act. Pl. Br. at 22. Plaintiffs' recitation of these sweeping, generic "common issues" is insufficient to satisfy Rule 23(a)(2). As explained at length in Section I.A above, a class-wide proceeding will not succeed in generating "common answers apt to drive the resolution of [this] litigation," because it cannot provide a common answer to the critical question of antitrust impact. Rule 23(a)(2) is not satisfied.

B. Plaintiffs Have Failed to Satisfy Typicality.

Plaintiffs have also failed to satisfy the typicality requirement of Rule 23(a)(3). The proposed class representatives listed homes on only five of the twenty Covered MLSs: NorthStar (Plaintiff Moehrl); ACTRIS (Plaintiff Darnell); REcolorado (Plaintiff Cole); Metro (Plaintiff Ruh) and Bright (Plaintiffs Ramey and Umpa). *See* Dkt. 302-4.

Plaintiffs also claim, in both their Complaint and in the Elhauge Report, that each of the Covered MLSs represents its own, distinct, relevant market for antitrust purposes. *See* FAC ¶¶ 133-139; Elhauge Report ¶¶ 76-107. The combination of these two facts—(1) Plaintiffs' assertion that each MLS is a distinct relevant market for antitrust purposes, and (2) named Plaintiffs' lack of participation in any of the purportedly distinct relevant geographic markets other than the NorthStar, ACTRIS, REcolorado, Metro or Bright MLSs— creates an insuperable typicality problem for Plaintiffs with respect to any listings made on MLSs other than those five MLSs.

It is well settled that an antitrust plaintiff does not have standing to sue over restraints that allegedly impacted markets in which the plaintiff, personally, did not participate. *See, e.g., In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 161 (2d Cir. 2016) ("to suffer antitrust injury, the putative plaintiff must be a participant in the very market that is directly restrained"); *Winstar Comms., LLC v. Equity Office Props., Inc.,* 170 F. App'x 740, 742 (2d Cir. 2006) ("[plaintiff's] allegations lend no support to the charge that competition was restrained in the relevant market in which [plaintiff] participated, a requirement of any antitrust suit"); *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, No. 09-CV-3690, 2013 WL 4506000, at *12 (N.D. Ill. Aug. 23, 2013) (antitrust plaintiffs did not have standing when their alleged injury "occurred in a market secondary to the allegedly monopolized market"). Thus, none of the named Plaintiffs has standing to bring claims based on any alleged wrongdoing that occurred in any MLS other than the five MLSs in which they participated.

It is equally well settled that typicality is not satisfied when a plaintiff attempts to certify a class on claims that the plaintiff, himself, lacks standing to bring.[129] For this reason, Rule 23(a)(2) is not satisfied with respect to the proposed classes of home sellers who listed homes in the following Covered MLSs: (1) Carolina/Canopy; (2) Triangle; (3) Stellar; (4) Miami; (5) Florida Gulf Coast; (6) Yes MLS/MLS Now; (7) Columbus Realtors; (8) Wasatch Front/Utah Real Estate; (9) Pikes Peak; (10) GLVAR; (11) SABOR; (12) HAR; (13) NTREIS; (14) ARMLS; or (15) Realcomp II.

III. The Court Should Not Certify The Proposed Rule 23(b)(2) Injunctive Relief Class.

Plaintiffs' request to certify an injunctive relief class under Rule 23(b)(2) should also be denied, for several reasons. First, Plaintiffs have failed to demonstrate that they and the putative class members face a likelihood of future injury from the challenged conduct, or that they lack an adequate remedy at law—both prerequisites for seeking injunctive relief. Plaintiffs therefore have no standing to seek certification of a Rule 23(b)(2) injunctive relief class. A plaintiff seeking injunctive relief on behalf of a putative class must show that he or she "is currently suffering some injury or there is some immediate danger of a direct injury." *Hawkins v. Groot Indus.*, No. 01 C 1731, 2003 WL 22057238, at *2 (N.D. Ill. Sept. 2, 2003) (internal quotations omitted) (denying Rule 23(b)(2) class certification sought by former employee on behalf of

