UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GARY BAUMAN, MARY JANE BAUMAN, and JENNIFER NOSALEK, 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

April 15, 2021

CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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I. INTRODUCTION

This lawsuit challenges overt anticompetitive restraints that have inflated the residential real estate commissions paid by home sellers by as much as 100% throughout Massachusetts, Rhode Island and much of New Hampshire (the "Covered Areas"). As Defendants acknowledge, home sellers are currently prosecuting two materially identical class action lawsuits (covering other geographic regions) against these same Defendants.[1] The Broker Defendants moved to dismiss both cases — and lost both motions. *See Moehrl v. National Assoc. of Realtors,* No. 19-cv-01610, 2020 WL 5878016 (N.D. Ill. Oct. 2, 2020); *Sitzer v. National Assoc. of Realtors,* 420 F. Supp. 3d 903 (W.D. Mo. 2019). Because *Moehrl* and *Sitzer* are both well-reasoned and directly on point, this Court should follow those decisions.

Because their first-choice arguments in *Moehrl* and *Sitzer* failed, Defendants now only raise what they contend are two new backup arguments. First, they argue that Plaintiffs' injury was not caused by the Buyer-Broker Commission Rule, but instead was caused by a more general risk of steering which would exist even if there was no Buyer-Broker Commission Rule. Second, the Broker Defendants claim that they have no control over MLS PIN, despite controlling MLS PIN through seats on the board of directors and through their market power.[2] But *Moehrl* and *Sitzer* addressed and rejected both of these arguments. Moreover, regardless of those cases, Defendants' arguments are without merit, and the Court should deny Defendants' motions to dismiss Count I.[3]

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[1] The other actions are *Moehrl v. National Assoc. of Realtors,* No. 19-cv-01610 (N.D. Ill.) and *Sitzer v. National Assoc. of Realtors,* 19-cv-00332-SRB (W.D. Mo.)

[2] Defendants challenge only the foregoing two aspects of Plaintiffs' complaint, and do not argue that Plaintiffs have failed to adequately plead any other element of their antitrust claims.

[3] Upon review and consideration of Defendants' arguments concerning Count II of the Complaint, Plaintiffs voluntarily dismiss that Count.

II. BACKGROUND FACTS

A. Seller and Buyer Brokers and the MLS PIN Listing System

The vast majority of home sellers and buyers in Massachusetts, New Hampshire and Rhode Island (the "Covered Area") use the services of a broker in connection with their home purchases and sales. ¶ 26.[4] Typically with these transactions, a seller will retain a seller-broker, and the buyer will separately work with a buyer-broker.[5]

The broker real estate market is dominated by the four Broker Defendant entities (including their franchisees and corporate families). Realogy is the nation's largest real estate brokerage company (¶ 10); HSA is the second largest (¶ 11); and RE/MAX and Keller Williams are also among the largest brokerages in the United States and the Covered Area (¶¶ 12-13). Defendants do not in their Motions contest their individual or collective market power.

Defendant MLS PIN is an association of brokers in the Covered Area, including the Broker Defendants. ¶¶ 3, 9. MLS PIN owns and operates Pinergy, an electronic listing service to facilitate the publishing and sharing of information about homes for sale. ¶¶ 35-37. The vast majority of home sales and purchases in the Covered Areas are sold and purchased on Pinergy through licensed brokerages and their individual broker agents. *Id.*; ¶ 26 (according to 2020 report of National Association of Realtors, 89% of sellers and 88% of buyers used real estate brokers for their transactions); *see also* ¶ 9 (Pinergy's database includes "approximately 29,000 properties for sale and more than 3.76 off-market listings and full public records for all of Massachusetts and Rhode Island and much of New Hampshire"). Pinergy also acts as the main

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[4] Unless otherwise specified, all citations to "¶__" herein are to the Complaint. Likewise, all party names and capitalized terms are used as set forth in the Complaint.

[5] The basic characteristics of the residential real estate industry are described in the Complaint at ¶¶ 22-34.

source of listings for online websites, such as Zillow, through which prospective homebuyers may search for homes. ¶ 56. Accordingly, listing a property for sale on Pinergy is essential to marketing a home effectively to prospective buyers. ¶¶ 36-37. Defendants do not dispute in their Motions that access to Pinergy is critical for brokers to compete in the Covered Area.

Access to Pinergy is predicated on a broker agreeing to follow MLS PIN's Rules and Regulations ("MLS PIN Rules"). ¶¶ 40-42, 52-54, 104. MLS PIN adopts, administers, and, when it chooses to do so, amends those Rules as it sees fit. ¶ 67. MLS PIN is governed by a Board comprised of fifteen Directors, eight of whom (*i.e.,* the majority) are Realtors for franchises owned by Defendants HomeServices,[6] RE/MAX and REALOGY. ¶ 9. Accordingly, representatives from these three Broker Defendants are responsible for formulating, reviewing, and approving MLS Pin's practices and policies. ¶ 108. All four Broker Defendants (including Keller Williams) require their franchisees, affiliates, and realtors to join MLS PIN and abide by the MLS PIN's rules. ¶¶ 106-107, 111-115.

B. The Buyer-Broker Commission Rule

Even though home sellers and buyers generally have separate brokers, ostensibly to represent their separate interests, the MLS PIN Rules effectively require home ***sellers*** to pay a commission to the brokers representing the ***buyers*** of their homes. Individual home sellers typically enter into a "listing agreement" with a seller broker that includes a total commission (as a percentage of the sales price) that the seller will pay. ¶¶ 29, 31. However, in order to list a property on Pinergy, Section 5 of the MLS PIN Rules (referenced herein as the "Buyer-Broker

[6] Defendant HomeServices of America, Inc. is the majority owner of Defendant HSF Affiliates, LLC. Defendant BHH Affiliates, LLC is a subsidiary of HSF Affiliates. The Complaint refers to all three entities (as well as their wholly-owned or controlled subsidiaries or affiliates) collectively as "HomeServices." ¶ 11.

Commission Rule," or the "Rule") ***requires*** the seller's broker, on behalf of the seller, to make a blanket, unilateral offer of compensation to all buyer-brokers when listing a home on Pinergy. ¶¶ 45, 57-58, 70, 72. Accordingly, only part of the total commission paid by a seller is paid to the selling broker. Sellers are thus forced to pay the buyer's broker who is negotiating ***against*** the seller on the buyer's behalf (and who owe fiduciary duties to the buyer, not the seller). *Id.*.; *see also* ¶ 62. Because the Rule requires a blanket commission offer applicable to any buyer's broker before the buyer broker even presents an offer, the Rule compels home sellers to make this financial offer without regard to the experience of the buyer-broker or the value they are providing. As a result, there is little relationship between the commission and the quality of the service. ¶¶ 72-73.

Because sellers using Pinergy must make this blanket commission offer to every buyer-broker using Pinergy, and because buyer-brokers can compare the offered commission with the blanket offers every other seller is required to post, the Rule creates tremendous pressure on sellers to offer the "standard" supracompetitive commissions in the industry to avoid adverse "steering." ¶ 74. Seller-brokers know that if the published blanket offer is less than the "standard" commission, many buyer-brokers will "steer" home buyers to residential properties that provide higher commissions. *Id.* The prevalence of such steering has been widely reported in government reports, economic research and the trade press and is well understood by MLS PIN, the Broker Defendants, and their co-conspirators. ¶¶ 75-79. For example, Keller Williams University's own course materials admit that offering less than three percent in buyer-broker commission on an MLS like Pinergy "will reduce the number of willing and qualified buyers that will see your home." ¶ 75. Indeed, selling brokers who offer less than "standard" broker commissions can face not just adverse steering, but intimidation and threats. ¶ 80 ("We've had

bricks thrown through car windows. We've had our cars egged. We've had hate mail sent to our sellers.").

