UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JENNIFER NOSALEK, RANDY HIRSCHORN, and TRACEY HIRSCHORN, individually and on behalf of all others similarly situated, Plaintiffs, vs. MLS PROPERTY INFORMATION NETWORK, INC., REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	No. 1:20-cv-12244-PBS CLASS ACTION AUGUST 5, 2022

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL AS TO DEFENDANT REALOGY HOLDINGS CORP.

Pursuant to Local Rule 37.1, Plaintiffs respectfully move this Court to require Defendant Realogy Holdings Corp. ("Realogy") to produce all documents relating to its nationwide implementation of the "Buyer Broker Commission Rule" (the "Rule"). Realogy has refused to produce any documents that do not directly address the specific implementation of the Rule in the geographic region at issue in this case (Massachusetts, Rhode Island and New Hampshire, which together are the "MLS PIN Service Area"). However, as discussed below, the Broker Defendants (including Realogy) did not formulate the Rule as enacted in the MLS PIN Service Area out of "whole cloth." [1] Rather, the Rule has its origin in a nationwide policy implemented in

[1] The term "Broker Defendants" as used herein includes all Defendants ***except*** Defendant MLS Property Information Network, Inc., which is a property listing service and not itself a broker.

ORAL ARGUMENT REQUESTED

most parts of the United States by each of the Broker Defendants here (including Realogy). Accordingly, Plaintiffs are entitled to explore (1) the origin of the Rule to the extent it was developed outside of the MLS PIN Service Area, (2) the overall context in which the local Rule was implemented and enforced, and (3) Plaintiffs' allegations that Defendants conspired in violation of antitrust law by implementing the Rule in the MLS PIN Service Area.

Indeed, as detailed below, ***every other*** Defendant has agreed with Plaintiffs that Plaintiffs are entitled to conduct discovery concerning the Rule beyond the strict borders of the MLS PIN Service Area. However, Realogy has refused to join its co-Defendants in that agreement. Accordingly, Plaintiffs respectfully submit that Realogy should be required to turn over ***all*** responsive documents concerning the Rule nationally. At a minimum, Realogy should be required to produce documents in accord with the agreement reached by Plaintiffs and every other Defendant on this issue.

I. BACKGROUND

A. The Buyer-Broker Commission Rule and Its Implementation in the MLS PIN Service Area

Since 1993, the National Association of Realtors has included in its nationwide Handbook on Multiple Listing Policy a cooperative compensation rule (the "NAR Rule") that requires a seller-broker of residential real estate, when listing a home on a covered MLS,[2] to make a blanket, unilateral offer of fixed compensation to other MLS agents working with a buyer, and to limit the ability of buyers or their agents to negotiate below any blanket offer once an offer is made. For example, the current version of the Handbook provides:

> In filing a property with the multiple listing service of an association of REALTORS, the participant of the service is making ***blanket unilateral offers*** of

[2] The definition and functioning of MLS Services is discussed in the Amended Complaint [ECF No. 110] at ¶¶ 35-42.

> compensation to the other MLS participants, and shall therefore specify on each listing filed with the service, the compensation being offered to the other MLS participants.

Handbook on Multiple Listing Policy, *NAR* (34th Ed.) (Chicago, Il. 2022), pp. 69-70 (emphasis added). The NAR Code of Ethics, Standard of Practice 3-2, reinforces the NAR Rule, stating:

> Any change in compensation offered for cooperative services must be communicated to the other REALTOR prior to the time that REALTOR submits an offer to purchase/lease the property. After a REALTOR has submitted an offer to purchase or lease property, the listing broker may not attempt to unilaterally modify the offered compensation with respect to that cooperative transaction.

The NAR Rule is presently the subject of at least two federal antitrust lawsuits. *See Moehrl v. National Association of Realtors*, No. 19-cv-01610 (N.D. Ill) and *Burnett v. National Association of Realtors*, No. 19-CV-00332-SRB (W.D. Mo.).[3] *Burnett* has been certified as a class action and is scheduled for trial in February 2023.

