UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, JEREMY KEEL, HOLLEE ELLIS, and FRANCES HARVEY, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX, LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	)	Case No: 4:19-cv-00332-SRB Judge Stephen R. Bough

DEFENDANT KELLER WILLIAMS REALTY, INC.'S MOTION FOR NEW TRIAL

Pursuant to Federal Rule of Civil Procedure 59(a), Defendant Keller Williams Realty, Inc. ("Keller Williams") moves for a new trial. The verdict was against the great weight of the evidence and erroneous evidentiary rulings had a substantial impact on the verdict.

A new trial is warranted for all the reasons set forth in the accompanying Suggestions in Support of this Motion, as well as for the reasons stated in the Motions for New Trial submitted by the HomeServices Defendants and the National Association of REALTORS®, both of which Keller Williams joins and incorporates. Accordingly, the Court should order a new trial.

Dated: January 8, 2024

Respectfully submitted,

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The undersigned hereby certifies that on January 8, 2024, an electronic copy of the foregoing was filed with the Clerk of the Court by using the CM/ECF system, and service upon all counsel of record will be accomplished by the CM/ECF system.

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UNITED STATES DISTRICT COURT
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DEFENDANT KELLER WILLIAMS REALTY, INC.'S
RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Pursuant to Federal Rule of Civil Procedure 50(b), Defendant Keller Williams Realty, Inc. ("Keller Williams") renews its motion for judgment as a matter of law. The jury's verdict in favor of Plaintiffs is deeply flawed as a matter of law. The Plaintiffs here were not direct purchasers from any of the named Defendants, and the long-established and state-authorized practices here were not tested under the rule of reason. The trial record was also bereft of any evidence that Keller Williams entered into a conspiracy with anyone, let alone legally sufficient evidence to satisfy the elements of Plaintiffs' antitrust claim.

Judgment as a matter of law is warranted for all the reasons set forth in the accompanying Suggestions in Support of this Motion, as well as for the reasons stated in Renewed Motions for Judgment as a Matter of Law submitted by the HomeServices Defendants and the National

Association of REALTORS®, both of which Keller Williams joins and incorporates. Accordingly, the Court should enter judgment as a matter of law in favor of Keller Williams.

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

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DEFENDANT THE NATIONAL ASSOCIATION OF REALTORS®' MOTION FOR A NEW TRIAL

Defendant the National Association of REALTORS® ("NAR") moves the Court for an order granting it a new trial under Federal Rule of Civil Procedure 59(a). As explained in the accompanying Suggestions in Support of this Motion, the previous trial resulted in a miscarriage of justice through a verdict against the weight of the evidence, an excessive damage award, and legal errors at trial. Specifically, in this Rule 59(a) motion, NAR focuses on legal errors in the jury instructions and Plaintiffs' counsel's pervasive and prejudicial misconduct, each of which requires a new trial.

Additionally, a new trial is warranted for all the reasons set forth in the HomeServices Defendants' Motion for a New Trial and Keller Williams Realty Inc.'s Motion for a New Trial, both of which NAR joins and incorporates: (a) the Court erred on a number of evidentiary rulings, including (i) its failure to exclude the speculative, contradictory, and unfounded testimony of

Plaintiffs' proffered expert witness Dr. Schulman, (ii) its failure to exclude admission of and references to the Clear Cooperation Policy and Roger Alford's testimony thereto, the Figgs hearsay notes, irrelevant documents related to commissions, and the settlements by former defendants Realogy and RE/MAX, and (iii) its exclusion of evidence demonstrating that Missouri law permits cooperative compensation; (b) the jury's finding of antitrust injury was against the weight of the evidence; and (c) the jury's damages award based on 100% overcharge was against the weight of the evidence. Further, for the same reasons set forth in NAR's Rule 50(b) motion that Plaintiffs failed to satisfy the requirements of direct purchaser, restraint of trade, conspiracy, antitrust injury, and damages, the jury's verdict was at minimum against the great weight of the evidence.

Accordingly, the Court should grant this motion for a new trial.

Dated: January 8, 2024

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, JEREMY KEEL, HOLLEE ELLIS, and FRANCES HARVEY on behalf of themselves and all others similarly situated, Plaintiffs, v. NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	)	Case No. 4:19-CV-00332-SRB Honorable Judge Bough

DEFENDANT THE NATIONAL ASSOCIATION OF REALTORS®' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendant the National Association of REALTORS® ("NAR") moves the Court for an order granting it judgment as a matter of law under Federal Rule of Civil Procedure 50(b). As explained in the accompanying Suggestions in Support of this Motion, because the jury lacked a legally sufficient basis to find for Plaintiffs, judgment as a matter of law should be granted in favor of NAR.

Specifically, the direct-purchaser requirement bars Plaintiffs' suit; the Model Rule is not an unreasonable restraint of trade; Plaintiffs presented no evidence that NAR conspired with anyone; and Plaintiffs failed to prove injury or damages resulting from the challenged rule.

Additionally, judgment as a matter of law is warranted for all the reasons set forth in the HomeServices Defendants' Renewed Motion for Judgment as a Matter of Law and Keller

Williams Realty Inc.'s Renewed Motion for Judgment as a Matter of Law, both of which NAR joins and incorporates.

Accordingly, the Court should enter judgment in favor of NAR.

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DEFENDANTS' MOTION TO DECERTIFY THE CLASS

Under Federal Rule of Civil Procedure 23(c)(1)(C), and for the reasons explained in the accompanying brief, HomeServices of America, Inc.; BHH Affiliates, LLC; HSF Affiliates, LLC; The National Association of REALTORS®; and Keller Williams Realty, Inc. (collectively, "Defendants") move to decertify the class. Trial revealed that individual issues pervade both the threshold question of antitrust injury and the ultimate question of damages. Because common issues do not predominate, the class must be decertified. The class should also be decertified for the reasons set forth in Defendants' Suggestions in Opposition to Plaintiffs' Motion for Class Certification, *see* ECF 553, which Defendants incorporate by reference.

Defendants have also moved for judgment as a matter of law under Fed. R. Civ. P. 50(b). Defendants move to decertify the class under Rule 23(c)(1)(C) in the alternative. Additionally,

Defendants have moved for a new trial under Fed. R. Civ. P. 59(a). Defendants incorporate by reference the discussion in the Rule 59(a) motion filed by HomeServices of America, Inc.; BHH Affiliates, LLC; HSF Affiliates, LLC (collectively, the "HomeServices Defendants") explaining how the trial testimony of Plaintiffs' economic expert (Dr. Schulman) does not show classwide injury.

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SUGGESTIONS IN SUPPORT OF DEFENDANT KELLER WILLIAMS REALTY, INC.'S MOTION FOR NEW TRIAL

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. LEGAL STANDARD 2

III. ARGUMENT 3

A. THE VERDICT WAS AGAINST THE GREAT WEIGHT OF THE EVIDENCE. 3

B. THE COURT'S EVIDENTIARY RULINGS IRREVOCABLY INFECTED THE JURY'S VERDICT. 4

1. Discussions of Commission Rates 5

2. Michelle Figgs's Notes 10

3. Common Officers and Directors 12

4. Clear Cooperation 14

5. Roger Alford 16

6. The Settlements 18

7. Missouri Law 20

IV. CONCLUSION 24

TABLE OF AUTHORITIES

Abraham v. BP Am. Prod. Co., 685 F.3d 1196 (10th Cir. 2012) 13, 15

Am. Eagle Ins. Co. v. Thompson, 85 F.3d 327 (8th Cir. 1996) 14

Bavlsik v. Gen. Motors, LLC, 870 F.3d 800 (8th Cir. 2017) 5

Butler v. French, 83 F.3d 942 (8th Cir. 1996) 6

Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n, 551 F.2d 1136 (8th Cir. 1977) 14

City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc., 838 F.2d 268 (8th Cir. 1998) 17

Copperweld v. Independence Tube Corp., 467 U.S. 752 (1984) 15

Greer v. Miller, 483 U.S. 756 (1987) 21

Gulbranson v. Duluth, Missabe & Iron Range Ry. Co., 921 F.2d 139 (8th Cir. 1990) 14

In re Se. Milk Antitrust Litig., No. 2:07-CV 208, 2011 WL 3300577 (E.D. Tenn. Aug. 1, 2011) 22, 23

Lacey Marketplace Assocs. II, LLC v. United Farmers of Alberta Co-op. Ltd., No. 13-cv-0383-JLR, 2015 WL 2345176 (W.D. Wash. May 14, 2015) 6

Littleton v. McNeely, 562 F.3d 880 (8th Cir. 2009) 7

Mawby v. United States, 999 F.2d 1252 (8th Cir. 1993) 19

RightCHOICE Managed Care, Inc. v. Hosp. Partners, Inc., No. 5:18-cv-06037-DGK, 2021 WL 4258747 (W.D. Mo. Sept. 17, 2021) 22

Ryan v. McDonough Power Equip., 734 F.2d 385 (8th Cir. 1984) 6

Spencer v. Young, 495 F.3d 945 (8th Cir. 2007) 9

Tenbarge v. Ames Taping Tool Sys., Inc., 190 F.3d 862 (8th Cir. 1999) 19

United States v. Bestfoods, 524 U.S. 51 (1998) 17

United States v. Durham, 868 F.2d 1010 (8th Cir. 1989) 25

United States v. J.L.K., Jr., 880 F.2d 993 (8th Cir. 1989) 25

Valadez v. Watkins Motor Lines, Inc., 758 F.3d 975 (8th Cir. 2014) 7, 13, 15

White v. Pence, 961 F.2d 776 (8th Cir. 1992) 5

I. INTRODUCTION AND SUMMARY

After twelve days of trial but fewer than three hours of deliberation, the jury returned a verdict for Plaintiffs that included findings that Keller Williams Realty, Inc. ("Keller Williams") conspired with the National Association of REALTORS® ("NAR") and the HomeServices Defendants[1] to follow and enforce the Cooperative Compensation Rule. The jury awarded almost $1.8 billion in damages, consisting of every single penny that home sellers had authorized their listing agents to pay to every buyer agent during the seven-year class period. ECF No. 1294. The only reasonable conclusion based on the trial record is that the jury rendered a verdict not based on evidence suggesting liability for Keller Williams or the other Defendants (because there was none), but due to Plaintiffs' efforts to inflame the passions of the jurors through the introduction of irrelevant and prejudicial evidence. In addition to those reasons set forth in the Motions for New Trial filed by National Association of REALTORS and the HomeServices Defendants, which Keller Williams joins and incorporates, the Court should order a new trial for two reasons.

First, the verdict was against the great weight of the evidence. As explained in Keller Williams' Rule 50(b) Motion for Judgment as a Matter of Law ("Keller Williams' Rule 50(b) Motion"), the jury found Keller Williams liable despite the complete lack of evidence that Keller Williams participated in a conspiracy. Plaintiffs put on no evidence that Keller Williams ever attended any meeting, participated in any communication, undertook any internal analysis or discussion, or engaged in any other activity relating in any way to the Cooperative Compensation Rule, let alone did so with the other Defendants. In fact, Plaintiffs introduced zero evidence that any listing agent offered compensation to buyer agents because of the Cooperative Compensation Rule or joined a board of REALTORS® because of Keller Williams. They jury's finding that

[1] HomeServices of America, Inc., BHH Affiliates, LLC, and HSF Affiliates, LLC.

NAR and the HomeServices Defendants also knowingly participated in a conspiracy to follow and enforce the Cooperative Compensation Rule was likewise unsupported by any evidence, as they also explain in their post-trial filings. Because the verdict was against the weight of the evidence and resulted in a miscarriage of justice, the Court should order a new trial.

Second, the Court's erroneous evidentiary rulings, which were wrong when issued and should now be reconsidered in light of the full trial record, irrevocably tainted the jury's verdict. Over Defendants' objections, the Court admitted references to national average commission rates that had no relevance to the alleged conspiracy, highly prejudicial notes of Michelle Figgs that contained inadmissible hearsay, irrelevant and misleading evidence regarding a common chief executive for three of HomeServices of America's subsidiaries, evidence regarding the Clear Cooperation Policy that served only to confuse the jury, and testimony from a purported expert that should have been excluded from trial at the outset. The Court also advised the jury that two parties—Anywhere Real Estate, Inc. ("Realogy") and RE/MAX LLC ("RE/MAX") had settled, which invited the jury to assume their culpability and, by extension, the culpability of the non-settling Defendants. On the flip side, the Court excluded important evidence that would have made clear that—contrary to Plaintiffs' position that no home seller would, in the absence of the alleged conspiracy, have authorized his or her listing agent to offer cooperative compensation to buyer agents—Missouri law expressly authorizes commission sharing between listing agents and buyer agents. Because these evidentiary rulings necessarily marred the jury's verdict, the Court should order a new trial.

II. LEGAL STANDARD

"A new trial is appropriate when the first trial, through a verdict against the weight of the evidence, an excessive damage award, or legal errors at trial, resulted in a miscarriage of justice." *Gray v. Bicknell*, 86 F.3d 1472, 1480 (8th Cir. 1996); *see Bavlsik v. Gen. Motors, LLC*, 870 F.3d

800, 809 (8th Cir. 2017) ("[The] court may, on motion, grant a new trial on all or some of the issues, provided there is a good reason to do so.").

III. ARGUMENT

A. The verdict was against the great weight of the evidence.

The Court should order a new trial because the jury's verdict was against the great weight of the evidence. "In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence—it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict.'" *White v. Pence*, 961 F.2d 776, 780 (8th Cir. 1992) (quoting *Ryan v. McDonough Power Equip*., 734 F.2d 385, 387 (8th Cir. 1984)). A new trial is proper where "the verdict was so contrary to the evidence as to amount to a miscarriage of justice." *Butler v. French*, 83 F.3d 942, 944 (8th Cir. 1996).

As explained in Keller Williams' Rule 50(b) Motion, Plaintiffs submitted no evidence whatsoever that could support an inference that Keller Williams entered into any agreement with anybody regarding the Cooperative Compensation Rule. In fact, the only evidence was to the contrary. For example, the evidence established that Keller Williams has never been meaningfully involved in NAR policymaking activities. *See, e.g*., ECF No. 1288-1, Tr. 134:18–134:21 & 134:23–135:04 (C. Sylvester); *id.* at 127:08–128:02; *id*. at 132:19–133:18; Oct. 27, 2023 Tr. 2020:12–24 (G. Keller). The evidence likewise showed that Keller Williams' requirement that independent contractor agents affiliated with its franchise brokerages join their local MLSs *preceded* NAR's adoption of the Cooperative Compensation Rule. D-3534 at PDF p.28; Oct. 27, 2023 Tr. 2025:20–2026:4. Nor did Plaintiffs introduce any evidence that any listing agent offered compensation to buyer agents because of the Cooperative Compensation Rule or that any listing agent joined a board of REALTORS® or MLS because of Keller Williams' requirement that they do so. Yet again, the evidence was to the contrary. Oct. 30, 2023 Tr. 2284:3–12; *id.* 2284:13–22;

Oct. 27, 2023 Tr. 2166:10–17. For these reasons and those offered in Defendants' Rule 50(b) Motions, the verdict was against the great weight of the evidence and amounts to a miscarriage of justice. If the Court declines to grant judgment as a matter of law as to any Defendant, that Defendant is entitled to a new trial. *See Lacey Marketplace Assocs. II, LLC v. United Farmers of Alberta Co-op. Ltd.*, No. 13-cv-0383-JLR, 2015 WL 2345176, at *3 (W.D. Wash. May 14, 2015) ("Courts apply a lower standard of proof to motions for new trial than they do to motions for judgment as a matter of law. . . . A verdict may be support by substantial evidence, yet still be against the clear weight of evidence.").

B. The Court's evidentiary rulings irrevocably infected the jury's verdict.

This Court should order a new trial because its erroneous evidentiary rulings had "a substantial influence on the jury's verdict." *Littleton v. McNeely*, 562 F.3d 880, 888 (8th Cir. 2009); *see Valadez v. Watkins Motor Lines, Inc.*, 758 F.3d 975, 982 (8th Cir. 2014) (reversing and remanding for a new trial where there was an erroneous evidentiary ruling that had an improper and substantial influence on the jury's verdict). As explained below, the Court erred in admitting certain evidence concerning specific commissions rates, the notes of Michelle Figgs, evidence regarding a common chief executive for certain entities, evidence regarding the Clear Cooperation Rule, and Roger Alford's testimony and in notifying the jury that two Defendants had settled. The Court further erred in refusing to admit evidence that Missouri law authorizes commission sharing between listing agents and buyer agents. The jury was exposed repeatedly and throughout trial to evidence with no relation to the Cooperative Compensation Rule or any agreement among Defendants, but cast by Plaintiffs as supportive of their alleged conspiracy to follow and enforce the Rule. And it was denied an opportunity to receive evidence concerning Missouri law that fundamentally undercuts the central premise of their case—that commission sharing between listing and buyer agents would occur *only* if real estate companies conspired to require it. Because

the erroneous evidentiary rulings had a substantial influence on the jury's verdict, a new trial is warranted.

1. Discussions of Commission Rates

One category of evidence that was improperly admitted at trial and that had a substantial impact on the jury's verdict was evidence of Defendants' mere references to commission rates, in contexts unrelated to the Cooperative Compensation Rule. Defendants moved before trial for an order *in limine* to exclude certain of that evidence. *See* ECF 1070.[2] As Defendants then explained, the mere fact that Plaintiffs alleged a conspiracy to raise, inflate, or stabilize commission rates did not somehow make all references to commission rates relevant evidence. Defendants also warned that, if such evidence were not excluded, the risk of jury confusion would be particularly acute, as Plaintiffs would have every incentive to use the uncontroversial and unproblematic reality that real-estate professionals talk about commissions to suggest that these Defendants were all in some sort of unlawful conspiracy to fix them. Yet the Court denied Defendants' motion, and—as Defendants predicted—Plaintiffs proceeded not only to litter the trial with evidence showing that Keller Williams mentioned commission rates in contexts that had nothing to do with the Cooperative Compensation Rule, but also to use those references in place of actual evidence that Keller Williams was part of the conspiracy to follow and enforce the Cooperative Compensation Rule that Plaintiffs alleged in this case. Had the Court properly precluded Plaintiffs from using this irrelevant evidence, the jury likely would not have—indeed, could not have—found a conspiracy between Defendants and Keller Williams' knowing participation in that conspiracy.

[2] *See also* ECF No. 1197 at 2 ("Without evidence connecting Keller Williams to the conduct they allege in this case, Plaintiffs instead seek to focus on what they claim are efforts by Keller Williams . . . to convince agents to charge commission rates of six percent. . . . Not only does this evidence have nothing to do with the NAR rules at issue, it also reflects entirely unilateral conduct consistent with Keller Williams' independent business interests.").

Defendants moved before trial to exclude two specific categories of such evidence: (1) models for agent businesses published or presented by Keller Williams or its employees that contained references to average commission rates, such as in Mr. Keller's book, *The Millionaire Real Estate Agent*;[3] and (2) reports of historical average commission rates earned by thousands of Keller Williams agents across the United States that were reported during Keller Williams' "Family Reunion" events.[4] ECF No. 1070. The Court denied the motion *in limine*, leaving no doubt that it considered the evidence to be admissible. *See* ECF No. 1132; Pretrial Conference Tr. 86:22–25, 87:1–7; *Spencer v. Young*, 495 F.3d 945, 949 (8th Cir. 2007) (noting that definitive rulings on a fully briefed and argued motion *in limine* that affects the entire course of trial preserves issues for review). This evidence became central to Plaintiffs' case and featured prominently in the examination of numerous witnesses and in both opening and closing.[5] For instance, on four

[3] These exhibits included D-3578 (admitted in place of P-0491, Plaintiffs' incomplete copy of the same document), P-0479, P-1631, P-1632, P-1633, P-1634, P-1635, P-1636, P-1637, P-1640, P-1646, and P-1650, all admitted over Keller Williams' objections. In addition to the objection to the relevance of these documents, Keller Williams also objected that Plaintiffs failed to lay the foundation that exhibits P-0479, P-1631, P-1632, P-1633, P-1634, P-1635, P-1636, P-1637, P-1640, P-1646, and P-1650 were actually presented at Family Reunion, as Plaintiffs suggested to the jury they were. *See* ECF 1197 at 3–4; Oct. 18, 2023 Tr. 213:13–214:9. The Court agreed that Plaintiffs had not laid the proper foundation for the documents, *id.* 214:22–25, but still admitted them into evidence over Keller Williams' objection. Oct. 19, 2023 Tr. 370:23–371:11. This ruling was also erroneous. As Plaintiffs' counsel himself observed, by allowing the jury to see the exhibits without the proper evidentiary foundation being laid, "[t]he jury will remember" the improper context admission of the evidence allowed Plaintiffs to suggest to the jury. Oct. 27, 2023 Tr. 2195:4–2197:10.

[4] This evidence includes P-2869B and P-2869C.

[5] *See, e.g.*, Oct. 17, 2023 Tr. 35:8–20 (Plaintiffs' Opening) (discussing slides presented at Family Reunion); *id*. 37:11–39:10 (discussing slides presented at Family Reunion and training materials); *id.* at 41:3–15 (discussing Keller's books); Oct. 19, 2023 Tr. 531:6–533:21 (C. Schulman) (discussing slides presented at Family Reunion); *id.* 538:9–541:3 (same); *id.* 572:6–9 (same); Oct. 20, 2023 Tr. 729:21–730:5 (C. Schulman) (addressing slides presented at Family Reunion); P-2886 (ECF No. 1338-7), Tr. 28:1–30:20 (D. King) (testifying about whether it would violate any antitrust policies or laws for Keller to discuss commission rates at Family Reunion); P-2888 (ECF No. 1338-8), Tr. 17:12–25 (M. Maples) (testifying about whether, under Keller Williams' antitrust policy, there should discussion of commissions at Family Reunion); *id.* 23:23–25:14 (testifying about slide presentations that were allegedly used at Keller Williams Family Reunion events); *id.* 27:5–40:11, 41:6–43:4, 44:19–47:2, 49:17–50:7 (same); *id.* 68:19–69:6 (same); *id.* 88:20–91:19 (testifying about whether the slides and presentations that discuss commissions would violate Keller Williams' antitrust policy); *id.* 43:5–44:18 (testifying about *The Millionaire Real Estate*

occasions Plaintiffs referred to a presentation entitled "Get [Y]our Full Commission" with a picture of a line in the sand, evidently suggesting that agents should resist efforts by clients to reduce their commissions. P-1634; Oct. 17, 2023 Tr. 38:1–13 (Plaintiffs' Opening); P-2888 (ECF No. 1338-8), Tr. 38:22–39:16 (M. Maples); Oct. 27, 2023 Tr. 2197:12–2198:11 (M. King); Oct 30, 2023 Tr. 2356:1–4 (Plaintiffs' Closing). Nothing about the presentation refers in any way to the Cooperative Compensation Rule, but it was admitted into evidence over Keller Williams' objections, which then allowed Plaintiffs to suggest to the jury that it related in some unspecified way to the alleged conspiracy.

Agent and the basic formula for the economic model that incorporates an average a 3 percent commission); *id.* 47:3–49:16 (same); *id.* 53:16–58:6 (testifying about a MAPS Coaching programs); *id.* 64:23–66:19 (testifying about training documents that discuss commission rates); P-2894, Tr. 140:14–25 (D. Strandmo) (testifying about *The Millionaire Real Estate Agent*; Oct. 24, 2023 Tr. 1294:1–14 (R. Gansho) (responding to question about whether it would be appropriate under NAR's antitrust policy for Gary Keller to discuss commission rates at Family Reunion); Oct. 27, 2023 Tr. 2036:6–2039:9, 2041:2–22 (G. Keller) (cross-examination related to Family Reunion commission slides and commission offer rates' clustering); *id.* 2071:3–2073:9 (cross-examination regarding Shift and arguing that the book's reference to "3 percent" commissions constitutes an instruction regarding the amount to pay buyers' agents); *id.* 2077:2–2084:18, 2087:20–23, 2103:10–2105:2 (cross-examination arguing that Family Reunion speech violates antitrust law because it "discuss[es] commission rates" with competitors present); *id.* 2089:20–23, ("Q: A person cannot use a model or a concept as a way to hide the fact that they're trying to engage in an illegal conspiracy in violation of federal antitrust law"); *id.* 2090:6–17 (cross-examination about *The Millionaire Real Estate Agent*); *id.* 2093:20–2096:7, 2098:25–2099:9 (cross-examination related to Keller Williams' awards to agents for "outstanding sales and listing achievements" referencing "sales volume based on a 3-percent commission"); *id.* 2096:18–2098:24, 2099:11–2103:9 (cross-examination related to *The Millionaire Real Estate Agent* model and average commission rates, arguing); *id.* 2105:10–2109:10 (cross-examination about discussion of commission rates at Family Reunion); *id.* 2110:3–2112:13 (cross-examination regarding Keller "stand[ing] on a stage [at Family Reunion] in front of a group of competitors . . . [and] put[ting] up this commission chart . . . based on your internal Keller Williams' research of the actual commissions charged by your agents across the country"); Oct. 27, 2023 Tr. 2194:24–2201:3 (M. King) (cross-examination related to discussions of commission negotiations and commission models at Family Reunion); Oct. 30, 2023 Tr. 2343:11–18 (Plaintiffs' Closing) (conflating the NAR rule, commission rates, training materials, and steering, stating to the jury: "The most problematic of the rule is the requirement that sellers predetermine before even knowing the buyer the amount of the commission that's paid. So when you're standing over here as the seller, before you even know if the buyer's agent did any work, you put the 6 percent in. Let's just talk – let's just call it what it is. They train these agents to scare sellers into doing it, or they'll have steering against them."); *id.* 2354:25–2358:17 ("[T]hey know if they're [discussing national historical average commission rates] in front of competitors, it's a violation of the antitrust policies and laws. And that's exactly what they're doing."); *id.* 2353:8–14 ("Do you find that there was a conspiracy . . . ? Absolutely. The [answer] to that is yes. And how do they do it? Through the training.").

That evidence, and all testimony regarding that evidence, should have been excluded. Plaintiffs alleged that the Defendants conspired to follow and enforce the Cooperative Compensation Rule; the alleged conspiracy was not a conspiracy to set commission rates or cooperative compensation offers—and it was certainly not a conspiracy to set all seller- or buyer-side commission rates nationwide. It is thus entirely irrelevant that individuals associated with Keller Williams might have published or presented economic models that include three percent average commissions as examples or reported average national commission rates earned by agents affiliated with Keller Williams' franchisee brokerages. Yet Plaintiffs' counsel made repeated reference to *The Millionaire Real Estate Agent* and Family Reunion throughout the trial including during both during opening and closing arguments. *See supra* n.5. None of that evidence could support an inference that Keller Williams participated in the alleged conspiracy to follow and enforce the Cooperative Compensation Rule. All of that evidence should have been excluded under Rule 402. *See* Fed. R. Evid. 402 (irrelevant evidence is inadmissible).

In all events, even if average national commission rates pass the relevance test, the evidence still should have been excluded under Rule 403, because any alleged minimal probative value was substantially outweighed by a danger of unfair prejudice, confusing the issues, and misleading the jury. *See* Fed. R. Evid. 403. Again, merely because Plaintiffs alleged that the conspiracy they challenged—to follow and enforce the Cooperative Compensation Rule—had the effect of raising, inflating, or stabilizing commission rates did not make all references to commission rates in Keller Williams' documents relevant to their alleged conspiracy. But it *did* make all references to them unduly prejudicial, as they served no purpose other than to replace actual evidence of coordination.

By admitting this evidence, the Court allowed Plaintiffs to improperly suggest to the jury that evidence of unrelated (and lawful) activity actually constituted evidence of Keller Williams'

knowing participation in a conspiracy to follow and enforce the Cooperative Compensation Rule. But Plaintiffs never actually established any nexus between this irrelevant evidence and the conspiracy they actually challenged in this case. Plaintiffs, for example, implied in questioning of Keller Williams' founder, Gary Keller, that the issues to be presented to the jury would determine the permissibility of his reporting on national historical averages of commissions earned by over 150,000 Keller Williams agents, when Plaintiffs' established no connection whatsoever between Mr. Keller's Vision Speeches and the Cooperative Compensation Rule (because there was no such connection). *See* Oct. 27, 2023 Tr. 2112:22–2113:6 (G. Keller) (Plaintiffs' counsel asking Mr. Keller if he would "stop standing on the stage in front of your competitors" and discussing national historical average commission rates if the jury found that "the purpose or effect [of NAR's rule] is to raise, inflate, or stabilize commissions"). Plaintiffs also suggested to the jury in examining Mr. Keller that his publication of *The Millionaire Real Estate Agent* in 2004 violated the antitrust laws because the book included a reference to average commission rates. *Id.* 2101:9–13 ("Q: You can't write a book that's designed to present a model that's based on actual commission studies that you give to competitors that they can use to set their commission rates? I mean, you know you can't do that under the antitrust laws, don't you?"); *id.* 2101:22–2102:3 ("Q: You cannot write a book—you can't be in a situation where you study the actual commissions of these agents, build a model off of it, put the number in a book that you then put out there for your competitors to see so that they can follow along and do the same commissions so you can participate in stabilizing and inflating or raising commission rates? You're not allowed to do that, are you?"). With no effort to connect Mr. Keller's book to a conspiracy to follow and enforce the Cooperative Compensation Rule, Plaintiffs' attempt to use Mr. Keller's book to support their allegations was incredibly (and unduly) prejudicial. Had this evidence been properly excluded before trial as

Defendants requested, Plaintiffs would not have been able to misuse it to support the existence of a conspiracy between the Defendants to follow and enforce the Cooperative Compensation Rule.

But the prejudicial impact of the admission of this evidence did not end there. When it denied Defendants' motion *in limine* to exclude this irrelevant evidence, the Court also allowed Plaintiffs to use it to convince the jury (without any actual evidence) that Keller Williams was involved in a conspiracy wholly unrelated to the Cooperative Compensation Rule to raise, inflate, or stabilize commission rates in Missouri. Plaintiffs' efforts to do so were pervasive. The Court can and should enter a new trial on that basis alone. *See Valadez*, 758 F.3d at 982 (remanding for new trial where a party emphasized improperly admitted evidence during its closing); *Abraham v. BP Am. Prod. Co.*, 685 F.3d 1196, 1203 (10th Cir. 2012) (noting that "considerable use of [inadmissible] evidence . . . during the taking of evidence and during argument may be sufficient to demonstrate substantial prejudice," and that "strong emphasis placed on irrelevant evidence may be sufficient to allow us to infer that a jury likely premised its verdict on such evidence" (citations omitted)).

2. Michelle Figgs's Notes

Defendants also moved before trial for an order *in limine* to prevent Plaintiffs from introducing notes of Michelle Figgs (the "Figgs Notes") that contained, in embedded hearsay to which no hearsay exception applied, a highly prejudicial statement that could be misinterpreted by the jury as supportive of Plaintiffs' alleged conspiracy, even though the statement did not refer or relate to the Cooperative Compensation Rule. ECF No. 1069; *see also* ECF No. 1197 at 4–5. Michelle Figgs is a former Keller Williams industry analyst, who wrote in her notes that "Gary believes strongly in collusion theory for why commissions are stable. 'co-opetition.'" P-0654. The Court denied the motion *in limine*. ECF No. 1132; *see also Spencer*, 495 F.3d at 949 (stating that a definitive ruling on a motion *in limine* obviates the need for further objection to preserve

error). This was error, and the resulting inappropriate use of this evidence by Plaintiffs further confirms that the Court should order a new trial.

The Figgs Notes, and all testimony regarding them, should have been excluded because of multiple levels of hearsay. First, the notes themselves are hearsay because they are an out-of-court statement offered to prove the matter asserted therein. Second, the "Gary believes" statement is hearsay within hearsay because Ms. Figgs was taking notes about what an unspecified declarant said at a meeting. Unless each level of hearsay is subject to a so-called hearsay exception, the Figgs Notes are inadmissible. Fed. R. Evid. 802.

Plaintiffs did not (and could not) meet their burden of establishing the applicability of a hearsay exception for the second level of hearsay, the "Gary believes" statement. *See Am. Eagle Ins. Co. v. Thompson*, 85 F.3d 327, 333 (8th Cir. 1996). Ms. Figgs, the note-taker, could not remember the identity of the person who made the statement, leaving Plaintiffs with no basis to support its admissibility. Indeed, she admitted that her "note would indicate that likely someone made that statement who I was listening to at that time." ECF No. 1069-1, Tr. 32:22–33:4 (M. Figgs).

The Eighth Circuit addressed nearly identical circumstances in *Gulbranson v. Duluth, Missabe & Iron Range Railway Co.*, 921 F.2d 139, 141–42 (8th Cir. 1990), and reversed the district court's judgment based on the admission of minutes that did not account for embedded hearsay statements by an unidentified declarant. The Eighth Circuit reasoned:

> [T]he minutes ***fail to identify the speaker or speakers of the particular statements at issue***. Thus, [the plaintiff] ***failed to establish a proper foundation for admitting the minutes as an admission of a party***, and the district court erred in admitting the minutes as such.

Id.; *see Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n*, 551 F.2d 1136, 1138 (8th Cir. 1977). ("That part of Murphy's statement which contains a reiteration of what someone told him is not

admissible as an admission by party-opponent since the author of the statement is unknown." (emphasis added)). Because Plaintiffs failed to identify the speaker of the "Gary believes" statement, the Figgs Notes were inadmissible.

Like *The Millionaire Real Estate Agent* and Family Reunion, the Figgs Notes were repeatedly paraded in front of the jury as evidence of Keller Williams' participation in the alleged conspiracy and were featured in Plaintiffs' opening and closing. *E.g.*, Oct. 17, 2023 Tr. 47:24–48:8 (Plaintiffs' Opening) (discussing the Figgs Notes); P-2902 (ECF No. 1338-13), Tr. 30:16–34:11 (M. Figgs) (discussing the Figgs Notes); Oct. 19, 2023 Tr. 494:2–12 (C. Schulman) (discussing the Figgs Notes); *id.* 496:11–18 (same); *id.* 497:2–11 (same); Oct. 30, 2023 Tr. 2365:1-20 (Plaintiffs' Closing) (discussing the Figgs Notes). Because the Figgs Notes were emphasized throughout trial, their admission had a substantial impact on the jury's verdict, further underscoring that a new trial is appropriate. *See Valadez*, 758 F.3d at 982; *Abraham*, 685 F.3d at 1203.