[129] *See, e.g.*, *Retired Chi. Police Ass'n v. City of Chi.*, 7 F.3d 584, 597 (7th Cir. 1993) (typicality not satisfied where named representatives were police retirees and did not have "the same essential characteristics as the claims of the class," which included other city employees.); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200, 2208 (2021) (holding that class members who had not suffered a concrete harm lacked Article III standing and "Every class member must have Article III standing in order to recover individual damages"); *Kohen v. Pacific Investment Management Co. LC & PIMCO Funds,* 571 F.3d 672,678 (7th Cir. 2009); *Clark v. Bumbo Int'l Trust,* No. 15-C-2725, 2017 WL 370825 (N.D. Ill. Aug. 28, 2017) (improper to certify a class that contains members without standing); *In re Fluidmaster Inc. Product Liab. Litig.,* No 14-CV-5696, 2017 WL 1196990 (N.D. Ill. Mar. 31, 2017) (same); *Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575, 580 (N.D. Ill. 2005) (same).

current and former employees due to named plaintiff's lack of standing to seek injunctive relief). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974).[130] "The prospective-orientation of the analysis is critical: to maintain an action for injunctive relief, a plaintiff cannot rely on past injury . . . but must show a *likelihood* that he . . . will be injured in the future." *Berni v. Barilla S.p.A.*, 964 F.3d 141, 147 (2d Cir. 2020) (emphasis added, internal quotations omitted). If the plaintiffs have an adequate remedy at law, a Rule 23(b)(2) class is not appropriate. *See, e.g.*, *id.*

Plaintiffs have failed to establish standing to seek injunctive relief or seek certification of a Rule 23(b)(2) class. Plaintiffs and the putative class are fundamentally complaining of past harm, which can be redressed through monetary damages, and which is, in fact, what Plaintiffs really seek here. Nor have Plaintiffs demonstrated (or even tried to demonstrate) that they and all class members will have to sell a home in the future on a Covered MLS and be subject to the Challenged Rules. Indeed, the Named Plaintiffs' own declarations—which say nothing except that Plaintiffs may list their homes on MLSs in the future—do not show ongoing or imminent injury to them or a *likelihood* of future injury. These vague attestations about events that may, or may not, occur at some indeterminate point in the future are insufficient to establish Plaintiffs' standing to seek injunctive relief, whether for themselves or on behalf of the putative class.

Second, Rule 23(b)(2) certification is improper given Plaintiffs' almost exclusive concern with damages, not injunctive relief. Because notice and an opportunity to opt out are not required for 23(b)(2) classes, Rule 23(b)(2) is applicable "only when the primary relief sought is

[130] *See also Gatore v. United States Dep't of Homeland Sec.*, 327 F. Supp. 3d 76, 103–04 (D.D.C. 2018) (denying injunctive relief and finding individual plaintiffs lacked standing when they failed to show "that they ha[d] concrete plans" to re-engage in conduct they were challenging).

injunctive, with monetary relief if moving if sought at all mechanically computable." *Randall v. Rolls-Royce Corp.*, 637 F.3d 818 826 (7th Cir. 2011); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 338 (2011). Rule 23(b)(2) "is the appropriate rule to enlist when the plaintiffs' primary goal is not monetary relief, but rather to require the defendant to do or not do something that would benefit the whole class." *Chicago Teachers Union, Local No. 1 v. Board of Educ.*, 797 F.3d 426, 441 (7th Cir. 2015). This case is overwhelmingly about the estimated $13.7 billion ($41.1 billion with trebling) in damages Plaintiffs seek—not injunctive relief. Plaintiffs' massive damages claims preclude certification of a Rule 23(b)(2) class.

IV. Plaintiffs' Proposed Class Definition is Overbroad, Because It Fails to Exclude Sellers Who Have Agreed to Arbitrate This and Related Disputes.

Earlier in this case, Defendant HSoA brought a motion to strike from the class definition plaintiffs who had arbitration agreements with their brokers. Dkt. 205. In support of its motion (Dkt. 206), HSoA supplied declarations from eleven of the twelve HSoA-owned brokerages in the Covered MLSs, and attached the applicable arbitration agreements. Dkt. 206-2 to 206-12. These same agreements also specified the listing and buyer broker commissions, which are the basis of Plaintiffs' damages claims, that sellers agreed to pay for brokers services. Dkt. 206 at 4–5. This Court denied the motion as premature, stating that "[r]egardless of the merits of the HomeServices Defendants' arguments for narrowing the class definition, the matter is best addressed when Plaintiffs move for class certification." Dkt. 256 at 5.