MLS PIN is not operated by the NAR and brokers in the MLS PIN Service Area are not directly required to follow the NAR Rule as such. However, when MLS PIN formed in 1996, it enacted a substantively identical policy that assuredly was modeled on the pre-existing NAR Rule that requires seller brokers to offer compensation to buyer brokers, which policy Plaintiffs allege likewise violates antitrust law. *See generally* Amended Complaint. Specifically, just like the NAR Rule, Section 5 of the MLS PIN Rules requires that:

> ***A Listing Broker shall specify, on each Listing Filed with the Service, the compensation offered to other Participants*** for their services as Cooperating Brokers in the sale, lease or rental of the Listed Property. ***Such offers shall be unconditional***, except that entitlement to compensation shall be conditioned on the Cooperating Broker's performance as the procuring cause of the sale, lease or rental.

[3] *Burnett* was formerly known under the title *Sitzer v. National Association of Realtors*, and was referenced as such in the parties' motion to dismiss briefing in this case.

Amended Complaint, ¶ 44 (emphasis added to original Section 5). Note 1 to Section 5 further states in relevant part that:

> In Filing a Listing with the Service, a Participant is deemed to be making blanket ***unilateral offers of compensation*** to the other Participants in the Service. The Participant therefore shall specify on each Listing Filed with the Service the compensation being offered to the other Participants.

Amended Complaint, ¶ 45 (emphasis added). Moreover, similar to NAR Standard of Practice 3-2, MLS PIN's Section 5 forbids changes to the compensation offered to a buyer broker after a buyer makes an offer. *See* Amended Complaint, ¶ 46.

The similarity between the NAR Rule and MLS PIN's Section 5 is not a coincidence. The exact same entities—that is, the Broker Defendants named in this action—control ***both*** NAR ***and*** MLS PIN. Although discovery is still ongoing in this case, Plaintiffs here allege that all of the Broker Defendants other than Keller Williams directly control MLS PIN's board, and that ***all*** Broker Defendants exert functional control over MLS PIN by virtue of their market dominance, by requiring their respective brokerage operations and franchisees to follow MLS PIN policies, and by the number of brokers they cause to be enrolled in MLS PIN. *See, e.g.*, Amended Complaint, ¶¶ 9, 105-116, 139-145. All of the Broker Defendants—including Realogy—are also Defendants in the *Moehrl* and *Burnett* actions. Both cases allege that the Broker Defendants here conspired to, and in fact do, control and enforce the NAR Rule. Although Plaintiffs here are not currently privy to the discovery in those cases, both District Courts ***denied*** the Broker Defendants' motions to dismiss the claims against them,[4] and the *Burnett* Court recently certified a class with regard to the NAR Rule against each of the Broker Defendants, including Realogy.

[4] *See generally Moehrl v. National Assoc. of Realtors*, 2020 WL 58788016 (N.D. Ill. Oct. 2, 2020); *Sitzer v. National Assoc. of Realtors*, 420 F. Supp. 3d 903 (W.D. Mo. 2019).

See Burnett v. National Association of Realtors, No. 19-CV-00332-SRB, 2022 WL 1203100 (W.D. Mo. April 22, 2022).

B. The Dispute With Realogy Concerning the Scope of Buyer-Broker Commission Rule Discovery

On March 4, 2022, Plaintiffs served their first Request for Production on all Defendants (*i.e.*, on each of the Broker Defendants as well as on MLS PIN itself). As an overarching definition applicable to relevant individual requests, Plaintiffs defined the Buyer Broker Commission Rule as follows:

> "Buyer-Broker Commission Rule" means a rule requiring brokers or agents to make a specific unilateral blanket offer of compensation to other MLS participants and includes, but is not limited to, the requirements on listing brokers set forth in Section 5 of the MLS PIN Rules.

In other words, Plaintiffs sought discovery concerning not only Section 5 itself, but also concerning the broader context in which Section 5 was developed. Given that Section 5 appears to have been directly derived from the NAR Rule and that the same Broker Defendants appear responsible for both, Plaintiffs in good faith believe that discovery concerning the parent NAR Rule and any "cousin" rules in other non-NAR markets reasonably could lead to relevant evidence in this action. Defendants objected to the scope of this definition, and proposed only producing documents related directly to the MLS PIN Service Area and Section 5 itself.