The risk of steering is exacerbated because the Rule also prohibits sellers and selling brokers from changing the commission offered to buyer-brokers after an offer has been made. ¶ 46. This improperly elevates the baseline price in negotiations between a buyer and seller because it removes commissions from the amounts that can be negotiated (while leaving everything else on the table). *See* ¶ 93. Moreover, MLS PIN rules prohibit buyers and sellers from seeing the commission offers that other sellers are offering to buyer-brokers. ¶ 87. Pinergy uses fields concerning compensation that only MLS PIN participants (*i.e.,* brokers and salespeople) are able to view, and the potential sellers and buyers themselves cannot access these fields. ¶¶ 88-89. Accordingly, sellers are unlikely to know whether the buyer-broker is engaged in steering to higher-commission properties. Collectively, the foregoing restraints effectively bar any realistic opportunity to negotiate buyer-broker commissions downward. ¶ 99.[7]

As discussed above, the Broker Defendants require their brokers and affiliates to follow all MLS PIN Rules, including the Buyer-Broker Commission Rule. Moreover, given the commercial necessity of having access to Pinergy, ***all*** real estate brokers and individual salespersons in the Covered Area, regardless of whether they are franchisees or brokers within the corporate families of the Broker Defendants, must comply with the Rule and all other MLS PIN rules. ¶ 104.

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[7] Although a seller-broker may offer a buyer-broker a lesser commission than was offered on Pinergy, it may only do so if the seller-broker informs the buyer-broker in writing of such proposed change ***before*** the buyer-broker produces an offer to purchase and the change is not the result of any agreement or cooperative activity between the seller-broker and the buyer-broker. ¶ 97. As a result, a seller cannot respond to a purchase offer with a counteroffer that is conditioned on reducing the buyer-broker commission; nor can the seller, after receiving purchase offers, decide to unilaterally reduce the buyer-broker commissioner offered on Pinergy. ¶ 98.

C. The Anticompetitive Impact of the Buyer-Broker Commission Rule

The pricing system imposed through Defendants' anticompetitive agreement has had numerous adverse impacts on the market for real estate services, including stabilizing commissions at a supracompetitive level, significantly increasing the actual broker costs imposed on sellers and impeding lower cost competition. *See generally* ¶¶ 59-100, 117-128, 146-163. According to one economic analysis, "[t]ypically, on either a 5% or 6% commission, 3% will be offered to brokers with buyer clients, and that commission split is disclosed to brokers" and "acts as a powerful force to discourage lower splits of 2% or even 1% because listing brokers, and their sellers, fear that properties carrying these lower splits will not be shown." ¶ 76.[8]

Indeed, buyer-broker commissions have remained steady in the United States, including in the Covered Area. ¶ 122. Over the past two decades, the average total commission (*i.e.*, the aggregate commission paid to the seller-broker and the buyer-broker) on an annual basis nationwide has always been maintained between 5.02 percent and 5.4 percent (¶ 122), and total average broker commissions in the Covered Area are approximately between 5 and 6 percent (¶ 120). The United States General Accounting Office, reviewing of the residential real estate market, reported that "commission rates have remained relatively uniform — regardless of market conditions, home prices, or the efforts required to sell a home." ¶ 122. In Defendant Keller Williams' presentation to competitors and other industry participants in 2016, Keller Williams reported that its average buyer-broker commission in 2015 (2.71%) was virtually the same level that was charged in 2002 (2.8%). *Id.* Moreover, since 2000, home prices have

[8] Accordingly, Defendants' argument that Pinergy "only requires *some amount* of compensation to be offered to the buyer brokers" and "does not require that the offered compensation be substantial" ([ECF No. 38] ("Caus. Mem.") at 4; emphasis added) misses the point. The rule as written may technically allow non-inflated commissions, but such offers are infeasible in practice. *See* Parts IV.A.2.a. and IV.A.2.b. below.

approximately doubled, while the total rate of inflation has been substantially lower, meaning that the commission consumers are paying today relative to 20 years ago is nearly twice as much. ¶ 123. As one commentator (an attorney and policy advisor with the federal government) noted in the Cornell Real Estate Review, the stability of broker commissions stands in stark contrast to the experience in other industries which have been significantly affected by the internet: "One would have expected that an information and communication-based industry like real estate brokerage, would enjoy tremendous cost efficiencies from the development of the Internet, Databases, and other communication technologies. Yet it appears that traditional brokers generally have not passed on their cost savings to consumers in the form of lower fees." ¶ 125.[9]

By contrast, in foreign markets not governed by the Rule and where homebuyers pay their own brokers if they choose to use one, those buyers frequently pay less than ***half*** the rate paid to buyer-brokers in the United States. ¶¶ 121, 128. Economic studies have indicated that total US residential brokerage fees in a competitive market would run closer to 3%, rather than the above-5% rates that actually prevail. *Id.* As the Consumer Federation of America, which has reviewed and criticized the brokerage industry's practices for many years, concluded, "[i]f sellers and buyers each separately negotiated compensation with their brokers, uniform 5-6% commissions would quickly disappear." ¶ 126.

Accordingly, the economic costs to the plaintiff home sellers, who were required to pay a commission to buyer-brokers, and to similarly-situated Class members, are enormous.

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[9] Although the article and analysis by cited in the Complaint dates from 2007, the same author published an updated law review article in March 2021 (during the pendency of this litigation) in the Berkeley Business Law Journal entitled "Obstacles to Price Competition in the Residential Real Estate Brokerage Market" that likewise concludes that "traditional brokers have used anti-competitive tactics to effectively hamper the growth of new entrants offering lower rates and price competition." 18:1 Berkeley Bus. L. J. 91, 91-92 (2021).

D. Defendants' Participation in the Anticompetitive Agreement

Each Defendant agreed to, and has played a central role in implementing, participating in, and enforcing, the Rule's anticompetitive restraints. As noted above, the Broker Defendants, other than Keller Williams, control MLS PIN's board. ¶ 9. ***All*** Broker Defendants (including Keller Williams) require their brokers and franchisees to join MLS PIN, and the Broker Defendants exert control over MLS PIN by virtue of their market dominance and the number of brokers they cause to be enrolled. ¶¶ 106, 111, 139-142. The challenged Rule is formally written into Defendant MLS PIN's formal policies, and the Broker Defendants all ***require*** their respective brokerage operations and franchisees to follow MLS PIN policies, including the Rule. ¶¶ 43-52, 101-104, 106, 111. Specifically:

- Defendant Realogy requires its franchisees and realtors to comply with the MLS PIN Rules, including the Buyer-Broker Commission Rule. For example, the Century 21 Alton Clark and Coldwell Banker Traditions Policies and Procedures Manuals formally require MLS PIN membership and compliance with MLS PIN rules. ¶ 112.
- Defendant HomeServices also requires its franchisees and Realtors to join MLS PIN and follow MLS PIN rules. For example, the Real Living Franchise Disclosure Document makes clear that MLS PIN membership and access is required for franchisees, and the agreement requires the franchisee to provide Real Living with access to the franchisee's MLS PIN data. ¶ 113.
- The Keller Williams Policies and Guidelines Manual requires all associates to "become members of their local Board/Association of Realtors and MLS" unless granted an exemption by their team leader. A 2018 Keller Williams Franchise Disclosure Document shows that MLS PIN membership is expected by franchisees,

because it includes the MLS PIN-fees as part of the estimated initial investment for a Keller Williams market center. ¶114.

- The 2016 RE/MAX Independent Contractor Agreement prescribes that the contractor shall join the local realtor's association and "shall abide by . . . the rules and regulations of each local or regional [MLS PIN]." ¶ 115.

By controlling and participating in MLS PIN, which prevents members from allowing their brokers to compete with each other for commissions — and by agreeing to follow and enforce the anticompetitive Rule — the Broker Defendants have joined the conspiracy and have played a central role in its perpetuation and enforcement.