3. Common Officers and Directors

Plaintiffs also were permitted, over Defendants' repeated objections, to suggest to the jury that intra-corporate relationships among subsidiaries of HomeServices of America supported their alleged conspiracy between Defendants to follow and enforce the Cooperative Compensation Rule, when those relationships could not, as a matter of law, support the existence of any conspiracy of any nature among those subsidiaries—much less any conspiracy between Defendants. Before trial, the HomeServices Defendants moved *in limine* to exclude evidence and testimony criticizing three of HomeServices of America's wholly owned subsidiaries for sharing a common chief executive. ECF No. 1223. The HomeServices Defendants argued that such evidence was irrelevant to any actionable conspiracy claim because co-subsidiaries of the same parent are incapable of conspiring and would serve only to confuse and mislead the jury. *See id.*

at 3 (citing *Copperweld v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984) and related Eighth Circuit law extending *Copperweld* to commonly owned subsidiaries.) The Court at first agreed, granting the motion in part and prohibiting Plaintiffs from "introducing evidence regarding intra-corporate conspiracy, *or that the HomeServices Defendants are liable only because their sister subsidiaries hav[e] common officers and directors*." ECF No. 1236 (emphasis added).

When it became clear that Plaintiffs intended to flout the Court's order and offer the same evidence of common officers that the Court had excluded, the HomeServices Defendants moved to enforce the order. *See* ECF No. 1237. In an abrupt reversal and with little explanation, the Court denied the motion to enforce, effectively overturning its prior order, and allowed Plaintiffs to introduce this evidence throughout the trial. *See* ECF No. 1243.

As a result, the jury repeatedly heard testimony and argument implying that Mike Frazier's status as CEO of ReeceNichols, BHHS Alliance Realty, and BHHS Kansas City was evidence of an antitrust conspiracy between those subsidiaries. Plaintiffs raised the subsidiaries' common leadership in their opening statement, noting Mr. Frazier's dual roles at ReeceNichols and Alliance. Oct. 17, 2023 Tr. 72:24–73:3 (Plaintiffs' Opening). During the deposition of Rosalie Warner shown to the jury, Ms. Warner was asked "[h]ow is it fair to have a man who is CEO of ReeceNichols that competes in Kansas City with Berkshire Hathaway Alliance also be the CEO of Berkshire Hathaway Alliance? How is that fair?" Oct. 23, 2023 Tr. 892:6–11; P-2897 (ECF No. 1338-11) Tr. 73:22–74:1 (R. Warner).[6]

[6] There is more. Counsel for Plaintiffs renewed this line of questioning when he cross-examined Ms. Warner, asking whether Mr. Frazier "one day wear[s] the hat as CEO over here, and one day wear[s] a hat as CEO over there." Oct. 25, 2023 Tr. 1570:12–5. Kevin Goffstein was similarly asked if he "understood that in addition to being chief executive officer of Berkshire Hathaway HomeServices Alliance Real Estate, Mr. Frazier is also the chief executive officer of the ReeceNichols company." Oct. 23, 2023 Tr. 897:7–10; ECF No. 1338-14 Tr. 13:23–14:3.

Taken together, these statements left the jury with the misimpression that the subsidiaries' common leadership could be construed as evidence of an intra-corporate conspiracy. As the Court recognized when it granted the HomeServices Defendants' motion *in limine*, that is not the law. *See* ECF No. 1236 ("The [C]ourt is mindful that [a] conspiracy requires a plurality of actors, and . . . no such plurality exists between a corporation and its wholly owned subsidiary corporation" (citing *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc.*, 838 F.2d 268, 274 (8th Cir. 1998))).

Given an opportunity to issue a curative instruction, the Court declined. The HomeServices Defendants objected and proposed amendments to Jury Instructions Nos. 21 and 22 clarifying both that a corporation's wholly owned subsidiaries are incapable of conspiring with each other and that it is not illegal for corporate officers to "change hats" and represent two corporations separately. *See* ECF No. 1281, at 9, 11 (citing *United States v. Bestfoods*, 524 U.S. 51, 69 (1998)). The Court overruled the objections and rejected the proposed language, Oct. 27, 2023 Tr. 2239:13–19, compounding its prior error of allowing the jury to hear this irrelevant and prejudicial evidence in the first place. The Court was right to grant the HomeServices Defendants' motion *in limine* to exclude testimony related to the subsidiaries' common officers and, respectfully, should have adhered to that ruling or, at the least, given a curative instruction. And that error impacted all Defendants to the extent the jury relied on that evidence to find a conspiracy between Defendants.

4. Clear Cooperation

Defendants also moved for an order excluding evidence relating to NAR's Clear Cooperation Policy as irrelevant. ECF No. 1080. The Court denied the motion *in limine*. ECF No. 1132. This too was error.

The Court should have excluded evidence about the Clear Cooperation Policy, under which:

> Within one (1) business day of marketing a property to the public, the listing broker must submit the listing to the MLS for cooperation with other MLS participants. Public marketing includes, but is not limited to, flyers displayed in windows, yard signs, digital marketing on public facing websites, brokerage website displays (including IDX and VOW), digital communications marketing (email blasts), multi-brokerage listing sharing networks, and applications available to the general public.

P-4587 at PDF p.48 (NAR Policy Statement 8.0, Clear Cooperation). The Clear Cooperation Policy was not part of the alleged conspiracy, was not adopted by NAR until 2019, and did not go into effect until May 2020, which is well after the alleged conspiracy occurred. The Clear Cooperation Policy does not mention, reference, or implicate the Cooperative Compensation Rule. The Clear Cooperation Policy is not mentioned in Plaintiffs' Third Amended Complaint. Simply put, the Clear Cooperation Policy had no connection to the issues in this case and any evidence surrounding that policy stood to confuse the jury. Fed. R. Evid. 401, 402, 403. Yet again, this irrelevant issue featured prominently in Plaintiffs' case.[7]

Not only were Plaintiffs permitted to admit evidence regarding an irrelevant policy, but also they examined witnesses about inadmissible hearsay about that policy. Specifically, the jury

[7] *See, e.g.*, Oct. 17, 2023 Tr. 56:22–59:08 (Plaintiffs' Opening) (discussing the Clear Cooperation Policy); id. at 65:2–6 (same); P-2881 (ECF No. 1338-3), Tr. 31:21–32:4, 129:16–147:3 (R. Gansho) (testifying about the Clear Cooperation Policy and feedback from NAR members about the Clear Cooperation Policy); *id.* 167:9–167:25 (same); *id.* 183:21–184:7 (testifying about the Clear Cooperation Policy); P-2897, Tr. 76:24–81:7 (R. Warner) (testifying about the Clear Cooperation Policy); *id.* 112:17–114:23 (same); P-2900 (ECF No. 1338-12), Tr. 17:11–17:19 (G. Blefari) (testifying about the Clear Cooperation Policy); *id.* 18:8–19:6 (same); *id.* 28:10–29:20, 29:23–24 (same); *id.* 30:3–18 (same); Oct. 20, 2023 Tr. 749:4–751:10 (R. Alford) (testifying about the Clear Cooperation Policy); *id.* 752:19–755:14 (same); *id.* 758:22–761:1 (same); *id.* 763:10–25 (same); Oct. 25, 2023 Tr. 1491:10–1501:21 (G. Blefari) (testifying about the Clear Cooperation Policy); Oct. 25, 2023 Tr. 1681:16–1682:1 (K. Wilson) (testifying about the Clear Cooperation Policy); Oct. 27, 2023 Tr. 2062:4–12 (G. Keller) (testifying about the Clear Cooperation Policy); Oct. 30, 2023 Tr. 2342:23–2343:6 (Plaintiffs' Closing) (arguing that NAR members "wrote to NAR saying, Don't do what you're doing. It violates the antitrust laws. Please don't make – pass this clear cooperation policy. Let us be who we are. When Mr. Goldberg and Mr. Gansho took the stand, remarkably silent on that, weren't they? They knew that we – I had shown you that testimony."); *id.* 2353:15–2354:16 (argument regarding Alford testimony on Clear Cooperation).

heard about the following anonymous comments regarding that policy over the objection of Defendants:

- "Sounds like this will only strengthen the case of the lawsuit filed against all the associations and multiple listing services and big brokers."
- "[S]eems that this violates the Sherman Antitrust Act, we have a duty to the seller, not to the MLS."
- "While I agree with this in theory, doesn't such a theory constitute a monopoly?"

P-2881 (ECF No. 1338-3), Tr. 133:21–135:3 (R. Gansho); *id.* 138:21–139:4; *id.* 146:8–146:16. These comments were improper opinion testimony under Fed. R. Evid. 701 regarding the potential legal impact of the Clear Cooperation Policy. Such unsworn comments made outside of the Court were also hearsay under Fed. R. Evid. 801 and unfairly prejudicial under Fed. R. Evid. 403. Because this inadmissible evidence had a substantial influence on the jury's verdict, the Court should order a new trial.

5. Roger Alford

Over Defendants' objections, the Court admitted the testimony of Roger Alford, a law professor. ECF No. 1021. Because the Court erred in overruling those objections and Alford's testimony had a substantial influence on the jury's verdict, the Court should order a new trial.

First, Alford should not have been permitted to testify about the Clear Cooperation Policy. As noted above, the evidence Plaintiffs adduced about the Clear Cooperation Policy was irrelevant to the issues in the case and unduly prejudicial. *See supra*. But even putting that aside, Plaintiffs did not disclose Alford as an expert to testify about the Clear Cooperation Policy. *See* Oct. 20, 2023 Tr. 615:23–616:8, 751:11–752:16. Under Rule 26(a)(2)(B), an expert report must contain "a complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B). And as the Eighth Circuit has noted, one of the purposes of Rule 26 is "*to eliminate surprise*" so as to permit a party "to develop [its] cross-examination . . . or to

present additional expert witnesses to counter [the expert]'s newly arrived at conclusions." *Tenbarge v. Ames Taping Tool Sys., Inc*., 190 F.3d 862, 865 (8th Cir. 1999) (emphasis added) (quoting *Mawby v. United States*, 999 F.2d 1252, 1254 (8th Cir. 1993)). In this regard, "[i]f a party fails to supplement expert testimony, the district court may order appropriate sanctions as provided for in Rule 37(c). Sanctions may include exclusion of the testimony, a continuance to allow depositions to be taken, or the grant of a new trial." *Id.*

The Clear Cooperation Policy was mentioned in only two sentences and one footnote of Alford's 128-paragraph report. *See* ECF No. 920-1 ¶ 108. Those two sentences provide, in full: "However, NAR recently added a rule for MLS participants, which requires agents to post a listing to the MLS within one (1) business day of public marketing. In this way, NAR has foreclosed one (very limited) potential route of defection by agents from the ACR." *Id.* The footnote goes on to cite the text of the Clear Cooperation Policy. *Id.* at 31 n.123. That is it.

His report's cursory reference to the Clear Cooperation Policy was thus limited to the fact that it exists and allegedly prevents "defection." Nevertheless, Alford was permitted to testify broadly about the Clear Cooperation Policy, including:

- "[W]hether or not the corporate real estate defendants and followed and enforced th[e] [C]lear [C]ooperation [P]olicy." Oct. 20, 2023 Tr. 751:2–6.
- The "role" of the corporate defendants with respect to the Clear Cooperation Policy. *E.g.*, *id.* 751:7–10; 753:3–755:2; 763:10–14.
- That the Clear Cooperation Policy "is not designed to promote the interest of home sellers." *Id.* 755:12–14.
- "[W]hether or not this clear cooperation is being used in any of the – what would you consider to be issues dealing with collusion or conspiracies or things of that sort?" *Id.* 758:22–759:3.

Each of these topics far exceeded the scope of Alford's expert report. Indeed, each of the "opinions" contained in the "Summary of Opinions" section of his report addresses only the

"Adversary Commission Rules" (also known as the Cooperative Compensation Rule). None of those "opinions" relates to the Clear Cooperation Policy, and Defendants had no notice that Alford would testify about the above topics. And this evidence had a substantial influence on the jury as it was stressed throughout closing. *See* Oct. 30, 2023 Tr. 2354:4–16; 2365:9–13; 2505:6–11 (Plaintiffs' Closing).

Second, Alford tainted the jury with information that the Court had excluded under a motion *in limine*. Before trial, the Court granted Defendants' motion *in limine* to exclude references to prior cases against NAR involving price-fixing allegations. *See* ECF No. 1132. Nonetheless, in violation of that order, Alford gratuitously testified that NAR had mandatory rates in the past, which violated the limine order. Oct. 20, 2023 Tr. 775:8–18. Although the Court granted a subsequent request to strike that testimony, the damage had already been done because the jury was left with the impression that NAR had fixed prices and was now trying to hide that fact from the jury. Therefore, there is an overwhelming probability that, in a case in which Plaintiffs alleged that Defendants engaged in price fixing, the jury would be unable to disregard testimony concerning past price fixing and a strong likelihood that the effect of the evidence would be devastating to Defendants. *See Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987) (noting that there is an exception to the general rule that a jury is presumed to follow a court's instruction to disregard where there is an "overwhelming probability that the jury will be unable to follow the court's instructions and a strong likelihood that the effect of the evidence would be devastating to the defendant" (citations omitted)).

6. The Settlements

Prior to trial, Defendants objected to any reference of settlements between Plaintiffs and Realogy and RE/MAX (the "Settlements"). *See* ECF No. 1186, 1211. Nonetheless, the Court told the jury that "[w]hile both [RE/MAX] and [Realogy] previously took part in all aspects of this

case, both corporations settled with the Class of Plaintiffs before trial." ECF No. 1292, Instruction Nos. 7 and 28.

The fact of settlement should not have been admitted and had a substantial effect on the jury's verdict. This Court's previous opinion in *RightCHOICE Managed Care, Inc. v. Hosp. Partners, Inc.* is instructive. No. 5:18-cv-06037-DGK, 2021 WL 4258747, at *2 (W.D. Mo. Sept. 17, 2021). There, the court excluded evidence and arguments regarding settlements between former defendants and alleged co-conspirators, notwithstanding the fact that the plaintiffs maintained such information was relevant "to explain why those defendants are not at trial." *Id*. This Court reasoned, "the former co-defendants' and co-conspirators' settlements with Plaintiffs may impute liability to the [remaining] defendants since it all revolves around the same general factual circumstances." *Id*. The court noted that, because defendants had not participated in any aspects of trial, there was no need to explain their absence to the jury. *Id*. Finally, the court cited significant risk under Rule 403 in informing the jury about the settlements:

> This case involves allegations of a conspiracy between the [remaining d]efendants and the Defendants who have settled. Informing the jury of the other Defendants' settlements risks the jury mistakenly inferring that settlements are a concession of liability. This risk far outweighs the marginal value of informing the jury of their absence to avoid potential confusion here.

Id. (citations omitted); *see also In re Se. Milk Antitrust Litig.*, No. 2:07-CV 208, 2011 WL 3300577, at *1 (E.D. Tenn. Aug. 1, 2011) (refusing to admit the fact that certain defendants had settled because "even if the evidence were admissible for some proper purpose, which it is not, admission of the evidence would raise Rule 403 problems and would be unfairly prejudicial to the remaining defendants").

So too here. The Settlements had no relevance. There was no need to explain the absence of RE/MAX and Realogy to the jury because the Settlements occurred before trial had begun. And to address any concerns regarding joint and several liability, the Court could have simply instructed

the jury that "there is no requirement in a conspiracy case that all alleged coconspirators be tried in the same proceeding in one trial [and] they are not to even consider the fact that the claims of plaintiffs against other coconspirators are not being tried at the same time and should not even discuss it in their deliberation." *In re Se. Milk Antitrust Litig.*, 2011 WL 3300577, at *2. Finally, even assuming some marginal relevance—and there was none—the Settlements allowed the jury to presume RE/MAX's and Realogy's liability. Because the non-settling Defendants were alleged to have conspired with those entities, the jury would therefore also impute liability to the non-settling Defendants as well. This was extremely prejudicial and warrants a new trial.

7. Missouri Law

During trial, the Court repeatedly sustained Plaintiffs' objection to evidence regarding Missouri law. Oct. 16, 2023 Tr. 16:11–19:16; *id.* 21:2–12; Oct. 23, 2023 Tr. 989:1–22; Oct. 25, 2023 Tr. 1675:24–1676:16; Oct. 27, 2023 Tr. 1938:5–15; *id.* 1941:7–1942:15; *id.* 2241:19–2242:10.[8] Specifically, Defendants sought to introduce evidence that Missouri law authorizes the sharing of commissions between seller agents and buyer agents:

[8] The Court not only refused to permit Defendants to inform the jury that Missouri law permitted the practice Plaintiffs asserted occurred only because of the alleged conspiracy, the Court also required redactions of any references to that statute from the listing contracts the class representatives entered into with their listing agents. Oct. 27, 2023 Trial Tr. 1939:25–1942:14 (requiring, over Defendants' objection, redaction of references to statutory language from several exhibits, including listing agreements); Oct. 30, 2023 Trial Tr. 2259:23–2262:7 (same).

> **Compensation of designated broker, paid by whom, sharing compensation — payment establishing agency — agreement by seller or buyer on sharing compensation.** —
>
> 1. In any real estate transaction, the designated broker's compensation may be paid by the *seller*, the landlord, the buyer, the tenant, or a third party *or by sharing the compensation between designated brokers* ….
>
> 3. A seller or landlord may agree that a designated broker may share with another designated broker the compensation paid by the seller or landlord.

Mo. Rev. Stat. 339.800 (emphasis added).[9] *See also* 4 Mo. Code of State Regulations 250-8.090 ("Every written listing agreement or other written agreement for brokerage services shall contain all of the following … 9. Specification of whether or not the designated broker is authorized to cooperate with and compensate other designated brokers acting pursuant to any other brokerage

[9] Among other states, Kansas also adopted a similar statute during the same period. *See* K.S.A. 58-30,105:

> **58-30,105. Compensation.** …
> (c) In any transaction, the broker's compensation may be paid by the seller, the landlord, the buyer or the tenant.…
> (d) A broker may: …
> (2) with the written agreement of the seller, landlord, buyer or tenant share a commission with another broker who acted as a transaction broker, a subagent or an agent of the other party

One of the four MLSs at issue in this case—the Heartland MLS—includes home sellers in Kansas.

Illinois also adopted a similar statute. *See* 255 Ill. Cop. Stat. 454/10-5 and 454/10-10. Under Illinois law, "[o]ne sponsoring broker may pay compensation to another sponsoring broker for the performance of licensed activities," 225 Ill. Cop. Stat. 454/10-5, and a licensee "must disclose to a client the sponsoring broker's compensation and policy with regard to cooperating with brokers who represent other parties in a transaction." 225 Ill. Cop. Stat. 454/10-10. Another MLS at issue in this case—the MARIS MLS—includes home sellers in Illinois.

Thus, each of the states covered by the MLSs at issue in this case have statutes that specifically authorize the practice of cooperative compensation. Nonetheless, the jury was denied this evidence and erroneously led to believe that the practice of cooperative compensation would not exist without the Cooperative Compensation Rule. This resulted in a miscarriage of justice.

relationship as defined by 339.710 to 339.860, RSMo, including but not limited to buyer's agents and/or transaction brokers").

Despite Missouri law permitting the practice of cooperative compensation and Plaintiffs' listing agreements being governed by that law, Plaintiffs created the impression with the jury that cooperative compensation is fundamentally unfair to home sellers and would have *never* been adopted or used as a lawful practice in the absence of the alleged conspiracy between Defendants.[10] But the mere existence of Mo. Rev. Stat. 339.800 is evidence that disproves Plaintiffs' theory of liability. Indeed, its existence directly rebuts Plaintiffs' claim that no seller would ever have authorized his or her listing broker to offer even a penny in cooperative compensation. Rather than conduct that would emerge only as a result of a conspiracy, the Missouri legislature expressly recognized the practice of cooperative compensation to be one that would help coordinate buyers and sellers and provide upfront costs—shared with agents on both sides—on a well-organized platform (*i.e.*, an MLS). It is accordingly relevant and should have been admitted. Fed. R. Evid. 401; *see United States v. J.L.K., Jr.*, 880 F.2d 993, 994–95 (8th Cir. 1989) (determining that federal regulations regarding the administrative remedy procedure available to inmates was admissible in

[10] *See, e.g.*, Oct. 17, 2023 Tr. 14:11–12 (Plaintiffs' Opening) ("We will prove to you and the evidence will show that [the alleged conspiracy is] unfair."); *id.* 22:16–17 ("[I]t's not right."); id. 25:6–7 ("Hollee [Ellis] is going to come here and tell you this isn't fair."); *id*. 74:10–11 ("[J]ust because someone's been getting away with something for a long time doesn't make it right."); *id.* 77:4–5 ("And but for this rule, like the rest of the world, it would not be happening."); *id.* 77:18–20 ("If that was removed like it is around the rest of the world, that wouldn't be happening."); Oct. 19, 2023 Tr. 392:7–9 (J. Breit) (testifying that he didn't think the way home selling works "was fair"); *id*. 406:13–16 ("I still don't see the fairness in paying the commission for somebody you're never going to meet or that never works for you in any way. I don't – I don't think it's fair."); Oct. 19, 2023 Tr. 567:16–21 (C. Schulman) (testifying that absent the Cooperative Compensation Rule "[s]ellers would not be paying buyer brokers' fees. They would not be making those offers upfront."); Oct. 18, 2023 Tr. 232:20–25 (H. Ellis) (testifying that she did not think having to pay the buyer's agent was a fair practice); *id*. 240:13–19 (same); id. 277:4–13 (same); *id.* 335:6–9 (J. Keel) (testifying that he did not think the process was fair).

a trial for attempted escape from prison because those regulations were relevant to whether the defendant has other remedies available to him).

Even if this evidence were somehow initially inadmissible, Plaintiffs opened the door to its admission. As the Eighth Circuit has noted, "[t]he doctrine of opening the door allows a party to explore otherwise inadmissible evidence on cross-examination when the opposing party has made unfair prejudicial use of related evidence on direct examination." *United States v. Durham*, 868 F.2d 1010, 1012 (8th Cir. 1989). "In theory, the admission of inadmissible evidence allows the injured party to cure the problem and clear up the false impression or to clarify or complete an issue opened up by [opposing] counsel." *Valadez*, 758 F.3d at 981 (alteration in original).

Plaintiffs opened the door to Missouri law regarding commission sharing. As NAR's counsel stated during trial "there has been law of virtually every other state in the country talked about by the plaintiffs, yet [defendants are] not able to tell the jury that in Missouri, the conduct the plaintiffs are claiming is bad is allowed by statute." Oct. 27, 2023 Tr. 1941:9–16; *see* Oct. 23, 2023 Tr. 989:1–22; Oct. 27, 2023 Tr. 1938:5–15; *id.* 1941:7–1942:15. Plaintiffs' economic expert also based his selection of Australia as a proper comparator market based on a common legal "heritage" between the United States and Australia, making the legal environment applicable to each market a clearly relevant consideration. Oct. 20, 2023 Tr. 699:19–700:3 (C. Schulman). Once Plaintiffs opened this door, Defendants' should have been able to introduce Missouri law to rebut Dr. Schulman's opinion that sellers in Missouri would never voluntarily agree to pay buyer agent commissions because sellers do not pay buyer agent commissions in Australia. Oct. 19, 2023 Tr. 560:2–14 (C. Schulman). And because this evidence also rebutted Plaintiffs' theory that commission sharing is unfair—a theory touted throughout trial—its absence had a substantial impact on the jury verdict and warrants a new trial.

IV. CONCLUSION

For the foregoing reasons, and those stated in motions for a new trial filed by the National Association of Realtors and the HomeServices Defendants, which Keller Williams joins and incorporates herein, the Court should order a new trial.

Dated: January 8, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 8, 2024, an electronic copy of the foregoing was filed with the Clerk of the Court by using the CM/ECF system, and service upon all counsel of record will be accomplished by the CM/ECF system.

/s/ *David C. Kully*
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, JEREMY KEEL, HOLLEE ELLIS, and FRANCES HARVEY, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX, LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	)	Case No: 4:19-cv-00332-SRB Judge Stephen R. Bough

SUGGESTIONS IN SUPPORT OF DEFENDANT KELLER WILLIAMS REALTY, INC.'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. LEGAL STANDARD 1

III. ARGUMENT 2

A. THERE WAS INSUFFICIENT EVIDENTIARY BASIS FOR THE JURY TO FIND THAT PLAINTIFFS WERE DIRECT PURCHASERS WHO SUFFERED HARM UNDER THE RULE OF REASON. 2

B. THERE WAS INSUFFICIENT EVIDENTIARY BASIS FOR THE JURY TO FIND THAT KELLER WILLIAMS ENTERED INTO A CONSPIRACY. 4

1. Plaintiffs presented no direct evidence of Keller Williams' participation in any conspiracy. 5

2. Plaintiffs presented no evidence that tends to exclude the possibility of Keller Williams' independent conduct. 6

C. THERE WAS NO SUFFICIENT EVIDENTIARY BASIS FOR THE JURY TO FIND THERE WAS AN UNREASONABLE RESTRAINT OF TRADE. 19

D. THERE WAS INSUFFICIENT EVIDENTIARY BASIS FOR THE JURY TO FIND CAUSATION OR INJURY. 23

E. THERE WAS INSUFFICIENT EVIDENTIARY BASIS FOR JURY'S AWARD OF DAMAGES. 28

IV. CONCLUSION 30

TABLE OF AUTHORITIES

Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483 (8th Cir. 1992) 23, 28

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 13

Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028 (8th Cir. 2000).... 5, 12

Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000)..... 23

Cont'l T.V. v. GTE Sylvania Inc., 433 U.S. 36 (1977)..... 2

Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984)..... 4

Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761 (8th Cir. 2004) 7

Hathaway v. Runyon, 132 F.3d 1214 (8th Cir. 1997)..... 14

Hyland v. HomeServices of Am., Inc., 771 F.3d 310 (6th Cir. 2014) 12

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)..... 4

In re Baby Food Antitrust Litig., 166 F.3d 112 (3d Cir. 1999)..... 6

In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002) 6

In re Ins. Brokerage Antitrust Litig., 618 F.3d 300 (3d Cir. 2010)..... 6

In re Tyson Foods, Inc. Sec. Litig., 275 F. Supp. 3d 970 (W.D. Ark. 2017) 7

Kleen Prods. LLC v. Georgia-Pacific LLC, 910 F.3d 927 (7th Cir. 2018)..... 9

Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007) 2

Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925)..... 17

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 584 (1986) 5

MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983)..... 23

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984)..... 4, 5

Nitro Distrib., Inc. v. Alticor, Inc., 565 F.3d 417 (8th Cir. 2009)..... 5, 6

Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224 (3d Cir. 1993)..... 10

Pumps & Power Co. v. Southern States Indus. Inc., 787 F.2d 1252 (8th Cir. 1986)..... 5

Riggs v. Gibbs, No. 14-cv-0676, 2017 WL 4391778 (W.D. Mo. Sept. 29, 2017)..... 10

Roark v. City of Cotton Plant, 323 F. App'x 481 (8th Cir. 2009) 14

Robertson v. Sea Pines Real Estate Cos., Inc., 679 F.3d 278 (4th Cir. 2012) 3

Smith v. Leggett Wire Co., 220 F.3d 752 (6th Cir. 2000) 15

St. Louis Convention & Visitors Comm'n v. Nat'l Football League, 154 F.3d 851 (8th Cir. 1998) 24, 26

Sullivan v. NFL, 34 F.3d 1091 (1st Cir. 1994) 26

United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980) 3

Williamson Oil Co. v. Philip Morris U.S.A., 346 F.3d 1287 (11th Cir. 2003) 17

I. INTRODUCTION AND SUMMARY

On October 31, 2023, after twelve days of trial, the jury returned a verdict for Plaintiffs, finding that Keller Williams Realty, Inc. ("Keller Williams") conspired with the National Association of REALTORS® ("NAR") and the HomeServices Defendants to follow and enforce the Cooperative Compensation Rule. ECF No. 1294. The jury returned this verdict notwithstanding the complete lack of evidence that Keller Williams at any point in its history had attended any meeting, participated in any communication, undertaken any internal analysis or discussion, or engaged in any other activity relating in any way to the Cooperative Compensation Rule, and despite the complete lack of evidence that any listing agent had offered compensation to buyer agents because of the Cooperative Compensation Rule. Adding insult to injury, the jury awarded as damages "every single penny" that every home seller had authorized his or her listing agent to pay to every buyer agent during the seven-year class period, in the face of significant evidence that listing agents offer compensation to buyer agents to help their clients and that listing agents and sellers would offer compensation in the absence of the Cooperative Compensation Rule.

That extraordinary verdict is deeply flawed as a matter of law. The Plaintiffs here were not direct purchasers from any of the named Defendants, and the long-established and state-authorized practices here were not tested under the rule of reason. But even beyond those threshold legal defects, the trial record is bereft of any evidence that Keller Williams entered into a conspiracy with anyone, let alone legally sufficient evidence to satisfy the elements for the antitrust violations that undergird the jury's massive verdict.

II. LEGAL STANDARD

Entry of judgment as a matter of law is proper where there is no evidence that is legally sufficient for a reasonable jury to find for a party on an issue on which that party has been fully

heard. Fed. R. Civ. P. 50(a)(1). In determining whether judgment is proper, the court reviews all facts in favor of the nonmoving party and gives the nonmovant the benefit of all reasonable inferences, *Arthaud v. Mut. of Omaha Ins. Co*., 170 F.3d 860, 862 (8th Cir. 1999), but not to inferences that are not reasonably supported by the evidence. *Kinserlow v. CMI Corp.*, 217 F.3d 1021, 1026 (8th Cir. 2000). "When the record contains no proof beyond speculation to support the verdict, judgment as a matter of law is appropriate." *Id.* (quotation marks and citations omitted).

Keller Williams moved for judgment as a matter of law under Rule 50(a) on several grounds, including those urged in motions filed by NAR and the HomeServices Defendants. *See* ECF Nos. 1267, 1268. Keller Williams hereby renews that motion pursuant to Federal Rule of Civil Procedure 50(b).

III. ARGUMENT

A. There was insufficient evidentiary basis for the jury to find that Plaintiffs were direct purchasers who suffered harm under the rule of reason.

As discussed in NAR's motion for a new trial, which Keller Williams joins and incorporates herein, the Court erred in instructing the jury to evaluate the alleged conspiracy as a *per se* violation of Section 1 of the Sherman Act, rather than asking the jury to "balance the competitive harm against the competitive benefit" of the alleged conspiracy under the rule of reason. ABA Model Jury Instructions in Civil Antitrust Cases § 3.A.

The *per se* standard applies only to specific "manifestly anticompetitive" conduct, *Cont'l T.V. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977), that "would always or almost always tend to restrict competition and decrease output," *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (internal quotation marks omitted). That is not remotely the case here. Indeed, because of the "enormously procompetitive objectives" and "significant economic

efficiencies" offered by MLSs, courts in the past several decades have uniformly determined that "out-of-hand condemnation" of MLS rules under the *per se* standard would be inappropriate. *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1368–69 (5th Cir. 1980); *see also, e.g.*, *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 290 (4th Cir. 2012) ("Because trade associations may be protective of consumer interests and not just inimical to them, the cooperative actions of MLS members are not per se unreasonable."). Those courts have instead determined the rule of reason to be applicable to challenges to MLS rules.

This Court should have done the same—and had the jury been properly instructed under the rule of reason, the trial record could not have supported a verdict for Plaintiffs. As discussed below, *see* §§ III.D & III.E, *infra*, cooperative compensation, and the Rule that Plaintiffs alleged requires it, produces significant benefits for home sellers, including by stimulating demand for sellers' homes by ensuring that cash-constrained buyers are not excluded as potential purchasers, *see, e.g.*, Oct. 26, 2023 Trial Tr. 1739:17–24 (D. Stevens) (testifying that sellers benefit because "there are so many buyer brokers representing all these potential homebuyers," which "brings more traffic and more competition" for sellers' properties); Oct. 23, 2023 Trial Tr. 936:10–937:11 (S. Millett) (explaining how the presence of buyer agents helps home sellers by increasing interest in sellers' properties, producing "better pricing offers," and helping homes sell more quickly), and by allowing agents to work together to bring even troubled transactions to the closing table, *see* Oct. 30, 2023 Trial Tr. 2314:9–13 (J. Davis) ("It's more likely that we're going to get to the closing table when both parties have . . . representation. It's more likely that the seller will actually get to close on the property."). Sellers themselves recognize these benefits and compensate buyer agents *even when not required to do so*, which is the exact opposite of what one would expect to happen under a true *per se* restraint. *See id.* 2294:21–2295:20 (J. Davis) (testifying that 90 percent of

FSBO sellers agree to compensate her when she finds a buyer for their homes). Properly instructed under the rule of reason, the jury would have reached the same conclusion as those sellers and found cooperative compensation and the Cooperative Compensation Rule to have been overwhelmingly more beneficial than harmful.

The trial record was also insufficient to support the jury's determination that home sellers were direct purchasers with standing to sue for damages under *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728–29, 741–41 (1977). As argued by NAR in its motion for judgment as a matter of law under Rule 50(a), ECF No. 1274, and in the motions by NAR and the HomeServices Defendants under Rule 50(b) (which Keller Williams joins and incorporates herein), Plaintiffs purchased nothing from NAR, Keller Williams, or the HomeServices Defendants and paid nothing to buyer agents. Plaintiffs were thus only indirect purchasers and lacked standing to sue. *See* ECF No. 1274 at 1–5.

B. There was insufficient evidentiary basis for the jury to find that Keller Williams entered into a conspiracy.

Plaintiffs failed to present evidence from which a reasonable jury could find that Keller Williams participated in any conspiracy. To establish a claim for a violation of Section 1 of the Sherman Act, Plaintiffs had to show that Keller Williams entered into a contract, combination, or conspiracy. 15 U.S.C. § 1; *Monsanto Co. v. Spray-Rite Serv. Corp*., 465 U.S. 752, 761 (1984). Section 1 of the Sherman Act "does not reach conduct that is wholly unilateral." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984). Proof of concerted action—that is, proof of a "conscious commitment to a common scheme designed to achieve an unlawful objective"—is essential to any claim under Section 1 of the Sherman Act. *Monsanto*, 465 U.S. at 768.

The Supreme Court has set forth explicit standards for determining whether there exists sufficient evidence of such a "conscious commitment" or agreement. The plaintiff must bring

forth evidence that "tends to exclude the possibility" of independent action. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 584, 587 (1986) (quoting *Monsanto*, 465 U.S. at 764). "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 588. The Eighth Circuit has echoed this standard, stating "if it is as reasonable to infer from the evidence a . . . conspiracy as it is to infer permissible activity, then the plaintiffs'[] claim, without more, fails." *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1032 (8th Cir. 2000); *see Nitro Distrib., Inc. v. Alticor, Inc.*, 565 F.3d 417, 423 (8th Cir. 2009) ("We apply *Monsanto* and *Matsushita* broadly . . . ."). "Unless an antitrust plaintiff offers 'evidence that tends to exclude the possibility' of independent action, an inference of conspiracy is unreasonable." *Pumps & Power Co. v. S. States Indus. Inc.*, 787 F.2d 1252, 1256 (8th Cir. 1986) (quoting *Monsanto*, 465 U.S. at 764) (finding judgment notwithstanding the verdict appropriate because the record contained no proof, beyond speculation, upon which a finding of concerted action could rationally be based).