The parties thereafter engaged in a lengthy and vigorous meet and confer process, including substantial correspondence and numerous all-party teleconferences. After several rounds of discussion, three of the four Broker Defendants (Re/Max, HomeServices and Keller Williams) proposed a compromise on June 14, 2022:

> We would propose to interpret requests for information concerning the "Buyer Broker Commission Rule" to reach documents concerning (i) the specific MLS PIN Rule on offers of compensation, and (ii) any discussion as a general matter of rules requiring listing agents to offer cooperative compensation to buyer agents

> (a) in MLS PIN's service area; (b) nationally; or (c) in unspecified geographies (and thus generally applicable).

See Ex. A hereto at p. 2 (email providing full text of the compromise proposal).

Plaintiffs believed (and continue to believe) that they are entitled to full discovery on all similar buyer-broker commission rules nationwide. However, in the spirit of compromise that the meet and confer process is designed to foster, Plaintiffs accepted (with certain reservations of rights not relevant here) the above proposal. *Id.* at pp 1-2 (including reservations). On July 7, after further discussions, Defendant MLS PIN also agreed to the compromise proposal, leaving Realogy as the sole holdout.

Plaintiffs thereafter renewed their efforts to persuade Realogy to join every other party in the compromise. During a final meet and confer videoconference, Plaintiffs understood Realogy to be maintaining its objection and stating its intent only to produce documents captured by subsection (i) of the above compromise (that is, only documents directly referencing MLS). This motion follows.

II. STANDARD

Federal Rule of Civil Procedure 26(b)(1) provides that:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

As this court has recognized, "[t]he Supreme Court has long recognized that the Federal Rules of Civil Procedure are to be construed liberally in favor of discovery." *In re Lernout & Hauspie Sec. Litig.*, 214 F. Supp. 2d 100, 107 (D. Mass. 2002) (Saris, J.) (quoting *Armistar Jet Charter,*

Inc. v. Signal Composites, Inc., 244 F.3d 189, 192 (1st Cir. 2001)). Indeed, "it is now beyond dispute that broad discovery is a cornerstone of the litigation process contemplated by the Federal Rules of Civil Procedure." *W.E. Aubuchon Co., Inc. v. BeneFirst, LLC*, 245 F.R.D. 38, 41 (D. Mass. 2007) (quotation marks and cite omitted). Moreover, "relevancy is broadly construed at the discovery stage of litigation and a request for discovery should be considered relevant if there is ***any possibility*** that the information sought may be relevant to the subject matter of the action." *McCarron v. J.P. Morgan Securities, Inc.*, No. 07-10786-RGS, 2008 WL 2066940, at *2 (emphasis added; quotation marks and cite omitted).

Broad discovery is particularly appropriate in antitrust cases. *See, e.g., Markson v. CRST International, Inc.*, No. ED CV 17-1261-SB, 2021 WL 4027499, at *5 (C.D. Cal. May 14, 2021) ("In antitrust conspiracy cases such as this, courts have generally allowed liberal discovery to uncover evidence of invidious design, pattern or intent") (cite omitted); *Health Alliance Plan of Michigan v. Blue Cross Blue Shield of Michigan Mutual Ins. Co.*, No. 14-13788, 2018 WL 10322116, at *2 (E.D. Mich. Jan. 2, 2018) ("it is no surprise that courts apply liberal rules of discovery in antitrust cases"); *Kleen Products LLC v. Packaging Corp. of America*, No. 10 C 5711, 2012 WL 4498465, at *13 (N.D. Ill. Sept. 28, 2012) ("In antitrust cases, courts generally take an expansive view of relevance and permit broad discovery"). This is because "[p]roving a conspiracy is usually difficult and often impossible without resort to discovery procedures," especially "in antitrust actions, where 'the proof is largely in the hands of the alleged conspirators.'" *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 95 (3d Cir. 1988) (quoting *Poller v. Columbia Broad. Sys. Inc.*, 368 U.S. 464, 473 (1962)); *In re Urethane Antitrust Litig.*, 261 F.R.D. 570, 573 (D. Kan. 2009) (a "liberal policy favoring discovery" is appropriate in antitrust conspiracy cases "because direct evidence of an anticompetitive conspiracy is often

difficult to obtain, and the existence of a conspiracy frequently can be established only through circumstantial evidence, such as business documents and other records") (cite omitted).