Moreover, several of the Broker Defendant have forthrightly declared their support for the current system. For example, during a 2016 presentation by Defendant Keller Williams' CEO to competing brokerages and other participants at a major industry event, he reported that his firm had found that "[l]imited service, discount broker, market share in the United States, is at an all-time low," that offering a lower buyer-broker commission rate than the industry average amounted to "giving away money" and that efforts to gain business by offering discounted commissions had become "irrelevant." ¶¶ 82, 143. Keller Williams also provides training to its Realtors specifically to teach them how to dissuade sellers from lowering buyer-broker commission offers:

Explaining How Commission Is Used: Script #4

SELLER:	*Can you reduce your commission?*
AGENT:	Of course. As you know, commissions are negotiable. But let me ask you—what are you trying to accomplish by getting me to reduce the commission?
SELLER:	*I'm trying to save money.*
AGENT:	I understand. Do you know how a commission structure works?
SELLER:	*Not really. I just know that I have to pay you a certain amount of what I receive for my house, and that means I get to keep less.*
AGENT:	Let me explain what happens when you reduce a commission. First of all, half of the commission usually goes to a cooperating agent. When you reduce the commission, you reduce the incentive for that agent to bring a buyer to your house. If an agent has ten different houses, nine of which come with a 3 percent commission, one of which comes with 2.5 percent commission, which houses do you think they're going to show?
SELLER:	*The ones with the larger commission.*
AGENT:	Absolutely. You're putting yourself at a disadvantage competitively when you reduce your commission, wouldn't you agree?
SELLER:	*I guess that's true.*

¶ 95. Defendant HomeServices explained its own role as follows: "As an industry leader, we have a responsibility to actively participate in shaping our industry and its current and future business model. The HomeServices executive leadership and CEOs of our operating companies drive these important discussions as leaders within the National Association of Realtors . . . and at the regional and local levels of the MLS organizations." ¶ 107.

III. STANDARD OF REVIEW

In *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), the Supreme Court reaffirmed that a plaintiff need only satisfy Rule 8 of the Federal Rules of Civil Procedure in order to state a claim under Section 1 of the Sherman Act (15 U.S.C. § 1). *Id.* at 554-55; *Dahl v. Bain Capital Partner, LLC*, 589 F. Supp. 2d 112, 117-18 (D. Mass. 2008). Fed. R. Civ. P. 8(a) requires in pertinent part that Plaintiffs' Complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." Although *Twombly* requires more than bare

"labels and conclusions" or "a formulaic recitation of the elements of a cause of action," a court should "not require heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face." *Twombly*, 550 U.S. at 555, 570.[10] Accordingly, "[a]fter *Twombly*, the task under Rule 12(b)(6) remains essentially the same." *Arista Records LLC v. Does 1-27*, 584 F. Supp. 2d 240, 247 (D. Me. 2008).

In an antitrust case, "the question at the pleading stage is not whether there is a plausible *alternative* to the plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible." *Evergreen Partnering Group, Inc. v. Pactiv Corp.,* 720 F.3d 33, 45 (1st Cir. 2013) (emphasis in original; citation deleted). Accordingly, "on a Rule 12(b)(6) motion it is not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives." *Id.* Indeed, "[a] party faces a heavy burden in moving to dismiss antitrust" claims because "[t]he pleading standard for antitrust cases is no higher than the 'plausibility' standard for other causes of action." *Bio-Rad Laboratories, Inc. v. 10X Genomics, Inc.,* 483 F. Supp. 3d 38, 52 (D. Mass. 2020). A court must "'continue[] to take all factual allegations as true and to draw all reasonable inferences in favor of the plaintiff,'" and the complaint must be sustained so long as it "does not merely allege" the elements of an offense but rather contains "factual allegations" that provide "'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Arista Records,* 584 F. Supp. 2d at 247-48 (citing *Twombly*).[11]

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[10] As here, *Twombly* involved allegations that the defendant telecommunication companies had unlawfully conspired in restraint of trade. 550 U.S. at 550. The Supreme Court found that plaintiffs had failed to allege ***any*** facts which, even taken as true, would support their claim. *Id.* at 555, 564-70. By contrast (and as set forth above and below), Plaintiffs' complaint here alleges in detail the causation and conspiracy elements challenged by Defendants.

[11] Defendants do not contend that they lack sufficient notice of Plaintiffs' claim.

IV. ARGUMENT

As set forth above, Defendants lost motions to dismiss in *Moehrl* and *Sitzer,* two materially identical lawsuits (covering other geographic regions). Because *Moehrl* and *Sitzer* are both well-reasoned and directly on point, this Court should follow those decisions.

Although Defendants claim to make two new arguments, these arguments were rejected in *Moehrl* and *Sitzer* and should be rejected here. In particular, Plaintiffs properly allege that their injuries were caused by the Buyer-Broker Commission Rule and not by a more general risk of steering (which Defendants argue would exist even if the Buyer-Broker Commission Rule did not). Moreover, because Defendants control MLS PIN, Plaintiffs have alleged sufficient participation in the alleged conspiracy. Since Defendants' arguments are without merit, the Court should deny Defendants' motions to dismiss Count I.

A. Plaintiffs Adequately Allege Causation

1. Defendants' Anticompetitive Conduct Caused Injury to Plaintiffs

Defendants first argue that Plaintiffs have failed to plead that the alleged anticompetitive conduct caused Plaintiffs to suffer an antitrust injury. *See generally* [ECF No. 38] ("Caus. Mem."). Defendants are wrong.[12] As explained above, an antitrust plaintiff need not ***prove*** causation at the pleading stage, but need only plead "sufficient factual allegations to make the complaint's claim plausible." *Evergreen Partnering Group, Inc.,* 720 F.3d at 45. This minimal "plausibility" standard applies as equally to causation allegations as to other elements of an antitrust claim. *See Arroyo-Melecio v. Puerto Rican American Ins. Co.,* 398 F.3d 56, 73 (1st Cir. 2005) (reversing dismissal of antitrust claim because "[a]t the Rule 12(b)(6) stage, we cannot

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[12] Notably, Defendant Keller Williams does ***not*** join in this causation argument. Accordingly, references to "Defendants" in this section do not include Keller Williams. But, Keller William's decision not to join raises questions about the strength of the argument.

conclude that the alleged antitrust activities ***could not*** be proven to be a but-for cause of the harm the consumers allegedly suffered") (emphasis added). To the contrary, causation issues should be left to summary judgment or trial "precisely because they depend on some factual development." *Id.*

There is no dispute as to the existence or functioning of the Buyer-Broker Commission Rule. Defendants ***admit*** that the Rule exists, and that it requires sellers to offer compensation to a buyer's broker. *See* Caus. Mem. at 3-4. Nor is there any dispute that the Rule mandates that the commissions offered to buyer-brokers be declared on a blanket basis before an offer is even made, and that the commission is wholly disconnected from the experience of, or work by, the buyer broker. *See* Caus. Mem. at 3-4, 16. Finally, Defendants admit that "steering risk is inherent to any system that allows sellers to offer compensation to buyer brokers" such as is established by the Rule. Caus. Mem. at 12.

Beyond these admissions, the Complaint is replete with allegations supporting Plaintiffs' claim that the Rule artificially inflates commissions and thereby damages sellers. As discussed above, the Complaint alleges with specificity that the Rule drives total commissions of 5-6%, with 3% typically going to buyer-brokers, because the Rule "acts as a powerful force to discourage lower splits of 2% or even 1% because listing brokers, and their sellers, fear that properties carrying these lower splits will not be shown." ¶ 76 (citing to an economic analysis by the Consumer Federation of America). The Complaint further alleges that broker commissions have remained consistent through the decades (¶ 122, citing to the United States General Accounting Office and to Defendant Keller Williams own presentation to industry participants), even though economists would expect commissions to go down both with inflation and technological advances that facilitate access to information by consumers (¶¶ 123, 125). Finally,

the Complaint cites to economic studies demonstrating that home buyers in foreign markets that do not have the Buyer-Broker Commission Rule frequently pay their brokers less than half of the commissions that sellers in the United States are forced to pay to buyer-brokers under the Rule, and that, based on this comparative study, United States residential broker fees should run closer to 3% rather than the above 5% rates that persist under the Rule (¶ 121).

Accordingly, the Complaint includes specific allegations derived from credible sources giving rise to a "plausible" (at a minimum) inference that Defendants' anticompetitive conduct caused them financial harm. Plaintiffs will conduct discovery and submit expert and other evidence regarding causation at the appropriate juncture; however, nothing more is required to overcome Defendants' motion to dismiss. *Arroyo-Melecio,* 398 F.3d at 73.