As explained below, the Court should enter judgment in favor of Keller Williams because the evidence was insufficient for a reasonable jury to find that Keller Williams entered into any conspiracy.

1. Plaintiffs presented no direct evidence of Keller Williams' participation in any conspiracy.

Plaintiffs were required to prove that each Defendant they sued entered into an unlawful conspiracy. *See supra*. Plaintiffs alleged that Defendants entered into a conspiracy "to follow and enforce a 'Cooperative Compensation Rule'" applicable to MLSs in Missouri that had "the purpose or effect" of "rais[ing], inflat[ing], or stabiliz[ing] broker commission rates paid by home sellers." *See* Instruction No. 18 (ECF No. 1292). But Plaintiffs offered no direct evidence that Keller Williams entered into any agreement with anyone concerning the Cooperative Compensation Rule.

Direct evidence must be "explicit and require[] no inferences" to establish Plaintiffs' proposition. *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002) (noting that direct of evidence of a conspiracy is "evidence tantamount to an acknowledgment of guilt," while circumstantial evidence is "everything else including ambiguous statements" (emphasis omitted)).

None of the evidence Plaintiffs presented against Keller Williams was of that nature. For example, there was no evidence such as "a document or conversation explicitly manifesting the existence of the agreement in question." *In re Ins. Brokerage Antitrust Litig*., 618 F.3d 300, 325 n.23 (3d Cir. 2010). Plaintiffs presented no evidence whatsoever of any meeting involving Keller Williams at which the Cooperative Compensation Rule was discussed, any communication involving Keller Williams relating to the Rule, or even any internal Keller Williams documents that addressed the Rule. In fact, Plaintiffs' economic expert agreed that he saw no documents or testimony showing any conspiracy among Defendants. Oct. 19, 2023 Trial Tr. 571:6–11, 572:2–5 (C. Schulman). Simply put, the trial record is utterly devoid of direct evidence of a conspiracy involving Keller Williams to follow and enforce the Cooperative Compensation Rule.[1]

2. Plaintiffs presented no evidence that tends to exclude the possibility of Keller Williams' independent conduct.

With no direct evidence that Keller Williams participated in any conspiracy to follow and enforce the Cooperative Compensation Rule, Plaintiffs instead urged the jury to infer a conspiracy from only the following three categories of evidence: (1) Keller Williams' conduct relating to

[1] Even if Plaintiffs had presented direct evidence of a conspiracy, the Eighth Circuit has explicitly rejected the argument that providing direct evidence removes the requirement that plaintiffs disprove independent action: "Although the presentation of direct evidence of an unlawful conspiracy will likely preclude a lawful explanation, *it does not follow that the possibility of independent action need not be excluded when direct evidence is provided*." *Nitro Distrib.*, 565 F.3d at 424 (emphasis added); *see also id.* at 423 ("We require a showing of independent action, *whether it be by circumstantial or direct evidence*." (emphasis added)). As explained below, Plaintiffs did not (and cannot) disprove independent action.

NAR, including a requirement that franchisee agents join their local Board of REALTORS® and MLS unless exempted by their local franchisee brokerage; (2) training materials; and (3) Keller Williams' inclusion of example commission amounts in published economic models and of historical national average commission rates in speeches by Keller Williams executives. As explained below, reasonable jurors could not draw any inference of conspiracy from the paltry evidence presented because it neither tends to exclude the possibility of independent action nor suggests the existence of any conspiracy at all, much less a conspiracy to follow and enforce the Cooperative Compensation Rule. Indeed, none of the evidence offered by Plaintiffs against Keller Williams has any relationship whatsoever to the Cooperative Compensation Rule. Accordingly, the Court should enter judgment in favor of Keller Williams.

a) Keller Williams' conduct relating to NAR provides no basis to infer a conspiracy.

To the extent Plaintiffs sought to have the jury infer the existence of a conspiracy involving Keller Williams merely from involvement in NAR, Plaintiffs' effort fails for multiple reasons.

First, and as a threshold matter, Keller Williams is not a member of NAR. Oct. 23, 2023 Trial Tr. 1041:4–6 (R. Goldberg). Even if it were a member of NAR (and it is not), Keller Williams could not be held liable under Section 1 of the Sherman Act as a co-conspirator merely based on membership in the trade association. *See, e.g.*, *In re Tyson Foods, Inc. Sec. Litig.*, 275 F. Supp. 3d 970, 995 (W.D. Ark. 2017) ("[M]ere membership in a trade association will not nudge an allegation from the realm of parallelism to the land of agreement." (citing cases)). Courts that have held association members liable for association rules have demanded evidence of "actual knowledge of, and participation in, the illegal scheme." *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 769, 771–72 (8th Cir. 2004) (finding that Ford joined a conspiracy with the association based on evidence of its deliberate efforts to influence the association's positions and

explicit directions to the association's president concerning its activities). Plaintiffs offered no such evidence as to Keller Williams. Indeed, Keller Williams has never been meaningfully involved in NAR policymaking activities. *See, e.g.*, ECF No. 1288-1, Tr. 134:18–134:21 & 134:23–24 (C. Sylvester) (Keller Williams had "no involvement whatsoever" in NAR or other industry organizations); *id.* 127:08–128:02 (testifying that the view of Keller Williams leadership was that "participating in the industry did not build your business, it did not grow your business and if anything it would harm your business"); *id.* 132:19–133:14 (testifying that the lack of support Ms. Sylvester received from Keller Williams leadership for industry relations activities was "the whole reason" she left the company and that her attempt to get Keller Williams more involved in industry relations "was a complete and total waste of my time"). Keller Williams' founder, Gary Keller, testified that at no time in his forty-year career in real estate did he participate in NAR activities. Oct. 27, 2023 Trial Tr. 2020:12–24 (G. Keller).

Plaintiffs offered no evidence to the contrary. They instead pointed to general participation by independent contractor agents affiliated with Keller Williams' franchisee brokerages on NAR's 800-member board[2] or on NAR committees. *See* P-446. But those agents are two steps removed from Keller Williams. As a result, their actions cannot be attributed to Keller Williams whether or not they are related to issues in this case (and they were not). *See* Oct. 30, 2023 Trial Tr. 2268:8–2269:19 (J. Davis) (describing differences between Keller Williams, its franchisee brokerages, and independent contractor agents, and testifying that "there's no direct relationship" between agents and Keller Williams). And even with respect to any NAR activities in which those independent contractor agents might have been involved, Plaintiffs provided no evidence whatsoever that the Cooperative Compensation Rule was ever a topic of discussion at any meeting attended by any

[2] Oct. 24, 2023 Trial Tr. 1171:16–21 (R. Gansho) ("We have 800-plus individuals on [NAR's] board of directors").

Keller Williams agent. Plaintiffs also provided no evidence that Keller Williams agents who participated on NAR's board or on NAR committees acted as representatives of Keller Williams when they did so, and the evidence in fact is to the contrary. *See id.* 1179:8–1180:17 (R. Gansho) (stating that participants on NAR's board and committees owe a fiduciary duty to NAR when engaged in board or committee activities and are regularly reminded of their obligations); ECF No. 1288-2, Tr. 106:3–17 (A. Kelm) (testifying that Keller Williams "can't control" agents and that agents involved in NAR activities do what is "best for their business" and consider only how issues might "affect[] themselves"). They also provided no evidence of any communications between Keller Williams and any agents concerning any board or committee activities in which the agents might have been involved.

Plaintiffs also referred to a single document suggesting involvement by Keller Williams in an NAR body called the RES Advisory Group, *see* P-0485; *but see* ECF No. 1288-2, Tr. 109:11–21 (A. Kelm) (stating that no "C-Suite" executive from Keller Williams ever participated in the RES group), but again provided no evidence that the RES group ever engaged in any activities related to the Cooperative Compensation Rule or that it did anything other than engage in legal trade association activities protected by the First Amendment.

Second, even if evidence existed of attendance by a Keller Williams executive at a NAR meeting or other meeting involving competitors (and the record contains no such evidence), attendance at meetings of legitimate organizations offers nothing more than a mere *opportunity* to conspire, which cannot support an inference of any agreement as a matter of law. *See, e.g.*, *Kleen Prods. LLC v. Georgia-Pacific LLC*, 910 F.3d 927, 938 (7th Cir. 2018) (finding opportunities to conspire, including at legitimate trade association meetings, did not support existence of conspiracy); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co*., 998 F.2d 1224, 1235

(3d Cir. 1993) (granting summary judgment as to defendant who socialized with other alleged conspirators and "had the opportunity to conspire" but did not participate in discussions relevant to the alleged antitrust conspiracy); *see also Riggs v. Gibbs*, No. 14-cv-0676, 2017 WL 4391778, at *8 (W.D. Mo. Sept. 29, 2017) (observing that a "bare, unsupported allegation that the defendants had the opportunity to conspire" did not support conspiracy allegation sufficiently to survive summary judgment in a Section 1983 action). Without evidence that Keller Williams representatives attended meetings of NAR or other organizations to advance the purposes of the alleged conspiracy to follow and enforce the Cooperative Compensation Rule, any evidence of those meetings (if any were to exist) would fail to provide a legally sufficient basis for the finding that Keller Williams knowingly entered into an unlawful agreement under Section 1 of the Sherman Act.

Third, evidence that Keller Williams requires independent contractor agents affiliated with its independently owned and operated franchisees to join their local Board of REALTORS® and MLS (unless exempted by the local franchisee) is unilateral conduct that is not indicative of any conspiracy. As Plaintiffs themselves acknowledged, MLS participation is important to brokers, ECF No. 759, Third Am. Compl. ¶ 106; Oct. 19, 2023 Trial Tr. 531:2–5, 593:24–594:6 (C. Schulman) (noting the benefits of listing a home on the MLS and stating that access to the MLS is a "core product" offered by agents); *id*. at 591:25–592:22 (C. Schulman) (testifying that real estate agents who are not members of NAR are not "reasonable substitutes in an economic sense" and not a "viable economic choice"), making MLS participation by agents and Keller Williams' requirement that they participate in MLSs (unless exempted by franchisee brokerages) consistent with their unilateral interests and not at all suggestive of a conspiracy. *See* P-0426 at PDF p.56 (KWRI_000456). Keller Williams adopted this policy independently and not in coordination with

any Defendant (or anyone else outside of Keller Williams), and Plaintiffs offered no evidence whatsoever that Keller Williams adopted or maintained the policy as part of a conspiracy to follow and enforce the Cooperative Compensation Rule. Again, the record evidence is to the contrary. It is undisputed that Keller Williams' requirement preceded NAR's adoption of the Cooperative Compensation Rule. D-3534 at PDF p.28; Oct. 27, 2023 Trial Tr. 2025:20–2026:4 (G. Keller) (testifying that Keller Williams adopted the requirement in 1989 when the company began franchising). The requirement exists because Keller Williams regards MLS participation by agents to be good for buyers and sellers; it has nothing to do with Keller Williams' supposed desire to ensure that agents followed the Cooperative Compensation Rule (or any other MLS rules). *Id*. 2026:18– 2027:4 (G. Keller).

Fourth, Plaintiffs also failed to provide any evidence that any Keller Williams franchisee agent joined NAR or his or her local MLS for reasons related to Keller Williams' policy. Agents join MLSs because it helps them when working with their clients, not because of any requirement that they do so. MLSs help listing agents market their seller clients' properties to all other agents who are members of the MLS, and they keep agents representing buyers informed of all properties listed by other MLS members. *See* Oct. 23, 2023 Trial Tr. 930:13–931:21 (S. Millett) (describing benefits of MLSs in helping market listed properties). Unsurprisingly, given the value of the MLS to agents and their independent interests in becoming members, the only evidence offered in this case concerning Keller Williams' policy was that the policy *had no bearing on agents' decisions to join MLSs*. Keller Williams agent Jen Davis testified that, although she joined a Keller Williams franchisee brokerage in Missouri in 2012, she was unaware until this case that Keller Williams maintained a policy requiring agents to join their local MLS. Oct. 30, 2023 Trial Tr. 2284:3–12 (J. Davis). Ms. Davis joined her local MLS in Springfield when she was affiliated with another

brokerage and before she joined Keller Williams. Keller Williams' policy had nothing to do with her membership in her local MLS. *Id.* 2284:13–22; *see also id.* 2281:13–19 (explaining that she is a member of the MLS "[t]o help our buyers and sellers"). Keller Williams' President, Marc King, testified similarly that every one of the thousands of agents he has recruited from other brokerages to a Keller Williams franchisee brokerage (including agents in Missouri) was already a member of the MLS. Oct. 27, 2023 Trial. Tr. 2166:10–17 (M. King). There is simply no evidence in the record that *any* agent in Missouri (or anywhere else) joined an MLS and followed the MLS's rules because of Keller Williams' policy. With a non-conspiratorial explanation for the existence of the requirement and no evidence whatsoever that any agent joined his or her local MLS as a result of anything Keller Williams did—let alone anything Keller Williams did in concert with others—Plaintiffs' reliance on Keller Williams' requirement that agents join NAR and MLSs to establish a conspiracy is the type of "assume conspiracy first" reasoning that the Eighth Circuit has explicitly rejected. *Blomkest*, 203 F.3d at 1033 ("[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly").[3]

b) Similarity in training materials, without evidence of any coordination with alleged co-conspirators, cannot support allegations of conspiracy.

Plaintiffs presented evidence of similarity of messaging in Defendants' training materials—again wholly unrelated to the Cooperative Compensation Rule—to invite the jury to infer the existence of a conspiracy based only on that similarity. But Plaintiffs have offered no evidence of *any* communications between Keller Williams and anyone outside the company concerning its training. *See* Oct. 27, 2023 Trial. Tr. 1976:12–14 (G. Keller) (testifying that Keller Williams does not coordinate with other real estate companies in developing training content).

[3] *See also Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 319–22 (6th Cir. 2014) (affirming grant of summary judgment where the conduct allegedly indicative of a conspiracy to fix real estate commission rates was consistent with independent conduct).

Without any connection between alleged conspirators, Plaintiffs' evidence amounts to nothing more than evidence of parallel conduct, which cannot provide a legally sufficient basis on which the jury could conclude that Keller Williams engaged in any conspiracy, let alone the alleged conspiracy to follow and enforce the Cooperative Compensation Rule. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007) ("Without more, parallel conduct does not suggest conspiracy . . . .").

Plaintiffs also never attempted to establish any nexus between Keller Williams' and other Defendants' training materials and the Cooperative Compensation Rule. They instead used these materials for no purpose other than to suggest that Keller Williams and independent contractor agents affiliated with its franchisees seek to charge higher commissions than Plaintiffs believed they deserve. Absent some connection to the Cooperative Compensation Rule and any indication of coordination among Defendants on the content of the training, Plaintiffs' evidence concerning Keller Williams' training materials was legally insufficient to support the jury's verdict.

Additionally, Plaintiffs offered no evidence that any independent contractor agents affiliated with a Keller Williams franchisee brokerage in Missouri either attended any training involving instructional materials published by Keller Williams or followed any such materials. Keller Williams develops sales training materials, but it is entirely up to independent contractor agents to decide what training courses to take. Oct. 30, 2023 Trial Tr. 2278:6–20 (J. Davis). There is no evidence in the record of any Keller Williams agent in Missouri actually employing any of the sales methods included in the training materials to which Plaintiffs referred. Indeed, because Mr. Keel—the only named plaintiff who used a listing agent affiliated with a Keller Williams franchisee—testified that he did not attempt to negotiate the commission, his agent would have had no reason to employ so-called "objection-handling" scripts to deflect Mr. Keel's attempts to negotiate. *See* Oct. 18, 2023 Trial Tr. 332:21–333:3, 339:5–13 (J. Keel) (admitting he knows, as

an attorney, that contracts are negotiable, but that he did not negotiate the commission percentage on his home sale); *id.* at 344:14–20 (stating in the purchase context that he did not know commissions were negotiable because "[n]o one ever mentioned negotiating commission to me").

c) Evidence concerning *The Millionaire Real Estate Agent* and Family Reunion speeches cannot support a finding of conspiracy.

Lacking evidence of any involvement by Keller Williams in any activities relating in any way to the Cooperative Compensation Rule, Plaintiffs further sought to distract the jury with evidence of completely irrelevant subjects, which Keller Williams sought unsuccessfully to have excluded before trial. *See* ECF No. 1070 (motion); ECF No. 1032 (order denying motion). Plaintiffs claimed to the jury that Keller Williams conspired to follow and enforce the Cooperative Compensation Rule through (1) references to commissions in *The Millionaire Real Estate Agent*, a *New York Times* bestselling book published over nineteen years ago, and (2) reports during Keller Williams' annual "Family Reunion" convention of historical national average commission rates earned annually by over 150,000 independent contractor agents affiliated with over 800 Keller Williams franchisee brokerages across all 50 states. Neither subject has anything at all to do with a conspiracy to follow and enforce the Cooperative Compensation Rule. Evidence wholly unrelated to the challenged conspiracy does not tend to exclude the possibility of independent conduct under *Matsushita* and does not provide a legally sufficient basis for the jury's verdict. *See Hathaway v. Runyon*, 132 F.3d 1214, 1220 (8th Cir. 1997) (stating that judgment as a matter of law is proper "when there is a complete absence of *probative facts* to support the conclusion reached" (emphasis added)); *Roark v. City of Cotton Plant*, 323 F. App'x 481, 482 (8th Cir. 2009) (affirming grant of judgment as a matter of law where the plaintiff "failed to offer evidence of a City policy or custom relevant to her claims"); *see also Smith v. Leggett Wire Co.*, 220 F.3d 752,

760–63 (6th Cir. 2000) (granting judgment as a matter of law in favor of defendant where jury based its verdict on irrelevant evidence that was improperly admitted).

Plaintiffs did not even attempt to connect *The Millionaire Real Estate Agent* to a conspiracy to follow and enforce the Cooperative Compensation Rule. Publication of *The Millionaire Real Estate Agent* was a wholly unilateral act that cannot support inferences of a conspiracy. Plaintiffs nevertheless point to references in one illustration of the use of the book's "Economic Model" to average commission rates earned from sellers and buyers of three percent, *see* D-3578 at 183, to argue to the book constituted an effort on the part of Keller Williams to dictate commission rates that agents should charge. *The Millionaire Real Estate Agent* provided no basis on which a reasonable juror could conclude that Keller Williams knowingly participated in a conspiracy to follow and enforce the Cooperative Compensation Rule, particularly when the book never mentions the Rule. Plaintiffs offered no evidence that the content of the book and the decision to publish it were anything but unilateral acts that had nothing to do with the conduct of any alleged co-conspirators. The evidence presented concerning the book only confirms that.

Mr. Keller explained at trial that *The Millionaire Real Estate Agent* seeks to convey to agents that, to succeed in real estate, they need to approach their work as an agent as a business, meaning they need to commit time daily to generating new clients, manage expenses carefully, and pay attention to other business variables on which agent incomes depend. *See* Oct. 27, 2023 Trial Tr. 1972:2–22 (G. Keller). The Economic Model, one of several models presented in the book (but the only one on which Plaintiffs focused), reveals how generating the income agents seek to achieve begins with being invited to meet with new seller and buyer clients—and, as Mr. Keller testified, seeks to impress upon agents the importance of constant attention to lead generation. *Id.* 1977:20–1980:7, 1982:9–1983:7, 1985:15–1986:12 (G. Keller); *see also id.*

2171:11–17; 2177:4–13 (M. King). Plaintiffs did not attempt to rebut the testimony presented at trial that including one illustration of the model with a three percent commission rate did not in any way constitute an effort by Keller Williams to suggest commissions that agents should charge, *id.* 1984:18–1985:7 (G. Keller); 2180:11-25 (M. King) ("[T]hat makes as much sense as telling agents to only sell $250,000 houses."), or testimony that the Economic Model would be of no use to any agent if he or she did not complete it based on the agent's own average commission rates and other figures. *Id.* 2175:25–2178:9 (M. King) ("It's not a useful tool for [agents] if they're using someone else's numbers."); 1985:5–1989:2 (G. Keller). Nothing about *The Millionaire Real Estate Agent* is at all suggestive of a conspiracy to follow and enforce the Cooperative Compensation Rule. Nothing about it tends to exclude the possibility of independent conduct on the part of Keller Williams.

The same is true for Plaintiffs' repeated references to the reporting of historical national average commission rates during the Vision Speech at Keller William's annual Family Reunion convention. Plaintiffs again made no effort to attempt to connect these speeches to a conspiracy to follow and enforce the Cooperative Compensation Rule. Plaintiffs merely referred to these reports and the presence in the audience of agents affiliated with competitor brokerages to suggest to the jury a connection to the conspiracy alleged in the case *that simply does not exist*. With the context provided by Keller Williams' witnesses at trial, it is clear that the speech constituted unilateral conduct on the part of Keller Williams, not at all indicative of the existence of any conspiracy, much less one to follow and enforce the Cooperative Compensation Rule (which was not mentioned once in any Family Reunion speeches).

As the unrebutted evidence at trial showed, the reporting of national historical averages of commission rates followed a lengthy discussion of economic and other information about all

aspects of the real estate business, an effort to educate agents and allow them to speak as experts to clients about factors that might impact an upcoming sale or purchase. *See* Oct. 27, 2023 Trial Tr. 1992:23–1994:5 (G. Keller). As Mr. Keller explained, he based the reports of average commission rates over time on data from the more than 150,000 agents affiliated with Keller Williams franchisee brokerages across all 50 states. *Id.* 2007:16–2008:8. Plaintiffs offered no rebuttal to testimony concerning the obvious fact that national commission averages would be of no use as a competitive matter to what any agent could charge in their local markets, where commission rates are based on local competitive conditions and the ability of agents to convey their value to clients. *Id.* 2187:17–2189:8 (M. King) (equating national commission averages to reporting on average temperatures in the United States, which "wouldn't have dictated what I wore to the courthouse today," and stating that "[c]omission rates are charged based on local market conditions and that agent's value proposition"); 2009:10–2010:22, 2012:19–2013:5, 2013:24–2014:3 (G. Keller). Plaintiffs made much of the presence in the audience of agents from competitor brokerages—suggesting to the jury that merely mentioning the word commission before such an audience was evidence of Keller Williams' participation in a conspiracy to follow and enforce the Cooperative Compensation Rule. Given the non-competitive nature of the information to any agent in the audience from a Keller Williams brokerage or a competitor brokerage (who were, in any event, invited to attend Family Reunion only to recruit them to join Keller Williams), the reporting of national historical commission averages presents no issues under the antitrust laws.[4]

[4] *See Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 574 (1925) (finding no antitrust violation from exchange among competitors of past pricing information with no disclosure of specific customers or their geographic location). While price "signaling" or advance announcements of price moves have been found to constitute a "plus factor" that can support inferences of a conspiracy, *see Williamson Oil Co. v. Philip Morris U.S.A.*, 346 F.3d 1287, 1305 (11th Cir. 2003), Plaintiffs make no allegations that Keller Williams executives are announcing any competitively sensitive, forward-looking information in reports of past commission rates. Plaintiffs' allegations concerning aggregated reports of *past* commission rates at Keller Williams' Family Reunion, which they do not even attempt to tie to the Cooperative Compensation Rule, cannot provide a legally sufficient basis for a jury verdict against Keller Williams.

But more to the point here, the reports simply are no evidence of Keller Williams' knowing participation in a conspiracy to follow and enforce the Cooperative Compensation Rule. Merely because Plaintiffs claimed (incorrectly) that the alleged conspiracy had an impact on commission rates does not make unrelated references to commission rates evidence of the alleged conspiracy. Without some connection to the Cooperative Compensation Rule, nothing about the Vision Speeches tended to exclude the possibility that Keller Williams was acting entirely independently and not in furtherance of a conspiracy to follow and enforce the Rule.

Other similar evidence offered by Plaintiffs is of the same nature and does not support Keller Williams' participation in a conspiracy to follow and enforce the Cooperative Compensation Rule. Plaintiffs offered a number of presentations found in Keller Williams' files that made reference to commission rates—including, for example, P-1633, with a picture of a line in the sand, implying that agents should resist commission discounting[5]—but none that referred to the Cooperative Compensation Rule or that reflected any coordination with other Defendants on any subject. Again, references to commission rates in documents found in the files of a real estate company are hardly surprising—and, absent some connection to the conspiracy at issue in this case (that does not exist), they are not evidence that can support the jury's verdict. Plaintiffs also presented by video deposition the testimony of former Keller Williams employee Darrell King (P-2886), who testified that an antitrust compliance policy contained in Keller Williams' Policies & Guidelines Manual (P-0426) applied to Keller Williams agents but not to the company itself.

[5] Plaintiffs wanted to argue to the jury that these presentations were presented at Keller Williams' Family Reunion, but failed to establish the appropriate foundation that they were actually shown to anyone. Oct. 18, 2023 Trial Tr. 213:13–214:25 (Court requiring additional foundation before Plaintiffs could argue that presentations were shown at Family Reunion); Oct. 19, 2023 Trial Tr. at 370:24–371:11 (noting admission of P-1631, P-1632, P-1633, P-1634, P-1635, P-1636, P-1637, P-1640, P-1646, and P-1650 subject to ruling that Plaintiffs not argue that the presentations were presented at Family Reunion). Plaintiffs recognized that admission of these presentations over Keller Williams' objections allowed Plaintiffs to leave their desired impression with the jury, *see* Oct. 27, 2023 Tr. 2195:4–2197:10 ("The jury will remember" the context, even if Plaintiffs failed to establish that context), but that does not mean that these presentations are entitled to any weight as evidence of Keller Williams' participation in the alleged conspiracy.

Nothing about Mr. King's testimony about his interpretation of Keller Williams' policies provides evidence of any conspiracy with anyone about any subject, much less specific evidence that Keller Williams conspired with other Defendants to follow and enforce the Cooperative Compensation Rule. Finally, Plaintiffs referred to a reference to a "collusion theory" in notes of a former Keller Williams employee, *see* P-0654, but the notes do not suggest Keller Williams' involvement in any conspiracy. Plaintiffs offered no evidence connecting the "collusion theory" referred to the notes to the Cooperative Compensation Rule and none is suggested by the notes themselves.[6]

C. There was no sufficient evidentiary basis for the jury to find there was an unreasonable restraint of trade.

As discussed above, *see* § III.A, *supra*, Plaintiffs should have been required to prove harm to competition under the rule of reason because the *per se* rule is inapplicable in this context. But even under the Court's view that the *per se* treatment is applicable because Plaintiffs alleged that Defendants conspired "with the purpose and effect of inflating or stabilizing broker commission

[6] At times, Plaintiffs appeared to be attempting to suggest to the jury the existence of a conspiracy concerning commission rates unrelated to the Cooperative Compensation Rule, even though Plaintiffs expressly disavowed any intention of asserting the existence of such a conspiracy. ECF 956 at 6 n.6. Even if that were their aim, Plaintiffs' effort failed completely as to Keller Williams, which as a franchisor of independently owned and operated real estate brokerages, and has no involvement in the commissions independent contractor agents in Missouri charge or the cooperative compensation amounts they offer. *See* Oct. 27, 2023 Trial Tr. 1948:9-14 (G. Keller) ("Agents are independent contractors. Think of them as . . . small business owners; and they determine the commission that they charge"); *id*. 2163:24–2165:9 (M. King) (testifying based on his experience as an agent, as an owner of franchisee brokerages, and as President of Keller Williams that agents are responsible for setting their own commissions and that Keller Williams and its franchisee brokerages do not interfere); Oct. 30, 2023 Trial Tr. 2270:1–8 (J. Davis) (testifying that neither Keller Williams nor the franchisee brokerage with which she is affiliated plays any role in the commissions she charges); D-3604 (Gary Keller stating that intruding on an agent's ability "to charge whatever commission they want or can . . . is so far outside our culture it isn't even funny"). The unrebutted record evidence is that, as a company "built by agents, for agents," *see, e.g.*, Oct. 27, 2023 Trial Tr. 1947:20–1948:8 (G. Keller), Keller Williams' company philosophy has been to offer tools and training to support agents but to otherwise avoid intruding on agents' businesses and to let them operate their businesses as they see fit, *see, e.g.*, *id*. 2163:4–23 (M. King) (Keller Williams positions itself as a place "where entrepreneurs thrive" by providing training and models but otherwise "get[ting] out of their way and let[ting] them build big businesses"). Keller Williams also presented evidence that Plaintiffs did not attempt to rebut that, under Keller Williams' "capping" business model, where the royalties Keller Williams receives from any agent "caps" at $3,000 per agent, Keller Williams' profitability depends on the number of agents who affiliate with its franchisee brokerage and not on the commission rates those agents earn. *See id.* 2157:13– 2159:21 (M. King). Keller Williams thus has little incentive to enter into any conspiracy to increase commission rates or cooperative compensation levels. *See id.* 2168:7–12 (increasing commission rates is not among the 25 economic fundamentals to the success of Keller Williams' franchisee brokerages).

rates,"[7] no reasonable jury could conclude based on the evidence at trial that either the purpose or the effect of the alleged conspiracy was to inflate or stabilize commission rates.

The evidence presented at trial as to the purpose of the Cooperative Compensation Rule was clear and unrebutted by Plaintiffs—and had nothing to do with inflating or stabilizing commission rates. The purpose is provided in the Rule itself, which states that requiring listing agents to make and disclose cooperative compensation offers "is necessary because cooperating participants have the right to know what their compensation will be prior to commencing their efforts to sell." P-4587 at PDF p.54 (NAR Policy Statement 7.23, "Commission/Cooperative Compensation Offers"). Particularly where buyer agents are typically compensated only upon the successful completion of transactions, and often incur significant expenses during the course of representing clients,[8] it is reasonable for buyer agents to be informed of how much compensation they can expect to receive if they succeed in finding a buyer for a listed property. But, more important, there is nothing about this explanation that could support a finding by the jury that the purpose of the Rule was to inflate or stabilize commissions. Sharon Millett, who chaired the NAR Presidential Advisory Group that recommended NAR policy changes that resulted in the Cooperative Compensation Rule, explained that NAR modified the rule that existed prior to 1992 to ensure that buyer agents owing duties to buyers, and not only "sub-agents" owing duties to home sellers, could receive compensation if they procured buyers for properties listed on MLSs. *See* Oct. 23, 2023 Trial Tr. 944:10–24, 949:16–950:9, 950:23–951:16 (S. Millett). There was no evidence that would support a finding that Defendants sought through the Rule to increase

[7] ECF No. 1019 at 20–21. Ultimately the jury was instructed to determine whether the conspiracy had the "purpose *or* effect of raising, inflating, or stabilizing broker commission rates paid by home sellers," ECF No. 1292 at 29 (emphasis added), which, as NAR points out was improper and provides grounds for a new trial. Keller Williams joins NAR's motion for a new trial and incorporates its arguments herein.

[8] *See, e.g.*, Oct. 30, 2023 Trial Tr. 2296:21–2300:5 (J. Davis) (identifying expenses incurred by buyer agents "[w]hether we close on the property or not"); Oct. 27, 2023 Trial Tr. 2181:22–2182:7 (M. King) ("We pay all of our expenses. And if we don't close a home, we don't make any money.").

commission rates. Indeed, Plaintiffs' counsel recognized as much when he specifically asked the jury to "[f]orget the purpose" and to focus only on the effect of the alleged conspiracy. Oct. 30, 2023 Trial Tr. 2346:22–2347:2.

But the trial record also cannot support a finding that the effect of the Rule was to inflate or stabilize commission rates. The evidence showed that the Cooperative Compensation Rule requires only that listing brokers make *an* offer of compensation, but leaves the amount of the offer to the complete discretion of the listing agent. P-0216 at 38; Oct. 19, 2023 Trial Tr. 589:12–14 (C. Schulman) ("Q And there's no rule that mandates a specific amount the seller's agent has to offer to buyer's agents, correct? A That's correct."). Plaintiffs' expert also presented evidence that offers of compensation varied significantly in the four Missouri MLSs at issue in this case, even though all four of the MLSs had adopted the same Cooperative Compensation Rule. *See* P-2908; Oct. 20, 2023 Trial Tr. 627:10–14, 628:14–18 (C. Schulman) (acknowledging that there is variation in commission rates among the four MLSs at issue and conceding that his analysis did not include an "explain[ation] why in the same state with the same rule, there is such a difference in the amounts that people are being offered across these cities"). When confronted with the variation among the Missouri MLSs, Plaintiffs' expert suggested there was a *separate* unproven agreement among the Defendants to set commissions for different markets. Oct. 19, 2023 Trial Tr. 550:21–551:1 (C. Schulman) ("It seemed that the St. Louis area had a different standard kind of rate that they focused in on 2.7 percent for the buy side rather than 3 percent."); Oct. 20, 2023 Trial Tr. 626:7–13 (C. Schulman) ("St. Louis, the MARIS MLS appeared to have a slightly different sharing rule where most of them were clustered around 2.7 percent."). But Plaintiffs offer no evidence whatsoever of such a separate conspiracy among the Defendants to agree to different commission rates in different MLS markets—and it should go without saying that the mere

speculation of Plaintiffs' expert concerning such a conspiracy cannot suffice to support the jury's verdict. No reasonable jury could conclude based on this evidence that it was the Rule that produced the market outcomes Plaintiffs' expert observed.

Further, as Plaintiffs recognized when they pleaded an antitrust market consisting of the "bundle of services provided to home buyers and sellers," ECF 759 (Third Amended Complaint) ¶ 106, real estate markets are two-sided markets. Plaintiffs were thus required under *Ohio v. American Express Co.* ("*Amex*"), 138 S. Ct. 2274, 2287–88 (2018), to show harm to competition considering the impacts of the challenged conduct on both sides of the market. But Plaintiffs offered no evidence of the impact of the alleged conspiracy that satisfies the requirements of *Amex*.

Instead, Plaintiffs presented evidence only of the amounts of cooperative compensation their listing agents offered to buyer agents. They did not attempt to account for benefits to buyers or how it benefits sellers as well to have a larger pool of potential buyers and increased demand for their properties. *See, e.g.*, Oct. 30, 2023 Trial Tr. 2325:20–2326:19 (J. Davis) (testifying that, if buyers do not have representation, "I think the seller will look up, and they'll have less offers. And with less offers, they'll have worse terms."); Oct. 23, 2023 Trial Tr. 936:10–937:11 (S. Millett) (explaining how the presence of buyer agents helps home sellers by increasing interest in sellers' properties, producing "better pricing offers," and helping homes sell more quickly); Oct. 25, 2023 Trial Tr. 1674:19–1675:12 (K. Wilson) (testifying that cooperative compensation benefits sellers by providing an "incentive for the buyer's agent to bring a buyer their way," allowing sellers to receive "a higher price for their home"). The evidence presented at trial also established that class representatives themselves benefitted from the challenged conduct, as compensation paid to their agents when they purchased a home more than offset any commissions they paid to buyer agents when they were sellers. *See* Oct. 26, 2023 Trial Tr. 1855:4–1856:19

(L. Wu). Cooperative compensation yields benefits across both sides of the market, which under *Amex* must have been accounted for—but was ignored by Plaintiffs. Accordingly, no reasonable juror could conclude that the conspiracy Plaintiffs challenged unreasonably restrained trade.