III. ARGUMENT

Realogy should be compelled to produce documents responsive to Plaintiffs' initial definition of the "Buyer-Broker Commission Rule." At a minimum, Realogy should be required to make production in accord with the agreement which ***every other Defendant*** in this case has already joined.

Realogy has consistently argued that the MLS PIN Service Area is not directly subject to the NAR Rule or the similar rules in other jurisdictions ***as such***. But Section 5 did not develop in a vacuum. Rather, as discussed above, it appears to be a direct offshoot of the NAR Rule that was promulgated by the same Broker Defendants (including Realogy) who are responsible for the national NAR policy. As a result, Defendants' discussions about the NAR Rule may reasonably be expected to include relevant evidence of Defendants' state of mind and expectations with regard to Section 5.

For example, Plaintiffs are aware of a document commissioned by the National Association of Realtors (of which Realogy brokers are members) entitled the "Definitive Analysis of Negative Game Changers Emerging in Real Estate" ("D.A.N.G.E.R.") report. *See Burnett*, 2022 WL 1203100, at *12. Although Defendants have yet to produce the D.A.N.G.E.R. report to Plaintiffs in this case, that report apparently "discusses that the United States real estate market may be susceptible to a 'gradual downward slide or a realignment of fees as charged in other countries in the world.'" *Id.* (quoting the D.A.N.G.E.R. Report). Specifically, the D.A.N.G.E.R. report appears to discuss the financial impact that a "gradual downward slide" of the commissions sellers pay to buyer-brokers would have on real estate broker firms (including

Realogy). In other words, the D.A.N.G.E.R. report appears to discuss the potential threat (*i.e.*, the danger) that unfettered competition would have on the antitrust conspiracy that Plaintiffs have alleged.

Under Realogy's discovery view, Plaintiffs are not entitled to this potentially damning document and any Realogy communications related to it. In Plaintiffs' view, and in accord with their agreement with all other defendants, Plaintiffs are entitled to Defendants' (including Realogy's) discussions of and responses to the D.A.N.G.E.R report and the assessments of competition "dangers" contained therein. Such evidence is directly relevant to Defendants' (and Realogy's) motive and actions to conspire to maintain the unlawful buyer-broker commission regime—including the alleged restraints in the MLS PIN Service Area.

Plaintiffs are entitled to explore whether Defendants discussed, in the context of the national NAR Rule, their desire to maintain the system under which sellers were required to pay buyer-broker fees in order to maximize Defendants' overall profits. Such a discussion may not have directly addressed or referenced Section 5. But it would still be relevant to Plaintiffs' claims in this case regarding Section 5, as it would help establish Defendants' motive for instituting the substantively identical Section 5 in the MLS PIN Service Area. Similarly, Plaintiffs reasonably expect that there will be documentary evidence demonstrating Defendants' joint efforts to implement and enforce the NAR Rule. Even if such documents do not directly reference the MLS PIN Service Area or Section 5, they would be evidence of Defendants' *mens rea* and history of conspiring and working together to maintain an anticompetitive requirement that sellers pay buyer-broker fees—the exact issue in this case.

Discovery concerning Section 5's "cousin" rules in other regional markets—that is, the similar rules in other markets that are derived from the NAR Rule—is also reasonable for the

same reason. The manner in which the Broker Defendants discussed, implemented and enforced buyer-broker commission rules in other MLS service areas can, just like discussions of the NAR Rule, provide important information concerning Defendants' motives and collusion that is directly relevant to their behavior in the MLS PIN Service Area. If Defendants conspired in another market to maintain that region's buyer broker commission rule in order to maximize profit, that is at least circumstantial evidence Defendants may have done so in the MLS PIN Service Area as well. Accordingly, Plaintiffs are entitled under Rule 26's "relevance" standard not only to discovery concerning the NAR Rule, but also concerning the substantively identical rules implemented in individual markets nationwide.