Indeed, the courts in *Moehrl* and *Sitzer* found materially identical allegations to be more than sufficient to plead causation against these same Broker Defendants and the MLS associations they control in the geographic regions at issue in those cases. For example, like Plaintiffs here, the plaintiffs in *Moehrl* alleged that "while the Buyer-Broker Commission Rules have been in effect, total commissions for United States residential real estate sales have held steady between 5.0 and 5.4 percent with 2.5 to 3.0 commissions going to buyer brokers," that those rates are "higher than in comparable international markets," and that total commission rates remain constant in the 5% to 5.4% range "even as housing prices increased during that time." *Moehrl,* 2020 WL 5878016 at *8. As they do here, the Broker Defendants sought dismissal in *Moehrl* on the basis that the plaintiffs "fail to allege facts showing how the Buyer-Broker Commission Rules cause inflated commission rates." The court soundly rejected this argument:

> When viewing the Buyer-Broker Commission Rules as a whole, it is easy to understand how they could plausibly result in inflated commission rates…. Defendants demand more facts than necessary at this time, as the adequacy of the comparison [between United States and international commission rates] is a fact-

> intensive issue not appropriate for resolution at this stage. At this stage, the comparison is sufficient to raise a reasonable inference that the Buyer-Broker Commission Rules have resulted in supracompetitive commission rates in the United States real estate market.

Id. at *8-9 (citations omitted). Similarly, the court in *Sitzer* denied the Broker Defendants' motion to dismiss a complaint involving similar factual allegations, noting that "[w]hile Plaintiffs will have to account for the various economic and market factors that may have caused or contributed to their alleged injuries, Plaintiffs do not have to do so to survive a motion to dismiss. Instead, Plaintiffs must present factual allegations to plausibly show Defendants' alleged anticompetitive actions are a 'material cause' of their alleged injuries. They have done so." *Sitzer,* 420 F. Supp. 3d at 916. This Court should reach the same conclusion.

2. Defendants' Arguments Regarding Causation Are Without Merit

a. Plaintiffs Have Plausibly Alleged that Absent the Challenged Rule, Sellers Would Pay Lower Commissions

Defendants' argument that Plaintiffs have failed to allege adequately that sellers would "change their current practices" to pay lower commissions but for Defendants' anticompetitive conduct (Caus. Mem. at 7-9) is without merit. Defendants assert that Plaintiffs need to plead a "causal link between the Rule ***and the industry practice of sellers paying buyer-brokers***." Caus. Mem. at 7 (emphasis added). Defendants then cherry-pick three paragraphs from Plaintiffs' complaint (¶¶ 33, 64, 69) and claim that Plaintiffs have not adequately alleged causation. Caus. Mem. at 7-8.

Defendants' argument mischaracterizes the causation allegations. To be clear, Plaintiffs do not allege that the Rule is illegal only because it causes sellers to pay buyer broker commissions. They allege also that the Rule causes sellers to pay ***supracompetitive commissions*** to buyer brokers ***due to market necessity created by Defendants' anticompetitive conduct***. Defendants wrongly attempt to define the causation issue to exclude the impact of the Rule on

supracompetitive commissions, and in doing so, they wrongly ignore all of the paragraphs in the Complaint regarding those inflated commissions. But, as much as Defendants may wish to ignore the point, the Complaint specifically alleges that Defendants, through the Rule, have established a system under which sellers are forced to pay ***inflated*** commissions to buyer brokers in order to access the market. ¶¶ 59-100, 117-128. Sellers cannot offer lower commissions due to, among other things, adverse steering by buyer brokers. *See, e.g.,* ¶¶ 74-81, 95. The Rule and Defendants' anticompetitive conduct force Plaintiffs to pay ***inflated*** commissions to buyer brokers to access the Pinergy system and effectively participate in the home real estate market. *See* ¶¶ 36-46, 56-58, 94-100. Accordingly, Plaintiffs ***do*** allege a direct causal link between the Rule and the industry practice of sellers paying inflated amounts to buyer-brokers. ***This*** is the causal link, which Defendants ignore and that the *Moehrl* court found to be adequately pled based on the same underlying facts alleged here, as discussed above (in Part IV.A.1.). *See Moehrl,* 2020 WL 5878016 at *10 ("Plaintiffs' allegations plausibly show[] that Buyer-Broker Commission Rules have caused an artificial inflation of commission rate").

Finkelman v. NFL, 810 F.3d 187 (3d Cir. 2016) (Caus. Mem. at 8-9), does not support Defendants' argument. In *Finkelman*, the plaintiff claimed that he and the class were damaged because the NFL allegedly withheld more Super Bowl tickets from the public than allowed under New Jersey Law, causing class members to pay more for tickets in the secondary market than they otherwise would have. *Id.* at 189-90. However, the plaintiff offered no concrete allegations of how the secondary ticket market was affected by the NFL's actions, and so "we have no way of knowing whether the NFL's withholding of tickets would have had the effect of increasing or decreasing prices on the secondary market." *Id.* at 200. The Court noted that a "strong suspicion" that rests on "no additional facts" is "pure conjecture." *Id.* at 201. Defendants here

argue that Plaintiffs likewise are relying on unsupported "suspicion." Caus. Mem. at 9. But as set forth above, and as *Moehrl* effectively held, Plaintiffs' Complaint alleges in detail how the Rule and Defendants' anticompetitive conduct forces Plaintiffs to pay supracompetitive commissions to buyer brokers.[13]

b. Defendants' Arguments Concerning the "Historical Development of the MLS and Current Market Conduct" Are Irrelevant

Defendants' argument that various courts have historically sustained certain aspects of the MLS model (Caus. Mem. at 10-11, 12) is irrelevant. Those cases (most of which Defendant cites merely for background color on the industry) address particular aspects of the MLS system that are irrelevant to this litigation or are otherwise procedurally or substantively distinguishable.[14] Regardless of whether certain court decisions (most from the 1970s or 1980s) rejected challenges to other aspects of the MLS system, Plaintiffs' specific claims regarding the anticompetitive effects of the Rule deserve to be heard (as the *Moehrl* and *Sitzer* courts have already concluded).[15]

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[13] Defendants bury in a footnote (Caus. Mem. at 9 n. 6) a bald assertion that Plaintiffs' allegations concerning lower commission rates paid to brokers in competitive foreign home real estate markets (¶¶ 121, 149) "do not save [Plaintiffs'] causation allegations" and should be disregarded by the Court because the fact that commissions in comparable foreign markets are lower "tells us nothing about whether the Rule causes injury to Plaintiffs." But real-life data from a comparable market is more than sufficient to allege injury. If Defendants' experts wish to challenge that analysis, they may do so, but that is for another day. Moreover, as discussed above in Part IV.A.1., the *Moehrl* court rejected this exact argument, and this Court should do the same. *Moehrl,* 2020 WL 5878016 at *8.

[14] For example, *Wells Real Estate, Inc. v. Greater Lowell Bd. Of Realtors,*850 F.2d 803 (1st Cir. 1988), involved appeal of a directed verdict after full jury trial of monopoly, boycott and tying claims, while the plaintiffs in *Re/Max Int'l, Inc., v. Realty One, Inc.*, 173 F.3d 995, 1025 (6th Cir. 1999), did ***not*** allege that the disputed commissions had "an unreasonable effect on commerce," as Plaintiffs do here (*see, e.g.,* ¶¶ 127-128, 146-163).

[15] Plaintiffs also obviously disagree with Defendants' general factual assertion that MLS systems like Pinergy have "created an efficient residential real estate market" (Caus. Mem. at 10) and they will defeat any such contention at trial. Plaintiffs do not believe a system that imposes

Defendants' argument that Pinergy does not mandate supracompetitive commissions because "the Rule requires only ***some*** level of compensation to be offered to the buyer broker; it does not require ***substantial*** compensation" (Caus. Mem. at 11; emphasis in original) is without merit. Defendants go so far as to say that "sellers can comply with the Rule by offering any compensation amount they desire, even as low as $0.01." *Id.*; *see also* Caus. Mem. at 4. However, as discussed above, regardless of what the Rule technically permits, the practical effect of the anticompetitive regime on rational economic actors is that sellers cannot offer commissions below the current inflated levels due to adverse steering. ¶¶ 74-86. Indeed, the *Moehrl* court rejected Defendants' precise argument, noting that "[c]ommon sense suggests that a buyer broker is highly unlikely to show their client a home when the seller is offering a penny in commission." *Moehrl,* 2020 WL 5878016 at *9.