D. There was insufficient evidentiary basis for the jury to find causation or injury.

Plaintiffs failed to present evidence from which a reasonable jury could find that the alleged conspiracy to follow and enforce the Cooperative Compensation Rule caused them injury. To prevail, Plaintiffs were required to establish that they "suffered antitrust injury caused by the defendant's anticompetitive wrongdoing" and that their "damages were caused by the unlawful acts of the defendants." *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1494 (8th Cir. 1992) (emphasis omitted) (quoting *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983)); *see also Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1054 (8th Cir. 2000) ("In order to prevail plaintiffs must prove for each claim '. . . a causal relationship between the violation and the injury, and the amount of damages.'" (quoting *Amerinet*, 972 F.2d at 1490)).

The trial record is replete with evidence that listing agents would offer compensation to buyer agents without any rule requiring them to do so. Based on this evidence, no reasonable jury could conclude that it was the Cooperative Compensation Rule or a conspiracy to follow and enforce the Rule that caused listing agents representing sellers in Missouri to compensate buyer agents. As discussed above, the evidence reflects that cooperative compensation benefits home sellers by increasing the pool of buyers available for sellers' homes and leads to homes selling more quickly and for higher prices. *See*, § III.C., *supra* (citing testimony from Jen Davis, Sharon Millett, and Krista Wilson). Because of these benefits, agents testified at trial that they regularly offered cooperative compensation without even knowing that an MLS rule mandated that they do so because they regarded the practice to be good for their seller clients and the marketing of their clients' homes. *See* Oct. 30, 2023 Trial Tr. 2286:20–2287:15 (J. Davis); Oct. 27, 2023 Trial Tr.

2189:9–23 (M. King). For these agents, the alleged conspiracy to follow and enforce the Cooperative Compensation Rule did not cause them to provide compensation to buyer agents; they did so because they regarded the practice to be beneficial to their clients. This evidence was unrebutted. Plaintiffs did not call a single listing agent who testified that he or she did not want to offer to compensate buyer agents but did so because of the Rule or the alleged conspiracy to follow and enforce the Rule. *See St. Louis Convention & Visitors Comm'n v. Nat'l Football League*, 154 F.3d 851, 863 (8th Cir. 1998) (affirming judgment as a matter of law for defendants where there were "legitimate reasons" for challenged conduct and plaintiffs offered no testimony from market actors supporting plaintiffs' causation allegations).[9]

Defendants also presented evidence that, in markets in the United States where listing agents are not required to offer cooperative compensation under local MLS rules, they nonetheless continue to do so with the same frequency as they do in Missouri. Oct. 26, 2023 Trial Tr. 1848:19–1950:10 (L. Wu). The continued existence of cooperative compensation those markets where the Cooperative Compensation Rule did not exist shows that the practice of listing agents sharing commissions with buyer agents is not caused by the Rule but by market forces and because the practice makes economic sense for both buyers and sellers. Again, that evidence was unrebutted.

Defendants also provided evidence of various types of home sellers who chose to compensate buyer agents without being required to do so by any MLS rule. This evidence contradicts Plaintiffs' position that no seller would ever agree to compensate the agent for their "adversary" unless mandated to do so by the Cooperative Compensation Rule. So-called "For Sale

[9] Plaintiffs' expert testified that there were over 30,000 licensed residential real estate agents in Missouri, including over 4,000 agents who were not members of NAR. Oct. 20, 2023 Trial Tr. 705:2–21 (C. Schulman). Plaintiffs did not introduce any evidence regarding the Rule or offers of cooperative compensation *from any of these agents*, let alone any evidence suggesting that they would not offer cooperative compensation absent the Rule, or that they did not regard the practice to be beneficial to their clients.

by Owner" or "FSBO" sellers seeking to sell their homes without the assistance of an agent regularly compensate buyer agents, reflecting the value they see in having buyer agents deliver buyers to their homes and work with buyers to help close deals. *See* Oct. 30, 2023 Trial Tr. 2294:21–2295:20 (J. Davis) (testifying that 90 percent of FSBO sellers agree to compensate her when she finds a buyer for their homes). Home builders and financial institutions like banks and Fannie Mae have conveyed their expectation to listing agents for homes they own that the agents offer to compensate buyer agents. Oct. 27, 2023 Trial Tr. 2190:14–2191:2 (M. King) (testifying that no seller ever objected to him sharing commission with buyer agents and that professional sellers like builders and banks expected him to do so to "get the most amount of exposure for their properties, which would lead to the highest price"). In slow real estate markets, such as during the Great Recession, sellers and listing agents increased cooperative compensation offers and even offered significant bonuses to buyer agents who brought qualified buyers. Oct. 30, 2023 Trial Tr. 2289:22–2290:16 (J. Davis) (testifying that, during the Great Recession, "sellers were doing anything possible that they could to set their home apart from other homes," including offering bonuses of "$10,000 or more with an acceptable offer"); Oct. 27, 2023 Trial Tr. 2008:9–2009:7 (G. Keller) (observing increase in buyer agent commissions during the Great Recession and explaining that it reflected sellers saying to buyer agents, "please come sell my home").

Plaintiffs offered no facts to rebut the evidence that it was market forces, and not the alleged conspiracy, that caused sellers to authorize listing agents to share commissions with buyer agents. They merely relied on their economic expert, Dr. Schulman, who asserted that sellers would never voluntarily agree to pay buyer agent commissions because sellers do not pay buyer agent commissions in Australia, Oct. 19, 2023 Trial Tr. 560:2–14 (C. Schulman), and because "[i]t doesn't make economic sense that a seller would pay for an agent that is representing somebody

directly adverse to their interest." *Id.* 567:16–21 (C. Schulman).[10] But "[a] jury may not rest its verdict on an expert's conclusion 'without some underlying facts and reasons, or a logical inferential process to support the expert's opinion.'" *St. Louis Convention & Visitors Comm'n*, 154 F.3d at 863 (rejecting expert's opinions on causation when based on "economic theory" and without "evidence which tended to show that this was actually the case" (citing *Sullivan v. NFL*, 34 F.3d 1091, 1105 (1st Cir. 1994))).

Not only did Dr. Schulman's position that it makes no "economic sense" for sellers to agree to compensate buyer agents lack evidentiary support, but it also ignored evidence of the more complicated nature of relationships between "adversaries" in real estate transactions. As former NAR president Sharon Millett testified, while buyers and sellers have "totally different goals . . . if a buyer wants to buy this property and a seller wants to sell it, ultimately somewhere you're going to have to find common ground because the seller will never sell it if they can't get a price that's acceptable to them, and the buyer is never going to buy it unless they can get a price that's acceptable to them." Oct. 23, 2023 Trial Tr. 937:12–938:5 (S. Millett); *see also* Oct. 27, 2023 Trial Tr. 2016:22–2017:24 (G. Keller) (explaining how "the second that you have a contract, the buyer and seller fully expect the two agents involved to drop all of that competitiveness and now cooperate to make sure that the transaction closes"). The evidence reflects that, in this context, compensating the buyer's agent helps the seller by bringing transactions to fruition, further undercutting Plaintiffs' speculative and unsupported position that sellers and listing agents would never compensate buyer agents in the absence of the alleged conspiracy. *See* Oct. 23, 2023 Trial

[10] Dr. Schulman asserted the threat of steering—the possibility that buyer agents might put their own interests ahead of their clients' interests and not inform buyers of properties where they would receive lower compensation—keeps listing agents from reducing cooperative compensation offers. Plaintiffs offered no evidence of any buyer agent actually engaging in steering, and the same market forces that might incentivize listing agents to offer cooperative compensation would exist regardless of whether MLS rules require agents to offer cooperative compensation.

Tr. 938:6–939:3 (S. Millett) (providing example of how the presence of a dedicated buyer agent led to completion of a challenging transaction); Oct. 30, 2023 Trial Tr. 2314:9–13 (J. Davis) ("It's more likely that we're going to get to the closing table when both parties have . . . representation. It's more likely that the seller will actually get to close on the property.").

The law in Missouri (and surrounding states) shows why Plaintiffs and Dr. Schulman could provide no evidentiary support for their extreme view that it is only the alleged conspiracy that caused any seller to pay a buyer agent's commission. As the Court knows, Missouri law expressly authorizes buyer agents to receive compensation from sellers or listing agents:

> **Compensation of designated broker, paid by whom, sharing compensation — payment establishing agency — agreement by seller or buyer on sharing compensation.** —
>
> 1. In any real estate transaction, the designated broker's compensation may be paid by the *seller*, the landlord, the buyer, the tenant, or a third party *or by sharing the compensation between designated brokers*. . . .
>
> 3. A seller or landlord may agree that a designated broker may share with another designated broker the compensation paid by the seller or landlord.

Mo. Rev. Stat. 339.800 (emphasis added).[11] Moreover, Missouri expressly requires every listing agent to disclose whether compensation is being offered to buyers' agents. Pursuant to regulations adopted by the Missouri Real Estate Commission, "[e]very written listing agreement or other

[11] Among other states, Kansas also adopted a similar statute:

> **58-30,105. Compensation.** . . .
>
> (c) In any transaction, the broker's compensation may be paid by the seller, the landlord, the buyer or the tenant. . . .
>
> (d) A broker may: . . .
>
> (2) with the written agreement of the seller, landlord, buyer or tenant share a commission with another broker who acted as a transaction broker, a subagent or an agent of the other party

K.S.A. 58-30,105. One of the MLSs at issue in this case—the Heartland MLS—includes home sellers in Kansas. Illinois also adopted similar statutes:

> **§ 10-5. Payment of compensation.** . . .
>
> (d) One sponsoring broker may pay compensation directly to another sponsoring broker for the performance of licensed activities.
>
> **§ 10-10. Disclosure of compensation.** . . .
>
> (a) A licensee must disclose to a client the sponsoring broker's compensation and policy with regard to cooperating with brokers who represent other parties in a transaction.

225 ILCS 454/10-5; 225 ILCS 454/10-10. One of the MLSs at issue in this case—the MARIS MLS—includes home sellers in Illinois.

written agreement for brokerage services shall contain," among other things, "[s]pecification of whether or not the designated broker is authorized to cooperate with and compensate other designated brokers acting pursuant to any other brokerage relationship as defined by 339.710 to 339.860, RSMo, including but not limited to buyer's agents and/or transaction brokers." 4 Mo. Code of State Regulations 250-8.090.

Plaintiffs' position that no home seller in Missouri would have paid a buyer agent's commission in the absence of the alleged conspiracy is unsupported by any record evidence. No reasonable jury would have concluded based on the evidence presented at trial that the alleged conspiracy to follow and enforce the Cooperative Compensation Rule caused harm to home sellers. Keller Williams is entitled to judgment as a matter of law on this basis.

E. There was insufficient evidentiary basis for jury's award of damages.

Plaintiffs' damages calculation flowed directly from their unsupported position that no home seller would have paid a buyer agent's commission in the absence of the alleged conspiracy. As Plaintiffs' economic expert testified, because sellers in Australia do not pay buyer agents, "*every single penny* that sellers had to pay a buy side agent here in Missouri is the measure of antitrust damages." Oct. 19, 2023 Trial Tr. 562:24–563:18 (C. Schulman) (emphasis added); *see also id.* 564:20–565:2 (damages were "*all* the buy side commission paid by home sellers that listed with one of the agent's brokers affiliated with these four companies" (emphasis added)).

Plaintiffs are permitted to recover only for alleged overpayments caused by Defendants' illegal acts. *See Amerinet, Inc.*, 972 F.2d at 1494. Just as there was no legally sufficient evidentiary basis for the jury's finding that the alleged conspiracy caused harm to Plaintiffs, the jury's damages award should be overturned as a matter of law.

Plaintiffs' damages calculation fails as a matter of law because it simply assumes that, if sellers and listing agents had not offered compensation to buyer agents, the overall commission

rate that sellers paid to their listing agents would have been reduced by the same exact amount paid to buyer agents. There is no evidence in the record that supports this conclusion and, again, evidence to the contrary. Plaintiffs' expert conceded that he "did not do an analysis of sell side commissions," or an analysis of how much sellers paid overall in commissions. Oct. 20, 2023 Trial Tr. 668:4–669:4 (C. Schulman). The class representatives' listing agreements with their agents specified the overall commission rate each Plaintiff agreed to pay his or her listing agent and then disclosed the amount that the *listing agent* agreed to compensate a buyer agent who procured a buyer for the property. *See, e.g.*, P-2211; Oct. 19, 2023 Trial Tr. 422:9–17, 425:18–426:3 (J. Breit) (acknowledging that he agreed to pay 5.5 percent commission to his listing agent and that his contract authorized the listing agent to share a portion of the commission with a buyer agent). Nothing in those agreements called for a reduction in the listing agent's agreed-to commission if no compensation were shared with a buyer agent. Further, there is evidence in the record that, because listing agents would have to take on the work performed by buyer agents in the absence of buyer agents, listing agents would likely maintain rates at the same level, even if they no longer shared their commissions with buyer agents. *See* Oct. 30, 2023 Trial Tr. 2325:20–2327:3 (J. Davis). Plaintiffs did not attempt to rebut this evidence. Accordingly, there is no legally sufficient basis on which to sustain the jury's damages determination that every single penny paid to buyer agents during the seven-year class period would have been retained by home sellers instead of being paid to listing agents.

The lack of evidentiary support for Plaintiffs' damages calculation is illustrated by the extreme and illogical result it necessarily requires. During the seven-year class period, there were ten or more independently owned and operated Keller Williams franchisee brokerages that separately contracted with thousands of Missouri-licensed real estate agents to affiliate with their

brokerages. Those agents separately negotiated and entered tens of thousands of listing agreements with tens of thousands of different home sellers and subsequently closed over 65,000 individually negotiated transactions in which buyer agents were collectively paid over $430 million. *See* P-4592A. Yet, according to Plaintiffs' theory, not one home seller in any one of these tens of thousands of transactions would have authorized even one penny to be paid to one buyer agent, even when the overwhelming majority of home owners selling without an agent compensate the buyer agent. *See* Oct. 30, 2023 Trial Tr. 2294:21–2295:20 (J. Davis). And not even one listing agent would have received even one penny more, even though the listing agreements obligated home sellers to pay the overall commissions to the listing agents and it would have been in those agents' economic interests to charge more for doing more work. Because there is no evidentiary support for Plaintiffs' extreme position and it defies common sense, the jury's damages award should be overturned as a matter of law.

IV. CONCLUSION

For the foregoing reasons and those offered in NAR's and the HomeServices Defendants' Renewed Motions for Judgment as a Matter of Law, the Could should enter judgment as a matter of law in favor of Keller Williams.

Dated: January 8, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 8, 2024, an electronic copy of the foregoing was filed with the Clerk of the Court by using the CM/ECF system, and service upon all counsel of record will be accomplished by the CM/ECF system.

/s/ *David C. Kully*
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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, JEREMY KEEL, HOLLEE ELLIS, and FRANCES HARVEY on behalf of themselves and all others similarly situated, Plaintiffs, v. NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	)	Case No. 4:19-CV-00332-SRB Honorable Judge Bough

SUGGESTIONS IN SUPPORT OF DEFENDANT THE NATIONAL ASSOCIATION OF REALTORS®' MOTION FOR NEW TRIAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

LEGAL STANDARDS 2

ARGUMENT 2

I. THE JURY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL 2

A. The Jury Instructions Misstated The Standard For Antitrust Liability 2

1. The Court Committed Legal Error In Issuing Per Se Jury Instructions 4

2. The Court's Instruction To The Jury Was Wrong And Highly Prejudicial Even Under The Court's Own Standard 16

B. The Court Should Have Instructed The Jury That Missouri Law Expressly Authorizes Offers Of Compensation 19

II. PLAINTIFFS' COUNSEL'S PERVASIVE AND PREJUDICIAL MISCONDUCT REQUIRES A NEW TRIAL 20

A. Plaintiffs' Counsel's Misconduct Was Pervasive And Deliberate 21

1. Plaintiffs' Counsel Repeatedly Injected Improper Personal Opinion 21

2. Plaintiffs' Counsel Flagrantly Disregarded Multiple Court Orders 23

3. Plaintiffs' Counsel Improperly Stoked Local Prejudice 25

4. Plaintiffs' Counsel Improperly Showed The Jury An Undisclosed And Highly Prejudicial Video 27

B. Plaintiffs' Counsel's Misconduct Was Profoundly Prejudicial 28

CONCLUSION 30

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

Page(s)

Cases

Allied Tube & Conduit Corp. v. Indian Head, Inc.,
486 U.S. 492 (1988).....17

Anheuser-Busch, Inc. v. Nat. Beverage Distribs.,
69 F.3d 337 (9th Cir. 1995).....23

Blair v. Wills,
420 F.3d 823 (8th Cir. 2005).....30

Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan,
203 F.3d 1028 (8th Cir. 2000).....10

Broad. Music, Inc. v. Columbia Broad. Sys., Inc.,
441 U.S. 1 (1979).....9, 10, 17

Chiasson v. Zapata Gulf Marine Corp.,
988 F.2d 513 (5th Cir. 1993).....28

Craftsmen Limousine, Inc. v. Ford Motor Co.,
363 F.3d 761 (8th Cir. 2004).....5, 6

Dean v. Searcey,
893 F.3d 504 (8th Cir. 2018).....21, 29

Findling v. Realcomp II, Ltd.,
2018 WL 1425952 (E.D. Mich. Mar. 22, 2018).....12

Freeman v. San Diego Ass'n of Realtors,
322 F.3d 1133 (9th Cir. 2003).....7

Gray v. Bicknell,
86 F.3d 1472 (8th Cir. 1996).....2

Harden v. Hillman,
993 F.3d 465 (6th Cir. 2021).....30

Herman v. Hess Oil Virgin Islands Corp.,
524 F.2d 767 (3d Cir. 1975).....26

Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,
551 U.S. 877 (2007).....4, 5, 6, 7, 8, 13, 17

McClarin v. City of New York,
2023 WL 5831059 (S.D.N.Y. Sept. 8, 2023).....27

Mkt. Force Inc. v. Wauwatosa Realty Co.,
906 F.2d 1167 (7th Cir. 1990).....11

Morrissey v. Welsh Co.,
821 F.2d 1294 (8th Cir. 1987).....21, 30

Mueller v. Hubbard Milling Co.,
573 F.2d 1029 (8th Cir. 1978).....2

Murphy v. Alpha Realty, Inc.,
1978 WL 1451 (N.D. Ill. Dec. 7, 1978).....7

Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.,
779 F.2d 592 (11th Cir. 1986).....11

Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.,
468 U.S. 85 (1984).....6

Nat'l Soc. of Pro. Eng'rs v. United States,
435 U.S. 679 (1978).....17

O'Riordan v. Long Island Bd. of Realtors, Inc.,
707 F. Supp. 111 (E.D.N.Y. 1988).....7

Palmer v. BRG of Georgia, Inc.,
498 U.S. 46 (1990).....17

Penne v. Greater Minneapolis Area Board of Realtors,
604 F.2d 1143 (8th Cir. 1979).....11

In re Processed Egg Prods. Antitrust Litig.,
206 F. Supp. 3d 1033 (E.D. Pa. 2016).....17

Re/Max Int'l, Inc. v. Realty One, Inc.,
173 F.3d 995 (6th Cir. 1999).....7

Realcomp II, Ltd. v. FTC,
635 F.3d 815 (6th Cir. 2011).....7

Reifert v. S. Cent. Wis. MLS Corp.,
450 F.3d 312 (7th Cir. 2006).....7

REX Real Est. Exch., Inc. v. Zillow, Inc.,
2023 WL 5278115 (W.D. Wash. Aug. 16, 2023).....24

Robertson v. Sea Pines Real Estate Cos., Inc.,
679 F.3d 279 (4th Cir. 2012) 7

Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,
792 F.2d 210 (D.C. Cir. 1986).....14, 17

Sanford v. Crittenden Mem'l Hosp.,
141 F.3d 882 (8th Cir. 1998) 2

In re Sulfuric Acid Antitrust Litig.,
703 F.3d 1004 (7th Cir. 2012) 13

Supermarket of Homes v. San Fernando Valley Bd. of Realtors,
1983 WL 2199 (C.D. Cal. Sept. 1, 1983) 7

Texaco Inc. v. Dagher,
547 U.S. 1 (2006).....4, 5, 10, 14

Thompson v. Metro. Multi-List, Inc.,
934 F.2d 1566 (11th Cir. 1991) 7

United States v. Citizens & S. Nat'l Bank,
422 U.S. 86 (1975).....11

United States v. Collins,
78 F.3d 1021 (6th Cir. 1996) 21

United States v. Emmert,
9 F.3d 699 (8th Cir. 1993) 21

United States v. Line Material Co.,
333 U.S. 287 (1948).....17

United States v. Moore,
639 F.3d 443 (8th Cir. 2011) 29

United States v. Realty Multi-List, Inc.,
629 F.2d 1351 (5th Cir. 1980) 7, 10, 12

United States v. Scott,
243 F.3d 1103 (8th Cir. 2001) 28

United States v. Socony-Vacuum Oil Co.,
310 U.S. 150 (1940).....12, 13, 16, 17

United States v. U.S. Gypsum Co.,
438 U.S. 422 (1978).....11

United States v. Williams,
2023 WL 4277461 (D. Ariz. Mar. 24, 2023) 28

United States v. Ybarra,
700 F. App'x 543 (8th Cir. 2017) 30

Westbrook v. Gen. Tire & Rubber Co.,
754 F.2d 1233 (5th Cir. 1985) 26

Statutes & Regulations

15 U.S.C. § 1 ..... 3, 4, 11, 12

20 Mo. Code of State Regulations 2250-8.090 20

Mo. Rev. Stat. 339.800 20

Rules

Fed. R. Civ. P. 59 ..... 1, 2

Mo. S. Ct. R. 4-3.4(e) 21

Other Authorities

ABA Model Jury Instructions in Civil Antitrust Cases § 1.C.1 (2016) 3

PRELIMINARY STATEMENT

The result of the trial in this case defies precedent, logic, and the evidence. For the reasons detailed in the motion under Federal Rule of Civil Procedure 50(b) that Defendant the National Association of REALTORS® (NAR) has filed contemporaneously with this motion, ECF 1359, 1360, the verdict should be vacated and the Court should enter judgment as a matter of law for NAR. If the Court declines to do so, it should order a new trial under Federal Rule of Civil Procedure 59(a) for several independent reasons.

In this Rule 59(a) motion, NAR focuses on two such reasons: legal errors in the jury instructions and pervasive misconduct by Plaintiffs' counsel, both of which severely prejudiced Defendants and can be remedied only through a new trial. *See infra* Parts I-II. NAR also moves for a new trial on the grounds that: (a) the Court erred on a number of evidentiary rulings, including (i) its failure to exclude the speculative, contradictory, and unfounded testimony of Plaintiffs' proffered expert witness Dr. Schulman, (ii) its failure to exclude admission of and references to the Clear Cooperation Policy and Roger Alford's testimony thereto, the Figgs hearsay notes, irrelevant documents related to commissions, and the settlements by former defendants Realogy and RE/MAX, and (iii) its exclusion of evidence demonstrating that Missouri law permits cooperative compensation; (b) the jury's finding of antitrust injury was against the weight of the evidence; and (c) the jury's damages award based on 100% overcharge was against the weight of the evidence. To avoid duplicative briefing, NAR fully joins and incorporates by reference the arguments elaborating those grounds in the Rule 59(a) motions filed concurrently by the Keller Williams and the HomeServices Defendants. In addition, for the same reasons set forth in NAR's Rule 50(b) motion that Plaintiffs failed to satisfy the requirements of direct purchaser, restraint of trade, conspiracy, antitrust injury, and damages, the jury's verdict was at minimum against the great weight of the evidence.

LEGAL STANDARDS

Rule 59(a) permits a district court "to grant a new trial based on its appraisal of the fairness of the trial and the reliability of the jury's verdict." *Gray v. Bicknell*, 86 F.3d 1472, 1480 (8th Cir. 1996). In particular, a court may grant a new trial based on "a verdict against the weight of the evidence, an excessive damage award, or legal errors at trial" that prejudiced the moving party. *Id.* A new trial should also be granted where the verdict was "the result of passion and prejudice on the part of the jury," *Mueller v. Hubbard Milling Co*., 573 F.2d 1029, 1039 (8th Cir. 1978), or where "[s]urprise during trial"—for example, through the introduction of evidence "undisclosed until after the trial is underway"—deprived the moving party of a fair trial, *Sanford v. Crittenden Mem'l Hosp*., 141 F.3d 882, 886 (8th Cir. 1998).

ARGUMENT

I. THE JURY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

The jury found that, through an NAR rule that has existed for decades, Defendants engaged in an illegal price-fixing conspiracy, even though the Cooperative Compensation Model Rule (Model Rule) is simply a disclosure requirement that does not fix commissions, direct seller brokers to offer any particular commission, or maintain offers within a given range. That verdict rested on flawed jury instructions that misstated blackletter antitrust law in multiple respects. Because that error clearly prejudiced Defendants by drastically reducing Plaintiffs' burden to prove antitrust liability, this Court should, at minimum, order a new trial.

A. The Jury Instructions Misstated The Standard For Antitrust Liability

The jury instructions misstated the basic standard for finding Defendants liable for an antitrust conspiracy. Instruction No. 22 set forth the elements that Plaintiffs had to prove to succeed on the Sherman Act claim. That instruction provided in full:

> To establish that any Defendant violated Section 1 of the Sherman Act in

this case, the Class Plaintiffs must prove the following elements:

First, that a conspiracy existed to follow and enforce the Cooperative Compensation Rule in the Subject MLSs;

Second, that the Defendant sought to be held liable knowingly—that is, voluntarily and intentionally—joined that conspiracy;

Third, that the conspiracy had the purpose or effect of raising, inflating, or stabilizing broker commission rates paid by home sellers; and

Fourth, that the conspiracy caused the Class Plaintiffs to suffer injury to their property.

ECF 1292 at 29. That instruction, and related Instruction Nos. 23 and 24, rested on the premise that Plaintiffs had presented sufficient evidence to establish a per se violation of the Sherman Act and so the Court could dispense with the ordinary rule of reason instructions proposed by Defendants[1] that apply in nearly all antitrust cases, which would have required the jury to "balance the competitive harm against the competitive benefit" of the Model Rule. ABA Model Jury Instructions in Civil Antitrust Cases § 1.C.1 (2016). But that premise and the resulting instruction were infected by two independent errors.

First, in deciding whether the Model Rule merited per se condemnation, the Court articulated the wrong legal standard. Before giving a per se instruction, a court must first determine whether "courts have had considerable experience with the type of restraint at issue" and then decide, based on that well of judicial experience, whether the restraint "would always or almost always tend to restrict competition and decrease output." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (*Leegin*) (internal quotation marks omitted). The Court did

[1] Instead of issuing Instruction No. 22, the Court should have issued Defendants' proposed instruction nos. 20-26. ECF 1280 at 3-11. The errors in the jury instructions were also reflected on the verdict form, which asked the jury to determine whether Plaintiffs had proved that "a conspiracy existed to follow and enforce the Cooperative Compensation Rule" and whether the putative conspiracy "had the purpose or effect of raising, inflating, or stabilizing broker commission rates paid by home sellers," not whether the Model Rule satisfied the rule of reason. ECF 1294 at 1.

not conduct that mandatory analysis, which could not possibly have resulted in per se condemnation given that nothing like the Model Rule has ever been subject to judicial scrutiny.

Second, even under the standard for per se price-fixing that the Court adopted—whether the Model Rule had the "purpose and effect of inflating or stabilizing broker commission rates," ECF 1019 at 20-21—the instructions were erroneous. The Court instructed the jury that it could find Defendants liable if the conspiracy had the "purpose ***or*** effect"—not the purpose ***and*** effect—"of raising, inflating, or stabilizing commission rates paid by home sellers." ECF 1292 at 29 (emphasis added). There was no conceivable justification to phrase that standard in the disjunctive. That permitted the jury to find Defendants liable if the alleged agreement to enforce the Model Rule merely had the "effect" of raising prices, which is true of innumerable perfectly lawful arrangements, such as industry-wide agreements on safety standards. And Plaintiffs' counsel exploited that error, telling the jury in closing to "[f]orget the purpose" of the Model Rule and focus only on its effect. 10/30/2023 Trial Tr. 2347:1. On that basis alone, the verdict unquestionably must be vacated.

1. The Court Committed Legal Error In Issuing Per Se Jury Instructions

a. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. The Supreme Court has long construed that language to prohibit only "unreasonable restraints." *Leegin*, 551 U.S. at 885 (internal quotation marks omitted). For that reason, courts "presumptively appl[y] rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Indeed, "[t]he rule of reason is the prevailing standard for determining a restraint's effect upon competition in a relevant market."

Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761, 772 (8th Cir. 2004) (internal quotation marks and citation omitted). Thus, in almost all cases, challenged restraints must be evaluated under the rule of reason, under which "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin*, 551 U.S. at 885 (internal quotation marks omitted). As part of that analysis, the factfinder considers "specific information about the relevant business," "the restraint's history, nature, and effect," and "whether the businesses involved have market power," *id.* at 885-86 (internal quotation marks omitted), and it must take account of the procompetitive benefits of the restraint "that are in the consumer's best interest," *id.* at 886.

The per se rule short-circuits that holistic approach, depriving a defendant of the opportunity to justify the challenged practice as reasonable in light of its benefits. For that reason, the Supreme Court has cautioned that per se treatment is rarely justified: "Resort to *per se* rules is confined to restraints . . . that would always or almost always tend to restrict competition and decrease output," *i.e.*, that "would be invalidated in all or almost all instances under the rule of reason." *Leegin*, 551 U.S. at 886-87 (internal quotation marks omitted). To meet that high standard, a per se violation must have "manifestly anticompetitive effects" and "lack . . . any redeeming virtue." *Id.* at 886 (internal quotation marks omitted). The "economic impact" of the challenged practice must be "immediately obvious," *id.* at 887 (internal quotation marks omitted), such "that no elaborate study of the industry is needed to establish [the restraint's] illegality," *Dagher*, 547 U.S. at 5 (internal quotation marks and citation omitted). In other words, "the *per se* mode of analysis" applies only "[w]hen a restraint's negative impact on competition is immediately discernable and the restraint has no redeeming virtue." *Craftsmen Limousine*, 363 F.3d at 773. The per se rule essentially is a means to streamline litigation when the outcome of a

rule of reason inquiry is foreordained: "Per se rules are invoked when [the] surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 103-04 (1984).

Given that per se treatment depends on a determination about the inevitable consequences of the challenged restraint, the Supreme Court has imposed an important methodological limitation on the per se rule: "[A] *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue." *Leegin*, 551 U.S. at 886; *see also Craftsmen Limousine*, 363 F.3d at 773 ("Because of the strength of this presumption, the per se analysis is appropriate only where experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it." (internal quotation marks and citation omitted)). It follows necessarily that when a given type of restraint has *never* been subject to judicial scrutiny, the per se rule cannot apply.

In electing to give the jury a per se instruction rather than a rule of reason instruction, the Court failed to follow these settled principles. *See* ECF 1280 at 3 (NAR & KW Objections to Court Proposed Final Jury Instructions). The Court did not evaluate whether the enforcement of a rule requiring seller brokers to make an offer of (any) commission in a Multiple Listing Service (MLS) listing would "always or almost always tend to restrict competition and decrease output" or "would be invalidated in all or almost all instances under the rule of reason." *Leegin*, 551 U.S. at 886-87 (citation omitted). Nor did the Court assess whether the Model Rule produces "manifestly anticompetitive effects" and "lack[s] . . . any redeeming virtue." *Id.* at 886 (internal quotation marks and citations omitted). And it did not find that the alleged economic effect of the rule was "immediately obvious." *Id.* at 887 (citation omitted).

Critically, the Court's error went far beyond merely failing to articulate the correct standards. Especially given the novelty of Plaintiffs' challenge, the standard for giving a per se instruction simply could not be satisfied here. Courts do not have "considerable experience" with the "type of restraint at issue" in this case; they have *zero* experience with it. *Id.* at 886. Despite having been in place for decades, the Model Rule has never been subject to judicial scrutiny before the currently pending cases. *See* ECF 1019 at 20 ("Section 2-G-1 has not been continually scrutinized by any government entity for antitrust implications."). Nor did Plaintiffs or the Court identify any reasonably similar disclosure rule or practice that has been held to violate the rule of reason. Indeed, other MLS rules, which likewise have not been subject to frequent antitrust scrutiny, have been evaluated (and largely held lawful) under the rule of reason.[2]

Moreover, the Court's own analysis made clear that the "economic impact" of the Model Rule was far from "immediately obvious." *Leegin*, 551 U.S. at 887 (citation omitted). The Court's summary judgment order merely identified a *factual dispute* about whether the alleged agreement to enforce the Model Rule inflated or stabilized broker commission rates—not an obvious, indisputable economic effect. *See* ECF 1019 at 20-21 (acknowledging that "an MLS can assist a transaction by making listings easily available to brokers that are members"). Such an uncertain

[2] *See Robertson v. Sea Pines Real Estate Cos., Inc.*, 679 F.3d 279, 290 (4th Cir. 2012); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 819, 825-27 (6th Cir. 2011); *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 321 (7th Cir. 2006) (applying rule of reason); *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1014-15 (6th Cir. 1999); *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1579-80 (11th Cir. 1991); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1365 (5th Cir. 1980); *O'Riordan v. Long Island Bd. of Realtors, Inc.*, 707 F. Supp. 111, 115 (E.D.N.Y. 1988) (noting that "there appears [to be] no federal case in which a court has applied a *per se* analysis to an MLS"); *Supermarket of Homes v. San Fernando Valley Bd. of Realtors*, 1983 WL 2199, at *7 (C.D. Cal. Sept. 1, 1983), *aff'd*, 786 F.2d 1400 (9th Cir. 1986) (applying rule of reason to antitrust claims regarding MLS); *Murphy v. Alpha Realty, Inc.*, 1978 WL 1451, at *4 (N.D. Ill. Dec. 7, 1978). *But see Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1144, 1150 (9th Cir. 2003) (finding per se framework applicable where defendants agreed to "set a fixed, uniform fee" and "concede[d] they fixed support fees").

economic impact demands the ordinary rule of reason inquiry, not per se condemnation.

More broadly, it simply does not make sense that a rule that has been in place for decades and that has demonstrable procompetitive benefits could be deemed to "lack . . . any redeeming virtue" and have "manifestly anticompetitive effects" such that per se treatment is warranted. *Leegin*, 551 U.S. at 886 (citations omitted). Although Defendants were prevented from developing a more complete record on the procompetitive benefits of the Model Rule by the Court's pretrial rulings, even the record that exists demonstrates that the Model Rule enhances consumer welfare by reducing transaction costs and promotes the most basic competitive goal of Plaintiffs—to sell their houses faster and at higher prices. 10/26/23 Trial Tr. 1784:12-1798:18, 1905:11-1911:0 (L. Wu); 10/23/23 Trial Tr. 952:10-953:19 (S. Millett). And, as NAR's former president testified, the rule was adopted for the procompetitive purposes of boosting buyer representation in the real estate market and increasing the number of first-time homebuyers. 10/23/23 Trial Tr. 939:5-953:19, 995:21-997:18 (S. Millett); DX-3533.