The discovery sought by Plaintiffs is proper under the factors set forth in Rule 26. The information sought about Defendants' collusion in implementing and enforcing a system under which real estate ***sellers*** are forced to pay the ***buyer*** broker's commission is of critical "importance," both within the context of this case and to real estate sellers nationwide. Indeed, although discovery in this case is ongoing, Plaintiffs anticipate based on the damages assessments in the *Burnett* case that "the amount in controversy" in the MLS PIN Service Area alone will amount to billions of dollars. Moreover, Defendants have sole "access" to this relevant information; there is no other way for Plaintiffs to acquire Defendants' internal documents on this topic. And Defendants' "resources," as some of the largest real estate firms in the United States, far outstrip the individual Plaintiffs'.

Notably, ***every*** other Defendant in this case has agreed to a compromise that recognizes Plaintiffs' right to conduct discovery that includes the broader NAR Rule. By agreeing to that compromise, those Defendants also implicitly acknowledged that the "burden" imposed by such discovery is proportional in relation to the information sought and the scope of the case. Indeed,

Plaintiffs anticipate that most if not all of the relevant documents about the NAR Rule may already have been reviewed and provided during discovery in the *Moehrl* and/or *Burnett* litigations. Accordingly, the burden of production on Realogy may well be little more than copying what has already been produced in those actions. Realogy, however, has refused to produce any documents beyond those that directly and specifically address Section 5 itself. Plaintiffs respectfully submit that, for the reasons set forth above, Realogy's position is inconsistent with the scope of Rule 26 and unreasonable. Accordingly, Plaintiffs respectfully request that Realogy be required to produce documents in accord with the definition of "Buyer-Broker Commission Rule" set forth in Plaintiffs' RFP. At a minimum, Realogy should be required to produce documents in accord with the good faith compromise to which Plaintiffs and all other Defendants have agreed.

IV. LOCAL RULE 37.1(A) CERTIFICATION

Counsel for Plaintiffs, Seth Klein and Christopher Barrett, conferred with counsel for Realogy on several occasions, including through several rounds of correspondence and "group" teleconferences with all Defendants, culminating with a Zoom video conference on July 15, 2022, lasting approximately 30 minutes, at which Realogy was represented by Stacey Anne Mahoney, Kenneth Kliebard and Jason Chrestionson, all of Morgan Lewis & Bockius LLP. This dispute was the sole topic at the July 15 meet and confer, and Plaintiffs and Realogy were unable to resolve this dispute without Court intervention.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request oral argument on this motion to respond to any arguments raised by Realogy in any opposition it may file and to address any questions that the Court may have.

Dated: August 5, 2022

Respectfully submitted,

/s/ Seth R. Klein

Douglas P. Needham, BBO No. 67101
Robert A. Izard (*pro hac vice*)
Craig A. Raabe (*pro hac vice*)
Seth R. Klein (*pro hac vice*)
Christopher M. Barrett (*pro hac vice*)

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Attorneys for Plaintiffs

Rule 7.1 Certification

Pursuant to Local Rule 7.1(a)(2), counsel for Plaintiffs and for Realogy conferred by correspondence, telephone and video conference as set forth above, and were unable to resolve the dispute raised in this motion.

Dated: August 5, 2022

Respectfully submitted,

/s/ Seth R. Klein

Douglas P. Needham, BBO No. 67101
Seth R. Klein (*pro hac vice*)
Robert A. Izard (*pro hac vice*)
Craig A. Raabe (*pro hac vice*)
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Seth R. Klein, hereby certify that a true copy of the foregoing document filed through the ECF system will be electronically sent to the registered participants as identified on the Notice of Electronic Filing on August 5, 2022.

/s/ Seth R. Klein
Seth R. Klein

Exhibit A

Seth Klein

From: Kully, David (WAS - X75415) <David.Kully@hklaw.com>
Sent: Thursday, June 30, 2022 10:36 AM
To: Seth Klein
Cc: jvaron; ehasdoo; Hayes, Anna P (WAS - X75441); Ray, Timothy (CHI - X66042); jkeas; Lada, Jennifer (NYC - X73513); Robert Izard; Craig Raabe; Christopher Barrett; clebsock@hausfeld.com; Halli Spraggins
Subject: RE: Nosalek v. MLS PIN - Meet & Confer

CAUTION: External email

Seth – Your proposal on the interpretation of "Buyer Broker Commission" rule under your RFPs works for Keller Williams, HomeServices, and RE/MAX.