Defendants' argument that Plaintiffs have not adequately alleged that "elimination of the Rule would lead to a market overhaul" or would lead to lower commissions (Caus. Mem. at 11-12) is incorrect. Plaintiffs have specifically alleged that competitive foreign markets that do ***not*** have the Rule have substantially lower commissions (¶¶ 121, 149), and also have cited economic studies that project the same result in the United States market if it did not have the Rule (¶¶ 121, 126, 128). As the *Moehrl* court held, such allegations are sufficient to overcome a motion to dismiss. *Moehrl,* 2020 WL 5878016 at *7-11.

Defendants' argument that Plaintiffs have "offer[ed] no explanation for why sellers would offer $0 if the Rule were revoked" or why steering "will dissipate [altogether] upon elimination of the Rule" (Caus. Mem. at 11-12) is a red herring. Plaintiffs are not predicting that

supracompetitive commissions on sellers is "efficient." In any event, this is an issue of fact that will be subject to expert testimony.

either will happen (although either certainly could) because the sufficiency of Plaintiffs' claim does not depend upon such an outcome. Rather, Plaintiffs allege (as discussed above) that broker commission levels would fall substantially to competitive levels absent the anticompetitive imposition of the Rule. Again, that is all that is required to establish that the Rule caused Plaintiffs to suffer an antitrust injury.

Finally, if the Broker Defendants truly believed that the Rule has ***no*** impact on the level of commissions, then they would have dropped the Rule when they were first sued in *Moehrl* and *Sitzer* in early 2019.[16] According to Defendants, if that had occurred, they would have made just as much money from the same high commissions and, at the same time, developed a substantial body of data to demonstrate that these lawsuits should be rejected. Defendants' decision to fight to maintain the Rule and maintain their inflated commissions speaks volumes.

c. Plaintiffs Correctly Characterize the Anticompetitive Impact of Other MLS PIN Rules

Defendants' argument that Plaintiffs mischaracterize the anticompetitive impact of certain provisions of the Rule and other MLS PIN rules (Caus. Mem. at 13-16) is without merit. First, Defendants incorrectly focus largely on subpart (2) of the rule discussed in ¶ 46. Caus. Mem. at 13-14.[17] While alleged for completeness, that portion is of the rule is irrelevant because the Rule requires compliance with ***both*** subparts (1) and (2). Subpart (1) of the rule, which requires that the buyer-broker commission be locked in before an offer is made, is the provision that anticompetitively bars sellers from negotiating commissions once a buyer makes an offer (even as all other financial aspects of the offer remain open for discussion), locking sellers into

[16] *Moehrl* was filed on March 6, 2019, and *Sitzer* was filed on April 29, 2019.

[17] Plaintiffs acknowledge that they incorrectly bolded subpart (2) of the rule quoted in ¶ 46, rather than subpart (1) which they meant to highlight.

supracompetitive commission rates. *See* ¶¶ 46, 98, 160-161. Defendants argue that this simply reflects the principle of contract law that an offer by the seller of a commission rate on Pinergy cannot be unilaterally revoked once accepted. Caus. Mem. at 14. But a buyer cannot pick and choose among the aspects of a listing that he or she "accepts." A counteroffer to buy a property is simply a counterproposal until the parties reach a final agreement, and there is no valid reason why a buyer's counteroffer should lock in one term of the transaction (the commission rate) while leaving ***all*** other terms open to negotiation. But there is a plausible — and anticompetitive — reason: to protect inflated commission rates.

Defendants' argument that MLS PIN rules do not completely prohibit sellers and buyers themselves from learning ***from their brokers*** about the range of commissions being offered (Caus. Mem. at 15) misses the point of Plaintiffs' allegations (¶¶ 87-92). Plaintiffs do not dispute that principals can learn any information that their brokers are willing to share with them, but the additional hurdle, and the lack of ***direct*** access, has anticompetitive impact. For example, where buyers must rely on their brokers for key information, they are much less likely to know they are being steered, particularly where the buyer-broker has a glaring conflict of interest and every economic incentive to secretly steer the prospective buyer to a seller paying a higher commission rather than to the seller offering the best house at the best price. ¶ 90. The *Moehrl* court highlighted this very risk:

> [A] prospective homebuyer [will not] necessarily be able to detect that their broker is screening out homes offering insufficient commissions because only brokers and realtors that subscribe to the MLS can view buyer-broker commission offers. That also means a home seller is unable to view the universe of buyer-broker commission offers before agreeing to a commission rate in the listing agreement, thereby putting the seller-broker in a substantial position of influence with respect to that decision. Such an arrangement could restrain trade because it substantially deprives the customer of the ability to utilize and compare prices in selecting brokers.

Moehrl, 2020 WL 5878016 at *9 (citations omitted).

Finally, Defendants argue that sellers should not care that they must offer blanket commissions to buyer brokers, regardless of the broker's experience or the work the broker performs, because it constitutes a "finder's fee." Caus. Mem. at 16. Defendants are certainly free to believe that sellers should be happy to pay inflated blanket commissions to close their transactions, but Plaintiffs respectfully submit that it is at least plausible that a reasonable seller would prefer to pay a buyer broker only for the fair value of the work the broker actually performed. For example, as the *Moehrl* court noted, many buyers find homes to purchase by searching online databases on their own. Yet those buyers will often retain brokers to handle the details of the transaction. Under Defendants' anticompetitive system, "if the homebuyer chooses to buy a home they found by themselves online, the buyer-broker is entitled to the same blanket buyer-broker commission offer as a buyer-broker who worked directly with the prospective homebuyer to initially locate the home." *Moehrl,* 2020 WL 5878016 at *9. And the seller is forced to pay that inflated blanket commission.

d. Defendants' Remaining Cases Do Not Support Dismissal of Plaintiffs' Complaint for Failure to Allege Causation

The cases that Defendants cite to support their argument that Plaintiffs have failed to adequately allege facts that plausibly allege causation (Caus. Mem. at 4-7) are readily distinguishable. For example, *A.G. v. Elsevier, Inc.,* 732 F.3d 77 (1st Cir. 2013) (Caus. Mem. at 5), involved an allegedly fraudulent article about a certain medical procedure. The article was introduced into evidence before the jury in a malpractice trial; when the jury found no liability, the plaintiffs in the malpractice action sued the publisher of the article, blaming the publisher for the loss. *Id.* at 79-80. The *Elsevier* plaintiffs made ***no*** substantive allegations of how they would have won the underlying malpractice case had the article not been published. Rather, they simply made a "bald assertion that 'but for'" the fraudulent article they "would have been

successful." *Id.* at 81. The court emphasized that neither "the complaint ([n]or anything else in the record, for that matter) suggest a feasible way as to how discovery might help develop the missing patina of facts." *Id.* Given the sparse pleading, the court understandably concluded that plaintiff's "threadbare" allegations lacked "any meaningful factual content" whatsoever and so dismissed the claim as failing to pass the "plausibility threshold." *Id.* By contrast, and as discussed above, Plaintiffs here provide specific facts and figures, from numerous reputable economic and governmental sources, that make their claims eminently plausible.