Furthermore, the practice of seller brokers paying the commissions of buyer brokers has been expressly authorized by Missouri law for decades, since long before the Model Rule was in place. While that long history does not immunize the Model Rule from antitrust scrutiny, it makes per se condemnation of a model rule that merely discloses such offers extremely implausible. Indeed, other MLS rules and practices have long been reviewed under the rule of reason precisely because courts understand that they generate real benefits for consumers. *See supra* at n.2.

b. This Court evidently declined to apply the settled standards for per se treatment on the ground that the Supreme Court has already held that horizontal price-fixing is a per se antitrust violation and that the Model Rule is alleged to be a form of price-fixing. ECF 1019 at 18, 21. That reasoning suffers from two basic flaws—one analytical and one a matter of common sense.

i. The analytical flaw pertains to the role of the "price-fixing" designation in the per se analysis. The Supreme Court's frequent observation that price-fixing arrangements are per se antitrust violations does not mean that any agreement that could reasonably be classified as price-fixing automatically triggers the per se rule. Rather, as the Supreme Court explained in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (*BMI*), the term "price fixing" is just "a shorthand way of describing certain categories of business behavior to which the *per se* rule applies." *Id.* at 9. In other words, a court must always undertake the analysis set forth above to determine whether per se treatment is warranted for a particular type of restraint alleged to influence prices; the label "price fixing" merely stands for the ultimate conclusion that per se condemnation is justified in light of that analysis. But the Court's approach in this case inverted the order of operations by first deeming the alleged agreement to enforce the Model Rule to be an arguable form of price-fixing and then citing that classification as the basis to instruct the jury on the per se theory.

BMI illustrates the proper approach. That case addressed a practice that "involved price-fixing in the literal sense": Composers and publishers agreed to set a price for a blanket license to perform music compositions. 441 U.S. at 8-9 (internal quotation marks omitted). In nevertheless declining to apply the per se rule, the Supreme Court explained that its precedent requires more than just "determining whether two or more potential competitors have literally 'fixed' a 'price.'" *Id.* at 9. Rather, the licensing arrangement was subject to ordinary rule of reason standards because it was not a "naked restrain[t] of trade with no purpose except stifling of competition," despite the fact that it literally fixed prices. *Id.* at 20 (internal quotation marks omitted). Thus, as the Fifth Circuit explained in the wake of *BMI*, "the Supreme Court has refused to accord per se treatment to practices literally comprehended within the term [price fixing] when, viewed in its full context,

the practice appeared potentially to be reasonably ancillary to procompetitive, efficiency-creating endeavors and therefore not a naked restraint of trade." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1365 (5th Cir. 1980).

In its summary judgment order, this Court distinguished *BMI* by pointing to asserted differences between the markets in the two cases. ECF 1019 at 20. Whatever the merits of that purported factual distinction, however, it overlooks the broader holding of *BMI* that per se treatment is not appropriate for every practice that might be called "price-fixing." *See Dagher*, 547 U.S. at 6 (holding rule of reason applied after concluding that while the "pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense" (citing *BMI*, 441 U.S. at 9)). Instead, courts must ask whether the challenged restraint would always or almost always tend to restrict competition and decrease output. This Court also observed that, unlike the licensing arrangement in *BMI*, the Model Rule "has not been continually scrutinized by any government entity for antitrust implications." ECF 1019 at 20. But if anything, that lack of prior scrutiny is a further reason not to apply a per se rule: Neither courts nor regulators have regularly "examined a practice like this one before." *BMI*, 441 U.S. at 10.

ii. Analytical problems aside, the Court's decision to instruct on a per se price-fixing theory has a more basic flaw: The alleged agreement to enforce the Model Rule is simply not "price-fixing" under any ordinary understanding of that term. The Model Rule merely requires seller brokers to disclose whatever price—any price, even $1—that they initially offer for services of buyer brokers. The Supreme Court has already rejected per se treatment for such conduct. As the Eighth Circuit has explained, "[t]he Supreme Court has held . . . that 'the dissemination of price information is not itself a per se violation of the Sherman Act.'" *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1037 (8th Cir. 2000) (quoting *United States v. Citizens &*

S. Nat'l Bank, 422 U.S. 86, 113 (1975)); *see also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) ("The exchange of price data and other information among competitors . . . do[es] not constitute a per se violation of the Sherman Act."); *Mkt. Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1173 (7th Cir. 1990) (finding defendants had "legitimate business reasons" for "exchange of information regarding the commissions that the firms would pay" to buyer broker plaintiff). Indeed, in *Penne v. Greater Minneapolis Area Board of Realtors*, the Eighth Circuit rejected the assertion that a board's dissemination of real-estate brokerage fees was per se illegal even where such exchanges were the alleged "vehicle" for other anticompetitive conduct, concluding instead that "[s]uch information exchanges are not Per se violations of Section 1 of the Sherman Act" because "they can serve to render the conduct of commercial affairs more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction." 604 F.2d 1143, 1147-48 (8th Cir. 1979) (internal quotation marks and citations omitted). Rather, to qualify for per se treatment, a conspiracy must employ "naked" price fixing; in other words, the "practice, on its face, always or almost always" must produce "immediately obvious" illicit anticompetitive effects. *Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 779 F.2d 592, 603 (11th Cir. 1986); *see supra* at 4-6. The Model Rule is nothing like that.

Indeed, Plaintiffs themselves well understood that an agreement to enforce the Model Rule could not alone amount to a conspiracy to fix prices. That is why the trial testimony of their experts relied on *other* alleged rules and practices as the mechanisms by which commissions were supposedly raised or stabilized, including the alleged practice of steering and the unrelated NAR model rule requiring seller brokers to file listings with the MLS within one business day of public marketing. *See, e.g.*, 10/19/2023 Trial Tr. 524:17-525:24 (C. Schulman); 10/20/2023 Trial Tr. 626:1-24 (C. Schulman); *id.* at 698:7-21; *id.* at 750:2-22 (R. Alford); *id.* at 764:16-765:16. But,

critically, this Court did not instruct the jury on a conspiracy to enforce any of those other rules and practices in combination with the Model Rule. Plaintiffs therefore were not required to prove an agreement about anything other than enforcing the Model Rule itself.

In short, it simply does not make sense to classify an agreement to follow and enforce a price-disclosure requirement as a price-fixing conspiracy. That conclusion accords with the views of other federal courts that have addressed the practices of multiple listing services, which have invariably rejected a per se approach, even when the challenged rule was alleged to have increased or stabilized prices. For example, the Fifth Circuit applied the rule of reason to an antitrust challenge to multiple listing practices after determining that the operation of the multiple listing services "helps reduce 'information and communication barriers,'" aids the market and the seller, provides "buyer benefits," and provides "clear competitive benefits to all parties." *Realty Multi-List, Inc*., 629 F.2d at 1368 (citations omitted); *see also Findling v. Realcomp II, Ltd.*, 2018 WL 1425952, at *4 (E.D. Mich. Mar. 22, 2018) ("When deciding whether a local realtor board's requirements violate § 1, the Court should use the rule of reason."). Given those "enormously procompetitive objectives," the Fifth Circuit explained, rules governing multiple listing services "are not subject to out-of-hand condemnation" under the *per se* rule. *Realty Multi-List, Inc*., 629 F.2d at 1368. This Court should have applied the same approach here.

The Court's contrary decision appeared to rest on two sentences from the Supreme Court's 1940 decision in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (*Socony-Vacuum*), which was issued decades before the Supreme Court adopted the modern per se framework described above. The first sentence was the opinion's observation that "price-fixing includes more than the mere establishment of uniform prices." ECF 1019 at 18 (quoting *Socony-Vacuum*, 310 U.S. at 222). What the Supreme Court meant by that statement, however, was that price-fixing

does not require "rigid, uniform prices," but could also include "agreements to raise or lower prices" through other mechanisms, such as where "the range within which purchases or sales will be made is agreed upon," or where the parties agree "to place a floor under the market." *Socony-Vacuum*, 310 U.S. at 222-23. The Model Rule, however, is nothing like those sorts of restraints; it merely requires disclosure of rates offered by seller brokers.

The Court also quoted *Socony-Vacuum*'s statement that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se," and the Court seemed to conclude that per se treatment ultimately depended on this "purpose and effect" inquiry. 310 U.S. at 223; *see* ECF 1019 at 18, 20-21. But there can be no doubt that the broad statement in *Socony-Vacuum*—arguable dicta at the time—has been cabined by decades of common-law development of the per se doctrine. *See Leegin*, 551 U.S. at 899 ("In antitrust, the federal courts . . . act more as common-law courts than in other areas governed by federal statute." (internal quotation marks omitted)); *see also In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1012 (7th Cir. 2012) (Posner, J.) (finding unpersuasive "the plaintiffs retreat to the general language in the *Socony-Vacuum* opinion, an opinion 72 years old and showing its age" because "[t]aken literally the quotation would outlaw resale price maintenance, which is no longer illegal per se"). Indeed, literal adherence to the "purpose and effect" language would mean that both *BMI* and *Leegin* were wrongly decided, since both the *BMI* licensing scheme and vertical price restraints have the purpose and effect of stabilizing prices. *See id.*

c. Another consideration demonstrates that the Court was wrong to hold the per se approach applicable here. The Model Rule satisfies the criteria for an "ancillary restraint" to a joint venture or business association—a context in which the Supreme Court has upheld even

direct price-setting by competitors. An MLS creates efficiencies for consumers by pooling information about home listings into one platform, vastly reducing transactions costs and facilitating sales between buyers and sellers. Because Plaintiffs have not contested that each MLS is a "legitimate business collaboration," the Model Rule is "valid" so long as it "is ancillary to the legitimate and competitive purposes of the business association," even if it does not lie at the "core" of an MLS. *Dagher*, 547 U.S. at 7. Given that a central purpose of an MLS is to collect all information about a home sale into a single location, requiring disclosure of what the seller broker is willing to pay the buyer broker makes the MLS "more effective in accomplishing its purpose." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J., for the Court). Indeed, although the Model Rule is not a necessary component of a functioning MLS, the Model Rule likely qualifies as part of the "core activity of the joint venture itself" within the meaning of *Dagher* insofar as the MLS's activity is pooling information about proposed home-sale transactions. *Dagher*, 547 U.S. at 7; *see* PX-216 at 12 ("Core MLS information, services, and products are essential to the effective functioning of MLS, as defined, and include[] active listing information [and] information communicating compensation to potential cooperating brokers"). Because Plaintiffs have not challenged the MLS itself as an antitrust violation, *cf. Dagher*, 547 U.S. at 6 n.1, the Model Rule is, at a minimum, not subject to per se condemnation. *See* ECF 1360 at 18 (explaining that the ancillary-restraints doctrine renders the Model Rule valid).

d. The Court's error in instructing the jury on a per se theory substantially diminished the showing necessary for Plaintiffs to establish liability and did not permit the jury to consider the pro-consumer benefits of the Model Rule within the MLS system. It was thus unquestionably prejudicial. Defendants presented a wealth of evidence that NAR model rules "promote[] . . . an

efficient system in a very complex real estate transaction" and "make the process easier and better for consumers" (and are prepared to present a full case at a new trial with proper rule of reason instructions). 10/23/2023 Trial Tr. 1058:20-1059:1 (R. Goldberg). That evidence demonstrated that the Model Rule enhances efficiency by ensuring that buyer brokers have upfront, unrestricted, and transparent access to seller brokers' offers for payment. Without the rule, buyer brokers would be forced to call each listing agent individually and request that information. That would make buyer brokers less efficient at finding new homes for their clients and would drive up transaction costs (and potentially commissions). 10/26/2023 Trial Tr. 1792:25-1793:17, 1905:20-1906:16 (L. Wu). But the jury was instructed that none of this evidence mattered to liability.

The evidence presented at trial also demonstrated that the rates of broker compensation are determined competitively. In reality, the average amount that listing brokers actually pay to cooperating brokers varies widely. For example, in the Heartland MLS in Kansas City, the average commission rate in 2020 was approximately 2.95% while in the MARIS MLS in St. Louis it was 2.65%—a 10% difference. *See* PX-2904; PX-2907; *see also* 10/26/2023 Trial Tr. 1836:10-1837:5 (L. Wu). Further, at the national level, commissions "vary literally every year," rising and falling depending on the health of the economy. 10/27/2023 Trial Tr. 2010:23-2011:6 (G. Keller); DX-3833 at 84. That is consistent with how NAR has explained the operation of the Model Rule to its members. NAR has expressly informed members that the initial offer is not set in stone. Rather, all offers are negotiable up through closing and, in practice, brokers regularly negotiate the listing commission. 10/24/2023 Trial Tr. 1220:16-19 (R. Gansho); 10/30/2023 Trial Tr. 2270:12-14 (J. Davis). In fact, for offers made in Missouri on the MLS between 2014 and 2020, in a "significant portion" of transactions (ranging from 23% to 33% depending upon the year), the commissions actually paid to buyer brokers differed from the commission rates that were offered. 10/26/2023

Trial Tr. 1830:1-1831:15 (L. Wu).

To be sure, the jury presumably determined that the alleged agreement to enforce the Model Rule had some "effect" on commissions given the language of Instruction No. 22. *But see* ECF 1360 at 24-29 (explaining that there was no evidence of such an effect). But the jury was not given the opportunity to weigh the magnitude of that perceived effect against the procompetitive benefits of the Model Rule, as it would have done under a rule of reason instruction. Instruction No. 22 was therefore prejudicial in the extreme.

2. The Court's Instruction To The Jury Was Wrong And Highly Prejudicial Even Under The Court's Own Standard

As explained above, the Court erred in concluding that under *Socony-Vacuum*, any restraint with the "purpose and effect" of increasing or stabilizing prices automatically qualifies as a per se antitrust violation, as decades of Supreme Court precedent since that decision demonstrates. But even assuming that standard were correct, the jury instructions were still erroneous and prejudicial.

In its summary judgment order, the Court held that "Plaintiffs ha[d] produced evidence, creating a genuine dispute of material fact" as to whether "Defendants implemented or enforced [the Model Rule] with the purpose and effect of inflating or stabilizing broker commission rates." ECF 1019 at 20-21. It therefore left the resolution of that question—which the Court regarded as determinative of "whether Defendants have engaged in a horizontal price-fixing scheme"—to the jury. But critically, the jury instructions then misstated that standard by allowing the jury to find Defendants liable so long as "the conspiracy had the purpose ***or*** effect of raising, inflating, or stabilizing broker commission rates paid by home sellers." ECF 1292 (Instruction Nos. 3, 18, and 22) (emphasis added).

That was clearly wrong. The sentence from *Socony-Vacuum* that the Court quoted in its summary judgment order is phrased in the conjunctive, as are other similar statements from

Supreme Court precedents. 310 U.S. at 223; *see, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990); *Nat'l Soc. of Pro. Eng'rs v. United States*, 435 U.S. 679, 693 (1978); *United States v. Line Material Co.*, 333 U.S. 287, 312-13 (1948). As Defendants explained in objecting to Plaintiffs' disjunctive phrasing, Plaintiffs were "wrong on the law" because "it is well settled that not every contract or combination that has the effect of stabilizing or raising prices violates the Sherman Act." ECF 1100-1 at 29 (emphasis omitted) (citing *BMI*, 441 U.S. at 23-24; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986)).

Indeed, it cannot be correct that any agreement with the "effect" of increasing or stabilizing prices is a per se antitrust violation, because many such agreements are clearly lawful. An industry-wide agreement on safety or health standards, for example, will often have the inevitable effect of raising prices. *E.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01 (1988); *see also, e.g.*, *In re Processed Egg Prods. Antitrust Litig.*, 206 F. Supp. 3d 1033, 1045-46 (E.D. Pa. 2016) ("While the plaintiffs have characterized the [challenged conduct establishing minimum cage space requirement] as a simple output-limitation agreement, they are unable to point to any evidence that, on its face, the agreement . . . constituted an express agreement among competitors to restrict egg supply" even though "this might reasonably be expected to reduce the number of eggs produced."), *aff'd*, 962 F.3d 719 (3d Cir. 2020). And the Supreme Court has instructed that "[n]ot all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints." *BMI*, 441 U.S. at 23 (emphasis omitted); *see also Leegin*, 551 U.S. at 895 ("Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct."). But the instruction here permitted the jury to find liability even if it agreed that the Model Rule had been instituted for valid purposes so long as it had some effect on prices.

That clear legal error was demonstrably prejudicial. Defendants presented substantial evidence that the Model Rule was designed to reduce transaction costs as part of the overall purpose of the MLS to collect information about home sales and facilitate transactions, not to stabilize or increase commissions. *See supra* at 14-15. And Plaintiffs' counsel repeatedly exploited the erroneous disjunctive phrasing of the instructions. For example, during the direct testimony of Plaintiffs' expert Craig Schulman, Plaintiffs' counsel emphasized that purpose was unnecessary.

> Q. Now, when we talk about that, let's first talk about this word "or" when it says "purpose or effect." Do you see that?
>
> A. Yes, sir.
>
> Q. The -- on the purpose side, there could be -- what is the word "or"? How is -- is that an important word in the field of economics as it relates to you when you're teaching the concept of conspiracy or understanding the concept of conspiracy?
>
> . . .
>
> Q. I don't want to focus on the purpose, the purpose behind something. ***I want to focus on the effect side of that purpose or effect.*** Do you understand that?
>
> A. Yes, sir.

10/19/2023 Trial Tr. 490:1-492:5 (emphasis added).

Then, in summation, Plaintiffs' counsel urged jurors to disregard Defendants' considerable evidence that the Model Rule was not instituted to stabilize or increase prices but to reduce transaction costs:

> Do you find the conspiracy we have that this rule that they're following and enforcing has had the purpose or effect of raising, inflating, or stabilizing commissions?
>
> Let's look at the second part because it had the effect. ***Forget the purpose***. They spent a lot of time talking about their purpose. Has it had the effect of that?

10/30/2023 Trial Tr. 2346:22-2347:2 (emphasis added).

There thus can be no doubt that an instruction permitting a finding of per se liability solely

on the ground that the Model Rule had an effect on prices was highly prejudicial. It allowed Defendants to be held liable under a standard that neither the Supreme Court nor the Eighth Circuit has blessed: that a mere effect on prices, regardless of purpose or pro-consumer benefits, renders a restraint a per se violation of the Sherman Act. Such a stark departure from ordinary antitrust principles warrants a new trial.

B. The Court Should Have Instructed The Jury That Missouri Law Expressly Authorizes Offers Of Compensation

The Court separately committed prejudicial error by failing to give an instruction necessary to give the jury a full picture of the law governing the activities at issue. The crux of Plaintiffs' case was that without the alleged agreement to enforce the Model Rule, sellers or listing brokers would not pay buyer brokers' commissions. That theory was crucial both to Plaintiffs' liability case under Instruction No. 22—*i.e.*, to whether the alleged conspiracy had the "effect" of raising or stabilizing prices—and to Plaintiffs' extraordinary damages calculation, which rested on the claim that there would be no buyer brokers absent the Model Rule.

Importantly, throughout the trial, Plaintiffs supported their theory with misleading claims about Missouri law. Among other things, through expert opinion, Plaintiffs argued that in the but-for world, Missouri would be like Australia because of "their legal structure" and "their tradition of laws," and offers of compensation would never be made. *See* 10/19/2023 Trial Tr. 558:18-20, 560:11-13 (C. Schulman). Plaintiffs also introduced evidence of the laws of *other* U.S. states, squarely opening the door to evidence of state laws—especially Missouri. *See, e.g.*, 10/23/2023 Trial Tr. at 9878:23-9879:8 (S. Millett).

Given those claims, Defendant Keller Williams sought an instruction explaining critical legal context: that commission-sharing has been expressly *authorized* by Missouri law since at least 1997. Missouri law provides:

> **Compensation of designated broker, paid by whom, sharing compensation — payment establishing agency — agreement by seller or buyer on sharing compensation. —**
>
> 1. In any real estate transaction, the designated broker's compensation may be paid by the seller, the landlord, the buyer, the tenant, or a third party or by sharing the compensation between designated brokers. . . .
>
> 3. A seller or landlord may agree that a designated broker may share with another designated broker the compensation paid by the seller or landlord.

Mo. Rev. Stat. 339.800; *see also* 20 Mo. Code of State Regulations 2250-8.090 ("Every written listing agreement or other written agreement for brokerage services shall contain all of the following . . . Specification of whether or not the designated broker is authorized to cooperate with and compensate other designated brokers acting pursuant to any other brokerage relationship as defined by 339.710 to 339.860, RSMo, including but not limited to buyer's agents and/or transaction brokers"). As Keller Williams cautioned the Court, "the existence of this statute is highly relevant and . . . withholding this information from the jury would be unduly prejudicial to Defendants." ECF 1276 (Mot. to Include Jury Instruction) at 2.

Yet the Court denied Defendants' requests to instruct the jury on this essential issue, leaving the jury with a one-sided and misleading view of Missouri law and fundamentally distorting the jury's consideration of the but-for world. That was clearly prejudicial. A jury told that, contrary to Plaintiffs' suggestions, commission-sharing has the imprimatur of Missouri law would have been likely to analyze the practical effect of the Model Rule differently.

II. PLAINTIFFS' COUNSEL'S PERVASIVE AND PREJUDICIAL MISCONDUCT REQUIRES A NEW TRIAL

A jury verdict must be based on the law and admissible evidence—not outside factors such as counsel's opinion, foreclosed areas of inquiry, or inflammatory prejudice. Regrettably, that core tenet was not honored in this case. From the start of trial to the finish, Plaintiffs' counsel engaged in a spree of impropriety, fundamentally distorting the factfinding process and grievously

prejudicing Defendants. To ensure a fair and accurate verdict, this Court should grant a new trial. *See, e.g.*, *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1304 (8th Cir. 1987) (remanding for new trial because "the cumulative effects of the numerous improper and inflammatory remarks made by plaintiffs' counsel were prejudicial").

A. Plaintiffs' Counsel's Misconduct Was Pervasive And Deliberate

In considering whether to grant a new trial based on counsel misconduct, a court first asks whether the misconduct was limited to "minor aberrations" or instead amounted to significant and deliberate misconduct. *Dean v. Searcey*, 893 F.3d 504, 520 (8th Cir. 2018) (citation omitted). That is not a close question here. Plaintiffs' counsel's misconduct was severe, calculated, and pervasive. Time and again, Plaintiffs' counsel shifted the spotlight from the law and the evidence to himself and other improper subjects, wrongfully diverting the jury's attention and violating cardinal principles of fairness and due process.

1. Plaintiffs' Counsel Repeatedly Injected Improper Personal Opinion

A "lawyer shall not . . . in trial, . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, [or] the culpability of a civil litigant." Mo. S. Ct. R. 4-3.4(e). Simply put, "the personal opinion of counsel has no place at trial." *United States v. Collins*, 78 F.3d 1021, 1039-40 (6th Cir. 1996); *see, e.g.*, *United States v. Emmert*, 9 F.3d 699, 701 (8th Cir. 1993). With striking disdain for that basic rule, Plaintiffs' counsel repeatedly injected into the trial his personal opinion on the evidence, credibility of witnesses, and culpability of Defendants. The transcript is replete with illustrations of such improper conduct:

- "I absolutely know that there's been an intentional and deliberate attempt by witnesses on the stand and arguments have been made in this case to confuse you or fool you as to what a conspiracy is." 10/30/2023 Trial Tr. 2330:23-2331:1.
- "And they want to say, well, this actually made it harder. Nonsense. Garbage. Anyone

who testifies, that's not being honest with you. I mean, come on. It's made it harder? This is their graph. I literally almost fell out of my chair when I heard that testimony. I thought, unbelievable." *Id.* at 2337:12-17.

- "And then I asked him this, because one of the silly arguments that -- silly is not the legal word. One of the ridiculous arguments -- that's a better word -- that they've made is that the sellers aren't paying it. You know why? Because they now know this trial isn't going well for them. You're going to see that they hope -- that's their last hope, that they can escape from this." *Id.* at 2340:15-20.

- "It is unbelievable the audacity, the behavior I have witnessed from these corporations. And the thing that's the most troubling to me really at a core level. I'm standing here in a federal courthouse, a beautiful courthouse that we have built as a society for laws and for the jury to get together and you're taking your time. It is -- just bothers me that they think anybody would be -- ever would buy that with the kind of garbage we've seen delivered here; you'd ever be fooled by that. I know it's not true. And so do you." *Id.* at 2385:9-19.

- "And witness after witness after witness, I think, are they trying to fool, are they trying to trick, because they have been, and I'll prove it to you." *Id.* at 2348:22-24.

- "But we're going to show you they can't because I knew that's where it was heading, because I knew the strength of this evidence. I knew the law was on our side. I knew we had brought all the evidence and the facts and the law." *Id.* at 2340:21-24.

- "Remember Professor Alford? He's given his life to the pursuit of free and fair competition, a massively impressive background. When I've been involved in this case for two years and I found this article online and had this conversation with him, it was just an unbelievable moment of joy for me because it confirmed something I already knew. And, I mean, here's this really bright, powerful, smart law professor who's saying the same thing." *Id.* at 2341:8-16.

- "Shame on them for the way they treated that man." *Id.* at 2377:18-22.

- "When I first saw this report that came back from them, I'm, like, I knew it was true. I knew, based upon the internal documentation and the training and everything else, it was true." *Id.* at 2346:4-8.

- "It [] just bothers me that they think anybody would be ever would buy that with the kind of garbage we've seen delivered here. You'd ever be fooled by that." *Id.* at 2385:16-18.

- "It's just a bunch of garbage." *Id.* at 2387:1-5.

- "And that's going to get to the separate topic of whether they're steering them. I'm not going to get on that issue right now. But you understand - do you know that in this case the jury has heard evidence that the corporate defendants engaged in that?" 10/24/2023 Trial Tr. 1124:3-5.

Defense counsel objected to many of Plaintiffs' counsel's improper remarks, *see, e.g.*, 10/24/2023 Trial Tr. 1124:3-11; 12/26/2023 Trial Tr. 1865:24-1867:7; 10/25/2023 Trial Tr. 1502:10-1505:11; *id.* at 1410:14-23, but Plaintiffs' counsel continued to substitute his personal opinion for the evidence, fundamentally polluting the presentation of the case to the jury.

2. Plaintiffs' Counsel Flagrantly Disregarded Multiple Court Orders

Plaintiffs' counsel also repeatedly and flagrantly violated multiple of this Court's orders on motions in limine, pretrial and trial stipulations, and other directions from the Court. Those violations demand a new trial. *See, e.g.*, *Anheuser-Busch, Inc. v. Nat. Beverage Distribs.*, 69 F.3d 337, 347 (9th Cir. 1995) (affirming order granting new trial where "counsel repeatedly and impermissibly elicited testimony and made reference to matters previously ruled inadmissible" and used it "in an inflammatory manner").

To take one clear example, Plaintiffs' counsel violated the Court's order barring "referring to . . . a Defendant's corporate representative observing or not observing trial," ECF 1119 at 2, by expressly referencing during his closing argument the absence of NAR's CEO from the courtroom: "Remember when Mr. Goldberg was here? I don't see him here in the courtroom here today." 10/30/2023 Trial Tr. 2339:12-13. Plaintiffs' counsel, moreover, used the absence of these individuals to inflame the passions of the jury stating: "I ask, where are they? Where are the corporate Titans who came in here and testified and scurried on out of here? They're not here now." 10/30/2023 Trial Tr. 2507:25-2508:2.

Plaintiffs' counsel also violated this Court's orders on Defendants' Motions in Limine (MILs) Nos. 3, 4, and 6, which bar testimony on investigations and litigation outside this case. Plaintiffs' counsel expressly asked Dr. Schulman about "studies . . . that were done by the Federal Trade Commission [and] the Department of Justice," which the Court struck after inviting an objection on the ground that the testimony violated its orders. 10/20/2023 Trial Tr. 684:10-24.

Similarly, despite representing during a sidebar that he had "no idea what [the REX litigation] means," *id.* at 692:19-25, Plaintiffs' counsel in *the very next question* sought to elicit from Schulman testimony about the optional rule that was the subject of that litigation, *id.* at 692:15-693:9; *see REX Real Est. Exch., Inc. v. Zillow, Inc.*, 2023 WL 5278115, at *7, *12 (W.D. Wash. Aug. 16, 2023) (granting summary judgment to NAR).

Plaintiffs' counsel further violated the Court's instruction to "Mr. Ketchmark not to make legal arguments that" the existence of the Model Rule alone proves an agreement. 10/27/2023 Trial Tr. 2235:14-2236:5. Yet Plaintiffs' counsel repeatedly made that very argument throughout closing. *See, e.g.*, 10/30/2023 Trial Tr. 2335:12-14 ("Direct evidence requires no inferences. What is the direct evidence here? We have the written rule."); *id.* at 2338:20-22 ("To show the conspiracy; first, the alleged conspiracy existed. That's just the rule they're following and enforcing."); *id.* at 2332:7-11 ("It's right here. The written rule. The NAR rule.")

In another instance, Plaintiffs' counsel violated the Court's decision "exclud[ing] reference to" witnesses' "wealth, income, [or] success" without the Court's specific approval. ECF 1119 at 3; 10/13/2023 Pretrial Conference Tr. 11:2-12. Disregarding the Court's express instructions, Plaintiffs' counsel proceeded to disclose NAR's CEO's salary without seeking leave from the Court—stopping partway through the figure only because Defense counsel immediately and successfully objected. 10/24/2023 Trial Tr. 1104:8-23 (R. Goldberg).

Plaintiffs' counsel misconduct was particularly egregious with respect to Defendants' expert Dr. Wu. On cross-examination, Dr. Wu testified under oath that his "work was done independently," his "report and [his] analysis and [his] conclusions are [his] own opinion," and he put together his presentation demonstrative on his own. 10/26/2023 Trial Tr. 1879:23-1880:1, 1879:23-1886:13. Fabricating from thin air, Plaintiffs' counsel nevertheless repeatedly asserted

as a focal point of his closing argument that defense counsel had "conjure[d]" up a PowerPoint presentation for Dr. Wu to puppet. 10/30/2023 Trial Tr. 2353:1-7; *see id.* at 2384:23-2385:7 ("[Y]ou get Dr. Wu together in a conference room and put him up there and lawyers and create PowerPoints and do that."); *id.* at 2350:8-9 ("Dr. Wu puts together this PowerPoint slide with the defense lawyers."); *id.* at 2501:16-22; *id.* at 2502:20-25. Plaintiffs' counsel embarked on this misconduct despite his own express statements to the Court that he would not refer to the fact that Defendants had hired a single expert and would not suggest that this was evidence of a conspiracy. 10/26/2023 Trial Tr. 1800:23-1801:5.

Plaintiffs' counsel also repeatedly sought to bring the jury's attention to media coverage of the trial, in contravention of the Court's instruction (and the well-settled legal mandate) that the jury must decide the case based only on the evidence before it. For example, Plaintiffs' counsel attempted to introduce before the jury an article from Inman that contained a quotation from Plaintiffs' counsel in the headline: "An attorney for the Sitzer/Burnett homeseller plaintiffs calls the change a 'stunning admission of guilt' on the eve of a class-action trial." ECF 1265-3; 10/24/2023 Trial Tr. 1282:1-5. Plaintiffs' counsel similarly gratuitously announced that the trial was receiving significant news coverage and that a reporter was in the courtroom, and further identified Inman as the collaborative website that quoted counsel's own take on proceedings. 10/24/2023 Trial Tr. 1282:1-5. The Court grasped the inappropriate and unprofessional conduct. *Id.* at 1388:7-8 ("talking about coverage in this case is causing us . . . all concern"). The Court further identified that the article lacked any legitimate impeachment value, *id.* at 1387:22-25 ("I don't think the impeachment with that Inman article was fair. . . . I don't think that article properly impeached on what he was saying."), leaving little to wonder of Plaintiffs' counsel's true purpose.

3. Plaintiffs' Counsel Improperly Stoked Local Prejudice

Plaintiffs' counsel also regularly and egregiously violated the rule that "an appeal to local

prejudice against [out-of-jurisdiction] defendants is never permissible." *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772 (3d Cir. 1975); *see Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1238-39 (5th Cir. 1985) ("[A]ll impassioned and prejudicial pleas intended to evoke a sense of community loyalty, duty and expectation . . . serve no proper purpose" and are "improper distraction[s] from the jury's sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial.").

Plaintiffs' counsel exerted enormous effort to inject local prejudice into the proceedings, repeatedly and superfluously referencing his own Missouri residence in naked attempts to ingratiate himself to the jury and unfairly prejudice "outsider" Defendants and their counsel. *E.g.*, 10/20/2023 Trial Tr. 855:6-10 ("I would recommend that you go to Lee's Summit, having lived there for 20 years at one point before we moved. It's a pretty cool place. Downtown Lee's Summit is a good place to go. I'd recommend it before you leave, okay?"); 10/17/2023 Trial Tr. 27:19-23 ("I remember it like it was yesterday, when my wife and I went to sell our first home in Lee's Summit before we moved to the current house. And we'd been there for almost ten years. And she's here right now."); 10/20/2023 Trial Tr. 822:14-16 ("A. My wife is sitting behind the gentleman in the Chiefs jacket. Q. That would be my father."); *id.* at 703:8-14 ("Q. Tell the jury - A. So at the break Mr. Ketchmark introduced me to his father wearing the Chiefs red out here and made that comment that he thought that the only good thing that came out of Texas was Patrick Mahomes.") (M. Ketchmark, R. Alford); 10/23/2023 Trial Tr. 977:9-10 ("Come back to Kansas City to a Chiefs game. I'd be happy to host you and your husband and those grandkids.").

Not satisfied by emphasizing his own (legally irrelevant) hometown roots, Plaintiffs' counsel also violated the parties' pretrial stipulation barring reference to "Plaintiffs' and Defendants' counsel's . . . location of residence or legal practice." ECF 1119 at 3; *see* 10/20/2023

Trial Tr. 702:18-20 ("if you were to go out there in Washington D.C., where Mr. Glass lives, would it matter to you if there's licensed or unlicensed realtors out there?"). It is impossible to imagine any purpose to such a comment other than to stoke local prejudice, and, indeed, the Court recognized that such conduct was improper. 10/23/2023 Trial Tr. 882:1-2 ("So Ketchmark, you got to quit poking about where they're from.").