Accordingly, Defendants seek to address this issue now and request that if the Court certifies any class, it reformulate the class definition to exclude any sellers who have arbitration provisions in their listing agreements with brokerage subsidiaries of HSoA. HSoA hereby

incorporates by reference the affidavits it initially filed in support of its motion to strike (Dkt. 206-1 to 206-12) and the legal authorities cited therein (Dkt. 206), and summarized below.[131]

The Court should reformulate the definition as requested for the following reasons. First, most of the arbitration provisions delegate questions as to the scope of the arbitration provisions and entity that enforces the arbitrations provisions to the arbitrators through direct language and/or incorporation of AAA or JAMS rules, which constitute clear and unmistakable evidence of the delegation of gateway issues like these to arbitrators. *See, e.g.*, *In re Dealer Mgmt. Sys. Antitrust Litig.*, No. 18-CV-864, 2020 WL 832365 at *5 (N.D. Ill. Feb. 20, 2020) (collecting cases).[132]

Second, because no named Plaintiff has signed an arbitration agreement that is claimed to be unenforceable or inapplicable, no named Plaintiffs' claims are typical of the claims that sellers with arbitration agreements might advance and no named Plaintiff can be an adequate representative of these sellers as to claims that named Plaintiffs do not possess. *See, e.g.*, *Santangelo v. Comcast Corp.*, No. 15-cv-0293, 2017 WL 6039903, at *10 (N.D. Ill. Dec. 6, 2017) ("the enforceability of the arbitration provision . . . [was] sufficiently 'arguable' to challenge the ability of [named plaintiff], who [was] not bound by the arbitration provision, to adequately represent the interests of the individuals in the four classes who [were]").[133]

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[131] If the Court prefers that HSoA make a separate motion to reformulate the class definition or to compel arbitration, HSoA is of course willing to proceed in that manner.

[132] *See also Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 852 (6th Cir. 2020) (noting that, where arbitration clause incorporates AAA Rules, the question of "whether Domino's can enforce the arbitration agreement under state contract law (specifically, equitable estoppel) . . . should be decided by an arbitrator, not a court"); *O'Connor v. Uber Techs.*, 904 F.3d 1087, 1094–95 (9th Cir. 2018) (similar).

[133] *See also Avilez v. Pinkerton Gov. Servs., Inc.*, 596 F. App'x 579, 579 (9th Cir. 2015) (vacating certification order where named plaintiff's arbitration agreement did not contain class action waiver and some putative class members' agreements did, finding named plaintiff was "not an adequate representative" for this reason); *Tan v. Grubhub, Inc.*, No. 15-cv-05128-JSC, 2016 WL 4721439 at *6 (N.D. Cal. July 19,

Third, as the Court recognized in its initial consideration of this matter, the issues surrounding the arbitration agreements are "highly factual and involve[] dozens of different arbitration provisions, each with differing language and scope." Dkt. 206 at 4. Accordingly, these are the not the type of issues that can be decided by common class-wide evidence or as part of a class action since they raise clear individualized issues.

Fourth, Plaintiffs' prior argument that arbitration should be rejected outright, because HSoA was not a signatory to the arbitration provisions is wrong. The Seventh Circuit has recognized that equitable estoppel in this context "allows a nonsignatory to compel arbitration when, as here, a signatory's claims are grounded in or intertwined with the terms of the written agreement." *Affymax, Inc. v. Johnson & Johnson*, 420 F. Supp. 2d 876, 881 (N.D. Ill. 2006) (citing *Hughes Masonry Co. v. Greater Clark Cty. Sch. Bldg. Corp.*, 659 F.2d 836, 841 (7th Cir. 1981)).[134] Indeed, "[P]laintiff cannot have it both ways. It cannot rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage." *Hughes Masonry*, 659 F.2d at 839 (quoting *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F. Supp. 688, 692 (S.D.N.Y. 1966)).