Defendants' reliance on *Doe v. Backpage.com, LLC,* 817 F.3d 12 (1st Cir. 2016), is unavailing for the same reason. As with *Elsevier*, the plaintiffs' causation allegations in *Doe* were facially "attenuated:" plaintiffs claimed that if the defendant publisher had not made "disingenuous" statements to law enforcement officials concerned about sex trafficking as to the steps it was taking to stop advertising related to such trafficking within its pages, the plaintiffs would never have been victimized. *Id.* at 24-25. The court concluded that "[t]his causal chain is shot through with conjecture" and "rampant guesswork" because it ignored how defendant's statement to police affected "an indeterminate number of third parties" (including the actual trafficking perpetrators) and did not concretely address "the odds that the [plaintiffs] would not have been victimized had [defendant] been more forthright" to police. *Id.* at 25. As the *Moehrl* and *Sitzer* courts found, Plaintiffs' allegations here are markedly more robust, and directly and proximately link the Rule and Defendants' anticompetitive conduct to concrete monetary losses.[18]

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[18] Defendants' string cite to *Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451 (2006), and *Auto Alignment & Body Serv. V. State Farm Mut. Auto. Ins. Co.*, 953 F.3d 707, 728-29 (11th Cir. 2020), is inapposite for the same reason: plaintiffs in those cases, unlike in the present matter, offered ***no*** specific facts explaining how the defendants' conduct harmed them, beyond fiat and bald declarations.

3. Defendants' Attempt to Distinguish the *Moehrl* and *Sitzer* Cases is Without Merit

Defendants' argument that the *Moehrl* and *Sitzer* cases do not address causation (Caus. Mem. at 16-18) is incorrect. Both directly address the issue. *Moehrl,* 2020 WL 5878016 at *9 ("[w]hen viewing the Buyer-Broker Commission Rules as a whole, it is easy to understand how they could plausibly result in inflated commission rates"); *Sitzer*, 420 F. Supp. 3d at 916. Defendants assert that their causation argument in this case presents a unique twist (Caus. Mem. at 16), but as discussed in Part IV.A.2.a. above, that purportedly new argument in fact is based on a tortured misreading of Plaintiffs' causation claim and is without merit.

Defendants rely on the portion of the *Moehrl* decision where the Court makes the common-sense observation that most buyer-brokers would be "highly unlikely to show their client a home when the seller is offering a penny in commission." Caus. Mem. at 17 (citing *Moehrl,* 2020 WL 5878016 at *9). Defendants argue that this passage "reinforce[s]" Defendants' argument that steering would exist even without the Rule, and so Plaintiff cannot establish causation. *Id.* But as discussed in Part IV.A.2.b. above, Plaintiffs' causation argument is ***not*** dependent on the idea that steering would vanish but for Defendants' anticompetitive conduct (or that buyer brokers would begin accepting one cent commissions). Rather, Plaintiffs argue, based on economic studies and international market comparisons, that buyer-broker commissions would not be ***inflated*** above market levels but for the Rule, regardless of who pays. *Moehrl* is not inconsistent with this claim; indeed, as discussed above, it holds that such a claim should not be dismissed.

B. Plaintiffs Adequately Allege the Broker Defendants' Control and Collusion

Broker Defendants HomeServices, RE/MAX and Keller Williams each have filed separate memoranda arguing that Plaintiffs' conspiracy allegations are inadequate as a matter of

law. *See* [ECF No. 41] ("HomeServices Mem."), [ECF No. 43] ("RE/MAX Mem."), [ECF No. 45] ("Keller Williams Mem."). Both *Moehrl* and *Sitzer*, which involved very similar conspiracy allegations, held to the contrary, and this Court should do the same. *Moehrl,* 2020 WL 5878016 at *4-7; *Sitzer,* 420 F. Supp. 3d at 911-13. In any event, for the reasons discussed below, the Broker Defendants are wrong.

1. The Broker Defendants Control Pinergy and Engaged in Collusion

An antitrust plaintiff alleging collusion or agreement need only "support[] those allegations with a context that tends to make said agreement plausible." *Evergreen,* 720 F.3d at 46. This "plausibility" standard is consistent with usual Rule 12(b)(6) pleading standard, and a heightened standard does ***not*** apply to pleading conspiracy in an antitrust case:

> Many courts have referenced "plus factors" in analyzing the plausibility of § 1 claims at the pleadings stage, but those references have invariably been drawn from cases evaluating the merits of an antitrust plaintiff's conspiracy claim at the summary judgment and trial stages of litigation, when there is significantly more information available regarding whether complex analysis of pricing structures and other information suggest agreement.

Id. Accordingly, as the *Moehrl* court observed in rejecting the Broker Defendants' similar arguments, "at the motion to dismiss stage it is ***not*** necessary for plaintiffs' allegations to exclude the possibility of independent conduct" but instead "plaintiffs need only to allege a conspiracy which is plausible in light of competing explanations." *Moehrl,* 2020 WL 5878016 at *6 (emphasis added; quotations marks and citations omitted).

Here, the Broker Defendants' agreement to support MLS PIN and its policies, including the anticompetitive Rule, is out in the open.[19] First, the Broker Defendants do not dispute that,

[19] Broker Defendant Realogy has ***not*** challenged the sufficiency of Plaintiffs' conspiracy claims against it. Since Realogy is in the same position as the other Broker Defendants, that fact alone sheds light on the strength of the arguments.

as alleged in the Complaint (*see, e.g.,* ¶¶ 9, 105-116), all Broker Defendants participate in MLS PIN and Pinergy and agree to follow MLS PIN's various rules (including the Rule at issue here). The Supreme Court has long treated such associational rules imposing "duties and restrictions on the conduct of [t]he members' separate businesses" as direct evidence of an agreement subject to Section 1. *Associated Press v. United States*, 326 U.S. 1, 8 (1945); *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma,* 468 U.S. 85, 99 (1984) (where "the policies of the NCAA with respect to television rights are ultimately controlled by the vote of member institutions" participating in the association, the member institutions had created "an agreement among competitors"). Accordingly, "the very passage of" rules by an MLS "establishes that the defendants convened and came to an agreement." *Robertson v. Sea Pines Real Estate Cos.,* 679 F.3d 278, 288-90 (4th Cir. 2012) (affirming denial of motion to dismiss); *Realcomp II, Ltd., v. F.T.C.*, 635 F.3d 815, 824-25 (6th Cir. 2011) (holding that, because the defendant MLS was "owned by seven associations of competing real-estate brokers, is governed by members of those associations, and claims a membership of brokers competing in the market for real-estate-brokerage services" its anticompetitive "website policy constitutes an agreement governing the Realcomp MLS among the Realcomp members"). Indeed, MLS PIN "would be unlikely to have the power to exclude brokerages and realtors that did not abide by" the Rule "[w]ithout the [Broker] Defendants' conscious assent to the system," given the Broker Defendants' market dominance. *Moehrl,* 2020 WL 5878016 at *4.

Second, Plaintiffs allege that the Broker Defendants ***require*** their brokerage operations and franchisees to follow MLS PIN policies, including the Rule. ¶¶ 106, 112-15. The Broker Defendants thereby work together to perpetuate the Rule's anticompetitive effects. Insofar as "the purported anticompetitive restraints here are a product of written rules issued by [MLS PIN]

that each [Broker] Defendant expressly imposes upon their franchisees and realtors, [t]hat suggests that each [Broker] Defendant has reviewed, understood, and ultimately agreed to" the MLS PIN's anticompetitive restrictions, including the Rule. *Moehrl,* 2020 WL 5878016 at *5. For example, if not for the Broker Defendants' agreement to enforce the Rule, one might expect market competition whereby one or more of these industry leaders would attempt to gain market share by underpricing the competition — such as by (1) directing their seller brokers and franchisees to offer lower commissions to buyer brokers or (2) directing their buyer brokers and franchisees ***not*** to steer clients away from sellers offering commissions below the present supracompetitive rates. Tellingly, that has not happened, and all the Broker Defendants have instead directed their brokers to adhere to the Rule. ¶¶ 111-115.