4. Plaintiffs' Counsel Improperly Showed The Jury An Undisclosed And Highly Prejudicial Video

In what was arguably the height of Plaintiffs' counsel's misconduct, he exposed the jury to a lewd, inflammatory video (the "Ambush Video") without any notice, permission, authentication, foundation, or competent sponsoring witness.[3] *See* 10/24/2023 Trial Tr. 1348:15-1354:8; ECF 1231 (Plaintiffs' Corrected Exhibit Index). That paradigmatic illustration of "[t]rial by ambush" was both extraordinarily improper and extraordinarily prejudicial. *McClarin v. City of New York*, 2023 WL 5831059, at *6-7 (S.D.N.Y. Sept. 8, 2023).

Plaintiffs' counsel sprung on Defendants this sensational video during the cross-examination of Mr. Peltier, founder of Defendant HomeServices of America. Plaintiffs' counsel began by re-eliciting Mr. Peltier's testimony to the generic point that HomeServices operates with "highest degree of integrity, honesty, and sincerity." 10/24/2023 Trial Tr. 1348:15-22. Without seeking leave, Plaintiffs' counsel then played a video clip of a separate person from a different company—Berkshire Hathaway HomeServices executive Allan Dalton—speaking on an unassociated entertainment podcast describing vulgar, threatening conduct as related to him by an

[3] The Court denied the HomeServices' motion for mistrial, partially because the other Defendants did not object to the Ambush Video before it was played. But that reasoning is misplaced for several reasons. Defendants stipulated at the beginning of trial that an objection by one Defendant is an objection by all. 10/16/2023 Voir Dire Tr. 229:25-230:6. Requiring NAR to object in front of the jury to questions of a non-NAR witness would also have been highly prejudicial—and likely used by Plaintiffs to claim a conspiracy. And NAR had no idea what the video showed before it was played (given that Plaintiffs failed to disclose it), so NAR could not have objected.

unnamed third party as a hypothetical response to a request to reduce commissions. *See* ECF 1265-1 at 1-2. Specifically, the video relates the third party's description of the commission-reduction request as placing the agent in the position of a "hooker standing outside the Lincoln Tunnel at 3 o'clock in the morning giving bleeping bleeping . . . bleep t[o] sailors" and stating that "if you think I'm going to cut my bleeping bleeping commission you can take this home and shove it up your bleeping bleeping." *Id.*

Despite being responsive to at least four requests for production, the video was never produced or otherwise identified. ECF 1265-2 at RFP 16, 20, 24, 25. When the video was shown to the jury, defense counsel objected immediately, noting that the video was never disclosed and was highly prejudicial. 10/24/2023 Trial Tr. 1349:23-1350:11.[4] There can be little doubt that the purpose of introducing the video was to "arouse an emotional response" by the jury "or appeal to an instinct to punish." *United States v. Williams*, 2023 WL 4277461, at *38 (D. Ariz. Mar. 24, 2023) (citation omitted). But inflaming the jury is not a permissible evidentiary purpose—and Plaintiffs' counsel's brazen attempt to do so underscores the extent of the misconduct in this case. *See, e.g.*, *United States v. Moore*, 639 F.3d 443, 448 (8th Cir. 2011) (identifying "the danger of unfair prejudice flowing from" recordings depicting the defendant using "vulgar, inflammatory, prejudicial language, most of which was irrelevant").[5]

B. Plaintiffs' Counsel's Misconduct Was Profoundly Prejudicial

In addition to asking whether attorney misconduct warrants a new trial because it was

[4] On top of attorney misconduct, introduction of this video—especially given its substantive purpose—without prior production and identification constitutes reversible evidentiary error. *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 514, 517 (5th Cir. 1993); *see United States v. Scott*, 243 F.3d 1103, 1107 (8th Cir. 2001) ("While impeachment by contradiction is a well-recognized way of attacking a witness's credibility, contradiction offered through the testimony of another witness is customarily excluded unless it is independently relevant or admissible.").

[5] Despite the Court's instruction not to reference the video again, 10/25/2023 Trial Tr. 1407:17-20, Plaintiffs' counsel could not help but do so, 10/30/2023 Trial Tr. at 2353:8-14.

deliberate and pervasive, courts also ask whether the misconduct was prejudicial. *Dean*, 893 F.3d at 520. Among other factors, courts examine whether "specific curative action" overcame the effects of the misconduct, whether the amount of damages suggests that the misconduct had prejudicial effect, and whether "the overall trial record" indicates the misconduct "deprived a party of a fair trial." *Id.* Here, all those considerations strongly demonstrate prejudice.

First, Plaintiffs' counsel's misconduct went uncorrected in many instances. For example, the jury was provided no curative instruction following the inflammatory and prejudicial Ambush Video. 10/24/2023 Trial Tr. 1349:18-1350:18. The jury was likewise provided no curative instructions concerning Plaintiffs' counsel's unethical personal opinions of the case and vouching for witnesses or for Plaintiffs' counsel's deliberate stoking of local prejudice.

Even where the Court did attempt curative instructions, those instructions were insufficient to shield the jury from the prejudicial effects of the misconduct. For example, the Court's brief instruction responding to Plaintiffs' counsel's improper invocation of media coverage of the trial and the salary of NAR's CEO came a full day after the improper comments and simply stated without any explanation that the jury should disregard the references. 10/25/2023 Trial Tr. 1423:15-22. Such an instruction is "insufficient" because it still allowed the verdict to be "substantially swayed" by the misconduct. *United States v. Ybarra*, 700 F. App'x 543, 545 (8th Cir. 2017) (citation and quotation marks omitted); *see Blair v. Wills*, 420 F.3d 823, 829-30 (8th Cir. 2005) ("Counsel's misconduct may be such that a district court cannot overcome its prejudicial effect by admonishing the jury or rebuking counsel; in such case a court should grant a new trial.").

Second, the massive damages award reinforces the prejudice inflicted on Defendants. The jury awarded an astounding $1.785 billion—the exact amount of the damages requested by Plaintiffs' counsel, and one of the largest awards in the 130-year history of the Sherman Act.

10/30/2023 Trial Tr. 2384:16-18. As explained elsewhere, that damages figure is wholly unsupportable. Given the implausibility of that result on the evidence properly before the jury, there is a clear "correlation between the large sum awarded" and the "obviously prejudicial" misconduct by Plaintiffs' counsel. *Morrissey*, 821 F.2d at 1303.

Finally, and for similar reasons, the record as a whole strongly indicates that Plaintiffs' counsel's misconduct influenced the jury. As discussed above and in NAR's companion Rule 50(b) motion, the evidence adduced at trial was insufficient to support a finding that a well-known rule that has been in existence for decades is in fact a per se antitrust violation. Set against the paucity of legitimate evidence of conspiratorial conduct or antitrust harm and fact that the jury deliberated for fewer than three hours, there is at the very least "a reasonable probability that the verdict of the jury has been influenced by" Plaintiffs' counsel's repeated and egregious misconduct. *Harden v. Hillman*, 993 F.3d 465, 476 (6th Cir. 2021) (citation omitted). The proper remedy is a new trial.

CONCLUSION

NAR respectfully requests that the Court grant its motion for new trial.

Dated: January 8, 2024

Respectfully submitted,

/s/ Ethan Glass

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CERTIFICATE OF SERVICE

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, JEREMY KEEL, HOLLEE ELLIS, and FRANCES HARVEY on behalf of themselves and all others similarly situated, Plaintiffs, v. NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	)	Case No. 4:19-CV-00332-SRB Honorable Judge Bough

SUGGESTIONS IN SUPPORT OF DEFENDANT THE NATIONAL ASSOCIATION OF REALTORS®' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES II

LEGAL STANDARD 1

ARGUMENT 1

I. THE DIRECT-PURCHASER REQUIREMENT BARS PLAINTIFFS' SUIT 2

A. Plaintiffs Did Not Purchase Directly From Defendants 2

B. No Exception To The Direct-Purchaser Requirement Applies 3

1. The Co-Conspirator Exception Does Not Apply 4

2. The Control Exception Does Not Apply 6

3. No Other Valid Exception Applies 9

C. Judgment As A Matter Of Law Is Required 11

II. THE MODEL RULE IS NOT AN UNREASONABLE RESTRAINT OF TRADE 13

A. The Model Rule Is Not A Per Se Antitrust Violation 13

B. The Undisputed Evidence Presented At Trial Establishes That The Model Rule Satisfies The Rule Of Reason 14

1. There Is No Evidence That The Model Rule Has Anticompetitive Effects 14

2. Even If The Model Rule Had Some Effect On Commissions, It Would Be Permissible As A Matter Of Law Under The Rule Of Reason 18

III. PLAINTIFFS PRESENTED NO EVIDENCE THAT NAR CONSPIRED WITH ANYONE 20

IV. PLAINTIFFS FAILED TO PROVE INJURY OR DAMAGES RESULTING FROM THE CHALLENGED MODEL RULE 24

A. Plaintiffs Failed To Establish Injury Resulting From The Challenged Rule 25

B. Plaintiffs Failed To Prove Any Legally Supportable Amount Of Damages 27

CONCLUSION 29

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

Page(s)

Cases

Admiral Theatre Corp. v. Douglas Theatre Co.,
585 F.2d 877 (8th Cir. 1978) 28

Amerinet, Inc. v. Xerox Corp.,
972 F.2d 1483 (8th Cir. 1992) 25, 29

Apple Inc. v. Pepper,
139 S. Ct. 1514 (2019).....2, 3, 9, 10, 12

In re ATM Fee Antitrust Litig.,
686 F.3d 741 (9th Cir. 2012) 10, 11

In re Beef Indus. Antitrust Litig.,
600 F.2d 1148 (5th Cir. 1979) 4, 5

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....24

Bonjorno v. Kaiser Aluminum & Chem. Corp.,
518 F. Supp. 102 (E.D. Pa. 1981) 26

In re Brand Name Prescription Drugs Antitrust Litig.,
123 F.3d 599 (7th Cir. 1997) 6

Broad. Music, Inc. v. Columbia Broad. Sys., Inc.,
441 U.S. 1 (1979).....14

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993).....25

Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.,
846 F.3d 1297 (10th Cir. 2017) 14

California v. ARC Am. Corp.,
490 U.S. 93 (1989).....2, 12

Campos v. Ticketmaster Corp.,
140 F.3d 1166 (8th Cir. 1998) 2, 3, 4, 5, 7, 8, 11

Concord Boat Corp. v. Brunswick Corp.,
207 F.3d 1039 (8th Cir. 2000) 24, 27

In re Coordinated Pretrial Procs.,
691 F.2d 1335 (9th Cir. 1982) 5, 6

Craftsmen Limousine, Inc. v. Ford Motor Co.,
491 F.3d 380 (8th Cir. 2007) 14

Deaktor v. Fox Grocery Co.,
475 F.2d 1112 (3d Cir. 1973).....27

Freeman v. San Diego Ass'n of Realtors,
322 F.3d 1133 (9th Cir. 2003) 9, 10

Hackman v. Dickerson Realtors, Inc.,
595 F. Supp. 2d 875 (N.D. Ill. 2009) 11

Hertz Corp. v. Friend,
559 U.S. 77 (2010).....9

Howard Hess Dental Lab'ys. Inc. v. Dentsply Int'l, Inc.,
424 F.3d 363 (3rd Cir. 2005) 5, 6, 8

In re Hydrogen Peroxide Antitrust Litig.,
552 F.3d 305 (3d Cir. 2008).....24, 26

Illinois Brick Co. v. Illinois,
431 U.S. 720 (1977).....2, 3, 6

Insulate SB, Inc. v. Advanced Finishing Sys., Inc.,
797 F.3d 538 (8th Cir. 2015) 5

Jewish Hosp. Ass'n v. Stewart Mech. Enters.,
628 F.2d 971 (6th Cir. 1980) 8, 9

Kansas v. UtiliCorp United, Inc.,
497 U.S. 199 (1990).....3

Keller v. Greater Augusta Ass'n of Realtors, Inc.,
760 F. Supp. 2d 1373 (S.D. Ga. 2011).....10

Kinserlow v. CMI Corp.,
217 F.3d 1021 (8th Cir. 2000) 1

Leegin Creative Leather Products, Inc. v. PSKS, Inc.,
551 U.S. 877 (2007).....13

Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League,
791 F.2d 1356 (9th Cir. 1986) 27

Marion Diagnostic Ctr., LLC v. Becton Dickinson & Co.,
29 F.4th 337 (7th Cir. 2022) 6

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986).....24

McDonald v. Johnson & Johnson,
722 F.2d 1370 (8th Cir. 1983) 24

Midwest Commc'ns v. Minnesota Twins, Inc.,
779 F.2d 444 (8th Cir. 1985) 25

In re Midwest Milk Monopolization Litig.,
730 F.2d 528 (8th Cir. 1984) 3, 4, 5, 6, 7, 11

Monsanto Co. v. Spray-Rite Serv. Corp.
465 U.S. 752 (1984).....21, 24

In re Mushroom Direct Purchaser Antitrust Litig.,
2017 WL 696983 (E.D. Pa. Feb. 22, 2017) 13

In re New Motor Vehicles Canadian Exp. Antitrust Litig.,
533 F.3d 1 (1st Cir. 2008).....5, 6

New Prime Inc. v. Espar, Inc.,
2016 WL 10644516 (W.D. Mo. Oct. 27, 2016).....11

Ohio v. Am. Express Co.,
138 S. Ct. 2274 (2018).....19

Reifert v. South Cent. Wisconsin MLS Corp.,
450 F.3d 312 (7th Cir. 2006) 10

Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,
792 F.2d 210 (D.C. Cir. 1986).....18

Royal Printing Co. v. Kimberly-Clark Corp.,
621 F.2d 323 (9th Cir. 1980) 7, 10

Se. Missouri Hosp. v. C.R. Bard, Inc.,
616 F.3d 888 (8th Cir. 2010) 8

Sitzer v. Nat'l Ass'n of Realtors,
No. 20-1779 (8th Cir. 2020) 3

St. Francis Med. Ctr. v. C.R. Bard, Inc.,
657 F. Supp. 2d 1069 (E.D. Mo. 2009).....7

Texaco Inc. v. Dagher,
547 U.S. 1 (2006) 14, 18

Thomas v. U.S. Bank N.A., N.D.,
2012 WL 12897284 (W.D. Mo. Sept. 27, 2012) 12

Turtle Island Foods, SPC v. Richardson,
425 F. Supp. 3d 1131 (W.D. Mo. 2019) 12

United States v. Socony-Vacuum Oil Co.,
310 U.S. 150 (1940) 14

In re Vitamin C Antitrust Litig.,
279 F.R.D. 90 (E.D.N.Y. 2012) 8

Warren v. Kemp,
79 F.4th 967 (8th Cir. 2023) 1

In re Wholesale Grocery Prods. Antitrust Litig.,
946 F.3d 995 (8th Cir. 2019) 17

Willman v. Heartland Hosp. E.,
34 F.3d 605 (8th Cir. 1994) 13, 20

Statutes

15 U.S.C. § 15(a) 2

Mo. Rev. Stat. § 339.800 (2004) 17, 29

Rules

Fed. R. Civ. P. 50 ..... 1, 2, 4

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Before submission of the case to the jury, Defendant the National Association of REALTORS® (NAR) timely moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). ECF 1273, 1275. The Court denied the motion, ECF 1278, and NAR now renews its request pursuant to Rule 50(b). Should the Court decline to enter judgment as a matter of law, NAR moves for a new trial pursuant to Rule 59 in a motion contemporaneously filed with this one. ECF 1361, 1362.

LEGAL STANDARD

"Judgment as a matter of law is appropriate where there is no 'legally sufficient evidentiary basis' for a reasonable jury to find for the non-moving party." *Warren v. Kemp*, 79 F.4th 967, 972 (8th Cir. 2023) (citation omitted). The non-moving party is "entitled to the benefit of reasonable inferences." *Kinserlow v. CMI Corp.*, 217 F.3d 1021, 1026 (8th Cir. 2000) (citation omitted). "When the record contains no proof beyond speculation to support the verdict," however, "judgment as a matter of law is appropriate." *Id.* (quotation marks and citations omitted).

ARGUMENT

Plaintiffs obtained a nearly $1.8 billion verdict—one of the largest antitrust damages awards ever issued—based on a challenge to the Cooperative Compensation Model Rule (Model Rule), which requires only that a seller broker disclose an offer of compensation to the buyer broker among other disclosures on a Multiple Listing Service (MLS). Plaintiffs obtained that astonishing recovery even though they purchased nothing directly from any Defendant, the rule does not restrain trade in any way (let alone in any way ever recognized as per se anticompetitive), NAR did not agree with the other Defendants on anything pertinent to Plaintiffs' allegations, and Plaintiffs made no effort to calculate a legally defensible damages amount. In short, Plaintiffs'

case was rife with legal defects from start to finish, and Defendants should be granted judgment as a matter of law for any or all of the following reasons.[1]

I. THE DIRECT-PURCHASER REQUIREMENT BARS PLAINTIFFS' SUIT

The Clayton Act authorizes a private damages action by a person "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). Interpreting that provision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and its progeny, the Supreme Court has "established a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers." *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520 (2019). Here, it is undisputed that Plaintiffs did not purchase anything directly from Defendants; Plaintiffs instead purchased real-estate services directly from local brokers, who "are not defendants in this case." 10/17/2023 Trial Tr. 15:2-3 (M. Ketchmark). Plaintiffs' suit can therefore proceed only if an exception to the direct-purchaser requirement applies. None does. By declining to sue the alleged antitrust violators from whom they purchased directly, Plaintiffs failed to satisfy a core requirement of a private damages action. Their suit must accordingly be dismissed. *See* ECF 1275 at 1 (NAR's Rule 50(a) motion preserving this argument).[2]

A. Plaintiffs Did Not Purchase Directly From Defendants

For all the other complexities in this case, the direct-purchaser analysis is simple. Plaintiffs did not purchase anything from Defendants. They are accordingly indirect purchasers with respect to the parties they sued. *See, e.g.*, *California v. ARC Am. Corp.*, 490 U.S. 93, 97 (1989) (explaining that "indirect purchasers" are those who "did not purchase . . . directly from the [allegedly] price-fixing defendants"); *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1169 (8th Cir. 1998) (same).

[1] NAR joins in full and incorporates by reference the arguments in the Rule 50(b) motions filed by Defendant Keller Williams and the HomeServices Defendants.

[2] Plaintiffs initially asserted state-law antitrust claims, which are not governed by *Illinois Brick* and its progeny, but Plaintiffs later voluntarily dismissed those claims. ECF 1142, 1227.

To be sure, Plaintiffs did make direct purchases. But they made those direct purchases from—*i.e.*, they paid real-estate commissions to—local brokers. *See, e.g.*, PX-2200 at 1, PX-2225 at 1, PX-2211 at 5, PX-2217 at 4, DX-3655 at 4, DX-3899 at 5 (home-sale listing agreements between Plaintiffs and local brokers); PX-2201 at 2, PX-2212 at 2, PX-2226 at 2 (closing statement contracts between Plaintiffs and local brokers). And it is undisputed that these local brokers "are not defendants in this case." 10/17/2023 Trial Tr. 15:2-3 (M. Ketchmark).[3]

Plaintiffs therefore may maintain this suit only if some exception to the direct-purchaser requirement applies. *See, e.g.*, *Illinois Brick*, 431 U.S. at 726, 728-729 (barring suit by plaintiffs who purchased directly from general contractors but sued only manufacturers and distributors from whom they purchased indirectly); *id.* at 735-36 (explaining that no exception applies).

B. No Exception To The Direct-Purchaser Requirement Applies

The Supreme Court has repeatedly refused to "engage in 'an unwarranted and counterproductive exercise to litigate a series of exceptions'" to the direct-purchaser requirement. *Apple*, 139 S. Ct. at 1524 (citation omitted). The Court has explained that the "possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216 (1990). Lower courts, including the Eighth Circuit, have accordingly recognized only "very limited circumstances" under which an indirect purchaser may sue, including where the defendant has "conspired with" or "own[s] or control[s]" an intermediary antitrust violator. *Campos*, 140 F.3d at 1170-71. Critically, an indirect purchaser can invoke those exceptions only if the intermediary violators are "joined as parties" to the case. *In re Midwest Milk Monopolization Litig.*, 730 F.2d 528, 529 (8th Cir. 1984). Because Plaintiffs

[3] Indeed, Plaintiffs acknowledged in their prior Eighth Circuit briefing that Corporate Defendants are "*two* steps removed" from any home-sale transaction. *Sitzer v. Nat'l Ass'n of Realtors*, No. 20-1779 (8th Cir. 2020), Resp. Br. at 5, 39-40.

did not join as defendants the alleged intermediary violators here—local brokers—Plaintiffs cannot invoke any valid exception to the direct-purchaser requirement.

1. The Co-Conspirator Exception Does Not Apply

At earlier stages of the case, Plaintiffs contended that the co-conspirator exception allows them to sue Defendants despite not purchasing directly from them. Specifically, Plaintiffs asserted that they can sue Defendants because Defendants allegedly conspired with the local brokers from whom Plaintiffs purchased directly. *See* ECF 759 at 17, ¶ 34 (complaint alleging that local brokers "have participated as co-conspirators in the antitrust violations"); ECF 956 at 31 (summary judgment brief arguing that, "[u]nder *Illinois Brick*, . . . standing is given to 'the first purchasers from *outside* the conspiracy'") (citation omitted); 10/26/2023 Trial Tr. 1717:12-16 (incorporating summary judgment arguments in response to NAR's Rule 50(a) motion). Plaintiffs failed to buttress their allegation of a conspiracy between NAR and local brokers with any evidentiary support. *See infra* Part III. But even setting that aside, Plaintiffs' attempt to invoke the co-conspirator exception has a fatal defect: "the alleged coconspirators, that is, the [local brokers], are not joined as parties." *Midwest Milk*, 730 F.2d at 529; *accord Campos*, 140 F.3d at 1171 n.4.

The Eighth Circuit explained that a plaintiff invoking the co-conspirator exception must name the alleged co-conspirators as defendants 40 years ago in *Midwest Milk*. There, the plaintiffs sued milk producers for alleged price fixing but "concede[d] that they did not buy . . . milk products" directly from those defendants. 730 F.2d at 529-30. The plaintiffs argued that their suit could proceed because the "dealers or vendors" from whom they purchased directly "[we]re alleged to be coconspirators," even though they were "not joined as party defendants." *Id.* The Eighth Circuit rejected that argument, reasoning that "[w]hatever the merits of the arguments for [a co-conspirator] exception in general, we do not think that the reasoning of *Illinois Brick* permits recognizing the exception when, *as here, the alleged co-conspirator middlemen are not named as*

parties defendant." *Id.* at 530 (quoting *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1163 (5th Cir. 1979)). The court explained that, "[a]bsent joinder of the [alleged co-conspirators]," the defendants would not be adequately protected "from the risk of overlapping liability," because the non-parties would not be bound by the judgment and could assert "in their own lawsuit that they did not in fact conspire with the [defendants] and are therefore not barred . . . from recovering" from the same defendants. *Id.* (citation and emphasis omitted). Such a "possibility of inconsistent adjudications," the court reasoned, "leaves the defendants subject to the risk of multiple liability that the *Illinois Brick* Court found unacceptable." *Id.* (citation and emphasis omitted).

The Eighth Circuit has since repeatedly confirmed that straightforward rule. *See, e.g.*, *Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, 797 F.3d 538, 542 (8th Cir. 2015); *Campos*, 140 F.3d at 1171 n.4. And the Eighth Circuit is not alone. The leading antitrust treatise explains that "courts generally hold that," when a plaintiff invokes the co-conspirator exception to the direct-purchaser requirement, "the alleged co-conspirators must be named as parties." 2A Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 346h (3d ed. 2007). The leading class-action treatise similarly instructs that "indirect purchasers are generally required to join the" allegedly conspiring intermediaries "as defendants if they want to take advantage of the co-conspirator exception to *Illinois Brick*." 6 William Rubenstein et al., *Newberg and Rubenstein on Class Actions* § 20:9 (6th ed. 2022). And numerous courts of appeals have "expressly refused to adopt a co-conspirator exception to *Illinois Brick* absent the joinder as defendants of the alleged co-conspirators." *Howard Hess Dental Lab'ys. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 371 (3rd Cir. 2005); *see also, e.g.*, *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 533 F.3d 1, 4-5 (1st Cir. 2008); *In re Coordinated Pretrial Procs.*, 691 F.2d 1335, 1342 (9th Cir. 1982); *Beef Industry*, 600 F.2d at 1163. Those authorities require joinder for precisely the same reason the Eighth Circuit

articulated in *Midwest Milk*: "Absent joinder of [the alleged co-conspirators], serious risks of duplicative recovery and inconsistent adjudications would ensue." *Pretrial Proceedings*, 691 F.2d at 1342; *see, e.g.*, *Antitrust Law*, *supra*, ¶ 346h; *Newberg and Rubenstein on Class Actions*, *supra*, § 20:9; *New Motor Vehicles*, 533 F.3d at 5; *Dentsply*, 424 F.3d at 371.[4]

The Eighth Circuit's settled joinder rule plainly bars Plaintiffs' attempt to invoke the co-conspirator exception to the direct-purchaser requirement here. Not only did Plaintiffs "fail[] to join" as defendants the alleged co-conspirators from whom they purchased directly (the local brokers), *Midwest Milk*, 730 F.2d at 533 n.6, but Plaintiffs emphatically reiterated that those alleged co-conspirators "are not defendants in this case," 10/17/2023 Trial Tr. 15:2-3 (M. Ketchmark). It is difficult to imagine a clearer illustration of the principle that "non-joinder defeats plaintiffs' claims." *Midwest Milk*, 730 F.2d at 533. !

2. The Control Exception Does Not Apply

Plaintiffs also briefly suggested at summary judgment that a "control" exception to the direct-purchaser requirement may permit their suit. *See* ECF 956 at 31 (stating that the direct-purchaser requirement does not apply "where the direct purchaser is owned or controlled by its customer") (quoting *Illinois Brick*, 431 U.S. at 736 n.16). But any such claim would be even more misplaced than Plaintiffs' attempted reliance on the co-conspirator exception.

[4] Courts outside the Eighth Circuit have referenced the co-conspirator exception without noting the corresponding joinder requirement. *See, e.g.*, *Marion Diagnostic Ctr., LLC v. Becton Dickinson & Co.*, 29 F.4th 337, 347 (7th Cir. 2022) ("[A plaintiff] may sue any member of an alleged antitrust conspiracy, so long as the plaintiff is a direct purchaser from at least one member of the conspiracy."). But that is likely because the alleged co-conspirators were already joined as defendants in those cases, so there was no need to address the joinder requirement. *See id.* at 344 (noting that the alleged conspirators were named defendants); *see also, e.g.*, *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 605 (7th Cir. 1997) (noting the rule that conspiring intermediaries must "be joined as defendants" and observing "that requirement is satisfied"). !

As an initial matter, the control relationship that Plaintiffs invoke—where an intermediary between an indirect-purchaser plaintiff and the defendants is "owned or controlled by its customer"—does not apply by its own terms. There is no allegation that the intermediaries here (local brokers) are owned or controlled by any "customer." And while the Eighth Circuit has suggested a possible exception where "indirect purchasers own or control the direct purchasers," *Campos*, 140 F.3d at 1171, the indirect purchasers here are Plaintiffs themselves, and they do not purport to own or control anyone. What Plaintiffs seem to envision is an exception under which indirect purchasers can sue defendants who own or control an intermediary. Although some courts have allowed suits in such circumstances, *see, e.g.*, *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326 (9th Cir. 1980), the Eighth Circuit has not.

Even if Plaintiffs' modified version of the control exception were theoretically cognizable, it would fail here for the same reason that their invocation of the co-conspirator exception fails: Plaintiffs declined to join the intermediaries as defendants in the suit. *See supra* § I.B.1. Just as an indirect-purchaser plaintiff's failure to join an intermediary that allegedly conspired with the defendants "leaves the defendants subject to the risk of multiple liability that the *Illinois Brick* Court found unacceptable," *Midwest Milk*, 730 F.2d at 530 (emphasis and citation omitted), so too does an indirect-purchaser plaintiff's failure to join an intermediary that is allegedly controlled by the defendants. In both scenarios, the non-party intermediary would not be bound by the judgment and could therefore bring a later suit seeking to recover duplicative damages from the same defendants. *See id.* To avoid that result, courts that recognize the control exception have applied the same joinder requirement that accompanies the co-conspirator exception. *See, e.g.*, *St. Francis Med. Ctr. v. C.R. Bard, Inc*., 657 F. Supp. 2d 1069, 1105 (E.D. Mo. 2009) (rejecting a plaintiff's invocation of an "exception to the direct purchaser rule that permits an indirect purchaser to

recover when the [intermediary] is owned or controlled by the seller" because the intermediary was not "'joined as a defendant'" (quoting *Campos*, 140 F.3d at 1171 n.4)), *aff'd sub nom. Se. Missouri Hosp. v. C.R. Bard, Inc.*, 616 F.3d 888 (8th Cir. 2010).

Plaintiffs' invocation of a control exception also fails for the independent reason that the intermediaries from whom they purchased directly—the local brokers—are not controlled by Defendants in the sense contemplated by the exception, and Plaintiffs did not prove otherwise. Courts have generally "applied the control exception only when the [defendant] *owned* the" relevant intermediary. *Dentsply*, 424 F.3d at 371 (emphasis added). But here, Defendants do not "own" local brokers. NAR does not own any brokerages. Defendant Keller Williams is a real estate franchise company that enters into arm's-length commercial relationships with "*independently owned and operated*" brokerages. 10/30/2023 Trial Tr. 2269:5-19 (J. Davis) (emphasis added); *accord id.* at 2268:8-20; 10/27/2023 Trial Tr. 1946:23-1947:14, 1948:9-14 (G. Keller). And Defendant HSF Affiliates is a holding company for BHH Affiliates, which similarly franchises "independently owned and operated" companies. PX 4612 (HomeServices of America organization chart); *see also* 10/25/2023 Trial Tr. 1523:24-1524:7, 1528:22-1529:1, 1530:19-25, 1588:5-1589:8 (R. Warner); *id.* at 1452:14-20 (G. Blefari).

Even when a defendant formally owns an intermediary, that alone does not establish the requisite degree of control for an indirect-purchaser plaintiff to invoke the control exception. *See, e.g.*, *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 101 (E.D.N.Y. 2012) ("A plaintiff seeking to gain the benefit of this exception . . . may not rely simply on the existence of a parent-subsidiary relationship."). The plaintiff must show "functional economic or other unity between the" intermediary and the defendant. *Jewish Hosp. Ass'n v. Stewart Mech. Enters.*, 628 F.2d 971, 975 (6th Cir. 1980); *see, e.g.*, *Vitamin C*, 279 F.R.D. at 101 (requiring the plaintiff to "present facts

demonstrating that such unity exists"). Plaintiffs fall far short of that standard here. There is no argument that Defendants NAR, Keller Williams, or HSF Affiliates have anything approaching "functional economic or other unity" with any local brokers. *Jewish Hosp. Ass'n*, 628 F.2d at 975. And while Home Services of America does indirectly own—via a different holding company—three brokerages in Missouri, it is undisputed that those local brokerages maintain operational independence. PX 4612; 10/24/2023 Trial Tr. 1334:16-1335:4, 1337:4-11 (R. Peltier); *id.* at 1368:7-25 (G. Blefari); 10/25/2023 Trial Tr. 1616:9-1618:12 (M. Frazier).

3. No Other Valid Exception Applies

At summary judgment, Plaintiffs also contended that they can sue Defendants despite not purchasing from them directly because—in Plaintiffs' view—"[n]o listing broker will ever sue its parent company claiming damage caused by the challenged rules." ECF 956 at 32. Plaintiffs based that supposed exception to the direct-purchaser requirement on the Ninth Circuit's decision in *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003). *Id.* This Court—while holding that it "need not address" the issue—appeared inclined to accept Plaintiffs' position at that stage of the case. ECF 1019 at 13 n.9. Plaintiffs' argument, however, rests on a demonstrable misreading of *Freeman*.

Freeman did not endorse a freestanding judicial inquiry into the probability that a hypothetical antitrust suit might be brought. Such a speculative test would have no basis in the Supreme Court's jurisprudence, which has stressed the need for a clear and administrable direct-purchaser rule. *See Apple*, 139 S. Ct. at 1524; *see also, e.g.*, *Hertz Corp. v. Friend*, 559 U.S. 77, 94-95 (2010) (explaining the need for "straightforward" and "predictab[le]" jurisdictional rules). *Freeman* instead referred to the lack of a "realistic possibility that the direct purchaser will sue its supplier" only in the context where the direct purchaser was "own[ed]" by and "accused of conspiring with" that supplier. *Freeman*, 322 F.3d at 1145-46. And *Freeman* relied on an earlier

decision that likewise referred to the unlikelihood of an enforcement suit only as a byproduct of conspiracy and control. *Id.* (citing *Royal Printing*, 621 F.2d at 326). Thus, as the Ninth Circuit later expressly clarified, "*Freeman* did not create a new variation of" a direct-purchaser exception, but simply "relied on ownership and control to find standing." *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 756 (9th Cir. 2012); *see Antitrust Law*, *supra*, ¶ 346f ("What [*Freeman*] was really describing was a 'control' or perhaps a 'co-conspirator' exception."). As explained above, Plaintiffs cannot invoke the control exception here for multiple reasons, including that they failed to name the allegedly controlled intermediaries as defendants and to establish the requisite degree of control. *See supra* § I.B.2; *cf. Freeman*, 322 F.3d at 1142, 1146 (noting that the plaintiffs "nam[ed] as defendant[]" the relevant intermediary, which was created, owned, and fully controlled by the other defendants).

In any event, even if Plaintiffs' reading of *Freeman* were correct, they would still not be permitted to sue. The Eighth Circuit has never suggested that it would adopt anything resembling the likelihood-of-suit inquiry that Plaintiffs claim to find in *Freeman*, and the Supreme Court has recently reiterated that the "bright-line rule of *Illinois Brick* means that there is no reason to ask whether the rationales of *Illinois Brick* 'apply with equal force' in every individual case." *Apple*, 139 S. Ct. at 1524 (citation omitted). Moreover, Plaintiffs offer no evidence to support their conclusory claim that no local brokers "will ever sue" Defendants. ECF 956 at 32. That is an especially puzzling claim for Plaintiffs to make while relying on *Freeman*, which was a suit *by local real-estate brokers against real-estate associations*. *Freeman*, 322 F.3d at 1140-43. And *Freeman* is hardly the only such suit. *See, e.g.*, *Reifert v. South Cent. Wisconsin MLS Corp.*, 450 F.3d 312 (7th Cir. 2006) (suit by real-estate broker against real-estate trade association alleging Sherman Act violation based on MLS access rules); *Keller v. Greater Augusta Ass'n of Realtors,*

Inc., 760 F. Supp. 2d 1373 (S.D. Ga. 2011) (suit by brokers against real-estate association alleging that MLS advertising rules violate the Sherman Act); *Hackman v. Dickerson Realtors, Inc*., 595 F. Supp. 2d 875 (N.D. Ill. 2009) (suit by brokers and agencies against real-estate associations and others alleging an anticompetitive conspiracy to exclude plaintiffs from the local real estate market). Contrary to Plaintiffs' *ipse dixit* assertion, it is not hard to imagine that some seller brokers might oppose sharing commissions with buyer brokers and choose to sue Defendants on grounds similar to those advanced by Plaintiffs. Thus, even if Plaintiffs were correct that indirect purchasers can bring an antitrust suit based solely on a prediction that no one else will, such an exception would not allow Plaintiffs to evade the direct-purchaser requirement here.