Fifth and finally, Plaintiffs' prior assertion—that class members should not be excised from the class definition because such sellers, even if compelled to arbitrate against HSoA, should be able to litigate the same claims against the other Defendants who Plaintiffs believe are jointly and severally liable for the antitrust violation—runs into the same equitable estoppel problem. Multiple courts have held that non-signatory co-conspirators can enforce arbitration agreements

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2016) (finding that non-arbitrating class representative could not adequately challenge arbitration agreements).

[134] *Accord Advanced Aerofoil Techs., Inc.* v. *Todaro*, No. 11-cv-7866, 2011 U.S. Dist. LEXIS 137230, at *26-27 (N.D. Ill. Nov. 30, 2011); *Dime Grp. Int'l, Inc. v. Soyuz-Victan USA, LLC*, No. 07-c-4178, 2008 U.S. Dist. LEXIS 11488, at *11-12 (N.D. Ill. Feb. 13, 2008).

under the equitable estoppel doctrine when "the signatory raises allegations of substantially interdependent or concerted misconduct by both the nonsignatory and one or more signatories to the contract." *In re Titanium Dioxide Antitrust Litig.*, 962 F. Supp. 2d 840, 849 (D. Md. 2013) (internal quotation marks and citation omitted).[135] Thus, if the Court is inclined to grant class certification in part, it should nevertheless exclude all class members that have arbitration agreements with HSoA.

V. The Western District of Missouri's Decision in *Burnett v. NAR* is Not Persuasive.

This Court should not be persuaded to certify a class based on the Western District of Missouri's recent decision to certify a damages class in *Burnett v. National Association of Realtors*, No. 19-cv-00332-SRB. That case addresses the same Challenged Rules in four Missouri MLSs as this case. That decision, which Defendants believe is deeply flawed, is unpersuasive on the motion to certify a class here.

First, the *Burnett* decision is not controlling on this Court. The Seventh Circuit has held that "district court judges in this circuit must not treat decisions by other district judges, in this and a fortiori in other circuits, as controlling." *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987). "Such decisions will normally be entitled to no more weight than their intrinsic persuasiveness merits." *Id.* The *Burnett* decision is not even from a sister court within the Seventh Circuit, let alone an Illinois District Court, and has zero persuasive value.

[135] *See also id.* at 850 ("[T]he arbitration clauses entered into by the class members and DuPont and Huntsman would be rendered meaningless if not for equitable estoppel . . . , because the Plaintiffs proceed in this action under a theory of joint and several liability, naming the four original Defendants as co-conspirators. Moreover, the liberal federal policy favoring arbitration agreements weighs in favor of permitting the non-signatories Millennium and Kronos to enforce the arbitration clauses that govern the relevant class members' contracts for the purchases of titanium dioxide."); *In re: Online Travel Co.*, 953 F. Supp. 2d 713, 724 (N.D. Tex. 2013) (rejecting "the argument that the joint and several nature of [antitrust] liability would render plaintiffs' claims non-arbitrable").

Beyond that, the *Burnett* court's application of law was erroneous because it failed to engage in the "rigorous analysis" required by *Comcast*, 569 U.S. at 33, with regard to the Plaintiffs' expert's supposed "common method" for proving class-wide injury. There is also a significant Circuit split on a key issue in the two cases. Unlike the Seventh Circuit, which requires a full *Daubert* analysis at class certification, the Eighth Circuit may allow a significantly less analytically robust analysis. *Compare Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 817 (7th Cir. 2010) (the "district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification") *with In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 614 (8th Cir. 2011) (allowing a watered-down "focused" *Daubert* review). And, of course, the Burnett Court was faced with different expert evidence than what is proffered in this case. For all of these reasons, *Burnett* is not instructive for this Court's analysis.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion for class certification should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2022, I filed the foregoing *Defendants' Memorandum In Opposition To Plaintiffs' Motion For Class Certification And Appointment Of Class Counsel* via the Court's CM/ECF system, which will cause a copy of the same to be served on all counsel of record.

Dated: May 31, 2022

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