Finally, Plaintiffs allege that the Broker Defendants other than Keller Williams directly participate in the governance of MLS PIN by holding, through their franchisees, a majority of seats on the board. ¶ 9.[20] Moreover, Plaintiffs have plausibly pled that ***all*** Broker Defendants, ***including*** Keller Williams, control MLS PIN regardless of board membership given the number of brokers and agents working for the Broker Defendants' franchisees and their market dominance. ¶ 139. In addition, the fact that each Broker Defendant required its franchisees and salespersons to join MLS PIN means that the Broker Defendants (including Keller Williams) supplied MLS PIN with the majority of its membership base, giving the Broker Defendants

[20] HomeServices' argument that Plaintiffs are improperly grouping the Broker Defendants' board seats to establish their collective control (HomeServices Mem. at 6) is without merit. Plaintiffs allege that there is an anticompetitive ***agreement*** among the Broker Defendants who hold board seats; accordingly, one would expect them to act in concert. HomeServices' additional argument that only one of the three defendants under the HomeServices umbrella (BHH) holds a seat on the MLS PIN board is without merit; as alleged in the Complaint (at ¶ 11), BHH is a subsidiary of fellow HomeServices defendant HSF, which in turn in majority owned by the third HomeServices defendant HSA. Accordingly, the HomeServices defendants are all linked in a chain of control.

power over MLS PIN to impose the Rule upon the industry in the Covered Area. ¶ 140. In sum, Plaintiffs have alleged that each individual Broker Defendant participated in, facilitated, and implemented the conspiracy.

Plaintiffs have not engaged in "group pleading," as the Broker Defendants claim. *See* RE/MAX Mem. at 5; *see also* HomeServices Mem. at 3, 6. Rather, Plaintiffs have alleged facts that plausibly give rise to an inference that ***each*** Broker Defendant participated in the conspiracy. *See, e.g.*, Part II.D. above. Plaintiffs allege that each Defendant participated in a similar way through control of MLS PIN and forcing their respective brokers and franchisees to join the MLS and follow the Rule, but that is not group pleading. Rather, it simply means that the individual members of the conspiracy each acted in a similar way. In light of the applicable standard on a Rule 12(b)(6) motion and the foregoing specific allegations, this Court should find, as the *Moehrl* court did based on similar allegations, that "[v]iewing all of the above factual allegations together[,] Plaintiffs have sufficiently pleaded the [Broker] Defendants' participation in the conspiracy." *Moehrl,* 2020 WL 5878016 at *4-5.

2. Defendants' Arguments Are Without Merit

The overlapping arguments in the HomeServices, RE/MAX, and Keller Williams motions to dismiss are uniformly without merit. Tellingly, Defendants repeatedly cite to ***summary judgment*** cases in their memoranda, ignoring *Evergreen*'s articulation of the simple "plausibility" standard for the Complaint to survive the present motions to dismiss.

First, the Broker Defendants' arguments that Plaintiffs have failed to adequately allege Defendants' control over MLS PIN are unavailing. The Broker Defendants argue that Plaintiffs' allegations are insufficient because Plaintiffs allege that Broker Defendant ***franchisees*** (rather than the Broker Defendants themselves) have the majority of seats on the MLS PIN board.

HomeServices Mem. at 6; RE/MAX Mem. at 6, 8-9; Keller Williams Mem. at 5-6. This argument is baseless: Plaintiffs have alleged that the Broker Defendants have control over their franchisees, including by forcing those franchisees to be members of MLS PIN. *See, e.g.,* ¶¶ 111-115. That is sufficient to establish the Broker Defendants' own control over MLS PIN on a motion to dismiss. *Moehrl*, 2020 WL 5878016 at *6 ("Plaintiffs have sufficiently alleged that the [Broker] Defendants have control over their franchisees and realtors insofar as the [Broker] Defendants require them to join" the local MLS, which is "the entit[y] responsible for implementing and enforcing the alleged anticompetitive restraints here").[21] HomeServices' and RE/MAX's additional argument that Plaintiffs have not adequately alleged sufficient information concerning the precise identity and tenure of the HomeServices franchisees who sat on MLS PIN's Board (HomeServices Mem. at 6; RE/MAX Mem. at 6) fails because such exacting pleading is not necessary in a complaint. *Evergreen,* 720 F.3d at 46. Finally, Keller Williams' argument that it does not have seats on the MLS PIN board does not relieve it of control liability; as discussed above (at Parts II.D. and IV.B.1.), its market dominance and the volume of members it funnels to the organization through its requirement that all franchisees join give it power over the association.[22]

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[21] The case that HomeServices cites, *Depianti v. Jan-Pro Franchising Int'l., Inc.,* 990 N.E.2d 1054, 1064 (Mass. 2013) (cited at HomeServices Mem. at 6), itself recognizes that "a franchisor is vicariously liable for the conduct of its franchisee" when it exerts control or has a right to control "the specific policy or practice resulting in harm to the plaintiff." *Id.* at 1064; *Hyland v. Homeservices of Am., Inc.*, No. 05-cv-612-R, 2007 WL 1959158, at *8 (W.D. Ky. June 28, 2007) ("courts have recognized antitrust vicarious liability claims between franchisors and franchisees under a theory of actual agency").

[22] Moreover, regardless of its control liability, Plaintiffs have pled in detail Keller Williams' agreement with and participation in the conspiracy. Defendant Keller Williams' CEO has proclaimed that offering a lower buyer-broker commission rate than the industry average amounted to "giving away money" and that efforts to gain business by offering discounted commissions had become "irrelevant." ¶¶ 82, 143. Keller Williams also provides training to its Realtors specifically to teach them how to dissuade sellers from lowering buyer-broker

HomeServices' argument (with no supporting case citation) that Plaintiffs have failed to allege "that these unrelated Broker Defendants had some secondary agreement under which they conspired to jointly cause [MLS PIN] to enact or enforce the Rule" (HomeServices Mem. at 6) also fails. HomeServices is simply incorrect: Plaintiffs specifically allege the existence of such an agreement. *See, e.g.,* ¶¶ 105-116. No more is required at this stage. *Evergreen,* 720 F.3d at 46. To the extent that HomeServices is implying that Plaintiffs must allege (or ultimately prove) an express rather than tacit agreement, they are equally incorrect. *See Twombly,* 550 U.S. at 553 (anticompetitive agreement may be "tacit or express").

RE/MAX's argument that Plaintiffs' conspiracy allegations are insufficient (RE/MAX Mem. at 5-7) also fails. RE/MAX repeats like a mantra that "there are no allegations" linking it to the conspiracy. *Id.* at 5-6. But RE/MAX itself cites to Plaintiffs' allegations concerning ***all*** Broker Defendants, including RE/MAX. *Id.* RE/MAX may wish that Plaintiffs' allegations are ***insufficient***, but Plaintiffs have pled all that *Evergreen* requires. RE/MAX also asserts that the "RE/MAX Independent Contractor Agreement" "says ***nothing*** about participation in … the MLS PIN Rules." RE/MAX Mem. at 6-7 (emphasis in original). To the contrary, as alleged in ¶ 115, the RE/MAX Independent Contractor Agreement requires that franchises must join the local MLS and "abide by … the rules and regulations" of that MLS.

Equally unavailing is the Broker Defendants' argument that the Broker Defendants' uniform decision to force their brokers and franchises to join MLS PIN and follow the Rule cannot be evidence of conspiracy because "each Broker Defendant 'had its own economic incentive' to require affiliates to join PIN and follow its rules." HomeServices Mem. at 7-8; RE/MAX Mem. at 7 (discussing "independent business justification"); Keller Williams Mem. at

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commission offers. ¶ 95.