C. Judgment As A Matter Of Law Is Required

Compliance with the direct-purchaser requirement is "a question of law for the district court to decide." *ATM Fee Antitrust Litig.*, 686 F.3d at 747. Because Plaintiffs undisputedly did not purchase directly from Defendants and have not established any valid exception to the direct-purchaser requirement, judgment as a matter of law is required. *See Midwest Milk*, 730 F.2d at 533 ("Under our view that non-joinder defeats plaintiffs' claims, it is not necessary to review the arguments made relating to allegedly disputed facts and the appropriateness of the grant of summary judgment."); *see also, e.g.*, *Campos*, 140 F.3d at 1171-72 (dismissing claims based on failure to comply with direct-purchaser rule or to invoke a valid exception); *New Prime Inc. v. Espar, Inc.*, 2016 WL 10644516, at *2 (W.D. Mo. Oct. 27, 2016) (same).

Although the Court did not reach that result at earlier stages of the case, it remains free to do so here. And even if the Court were to consider the evidence that went to the jury, judgment as a matter of law for Defendants would nevertheless be required. The Court instructed the jury that, "[i]f you find that the plaintiffs have not shown they paid . . . allegedly inflated commissions directly to the buyers' brokers, the plaintiffs are not entitled to damages and you must find for the

defendants on these claims." ECF 1292 at 43. Given that instruction, the jury was required as a matter of law to "find that the plaintiffs have not shown they paid . . . allegedly inflated commissions directly to the buyers' brokers," *id.*, because Plaintiffs adduced no evidence demonstrating that they paid any commissions directly to buyer brokers. To the contrary, the unrefuted evidence demonstrated that payments from Plaintiffs went only to *seller* brokers. For example, the listing agreement between Plaintiff Rhonda Burnett and her seller broker states that "SELLER agrees to pay Reece & Nichols Realtors [the seller broker] a commission consisting of . . . 6% of the selling price" and that the "BROKER will offer a commission" to the buyer broker. PX-2200 at 2. All of the other listing agreements introduced into evidence have the same structure. *See* PX-2211, PX-2225. The inescapable meaning of those documents is that Plaintiffs did not make any payments directly to buyer brokers, but only did so through an "intermediary"—which makes Plaintiffs paradigmatic "indirect purchasers" who cannot sue. *Apple*, 139 S. Ct. at 1522.[5]

Dismissing Plaintiffs' claims would not mean that no one can ever challenge the practices at issue here. Indeed, Plaintiffs themselves may have been able to do so if they had chosen to join as defendants the local brokers from whom they purchased directly or if they had maintained their state-law claims. *See ARC Am. Corp.*, 490 U.S. at 105-06 (holding that state-law antitrust claims are not subject to the *Illinois Brick* rule); *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131, 1138 (W.D. Mo. 2019) (naming a putative class of defendants); *Thomas v. U.S. Bank N.A., N.D.*, 2012 WL 12897284, at *1 n.2 (W.D. Mo. Sept. 27, 2012) (same). But Plaintiffs made—and

[5] Plaintiffs' trial presentation was nonresponsive to that legal defect. Plaintiffs' position was instead that they qualify as "direct purchaser[s]" because "they paid the [allegedly] inflated commissions." 10/30/2023 Trial Tr. 2504:7-11 (M. Ketchmark). That is not an accurate statement of the law. After all, the plaintiffs in *Illinois Brick* also paid allegedly inflated prices; the whole point of the Court's decision in that case and the decades of direct-purchaser jurisprudence that has followed is that only certain parties who pay allegedly inflated prices can bring suit.

trumpeted—the deliberate decision not to bring this case against local brokers. Whatever strategic benefits they might have expected at trial from that decision, the cost now is dismissal of their suit. *Cf. In re Mushroom Direct Purchaser Antitrust Litig.*, 2017 WL 696983, at *7 (E.D. Pa. Feb. 22, 2017) ("Plaintiffs' failure to name [the required intermediary] as a defendant is what creates any 'gap in antitrust enforcement,' not application of the *Illinois Brick* direct purchaser rule." (citation omitted)).

II. THE MODEL RULE IS NOT AN UNREASONABLE RESTRAINT OF TRADE

Plaintiffs were required to prove that the Model Rule is "an unreasonable restraint on trade." *Willman v. Heartland Hosp. E.*, 34 F.3d 605, 610 (8th Cir. 1994). But they failed to submit sufficient evidence to support the jury's verdict. They proceeded at trial exclusively under a per se theory of antitrust liability, but that theory is legally defective, and the evidence could not support the jury's verdict under the rule of reason.

A. The Model Rule Is Not A Per Se Antitrust Violation

NAR explains at length in its motion for a new trial under Rule 59 why settled law does not allow per se condemnation of the Model Rule. *See* ECF 1362 at 4-16. For the sake of brevity, NAR does not repeat that full analysis here and incorporates the discussion from the Rule 59 motion by reference. In short, a court may not condemn a given arrangement as a per se violation unless "courts have had considerable experience with the type of restraint at issue" and the restraint "would always or almost always tend to restrict competition and decrease output." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (citation and internal quotation marks omitted). Neither the Model Rule nor any analogous disclosure rule has ever been subject to judicial scrutiny, let alone found to virtually always restrict competition. And although Plaintiffs have characterized the Model Rule as a form of horizontal price-fixing, the Supreme Court has not condemned all arrangements that might be described that way, even where they

clearly involved agreements on price. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5-6 (2006); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979). Plaintiffs rely principally on isolated statements from *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), to argue that any practice with the "purpose and effect" of increasing or stabilizing prices automatically warrants per se treatment, but that interpretation is far too broad, particularly in light of the many ensuing decades of development of the per se framework since *Socony-Vacuum Oil* was issued in 1940.

B. The Undisputed Evidence Presented At Trial Establishes That The Model Rule Satisfies The Rule Of Reason

When analyzed under the rule of reason, the Model Rule does not amount to an unreasonable restraint of trade as a matter of law. "Under rule-of-reason analysis, courts seek to ascertain the extent to which challenged conduct harms competition and to then determine whether any such harm is nonetheless justified by countervailing procompetitive benefits." *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1306 (10th Cir. 2017); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 388-89 (8th Cir. 2007). As overwhelmingly shown at trial—indeed, as made clear by undisputed and indisputable facts—the Model Rule has no effect on whether seller brokers make offers of commissions or on the rates paid by sellers. Even if it did have some effect on the rates that sellers pay, moreover, the Model Rule would be justified under antitrust principles governing ancillary restraints and two-sided platforms.

1. There Is No Evidence That The Model Rule Has Anticompetitive Effects

Despite hinging their case at trial on the alleged price effects of the Model Rule, *see, e.g.*, 10/30/2023 Trial Tr. 2346:25-2347:2 (M. Ketchmark), Plaintiffs presented no evidence that the Model Rule—which does no more than require a seller broker to make an offer of compensation of any amount, even $1—has any effect whatsoever on the commissions that sellers pay (or that the purpose of the Model Rule is to inflate or stabilize commissions). The claim is deeply

implausible on its face. The Model Rule does not impose any obligation whatsoever on sellers; neither NAR's Handbook on Multiple Listing Policy nor its Code of Ethics requires sellers to pay anything to anyone. PX-216 at 37-39; 10/19/2023 Trial Tr. 588:2-4 ("Q And this rule does not say anything about what sellers must do, correct? A No, it does not.") (C. Schulman). As the testimony and listing agreements from the named Plaintiffs show, sellers commit ***only*** to pay the seller brokers their commissions, which sellers are free to negotiate, and it is the seller brokers who decide how they will share their commissions with buyer brokers. *See e.g.*, PX-2200; PX-2225; 10/18/2023 Trial Tr. 267:18-268:11 (H. Ellis).

Other features of the Model Rules make clear that, as a practical matter, sellers are under no obligation to pay any particular commission. Offers of compensation made by seller brokers to buyer brokers are disclosed to sellers in Missouri, and sellers must consent to the arrangement. *See* DX-4034 (Code of Ethics, SOP 1-12). The offers are negotiable at all times before closing, and, in practice, brokers regularly negotiate the listing commission. *See* 10/24/2023 Trial Tr. 1217:24-1220:23 (R. Gansho); 10/30/2023 Trial Tr. 2270:12-14 (J. Davis). In fact, a "significant portion" of offers made in Missouri on the MLS between 2014 and 2020, ranging from 23% to 33% depending upon the year, differed from the commissions ultimately paid. 10/26/2023 Trial Tr. 1830:1-1831:15 (L. Wu). And at any rate, if a seller objects to any of the mandatory rules in NAR's Handbook on Multiple Listing Policy—including if the seller does not want the seller broker to pay a buyer broker anything—the seller can easily avoid the requirement entirely by selling the property without a broker, hiring a nonmember of NAR, or marketing the property privately with a NAR member. *See* 10/24/2023 Trial Tr. 1243:4-10 (R. Gansho).

The Model Rule thus does not require sellers to pay any particular commission or to do anything at all. They can freely negotiate commissions with their seller brokers or can take

advantage of multiple alternative ways to sell their homes. Nor does the Model Rule impose any obligation on seller brokers that could plausibly result in higher commissions for buyer brokers. The Model Rule is simply a disclosure obligation, and seller brokers are free to list offers of $1 and to renegotiate commissions up to closing. 10/24/2023 Trial Tr. 1220:13-23 ("You can always negotiate what the commission is.") (R. Gansho); *id.* at 1162:8-17 ("Q Is there anything in this rule that tells a seller what they have to do? A No. It's up to the seller to decide what they want to do.") (R. Goldberg). For that reason, the Model Rule can hardly even be deemed a "restraint." It does not restrain anything.

At trial, Plaintiffs never coherently explained how a mere disclosure rule could increase commission rates at all, let alone be solely responsible for the existence of the practice of seller brokers paying buyer-side commissions—the preposterous premise of Plaintiffs' damages theory. Revealingly, the Plaintiffs' experts focused on *other* alleged rules and practices as the mechanisms by which commissions were supposedly raised or stabilized, including the alleged practice of steering and the NAR model rule requiring seller brokers to file listings into an MLS within one business day of public marketing. *See, e.g.,* 10/19/2023 Trial Tr. 524:17-525:24 (C. Schulman); 10/20/2023 Trial Tr. 626:1-24 (C. Schulman); *id.* at 698:7-21; *id.* at 750:2-22 (R. Alford); *id.* at 764:16-765:16. But the Plaintiffs presented no evidence of a conspiracy to enforce those other rules or practices, and the jury was not asked to make any such finding. In short, there was simply no evidence that the Model Rule itself is responsible for the paying of buyer broker commissions or for the rate of commissions that sellers pay their brokers.

To the contrary, the empirical evidence presented at trial uniformly demonstrates that the Model Rule has no effect on commissions. For one thing, Plaintiffs' own expert, Dr. Schulman, admitted that commission sharing existed in the real estate industry for *decades* before NAR

adopted a Model Rule requiring that seller brokers disclose their offers of compensation. 10/20/2023 Trial Tr. 635:5-7 ("Q In fact, listing brokers offering to pay buyer's agents has existed for decades, fair? A Yes.") (C. Schulman). That shows that the Model Rule did not cause the practice that Plaintiffs claim to have injured them. *See* ABA Antitrust Section, 1-9 *Antitrust Law Developments* § 9C-3-b (9th ed. 2022) (One common method of determining whether conduct is a restraint is to look at behavior, such as prices, "during the period" with the alleged restraint and compare it to behavior "prior to the beginning of the violation or after its termination."). In fact, offers of compensation from seller brokers or sellers to buyer brokers have been authorized by a Missouri statute since long before the Model Rule was promulgated—a curious feature of the law if such arrangements were solely the product of the Model Rule. Mo. Rev. Stat. § 339.800 (2004).

Other undisputed empirical evidence presented at trial confirms the common-sense conclusion that a mere disclosure rule could have no effect on commission rates. Dr. Wu's analysis of residential markets in the United States that do not have a requirement akin to the Model Rule shows there is no material difference in commissions or offers of compensation. 10/26/2023 Trial Tr. 1837:12-1838:6 ("I also have looked at commission rates in other U.S. cities, including cities where the rule at issue was not present. And you also will see commissions that are clustered around a single rate.") (L. Wu); *see In re Wholesale Grocery Prods. Antitrust Litig.*, 946 F.3d 995, 1002-03 (8th Cir. 2019) (analyzing whether conduct causes harm by examining similar markets that do not have the conduct). Perhaps most notably, Plaintiffs' expert, Dr. Schulman, agreed that the amounts offered by seller brokers to buyer brokers vary across and within the subject MLSs, despite all having identical NAR rules. *See infra* at 22-23. This variation shows that market factors and competition, and not NAR's rules, determine offers of compensation.

2. Even If The Model Rule Had Some Effect On Commissions, It Would Be Permissible As A Matter Of Law Under The Rule Of Reason

Even if the Model Rule had some effect on commissions, the Model Rule would not be an unreasonable restraint of trade under the traditional rule of reason analysis as a matter of law. Given controlling legal principles and the evidence presented at trial, no reasonable jury could conclude otherwise.

As an initial matter, the Model Rule is justified as a valid ancillary restraint supporting the MLS, which qualifies as a type of business association or joint venture. An MLS indisputably creates efficiencies for consumers by pooling information about home listings into one platform, vastly reducing transactions costs and facilitating sales between buyers and sellers. Because Plaintiffs have not contested that each MLS is a "legitimate business collaboration," the Model Rule is "valid" so long as it "is ancillary to the legitimate and competitive purposes of the business association," even if it does not lie at the "core" of an MLS. *Dagher*, 547 U.S. at 7. Given that a central purpose of an MLS is to collect all information about a home sale into a single location, requiring disclosure of what the seller broker is willing to offer the buyer broker makes the MLS "more effective in accomplishing its purpose." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J., for the court). Indeed, although the Model Rule is not a necessary component of a functioning MLS, the Model Rule likely qualifies as part of the "core activity of the joint venture itself" within the meaning of *Dagher* insofar as the MLS's activity is pooling information about proposed home-sale transactions. *Dagher*, 547 U.S. at 7. Because Plaintiffs have not challenged the MLS itself as an antitrust violation, *cf. Dagher*, 547 U.S. at 6 n.1, the Model Rule is necessarily valid as a matter of law under *Dagher*.

In addition, Plaintiffs' trial evidence could not justify invaliding the Model Rule under the rule of reason because Plaintiffs' arguments and evidence did not accord with the proper

framework for addressing rules in platforms like an MLS. An MLS is a "two-sided platform," because it "offers different products or services to two different groups"—buyers and sellers—"who both depend on the platform to intermediate between them." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280 (2018) (*AmEx*).[6] The sale to the buyer, the payment by the seller, and the payment of commissions are made simultaneously, *see AmEx*, 138 S. Ct. at 2286, and offers of compensation to buyer brokers cannot be lowered or eliminated "without risking a feedback loop of declining demand." *Id.* at 2285. In *AmEx*, the Supreme Court was crystal clear that the antitrust analysis of a two-sided platform generally "must include both sides of the platform," because "[p]rice increases on one side of the platform . . . do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services." *Id.* at 2286. Here, however, Plaintiffs never attempted to show that the Model Rule increases the "overall cost" of MLS services for all participants but rather focused exclusively on the effect on sellers.

That failure of proof requires that judgment be entered for Defendants. It cannot be disputed, after all, that offers of compensation benefit home buyers, because they receive representation without having to pay for broker services out of their own pocket, making it possible for them to make offers for properties that they may not otherwise have been able to afford. 10/26/2023 Trial Tr. 1726:14-1728:6 ("[I]f a home buyer wants professional representation, which I think is critically needed if you've never bought a home before, it's going to then take some of the money you were going to use for a down payment.") (D. Stevens). Assuming *arguendo* that

[6] *See generally* Jean-Charles Rochet & Jean Tirole, *Cooperation Among Competitors: Some Economics of Payment Card Associations*, 33 RAND J. Econ., no. 4, 549-70 (Winter 2002); Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. Eur. Econ. Ass'n, no. 4, 990 (2003); Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. Econ., no. 3, 645 (Autumn 2006); David S. Evans, *The Antitrust Economics of Two-Sided Markets*, 20 Yale J. Regul. 325 (2003).

Plaintiffs succeeded in showing that the Model Rule causes offers of compensation to be made or affects commission rates (*but see supra* at 16-17), they nevertheless failed to establish an antitrust violation as a matter of law because they did not offer any evidence that whatever anticompetitive effect (if any) exists with respect to home sellers more than offsets the benefit to home buyers.

Finally, apart from those two fundamental legal flaws in Plaintiffs' position, they simply presented no rebuttal to Defendants' considerable evidence that the Model Rule benefits home sellers. 10/26/2023 Trial Tr. 1726:14-1727:19 (changing the model rule "would cause extraordinary, serious damage, particularly to first-time homebuyers and cash-constrained homebuyers") (D. Stevens); *id.* at 1728:7-1729:8 ("In the absence of [the model rule], there would be a lot of buyers who could not afford a buyer broker in some cases, and they wouldn't necessarily know what's coming on the market at any given point in time, or even if it's a market that they should be looking at.") (D. Stevens); *id.* at 1739:14-1740:7 (the model rule benefits sellers because "there are so many buyer brokers representing all these potential homebuyers in the market" who "bring[] more traffic and more competition to the sale of that home") (D. Stevens). Given the overwhelming evidence of benefits, and the paucity of evidence (if any) that the rule affects the commissions paid by sellers, Defendants are entitled to judgment as a matter of law because no reasonable jury could find that the Model Rule fails the rule of reason.

III. PLAINTIFFS PRESENTED NO EVIDENCE THAT NAR CONSPIRED WITH ANYONE

In addition to failing to prove that the Model Rule is an unreasonable restraint of trade, Plaintiffs failed to prove "an agreement in the form of a contract, combination, or conspiracy" to enforce the Model Rule. *Willman*, 34 F.3d at 610. To satisfy that element, Plaintiffs were required to present evidence showing that the alleged conspirators "had a conscious commitment to a

common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.* 465 U.S. 752, 764 (1984) (citation omitted).

Plaintiffs failed to present the jury with evidence that NAR conspired with another Defendant to enforce the Model Rule. The trial record contains no evidence of any agreement between NAR and any of the Corporate Defendants and does not otherwise establish a "conscious commitment to a common scheme." *Id.* Plaintiffs' own expert, Dr. Schulman, admitted that he had no opinion on whether there was a conspiracy and saw no documents or testimony showing that a conspiracy existed:

> Q. Sir, isn't it true that you have no opinion on whether there's a conspiracy between NAR and HomeServices?
>
> A. I believe I testified to that effect, yes.
>
> Q. Okay. And isn't it true that you have no opinion whether there is a conspiracy between NAR and Keller Williams?
>
> A. I believe that's what I testified to at deposition, yes.
>
> Q. And you have no opinion on whether or not there's a conspiracy between HomeServices and Keller Williams?
>
> A. I believe I testified to that at deposition, yes.
>
> . . . .
>
> Q. Let's focus on the facts. Okay? You have not seen a single document showing any Defendant discussing commissions with each other, correct, sir?
>
> A. That's correct.

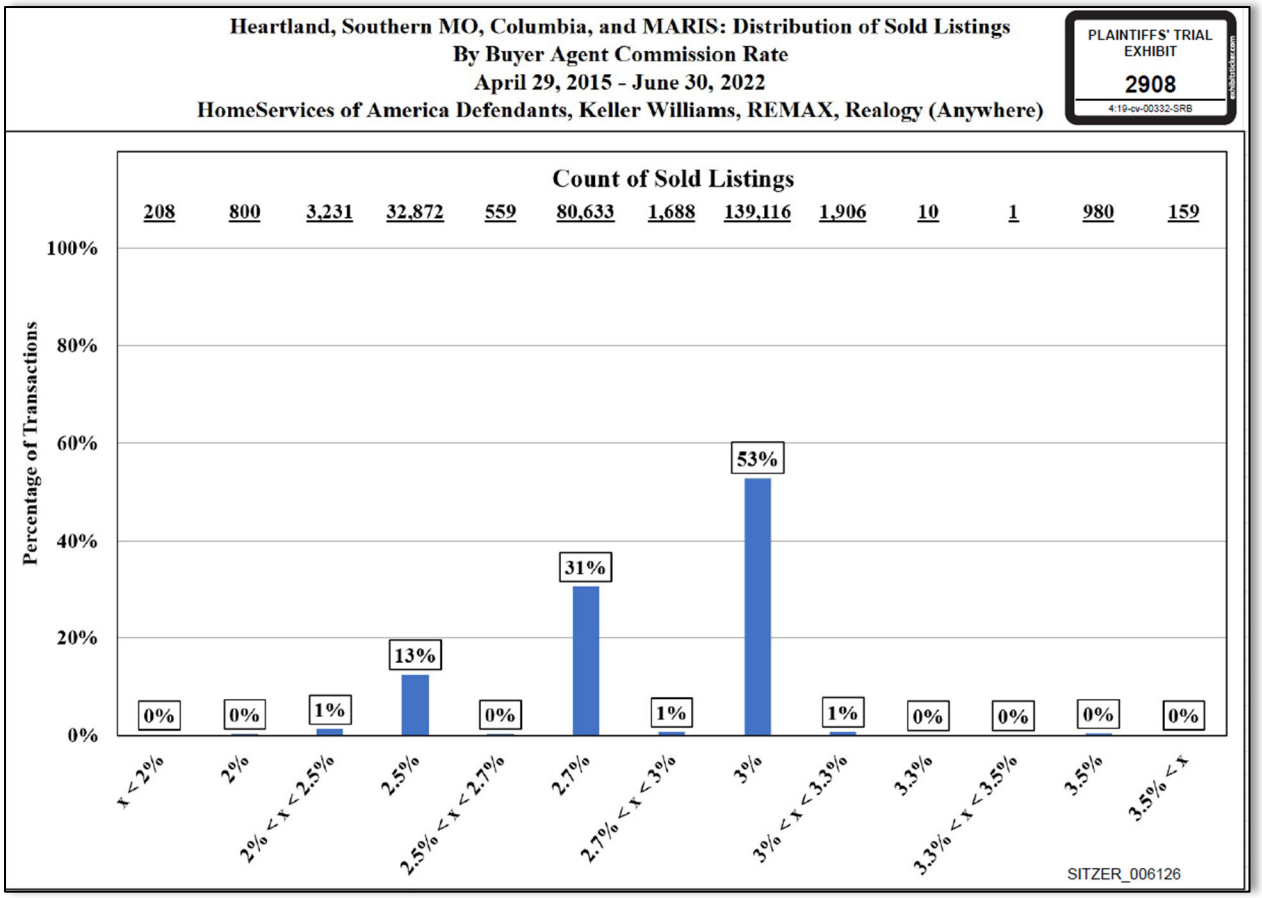
10/19/2023 Trial Tr. 571:9-572:5 (C. Schulman).

Nor did the jury hear any other testimony or see any documents showing an agreement. To the contrary, every single witness who testified about the Model Rule affirmed that there was no conspiracy. Without exception, they all denied that they were involved in any agreement with

competitors on pricing. *See* 10/23/2023 Trial Tr. 915:2-11 (S. Millet); *id.* at 1030:13-1031:1 (R. Goldberg); 10/24/2023 Trial Tr. 1169:7-19 (R. Gansho); *id.* at 1346:13-1347:9 (R. Peltier); *id.* at 1384:16-1385:20 (G. Blefari); 10/25/2023 Trial Tr. 1531:16-1532:5 (R. Warner); 10/27/2023 Trial Tr. 2032:21-2033:5 (G. Keller); *id.* at 2191:6-16 (M. King). Witnesses from the Corporate Defendants testified that they did not even know about the Model Rule. *See, e.g.*, 10/24/2023 Trial Tr. 1345:12-1346:25 (R. Peltier); 10/25/2023 Trial Tr. 1482:10-19 (G. Blefari).

While some Corporate Defendants require brokers to join NAR, there is no evidence that the Corporate Defendants require their brokers to follow the Model Rule, make offers of compensation at all, or stabilize, fix, or raise commissions. 10/19/2023 Trial Tr. 574:17-21 ("Q And you have not seen any documents or any testimony that would show any of the defendants have discussed how much a seller or their agent should offer to buyer brokers, correct? A Correct.") (C. Schulman). And there was no evidence that NAR entered into an agreement with any Corporate Defendant requiring its brokers to either join NAR or abide by the Model Rule.

Dr. Schulman's testimony confirms that there could not have been a conspiracy to fix prices because he admitted that offers by seller brokers to buyer brokers varied materially through Missouri. 10/20/2023 Trial Tr. 619:20-628:18 (C. Schulman). From April 29, 2015, through June 30, 2022, the buyer-broker commission rate across the four subject MLSs included 33,872 instances of a buyer broker being offered 2.5%, 80,633 instances of a buyer broker being offered 2.7%, and 139,116 instances of a buyer broker being offered 3%.



PX-2908; 10/20/2023 Trial Tr. 623:25-624:22 (C. Schulman). Offers of compensations to buyer brokers vary even within the individual subject MLSs. *See* PX-2907 (In MARIS MLS, 22% of buyer brokers are offered 2.5% commission, while 65% of buyer brokers are offered 2.7% commission and 7% of buyer brokers are offered 3%.).

There was no dispute, moreover, that those are just ***offers*** of compensation and are not what brokers were actually paid. As noted above, the trial evidence shows that the ultimate compensation paid differs from the offer in 23% to 33% of transactions. *See supra at* 15. These adjustments are evidence of negotiation, which is inconsistent with an antitrust conspiracy.

At most, Plaintiffs showed some degree of parallel pricing. But parallel behavior can be evidence of a conspiracy only if the evidence shows it "would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an

advance understanding among the parties." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.4 (2007) (internal quotation marks and citation omitted). In other words, "[t]here must be evidence that tends to exclude the possibility of independent action." *Monsanto*, 465 U.S. at 768; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."); *Twombly*, 550 U.S. at 554 ("An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict.").

Plaintiffs submitted no such evidence here. Plaintiffs heavily relied on the Corporate Defendants' internal training materials, videos, and meetings. But those are not evidence of a conspiracy *with NAR* because they have nothing to do with NAR or the Model Rule. *See, e.g.*, PX-503; PX-686; PX-1187. There is no evidence that these training materials were developed as a part of any communication or understanding with NAR or any other Defendant.

In short, no reasonable jury could conclude that the trial evidence in this case met the legal standard for a conspiracy. NAR is entitled to judgment on that basis.

IV. PLAINTIFFS FAILED TO PROVE INJURY OR DAMAGES RESULTING FROM THE CHALLENGED MODEL RULE

To recover for an antitrust violation, a plaintiff must prove "the fact of damage or injury, a causal relationship between the violation and the injury, and the amount of damages." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1054 (8th Cir. 2000) (citation omitted). In a class action, those elements must be proven for each class member. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008). Because Plaintiffs failed to establish those elements here, their claim fails as a matter of law. *See, e.g.*, *McDonald v. Johnson & Johnson*,

722 F.2d 1370, 1379 (8th Cir. 1983) (discussing the "solid line of case law [that] mandates" judgment as a matter of law "for failure to prove damages cognizable under the antitrust laws").

A. Plaintiffs Failed To Establish Injury Resulting From The Challenged Rule

As a threshold matter, Plaintiffs fail to establish any injury resulting from the challenged Model Rule for a straightforward reason: the Model Rule does not require them to do anything. *See supra* § II.B.1. Plaintiffs are home sellers, but the Model Rule they challenge imposes obligations only on sellers' *brokers*. Any harm Plaintiffs allegedly suffered is therefore not traceable to the antitrust violation they assert. Plaintiffs are accordingly barred from collecting any damages. *See Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1494 (8th Cir. 1992) ("It is a requirement that an antitrust plaintiff must prove that his damages were caused by the *unlawful* acts of the defendant."); *Midwest Commc'ns v. Minnesota Twins, Inc.*, 779 F.2d 444, 451 (8th Cir. 1985) (similar).

Plaintiffs' evidence did not provide any legally cognizable basis for the jury to find that they suffered an injury resulting from the challenged Model Rule. Plaintiffs' damages case was presented entirely through the testimony of one expert witness, Dr. Schulman. He presented a series of charts that showed, through percentages, the buyer's commission offered by brokers affiliated with the Corporate Defendants during the class period, 10/19/2023 Trial Tr. 543:14-20 (C. Schulman); PX-2904 through PX-2908, and a one-page table representing "all the buy side commissions paid for by home sellers that listed with one of the agent's brokers affiliated with [the Corporate Defendants]," 10/19/2023 Trial Tr. 564:9-565:2 (C. Schulman); PX-4592A. Neither those figures themselves nor anything else in Dr. Schulman's testimony attempted to connect the amount of the buy-side commissions to the Model Rule. The premise of Plaintiffs' claimed injury was that *no* real-estate transaction in a market without the Model Rule would *ever* result in payment of the same buyer broker commissions as occurred during the class period. Thus,

if even *one* transaction without the Model Rule would include the same (or greater) buyer broker commission as was paid with the Model Rule, Plaintiffs would not be able to claim classwide harm. Yet Dr. Schulman presented no evidence to support that critical—and dubious—premise, and Plaintiffs failed to refute clear evidence showing that, in the markets without the Model Rule, buyer broker commission offers are in fact largely unchanged. *See* 10/26/2023 Trial Tr. 1848:25-1851:2 (L. Wu). Plaintiffs' evidence was accordingly legally insufficient to establish harm. *See, e.g.*, *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 518 F. Supp. 102, 117, 119 (E.D. Pa. 1981) (granting judgment as a matter of law where "the illusion of complete accuracy created by graphs, charts, and garbled expert testimony created a speculative verdict"); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").

Plaintiffs' assertion of injury is also legally defective because it fails to account for class members who suffered no harm because they negotiated a home sales price net of any commissions paid, rather than a gross price. For example, former named Plaintiff Scott Trupiano testified that he sold a house to a hedge fund and negotiated a net sales price of $285,000. Deposition Designations of Scott Trupiano ("Trupiano Dep.") 220:11-221:16. Trupiano testified that he was agnostic as to the commissions and other transaction costs that were added to the total sales price, including the commission paid to the hedge fund's buyer broker. *Id.* at 230:17-231:07. Thus, even if the Model Rule that Plaintiffs challenge did affect the commissions ultimately paid, Plaintiffs like Trupiano were not harmed. Plaintiffs' failure to show injury for all members of the class they proposed is a legal defect requiring judgment for Defendants. *See Hydrogen Peroxide*,

552 F.3d at 311.[7]

B. Plaintiffs Failed To Prove Any Legally Supportable Amount Of Damages

Even if Plaintiffs could show that they were injured by the Model Rule, they did not present any legally valid theory for determining damages. *See Concord Boat*, 207 F.3d at 1057 (granting judgment as a matter of law based on flawed damages theory); *see also*, *e.g.*, *Deaktor v. Fox Grocery Co.*, 475 F.2d 1112, 1116-17 (3d Cir. 1973) (affirming directed verdict for antitrust defendant where plaintiffs failed to produce "evidence concerning the factors essential to establish net profit" and thus "did not meet their burden of establishing the quantum of damages").

As explained above, the only evidence that Plaintiffs presented in support of their damages figure—the same $1,785,310,872 that the jury awarded—was a series of charts depicting the percentages and amounts of buyer commissions offered and paid in connection with home sales through brokers affiliated with the Corporate Defendants. *See supra* § IV.A. That paltry presentation was woefully inadequate to support the jury's award. To begin, Plaintiffs' claim fails to account for benefits that Plaintiffs received from the Model Rule. *See Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1367 (9th Cir. 1986) ("An antitrust plaintiff may recover only to the 'net' extent of its injury; if benefits accrued to it because of an antitrust violation, those benefits must be deducted from the gross damages caused by the illegal conduct."). Many class members who sold homes during the class period also bought homes during that same period, and in the process engaged buyer brokers who were compensated through commissions shared by seller brokers. *See, e.g.*, 10/18/2023 Trial Tr. 265:11-15 (H. Ellis); *id.* at 341:21-23 (J. Keel). In the but-for world envisioned by Plaintiffs, such class members would have to pay their buyer brokers directly. *See* 10/19/2023 Trial Tr. 569:18-570:1 (C. Schulman). Dr.

[7] That defect and others also require decertification of the class, as explained further in Defendants' motion for decertification filed contemporaneously with this motion.

Schulman refused to even consider that shift in his damages theory, but it would have dramatic ramifications. For example, named Plaintiff Jeremy Breit paid about $9,000 to his seller broker when he sold a home during the class period and paid nothing to his buyer broker when he bought a home during that period. 10/26/2023 Trial Tr. 1855:4-1856:19. In Dr. Schulman's but-for world, Mr. Breit would have paid about $5,000 to his seller broker and about $10,000 to his buyer broker—leaving him with a total commissions bill of about $6,000 *more*. *Id*.

Dr. Schulman also admitted that he failed to even attempt to calculate the total commissions that any Plaintiff paid, which is critical to any credible determination of Plaintiffs' damage amount. 10/20/2023 Trial Tr. 668:10-23. And Dr. Schulman made no effort to account for additional costs that sellers could incur in a world without the Model Rule, such as higher seller-side commissions or lower home-sale prices. Those errors are fatal to Plaintiffs' ability to present a legally sufficient basis for damages. *See, e.g.*, *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 893 (8th Cir. 1978) ("[D]amages accruing from the injury must be capable of reasonable ascertainment and must not be speculative or conjectural.").

Perhaps most egregiously, Dr. Schulman relied on a fantasy of a but-for world in which *no* class member—not one person—would have authorized a seller broker to offer *any* compensation to *any* buyer broker in *any* circumstance during the class period. 10/19/2023 Trial Tr. 563:13-16. That is, in Dr. Schulman's but-for world, the model that has prevailed in American real-estate for roughly the past half century would come to a total and immediate conclusion, with the entire state of Missouri transformed overnight into an Australia on the Plains in which buyer brokers are largely extinct. Confirming that his position was indeed that radical, Dr. Schulman testified that "every single penny that sellers had to pay a buy side agent here in Missouri during this time period is the measure of antitrust damages." *Id.* Dr. Schulman not only failed to provide legally sufficient

evidence to support that implausible result, but also failed to refute the overwhelming evidence that at least some compensation from seller brokers to buyer brokers would continue to exist—as occurred for decades before the Model Rule existed (starting in the nineteenth century), occurs regularly in markets where the Model Rule is not in force (such as those governed by the Northwest MLS and Real Estate Board of New York), is expressly authorized by Missouri law, and even sometimes happens in Australia. *See* 10/20/2023 Trial Tr. 635:5-7 (C. Schulman); *id.* at 836:5-10 (T. Reynolds); 10/26/2023 Trial Tr. 1848:15-1850:23, 1912:16-1913:6 (L. Wu); 10/30/2023 Trial Tr. 2294:25-2295:20 (J. Davis); *see also* Mo. Rev. Stat. § 339.800.