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From: Seth Klein <sklein@ikrlaw.com>
Sent: Wednesday, June 29, 2022 5:03 PM
To: Kully, David (WAS - X75415) <David.Kully@hklaw.com>
Cc: jvaron <jvaron@foley.com>; ehasdoo <ehasdoo@jonesday.com>; Hayes, Anna P (WAS - X75441) <Anna.Hayes@hklaw.com>; Ray, Timothy (CHI - X66042) <Timothy.Ray@hklaw.com>; jkeas <jkeas@foley.com>; Lada, Jennifer (NYC - X73513) <Jennifer.Lada@hklaw.com>; Robert Izard <rizard@ikrlaw.com>; craabe <craabe@ikrlaw.com>; Christopher Barrett <cbarrett@ikrlaw.com>; clebsock@hausfeld.com; Halli Spraggins <hspraggins@hausfeld.com>
Subject: RE: Nosalek v. MLS PIN - Meet & Confer

[External email]
David,

Thank you for the below. Following up on our meet and confer last week, we are in agreement with your proposal with the following additional understandings:

1) Plaintiffs expressly reserve the right to seek discovery concerning the Northwest MLS in future document requests permitted under the scheduling order. Defendants maintain all rights to oppose any such discovery requests.

2) Should Defendants intend to raise arguments concerning any other regions (beyond MLS PIN and Northwest), the parties will engage in good faith discussions concerning the discovery to be conducted concerning such region(s), and Plaintiffs are not waiving any right to seek permission from the Court to conduct such discovery should the parties be unable to reach agreement. The parties will discuss in good faith the timing for Defendants to alert Plaintiff as to any additional regions concerning which they intend to raise arguments. (As I expect to

raise with the broader group shortly, I believe we may need to modify the current schedule given the current state of discovery and the time it is taking to finalize discussions and begin production. Accordingly, the timing of any such disclosure by Defendants can be part of that discussion.)

3) Plaintiffs are not waiving any rights to seek specified documents concerning other regions in future document requests where Plaintiffs have a good faith basis for doing so based upon discovery and documents not presently in Plaintiffs' possession. Defendants, again, maintain all rights to oppose any such discovery.

Please confirm if the above is acceptable to Keller Williams, HomeServices, and Re/Max. I am happy to schedule a call with any or all of you if that would be helpful.

Best,

SRK

From: Kully, David (WAS - X75415) <David.Kully@hklaw.com>
Sent: Tuesday, June 14, 2022 9:15 PM
To: Seth Klein <sklein@ikrlaw.com>
Cc: jvaron <jvaron@foley.com>; ehasdoo <ehasdoo@jonesday.com>; Hayes, Anna P (WAS - X75441) <Anna.Hayes@hklaw.com>; Ray, Timothy (CHI - X66042) <Timothy.Ray@hklaw.com>; jkeas <jkeas@foley.com>; Lada, Jennifer (NYC - X73513) <Jennifer.Lada@hklaw.com>
Subject: RE: Nosalek v. MLS PIN - Meet & Confer

Seth – I write on behalf of Keller Williams, HomeServices, and RE/MAX in hopes of advancing our discussions concerning how to interpret the term "Buyer Broker Commission Rule" for purposes of our responses to your RFPs. Although we continue to believe that, based on your complaint, it would be appropriate to limit discovery to activities occurring only in MLS PIN's service area and concerning the application only of MLS PIN's rule and not similar provisions in rules of other MLSs, we would propose the following as a compromise and alternative to your request that we produce all documents we produced in the *Moehrl* and *Burnett* cases, a position we continue to believe is overbroad.