6-7 (discussing "commercial necessity"). The fact that an antitrust defendant may have an independent economic motive to act in a particular way, and that such action would be permissible if pursued independently, does not absolve the defendant from liability if it participated in illegal anticompetitive conduct. *See NCAA*, 468 U.S. at 101 n.23 (observing that "good motives will not validate an otherwise anticompetitive practice"); *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 698 (S.D.N.Y. 2013) ("It is not surprising that Apple chose to further its own independent economic interests. Such a motivation, however, does not insulate a defendant from liability for illegal conduct."), *aff'd*, 791 F.3d 290 (2d. Cir. 2015).[23]

The cases relied upon by the Broker Defendants are inapposite. For example, HomeServices and Keller Williams improperly rely upon *AD/SAT v. AP*, 181 F.3d 216 (2d Cir. 1999), to support their argument that membership in a trade association engaged in anticompetitive conduct is insufficient to establish liability, but rather that there must be evidence of active participation. *See* HomeServices Mem. at 4, 5; Keller Williams Mem. at 6. However, *AD/SAT* concerns the Second Circuit's standard for "surviving a motion ***for summary judgment***." *Id.* at 233. As discussed above, the First Circuit expressly held in *Evergreen* that the standard for surviving a 12(b)(6) motion to dismiss is much lower because Plaintiffs have not yet

[23] The Court's decision in *Advanced Tech. Corp., Inc., v. Instron, Inc.,* 925 F. Supp. 2d 170 (D. Mass. 2013) (HomeServices Mem. at 7-8; Keller Williams Mem. at 6, 7), does not undermine this point. The *Advanced Tech.* court specifically heled that "***[n]othing*** in the complaint" indicates that the Defendants' allegedly anticompetitive act "was anything more than the natural, ***unilateral*** reaction of each defendant intent on keeping its dominance." *Id.* at 179 (emphasis added; quotation marks removed). Here, as discussed above and as the *Moehrl* and *Sitzer* courts have already found on substantially similar allegations, Plaintiffs have pled facts such as the Broker Defendants' control of MLS PIN that, when combined with Defendants' uniform requirement that their brokers and franchisees follow MLS PIN rules, are sufficient to sustain the Complaint's collusion allegations at this stage of the litigation. *See, e.g., Moehrl* at *5 ("viewing all of the above factual allegations together [including the Broker Defendants' requirement that the franchisees joint the local MLS and follow the Rule], the Court concludes that Plaintiffs have sufficiently pleaded the [Broker] Defendants' participation in the conspiracy").

had the benefit of discovery. *Evergreen,* 720 F.3d at 46. Plaintiffs have specifically alleged that the Broker Defendants were active participants in the MLS PIN anticompetitive scheme. *See, e.g.,* ¶¶ 105-116. To the extent that evidence of "active participation" is even necessary to establish ultimate liability, Plaintiffs are entitled to the opportunity to develop that evidence.[24]

HomeServices' and RE/MAX's citation to *Sanchez v. Pereira-Castillo,* 590 F.3d 31 (1st Cit. 2009) (HomeServices Mem. at 7; RE/MAX Mem. at 5), is equally unavailing. In that § 1983 case, the court merely recited the boilerplate principle that courts must determine the sufficiency of complaints "as to each defendant." *Id.* at 48. Here, Plaintiffs adequately plead their complaint against each Broker Defendant as required by *Evergreen* and the other relevant precedent and principles discussed above.

United States v. Nat'l Ass'n of Real Estate Boards, 339 U.S. 485 (1950), is likewise readily distinguishable. Defendant HomeServices cites it for the proposition that Plaintiff's conspiracy allegations are inadequate. HomeServices Mem. at 8-9. But as with other cases cited by Defendants, this case involves affirmance of a grant of ***summary judgment***; indeed, the Supreme Court emphasized that the defendants' "relationship to [the conspiracy] is, ***on this***

[24] Moreover, Supreme Court precedent holds that associations' members engage in concerted action when they "surrender[] [their] freedom of action" in some aspect of their separate businesses and "agree[] to abide by the will of the associations." *Anderson v. Shipowners Ass'n of Pac. Coast*, 272 U.S. 359, 364-65 (1926); *see also, e.g.*, *NCAA*, 468 U.S. at 99; *Dickson v. Microsoft Corp.*, 309 F.3d 193, 204-05 (4th Cir. 2002) ("The coconspirators need not share the same motive or goal; it is sufficient to allege that the coconspirators 'acquiesc[ed] in an illegal scheme.'"). Although *AD/SAT* may indicate that the ***Second*** Circuit believes the Supreme Court has moved away from the acquiescence standard, the Broker Defendants cite no case indicating that courts in ***this*** Circuit share that concern. Defendant Keller Williams points to *Dahl v. Bain Capital Partners LLC,* 963 F. Supp. 2d 38, 44 (D. Mass. 2013) (Keller Williams Mem. at 6), but that case cites *AD/SAT* only for the proposition that every antitrust defendant must have "committed" to the conspiracy; *Dahl* does not hold that commitment cannot be shown by acquiescence as per the traditional rule. In any event, *Dahl* discusses a motion for summary judgment rather than a motion to dismiss, reinforcing that under any standard, Plaintiffs are entitled to pursue discovery to gather further evidence of the conspiracy allegations.

record, a somewhat attenuated one." *Id.* at 495 (emphasis added). As set forth in *Evergreen,* Plaintiffs are entitled to develop their own record here.

Finally, RE/MAX's reliance on *DM Research, Inc. v. College of Am. Pathologists*, 2 F. Supp. 2d 226 (D.R.I. 1998), *aff'd*, 170 F.3d 53 (1st Cir. 1999), is equally unavailing. In *DM Research,* the court found that plaintiff had provided ***no*** evidence any agreement (as opposed to parallel conduct) between "two independent professional organizations" when one wholly independent association adopted standards proposed by the other, and when those standards would ***increase*** the costs to the adopting association's own members. *Id.* at 229-30. Given this background, the court emphasized the "inherent implausibility of inferring a conspiracy from the[se] facts." *Id.* at 230. Here, the Broker Defendants are all members of (and most of them hold leadership positions in) the ***same*** organization (MLS PIN). As discussed in Part IV.B.1. above, that is itself direct evidence of an agreement. Moreover, as alleged in detail in the Complaint, the effect of the conspiracy is economically ***beneficial*** to the Broker Defendants by inflating commissions. *See, e.g.,* ¶¶ 117-128; *see also* ¶ 143 (Keller Williams CEO stated that offering a lower buyer-broker commission would amount to "giving away money").

For all of these reasons, Plaintiffs' control and collusion allegations are sufficient under the controlling precedent of *Evergreen*. The court should deny the Motions to Dismiss, just as the courts did on the similar cases of *Moehrl* and *Sitzer*.

3. The Broker Defendants' Attempt to Distinguish the *Moehrl* and *Sitzer* Cases is Without Merit

The Broker Defendants' arguments that the *Moehrl* the *Sitzer* cases are meaningfully distinguishable from the present litigation are baseless. HomeServices argues that those cases involved claims against the Broker Defendants and a ***national*** rule-setting association (the National Association of Realtors ("NAR")), while the present case involves claims against the

same Broker Defendants but only a ***regional*** rule-setting association (MLS PIN). HomeServices Mem. at 10. However, HomeServices provide no explanation as to why this distinction is supposedly meaningful; indeed, it is not, because each case involves a conspiracy in distinct relevant geographic markets. HomeServices also argues that representatives of the Broker Defendants sat directly on the board of the NAR in *Moehrl* and *Sitzer*, while in the present case board seats on MLS PIN are held by the Broker Defendants' franchisees controlled by the Broker Defendants. But this purported distinction is also of no substantive import, as discussed in Part IV.B.2. above.

Keller Williams argues that *Moehrl* and *Sitzer* do not apply to it simply because the company does not have a seat on MLS PIN's board. Keller Williams Mem. at 8-9. However, contrary to Keller Williams' argument, the *Moehrl* court noted that while direct control was relevant, each defendant's requirement that its brokers and franchisees join the MLS and adhere to the Rule was "most important[]." *Moehrl*, 2020 WL 5878016 at *4. As discussed above, Plaintiffs have alleged Keller Williams engaged in that misconduct here. ¶ 114. Moreover, as also discussed above, Plaintiffs have alleged several additional statements by Keller Williams that support that "most important" allegation and further buttress Plaintiffs' allegations of Keller Williams' participation in the anticompetitive scheme. *See* ¶¶ 82, 95, 143.

In sum, Plaintiffs respectfully submit that *Moehrl* and *Sitzer* are directly on-point and weigh strongly in favor of denying Defendants' motions to dismiss and allowing Plaintiffs to proceed to discovery.

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny all four Defendants' motions to dismiss Count I of the Complaint. To the extent the Court dismisses Count I in any respect, Plaintiffs respectfully request leave to amend.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Doug Needham, 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 April 15, 2021.

/s/ Douglas P. Needham
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