We would propose to interpret requests for information concerning the "Buyer Broker Commission Rule" to reach documents concerning (i) the specific MLS PIN Rule on offers of compensation, and (ii) any discussion as a general matter of rules requiring listing agents to offer cooperative compensation to buyer agents (a) in MLS PIN's service area; (b) nationally; or (c) in unspecified geographies (and thus generally applicable). By way of illustration, under our proposal, a communication from one of the corporate defendants to a franchisee in Nevada involving a cooperative compensation rule adopted by the Nevada MLS and/or how a franchisee was interpreting it, conducting business with respect to it, or answering inquires about it, would not be responsive to requests for communications about the "Buyer Broker Commission Rule." By contrast, if a communication were sent to a franchisee in the MLS PIN service area asking what type of offers it makes or receives, that communication would be captured in the definition of "Buyer Broker Commission Rule" regardless of whether it identified the MLS PIN Rule specifically

We hope this proposal advances our discussions on this issue. We also believe that, by offering to expand our discovery beyond MLS PIN's specific rules in this fashion, there is no need for us to provide RFPs served in the other cases. (We were dubious of the usefulness of that request in any event, when none of us produced documents with reference to specific RFPs.)

Let us know if it would be helpful to discuss. In any event we think all defendants are amenable to meeting on 6/30 at 3 PM as you proposed.

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From: Seth Klein <sklein@ikrlaw.com>
Sent: Thursday, June 09, 2022 9:52 AM
To: janderson@brcsm.com; jkeas <jkeas@foley.com>; jvaron <jvaron@foley.com>; Hayes, Anna P (WAS - X75441) <Anna.Hayes@hklaw.com>; Nelson, Heather J. <heather.nelson@morganlewis.com>; Kully, David (WAS - X75415) <David.Kully@hklaw.com>; ehasdoo <ehasdoo@jonesday.com>; jlevee <jlevee@jonesday.com>; Shaw, Robert M (BOS - X72018) <Robert.Shaw@hklaw.com>; Ray, Timothy (CHI - X66042) <Timothy.Ray@hklaw.com>; robert.macgill <robert.macgill@macgilllaw.com>; scott.murray <scott.murray@macgilllaw.com>; matthew.ciulla <matthew.ciulla@macgilllaw.com>; stacey.mahoney <stacey.mahoney@morganlewis.com>; kenneth.kliebard <kenneth.kliebard@morganlewis.com>; william.mcenroe <william.mcenroe@morganlewis.com>; samuel.rowley@morganlewis.com; Kroneman, Irma <ikroneman@jonesday.com>; Raux, Geoffrey <GRaux@foley.com>; Lada, Jennifer (NYC - X73513) <Jennifer.Lada@hklaw.com>; epenson <epenson@jonesday.com>; Patrick Sanders <patrick.sanders@macgilllaw.com>; Chrestionson, Jason L. <jason.chrestionson@morganlewis.com>; David J. Sandefer <dsandefer@jonesday.com>
Cc: Craig Raabe <craabe@ikrlaw.com>; Robert Izard <rizard@ikrlaw.com>; Doug Needham <dneedham@ikrlaw.com>; Christopher Barrett <cbarrett@ikrlaw.com>
Subject: Nosalek v. MLS PIN - Meet & Confer

[External email]
Counsel,

As you may recall, I indicated during our meet and confer last Friday that I hoped to send various proposals (including more definite time periods for each RFP and a list of RFPs to prioritize) this week, in anticipation of a follow-up meet and confer next Monday. We are striving to be as specific and precise as possible, taking into account Defendants' objections to date. As a result, assembling those materials has taken longer than anticipated. Accordingly, I propose postponing our next meet and confer by a week, which will give Plaintiffs an opportunity to send you the relevant proposals with enough time for you to review before meeting.

Notwithstanding this proposed postponement, we request that Defendants let us know by this coming Monday, 6/13, whether you will agree to provide the RFPs in *Moehrl* and *Sitzer* as discussed last week so that the parties can make further progress on trying to formulate a definition and production of Buyer Broker Rule documents that is acceptable to everyone. If we cannot make progress on this foundational issue, we will likely have to go to the Court for resolution at this point.

In addition, we understand from our call last week that the broker Defendants are all at varying stages of gathering and production of the organizational / franchise materials that Defendants have agreed to provide. Now that nearly another week has passed, we would appreciate an update on the status of these efforts, especially from any broker that does not expect to make (or, in the case of the Homeservices Defendants, to complete) its production in the next few days.

Thanks, and let me know if 6/20 at 3:00 would work for a rescheduled call. If Defendants would prefer to proceed on the other issues this coming Monday (6/13) even without the proposals from Plaintiffs discussed above, we are happy to do that too.

Best,

SRK

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