In short, "[w]hen a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage." *Amerinet*, 972 F.2d at 1494 (citation omitted). That is what happened here. Plaintiffs chose an all-or-nothing approach to damages and failed to support their request for all of the damages they sought. The legally required result is accordingly no damages.

CONCLUSION

The Court should enter judgment as a matter of law for NAR.

Dated: January 8, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2024, a copy of the foregoing document was electronically filed through the ECF system and will be sent electronically to all persons identified on the Notice of Electronic Filing.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, JEREMY KEEL, HOLLEE ELLIS, and FRANCES HARVEY, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and KELLER WILLIAMS REALTY, INC.,

Defendants.

Case No. 4:19-cv-00332-SRB

CLASS ACTION

ORAL ARGUMENT REQUESTED

SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION TO DECERTIFY THE CLASS

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. LEGAL STANDARDS 3

III. ARGUMENT 4

A. TRIAL MADE CLEAR THAT ANTITRUST INJURY TURNS ON HIGHLY INDIVIDUALIZED FACTS 4

1. Trial Demonstrated That Individualized Proof Dictates Whether A Class Member Would Have Authorized Less Cooperative Compensation In The "But-For" World. 4

2. Dr. Schulman's Flawed Model Does Not Show That Injury Can Be Proven On A Classwide Basis With Common Proof 10

B. PREDOMINANCE ALSO FAILS BECAUSE TRIAL REVEALED MORE THAN A *DE MINIMIS* NUMBER OF UNINJURED CLASS MEMBERS 13

C. TRIAL ALSO SHOWED THAT DAMAGES ARE HIGHLY INDIVIDUALIZED 14

IV. CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

In re Asacol Antitrust Litig.,
907 F.3d 42 (1st Cir. 2018) 13, 14

Best Pallets Inc. v. Brambles Indus., Inc.,
No. C08-2012RTD, 2009 WL 10672543 (W.D. Ark. Aug. 17, 2009) 11

Blades v. Monsanto Co.,
400 F.3d 562 (8th Cir. 2005) 2, 3, 4, 5, 11, 13

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 3

Halvorson v. Auto-Owners Ins.,
718 F.3d 773 (8th Cir. 2013) 5, 10, 13

Mason's Auto. Collision Ctr., LLC v. Auto-Owners Ins. Co.,
No. C21-153, 2022 WL 16700680 (W.D. Ark. Nov. 3, 2022) 15

Mazzei v. Money Store,
829 F.3d 260 (2d Cir. 2016) 15

In re Modafinil Antitrust Litig.,
837 F.3d 238 (3d Cir. 2016) 4

In re Nexium Antitrust Litig.,
777 F.3d 9 (1st Cir. 2015) 1

Nichols v. Mobile Bd. of Realtors, Inc.,
675 F.2d 671 (5th Cir. 1982) 5

Petrovic v. Amoco Oil Co.,
200 F.3d 1140 (8th Cir. 1999) 1, 3

In re Pre-Filled Propane Tank Antitrust Litig.,
No. C14-02567GAF, 2021 WL 5632089 (W.D. Mo. Nov. 9, 2021) 4, 11, 13

In re Rail Freight Fuel Surcharge Antitrust Litig.,
934 F.3d 619 (D.C. Cir. 2019) 13

Webb v. Exxon Mobil Corp.,
856 F.3d 1150 (8th Cir. 2017) 3

White Indus., Inc. v. Cessna Aircraft Co.,
657 F. Supp. 687 (W.D. Mo. 1986), *aff'd*, 845 F.2d 1497 (8th Cir. 1988) 3

In re Wholesale Grocery Prods. Antitrust Litig.,
2012 WL 3031085 (D. Minn. July 25, 2012) 5

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

In re Zurn Pex Plumbing Prod. Liab. Litig.,
644 F.3d 604 (8th Cir. 2011) 3

Rules

Fed. R. Civ. P. 23 3

I. INTRODUCTION

With a trial on the books, the class certification inquiry no longer turns on guesswork but on an actual record that tested whether this case is susceptible to classwide proof. Trial exposed numerous reasons why it is not. First, Plaintiffs failed to present classwide evidence proving injury. *See* The HomeServices Defendants' Motion for Judgment as a Matter of Law ("JMOL") § III; Keller Williams Realty, Inc.'s JMOL § III.D–E; The National Association of REALTORS® JMOL § IV. Failure to prove that element of their antitrust claims warrants entry of judgment for Defendants. But in the event the Court denies Defendants' JMOLs, this same failure of classwide proof means that the class should be decertified for failure to satisfy Rule 23(b)(3)'s predominance requirement. The Court recognized in its class certification ruling that common proof of antitrust injury was necessary "to meet the predominance requirement." Class Certification Order at 22 (quoting *In re Nexium Antitrust Litig.*, 777 F.3d 9, 18 (1st Cir. 2015)). With trial highlighting the absence of such proof, decertification is necessary under this Court's "duty to assure that a class once certified continues to be certifiable." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1145 (8th Cir. 1999).

Trial revealed fatal flaws in Plaintiffs' injury theory, which surmised that in a world without the challenged Cooperative Compensation Rule (the "Rule"), no class member would have authorized the same amount of cooperative compensation paid in the actual world. The trial documented the highly individualized facts that influence whether any class member would have authorized cooperative compensation in the "but-for" world (and if so, in what amount). This plaintiff-specific evidence includes class members' subjective preferences about the sales of their homes and market conditions at the time of the sale. Trial showed that some sellers care about netting a certain dollar amount, meaning that in the "but-for" world they might authorize the same

amount of cooperative compensation if doing so would help net the desired amount. Other sellers voluntarily offer to cover a portion of buyer costs, showing that in a world without the Rule, they would authorize *at least some* cooperative compensation. As these examples demonstrate, determining whether Plaintiffs' theory of injury holds true for any class member—and, if so, the extent to which any class member was injured—depends largely on individualized proof.

Plaintiffs' economic expert, Dr. Craig Schulman, did not fill this fundamental gap in Plaintiffs' proof of classwide injury. Dr. Schulman's trial opinion on injury in fact—that 100% of class members were injured by the Rule because none would have authorized any cooperative compensation in the "but-for" world—ignores the testimony showing the varying preferences of real-world sellers. It also ignores that cooperative compensation was paid for decades before the Rule existed and is routinely offered in markets not subject to the Rule. These defects mean that Dr. Schulman's testimony cannot show that injury is provable with common evidence. *See Blades v. Monsanto Co.*, 400 F.3d 562, 570–72 (8th Cir. 2005) (holding that common issues did not predominate with respect to antitrust injury and finding that evidence contradicted the presumption of classwide impact underpinning the expert's model).

The trial evidence showing that injury turns on plaintiff-specific factors has other fatal ramifications for class treatment. The proof that more than a *de minimis* number of class members suffered no injury means Plaintiffs needed to present some mechanism at trial for sorting the injured from the uninjured. Plaintiffs did not do so. Leaving the sorting of uninjured and injured class members for a post-trial claims process fails the requirement that common issues needed to predominate at trial and poses Seventh Amendment problems. And because the individualized proof impacts not just the question of whether any particular class member was injured, but also

the extent of any injury that might exist, damages are another major piece of this case that weighs against a finding that common issues predominate.

Because the trial demonstrated that this case cannot be adjudicated as a class action, the class must be decertified.

II. LEGAL STANDARDS

An "order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C); *see also* Fed. R. Civ. P. 23(c)(1) advisory committee's note to 1966 amendment (explaining that Rule 23(c)(1) permits the court to alter or amend its certification determination "if, upon fuller development of the facts, the original determination appears unsound"); *Petrovic*, 200 F.3d at 1145 ("A district court has a duty to assure that a class once certified continues to be certifiable under Fed. R. Civ. P. 23(a)."). Because "the decision on class certification comes before full merits discovery has been completed," *Blades*, 400 F.3d at 567, class certification is "inherently tentative," *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978)). Class certification "may therefore require revisiting upon completion of full discovery," *Blades*, 400 F.3d at 567, including after trial, *see, e.g.*, *White Indus., Inc. v. Cessna Aircraft Co.*, 657 F. Supp. 687, 716 (W.D. Mo. 1986) (explaining that when a prior grant of "class certification is found to have been improvident" in light of the evidence admitted at trial, "a decertification order" is warranted), *aff'd*, 845 F.2d 1497 (8th Cir. 1988); *see also Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1156–57 (8th Cir. 2017) (affirming order decertifying a class because further factual development revealed that common issues did not predominate).

Decertification asks the same Rule 23 questions applied at the initial class certification stage. *See Webb*, 856 F.3d at 1155–56. Those standards include the predominance requirement,

which asks whether "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "In antitrust cases such as this one, the issue of antitrust 'impact often is critically important for the purposes of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof." *In re Pre-Filled Propane Tank Antitrust Litig.*, No. C14-02567GAF, 2021 WL 5632089, at *5 (W.D. Mo. Nov. 9, 2021) (quoting *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 262 (3d Cir. 2016)).

III. ARGUMENT

The class should be decertified because trial demonstrated that the injury element of Plaintiffs' antitrust claim—and relatedly, the damages element—requires individualized inquiries, thus undermining a central pillar of this Court's certification order. That evidence also shows that far more than a *de minimis* number of class members suffered no injury, thus requiring some trial determination sorting those who have been injured from those who have not—a finding that was not made and is not capable of being made in a single trial given the complexity and number of factors influencing the injury question. With trial revealing that injury and damages turn on individualized proof, any remaining common issues pale in comparison to the individual ones that decide the most important issues in this case.

A. TRIAL MADE CLEAR THAT ANTITRUST INJURY TURNS ON HIGHLY INDIVIDUALIZED FACTS

1. Trial Demonstrated That Individualized Proof Dictates Whether A Class Member Would Have Authorized Less Cooperative Compensation In The "But-For" World

Rule 23(b)(3)'s predominance requirement is not satisfied when the relevant market is highly individualized, such that particularized evidence is required "to determine the competitive price that would have prevailed" in a "but-for" world without the challenged conduct. *Blades*, 400

F.3d at 574;[1] *see also In re Wholesale Grocery Prods. Antitrust Litig.*, 2012 WL 3031085, at *9 (D. Minn. July 25, 2012) (explaining that when "prices vary, each customer may have to establish its own 'but for' price as well as price ultimately paid – both individual inquiries" (citing *Blades*, 400 F.3d at 574)), *aff'd*, 752 F.3d 728 (8th Cir. 2014); *Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 678–79 (5th Cir. 1982) (affirming decertification on predominance grounds when class of home buyers failed for lack of classwide proof of antitrust injury).

Blades is instructive. There, a putative class of farmers sued various seed producers under the Sherman Act, alleging a conspiracy to fix the prices of certain seeds. In evaluating the injury element of the farmers' antitrust claim, the Eighth Circuit explained that "[t]o prove that the members of the proposed classes were injured by paying supra-competitive prices for [the] seeds, each plaintiff must be able to present evidence from which a jury could reasonably infer that the competitive price was less than the price the plaintiff paid." *Id.* at 573. Citing the "variety" of seeds at issue and "the varying factors" that affected their prices, *Blades* held that "the construction of hypothetical competitive prices would require . . . individualized, not common, evidence." *Id.* at 574; *see also id.* at 571 (quoting the district court's finding that "the impact of defendants' alleged antitrust violations . . . is a highly individualized, fact[-]intensive inquiry that necessarily requires consideration of factors unique to each potential class member"). Because the "evidence . . . demonstrate[d] that not every member of the proposed classes can prove with common evidence that they suffered impact from the alleged conspiracy," the denial of class certification was appropriate. *Id.* at 571; *see also Halvorson*, 718 F.3d at 778–80 (reversing grant of

[1] Antitrust law is not the only area where the Eighth Circuit has recognized that an inability to prove injury on a class basis defeats certification. *See Halvorson v. Auto-Owners Ins.*, 718 F.3d 773, 779 (8th Cir. 2013) (reversing class certification in insurance case because the "individual inquiries" necessary to determine which class members were injured would "overwhelm questions common to the class").

certification for lack of predominance where the question of injury turned on individual proof).

The trial showed that this class suffers from the same flaw that doomed the one in *Blades*. Testimony revealed that the residential real estate market is highly individualized, requiring particularized evidence to determine whether each individual class member would have authorized less cooperative compensation in the "but-for" world. In fact, trial demonstrated that the residential real estate market is *dominated by* subjective preferences informed by each class member's unique goals (or constraints) when listing a home, and that determining whether each class member would have authorized cooperative compensation in the "but-for" world requires an assessment of these preferences, as well as of the market conditions impacting each sale. For example, some class members were focused exclusively on clearing a certain amount from the sale of their homes and thus agnostic about cooperative compensation, and others were motivated by the desire to sell their homes quickly and authorized their seller brokers to pay cooperative compensation with that goal in mind.

One striking example is former named Plaintiff Scott Trupiano. He explained that the 8.3% listing commission attached to his home sale "didn't matter" to him because he had established with his seller broker that he wanted to "clear" $285,000 from the sale and priced his house accordingly. Trupiano Dep. Tr. 221:03–231:07 (D-9000) (the final sale price with "everything baked in" was around $311,000); *see also* Tr. 2287:19–2288:6 (broker Jen Davis testifying that she puts together a "net sheet" for her clients which subtracts commissions, title fees, and other costs from the proceeds of the home sale and helps clients price their homes accordingly). Class members who, like Mr. Trupiano, list their homes with the goal of netting a certain amount have no reason to authorize less cooperative compensation in the "but-for" world than they authorized

in the actual world.[2]

Other class members expressed different subjective preferences at trial. For instance, named Plaintiff Rhonda Burnett testified that her goal was to sell her home quickly and ensure that the largest number of people possible knew that her home was for sale. Tr. 313:11–20. Two additional named Plaintiffs also testified that their goal was to sell "quickly." Tr. 252:24–253:1 (Hollee Ellis); Tr. 419:1–5 (Jerod Breit); *see also* D-3886 at 134, 138 (survey finding that one of the top five things home sellers "most want from [a] real estate agent" is help selling their home within a specific timeframe). The desire for a quick sale that motivated some class members undoubtedly impacts the amount of cooperative compensation those class members would be willing to authorize in the "but-for" world, as offers of competitive cooperative compensation incentivize buyer brokers to locate qualified buyers and successfully close the sale. *See* Tr. 2314:10–13 (Jen Davis testifying that "[i]t's more likely that we're going to get to the closing table when both parties have . . . representation. It's more likely that the seller will actually get to close on the property."). In fact, Plaintiffs' expert witness on the real estate market in Australia—the "benchmark" that Dr. Schulman relied on when constructing his "but-for" world, *see* Rule 59 Motion at 5–6[3]—recognized that class members desiring a prompt sale would be incentivized to authorize cooperative compensation in order to speed up a sale. Tr. 836:16–18 (Todd Reynolds testifying that "there are a lot of factors that could influence why an agent or the owner chooses to" use conjunction agency, wherein the seller broker shares his or her commission with the agent

[2] Even if a seller like Mr. Trupiano would not authorize the same amount of cooperative compensation in the "but-for" world, he still may be uninjured. Because he is focused on what he "clear[s]" from the sale, he might respond to the elimination of the Rule by lowering his sale price if that would still allow him to achieve his desired $285,000. In any event, if the net proceeds from his sale are the same, he has not been injured.

[3] Citations to "Rule 59 Motion" refer to the HomeServices' Defendants concurrently filed Motion for a New Trial.

who introduces a successful buyer, including "the length of time the property [i]s on the market.").

That home sellers motivated to sell their homes quickly would be incentivized to authorize cooperative compensation in a world without the Rule is also clear from the evidence showing that sellers often allocate part of the purchase price towards costs that might otherwise be borne by the buyer in order to close a sale. This can come in the form of contributing to closing costs, paying for repairs, or purchasing home warranties. For instance, named Plaintiff Hollee Ellis testified that she offered to contribute to the buyer's closing costs and pay for a home warranty in order to help her "house . . . sell quicker" even though it was not "required." Tr. 252:21–253:1. Relatedly, trial evidence demonstrated that in slow markets, sellers sometime offer bonuses to successful buyer brokers (in addition to authorizing cooperative compensation). Tr. 2289:24–2290:7. This proof that certain class members were willing to voluntarily compensate buyers (and their brokers) in order to sell their homes more quickly would clearly impact those class members' willingness to authorize cooperative compensation in the "but-for" world.

Another subjective preference that informs whether individual class members would authorize cooperative compensation in the "but-for" world concerns each class member's choice of seller broker. Trial evidence showed that many class members chose to work with "full service" seller brokers. Tr. 311:2–12, 312:21–313:6 (named Plaintiff Rhonda Burnett chose to work with a full-service seller broker who could successfully "market" both the "house" and the "neighborhood"); Tr. 421:19–22 (named Plaintiff Jerod Breit used a full-service seller broker who would "maximize the purchase price . . . based on their skill and their experience" and "sell [the] house quickly"). And numerous "full service" brokers testified that they would continue to offer cooperative compensation in a world without the Rule, given its proven status as a good marketing investment. Consider broker Jen Davis, who testified that she would continue to offer cooperative

compensation because "it helps [] sellers" in that it drives interest, and "[w]e want more buyers in our sellers' homes." Tr. 2287:7–15; *see also* Tr. 930:21–23 (realtor Sharon Millett testifying "[t]here is no one marketing tool that reaches more ready, willing, and able buyers than the offer of compensation sharing in the MLS"); Tr. 1674:12–1675:12 (broker Krista Wilson explaining that buyer brokers help sellers "get . . . the most eyeballs on the house. So the more buyers you have that see the property, the more likely you are to get the terms and price that you're looking for"). The value that some brokers ascribe to cooperative compensation is yet another factor that would influence certain class members' willingness to authorize such offers in the "but-for" world.

Relatedly, Plaintiffs have provided no method for determining on a classwide basis whether, in the absence of the Rule, the commission class members paid to *seller* brokers would decrease. Plaintiffs agreed with their seller brokers to pay an overall commission to their seller brokers. *See, e.g.*, Tr. 314:16–315:15 (named Plaintiff Rhonda Burnett agreed to pay an "overall commission amount of 6 percent" and "authorized the broker to cooperate and share the commission . . . with other brokers"). The fact Plaintiffs agreed to pay a particular overall commission to their seller brokers suggests that some class members would be willing to pay the same total commission in the "but-for" world, particularly if (as Dr. Schulman wrongly assumes) the sale price of their home is unchanged. Rule 59 Motion at 13–14. Other Plaintiffs may well be willing to pay a commission in the "but-for" world that is less than they actually paid but greater than the difference between what they paid to the seller broker and the amount of cooperative compensation that went to the buyer broker. Whether each class member would have negotiated a lower broker commission in the "but-for" world (or, alternatively, would have paid the full contracted commission rate—in which case they are uninjured), is an individualized inquiry that turns on characteristics that vary from one home sale to the next, such as the broker's capabilities,

the broker's relationship with the seller, and the broker's performance, in addition to the various seller (and broker) incentives discussed *supra* pp. 6–9.[4]

The above evidence—which was undisputed at trial—is consistent with common sense, as the decision to sell one's home (and on what terms) is, for most individuals, guided by highly individualized and emotional metrics. *See Halvorson*, 718 F.3d at 780 (predominance was not satisfied where the reasons for the challenged conduct "may be different for each class member"). By contrast, the notion that *no* seller would choose to authorize in the "but-for" world the cooperative compensation that he or she actually authorized, irrespective of his or her goals, the condition of the real estate market at the time, the length of time his or her home has been on the market, or countless other individualized factors is simply nonsensical. Plaintiffs' theory that all sellers over a seven year period would react to the elimination of the Rule in exactly the same way despite their different objectives and circumstances may be the position Plaintiffs were required to adopt to get their class certified, but it is a position that was belied by the evidence at trial and exposed for the fiction that it is.

2. Dr. Schulman's Flawed Model Does Not Show That Injury Can Be Proven On A Classwide Basis With Common Proof

The disconnect the trial revealed between Plaintiffs' injury theory and real-world homebuying decisions also shows why Plaintiff's economic expert does not support classwide proof of injury. According to Dr. Schulman's trial testimony, in a "but-for" world without the Rule, no home seller would ever authorize *any* amount of cooperative compensation. Tr. 563:12–13 ("So the answer is in the U.S., if this rule had never existed, sellers wouldn't be paying buy side agents."). He uses that counterfactual theory to conclude that 100% of class members were injured

[4] Plaintiffs cannot rely on Dr. Schulman's opinions as classwide proof on this issue, as he conceded at trial that he "did not do an analysis of sell side commissions," or an analysis of how much sellers paid overall in commissions. Tr. 668:4–669:4.

because they all authorized *some* amount of cooperative compensation.

The problem for Plaintiffs is that Dr. Schulman's overly simplistic and flawed model ignores the real world. The model is at odds both with the extensive trial testimony about the subjective preferences and economic incentives that sellers and seller brokers face, see *supra* pp. 6–9, and with how sellers have behaved in the United States at times and in geographic regions where the Rule does not apply.

Again, *Blades* is instructive. The *Blades* plaintiffs also tried to establish predominance using an expert theory that purported to show classwide injury "without any consideration of whether the markets or the alleged conspiracy . . . actually operated in such a manner so as to justify that presumption." *Id.* at 570. Even worse, as is true here, evidence of real-world decisionmaking contradicted the presumption of classwide impact underpinning the expert's model. *Id.* Other courts within this Circuit have similarly held that antirust injury is not a common issue when the plaintiff's economic model conveniently ignores evidence showing that it depends on individualized proof. *See, e.g.*, *In re Pre-Filled Propane Tank Antitrust Litig.*, 2021 WL 5632089, at *8–9 (denying class certification on predominance grounds because the plaintiffs' expert's overcharge model "mask[ed] unequivocal record evidence" of "highly individualized issues" relating to pricing in the relevant market); *Best Pallets Inc. v. Brambles Indus., Inc.*, No. C08-2012RTD, 2009 WL 10672543, at *10–11 (W.D. Ark. Aug. 17, 2009) (finding Rule 23(b)(3)'s predominance requirement not satisfied where the plaintiffs' experts "simply assumed" that the market was "sufficiently homogeneous to support common proof" and this assumption was contradicted by the record evidence).

As further detailed in the Rule 59 Motion,[5] Dr. Schulman's model suffers from the same flaws that led *Blades* and other courts to deny certification when fact testimony contradicted the expert's presumption of classwide injury. *See* Rule 59 Motion at 6–16. As an initial matter, Dr. Schulman's opinion regarding classwide impact relies on his nonsensical and unsupported opinion that in the absence of the Rule, no seller would ever authorize an offer of cooperative compensation. Tr. 563:12–13. This opinion is flatly contradicted by the evidence highlighted *supra* pp. 6–9, which demonstrates that at least some sellers (and their brokers) have unilateral incentives to authorize cooperative compensation, and the practice would thus not disappear entirely in a world without the Rule. Evidence of what has actually happened in this country at times and in regions without the Rule also disproves Dr. Schulman's opinion that no seller would ever authorize cooperative compensation in the "but-for" world. *See* Rule 59 Motion at 8. This historical and contemporary evidence of cooperative compensation means we do not have to guess what would happen in a world without the Rule: contrary to Dr. Schulman's prediction of extinction, the practice has persisted even when not required. Finally, Plaintiffs cannot rely on Dr. Schulman's model to demonstrate classwide impact because trial showed that the one real-world example he points to—the Australian real estate market—is an unreliable basis for comparison. *See* Rule 59 Motion at 12–13.

* * *

Overwhelming trial evidence showed that the threshold question of whether Plaintiffs suffered an antitrust injury turns on individualized proof rather than classwide evidence. With each class member's unique preferences and motivations dictating whether he or she would

[5] To avoid duplicative briefing, Defendants incorporate by reference herein the Rule 59 Motion's discussion explaining how Dr. Schulman's testimony does not show classwide injury.

authorize cooperative compensation in a world without the Rule, an essential finding of the Court's certification order has fallen by the wayside. Class Certification Order at 22–23 (recognizing that Plaintiffs must show classwide proof of injury to establish predominance). Because trial revealed that common issues do not predominate over the numerous ones that determine whether a class member can even bring an antitrust claim, decertification is warranted. *See Blades*, 400 F.3d at 574 (individual issues predominated with respect to antitrust injury because "the construction of hypothetical competitive prices would require . . . individualized, not common, evidence"); *see also Halvorson*, 718 F.3d at 779–80 (reversing class certification because injury would turn on individual issues).

B. PREDOMINANCE ALSO FAILS BECAUSE TRIAL REVEALED MORE THAN A *DE MINIMIS* NUMBER OF UNINJURED CLASS MEMBERS

The same trial evidence showed that a meaningful number of class members were not injured, which requires decertification for the additional reason that the trial did not provide a mechanism for sorting those who are uninjured from the injured. *See, e.g.*, *In re Asacol Antitrust Litig.*, 907 F.3d 42, 51–58 (1st Cir. 2018) (explaining that when more than a *de minimis* number of class members are not injured, certification is inappropriate unless plaintiffs have proven there is a manageable way for the trial to distinguish the injured from the uninjured); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624–26 (D.C. Cir. 2019) (finding no predominance because more than a *de minimis* number of class members were uninjured); *see also In re Pre-Filled Propane Tank*, 2021 WL 5632089, at *4, *7 (recognizing that predominance "is lacking in circumstances where a plaintiff's common proof of impact fails to show that all or nearly all class members were in fact injured"). On top of the Rule 23 predominance problem this creates, leaving to a claims administrator the task of sorting the injured from the uninjured violates a defendant's constitutional right to a jury trial. *See Asacol*, 907 F.3d at 52–53.

Trial revealed that far more than a *de minimis* number of this class are uninjured. For instance, class members like Mr. Trupiano have not been injured because they priced their homes to net a certain dollar amount (and were thus indifferent about cooperative compensation). *Supra* p. 6. Other class members were uninjured because they voluntarily offered compensation to the buyer of their homes, *see supra* p. 8, or because they bought more expensive homes during the class period than they sold, *see infra* p. 15. Yet Plaintiffs failed to offer any way for the jury to sort the injured from the uninjured. Instead, they relied on the mistaken presumption from Dr. Schulman's testimony that 100% of class members were injured by the Rule. *See* Rule 59 Motion at 6–16 (detailing defects in that opinion).

The presence of more than a *de minimis* number of uninjured class members, coupled with the lack of a trial mechanism for identifying such class members, is another reason Plaintiffs' class must be decertified. *See Asacol*, 907 F.3d at 53.

C. TRIAL ALSO SHOWED THAT DAMAGES ARE HIGHLY INDIVIDUALIZED

The same problems that prevent Plaintiffs from providing classwide injury prevent a common approach to any damages calculation. The extent to which any class member was damaged depends on how much cooperative compensation, if any, he or she would have authorized in the "but-for" world, as well as the price at which his or her home would have sold in the "but-for" world. Both variables are plagued by individualized proof. Trial made clear that some class members likely would authorize some cooperative compensation in the "but-for" world based on the subjective preferences discussed *supra* pp. 6–9 (such as the desire to sell quickly); for those class members, calculating damages would involve the same individualized inquiries an assessment of impact would. For sales price, some class members (like Mr. Trupiano) cared only about clearing a certain dollar figure, which might reduce the price of their home in a world without

seller-funded buy-side commission. *See supra* p. 6. The amount by which certain class members would reduce their sales price to account for preferences like Mr. Trupiano's presents an individualized issue. Relatedly, class members who both sold and purchased homes during the class period benefitted from the Rule when their buyer broker fees (which they did not pay for) were greater than the cooperative compensation paid by their seller broker. *See, e.g.*, Tr. 1855:17–1856:19 (Dr. Wu testifying that named Plaintiff Jerod Breit "would have [paid] $6,000 more in commissions" in a world where buyers pay their broker commission directly). Determining which class members are subject to this offsetting would require further individualized inquiry into each class members' selling and purchasing history.

With damages also turning on highly individualized facts, two linchpins of the Court's pretrial certification order—that both injury and damages could be proven on a classwide basis, *see* Class Certification Order at 19–35—did not withstand the crucible of trial. As a result, the class must be decertified. *See, e.g.*, *Mazzei v. Money Store*, 829 F.3d 260, 265–71 (2d Cir. 2016) (affirming decertification order because trial revealed a lack of predominance); *Mason's Auto. Collision Ctr., LLC v. Auto-Owners Ins. Co.*, No. C21-153, 2022 WL 16700680, at *5–6 (W.D. Ark. Nov. 3, 2022) (decertifying class because a "file-by-file review would be necessary" to determine liability and damages for each class member).

IV. CONCLUSION

Trial revealed that individual issues pervade both the threshold question of antitrust injury and the ultimate question of damages. Common issues do not predominate in this case; they are overwhelmed by plaintiff-specific ones. The class must be decertified.

Dated: January 8, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 8, 2024, an electronic copy of the foregoing was filed with the Clerk of the Court by using the CM/ECF system and service upon all counsel of record will be accomplished by the CM/ECF system.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, JEREMY KEEL, HOLLEE ELLIS, and FRANCES HARVEY, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	Case No. 4:19-cv-00332-SRB **CLASS ACTION** **ORAL ARGUMENT REQUESTED**

SUGGESTIONS IN SUPPORT OF THE HOMESERVICES DEFENDANTS' MOTION FOR A NEW TRIAL

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STANDARD FOR NEW TRIAL 4

III. DR. SCHULMAN'S FLAWED "BUT-FOR" WORLD 4

IV. ARGUMENT 6

A. Dr. Schulman's Testimony Should Not Have Been Admitted 6

1. Dr. Schulman's Opinions Regarding Cooperative Compensation In The "But-For" World Ignore Inconvenient Evidence 8

2. Dr. Schulman's "But-For" World Also Rests On Nonsensical Assumptions 12

B. The Jury's Verdict And Damages Award Are Against The Weight Of The Evidence 16

V. CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

Blue Dane Simmental Corp. v. Am. Simmental Ass'n,
178 F.3d 1035 (8th Cir. 1999) 7

Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993).....3, 7

Child.'s Broad. Corp. v. Walt Disney Co.,
245 F.3d 1008 (8th Cir. 2001) 4, 7

Concord Boat Corp. v. Brunswick Corp.,
207 F.3d 1039 (8th Cir. 2000) 3, 6, 7, 11, 16

Craftsmen Limousine, Inc. v. Ford Motor Co.,
363 F.3d 761 (8th Cir. 2004) 6

In re Elec. Books Antitrust Litig.,
No. C11-2293DLC, 2014 WL 1282293 (S.D.N.Y. Mar. 28, 2014) 13

Hale v. Firestone Tire & Rubber Co.,
756 F.2d 1322 (8th Cir. 1985) 16

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999).....6

McGee v. S. Pemiscot Sch. Dist. R–V,
712 F.2d 339 (8th Cir. 1983) 4, 16

Montgomery Ward & Co. v. Duncan,
311 U.S. 243 (1940).....4

Nichols v. Am. Nat'l Ins. Co.,
154 F.3d 875 (8th Cir. 1998) 6

Ryan v. McDonough Power Equip., Inc.,
734 F.2d 385 (8th Cir. 1984) 4, 16, 18

Sip-Top, Inc. v. Ekco Grp., Inc.,
86 F.3d 827 (8th Cir. 1996) 17

St. Louis Convention & Visitors Comm'n v. Nat'l Football League,
154 F.3d 851 (8th Cir. 1998) 16, 17, 18

Sullivan v. Nat'l Football League,
34 F.3d 1091 (1st Cir. 1994).....16

Virgin Atl. Airways Ltd. v. British Airways PLC,
69 F. Supp. 2d 571 (S.D.N.Y. 1999).....7

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

Weisgram v. Marley Co.,
528 U.S. 440 (2000).....16

In re Wholesale Grocery Prods. Antitrust Litig.,
946 F.3d 995 (8th Cir. 2019).....7

In re Wholesale Grocery Prods. Antitrust Litig.,
No. C09-2090ADM, 2018 WL 3862773 (D. Minn. Aug. 14, 2018).....12

Wright v. Willamette Indus., Inc.,
91 F.3d 1105 (8th Cir. 1996).....17

Statutes

Mo. Rev. Stat. § 339.800 (2023).....12

Rules

Fed. R. Civ. P. 59.....4

Regulations

Mo. Code Regs. Ann. tit. 20, § 250-8.090 (2023).....12

I. INTRODUCTION

At trial, Plaintiffs offered the testimony of their economic expert, Dr. Craig Schulman ("Dr. Schulman"), to prove antitrust injury and damages. According to Dr. Schulman, *100% of class members* were injured by the challenged Cooperative Compensation Rule (the "Rule") to the tune of *100% of the buyer commissions* that were paid by their seller brokers. Dr. Schulman arrived at his extreme and illogical opinion regarding a 100% overcharge by positing that in a "but-for" world without the Rule, *no* home seller would *ever* authorize his or her seller broker to pay *any* amount in cooperative compensation. Thus, according to Dr. Schulman: (1) every class member was injured (because no class member would have authorized his or her seller broker to pay in the "but-for" world the same amount of cooperative compensation they authorized in the actual world); and (2) every class member was damaged in an amount equivalent to the entirety of the cooperative compensation his or her seller broker paid (because no class member would have authorized *any* cooperative compensation, not even a reduced amount, in the "but-for" world).

Dr. Schulman's opinions regarding antitrust injury and damages—and the assumptions on which his "but-for" world relies—find no support in the trial record. In fact, they are flatly contradicted by and inconsistent with the evidence presented at trial. For instance, evidence presented at trial demonstrated that at least some sellers would continue to authorize offers of cooperative compensation in a world without the Rule: cooperative compensation was prevalent for decades before the Rule came into existence, cooperative compensation is routinely offered in markets that are not subject to the Rule, and there are many good reasons why such offers would continue to be made in a world without the Rule. Worse, Dr. Schulman ignored important differences between Missouri and his cherry-picked benchmark, Australia—including testimony from Plaintiffs' own witnesses that *even in Australia* some seller brokers pay some compensation

to agents who locate a successful buyer. He also erroneously assumed that each class member's home would sell in the "but-for" world at the exact same price as in the actual world (where buyer brokers, compensated through the Rule, are incentivized to find and bring qualified buyers to the seller). That assumption is at odds with basic economic theory, and was contradicted by Dr. Schulman's own testimony that competitive offers of cooperative compensation incentivize buyer brokers to "steer" qualified buyers toward those listings. Lastly, Dr. Schulman wrongly assumed that the payment each class member made to his or her seller broker would be reduced in the "but-for" world by the exact amount his or her broker paid to a successful buyer broker, even though (1) class members agreed with their seller brokers to *overall commissions*, suggesting that at least some class members would be willing to reach the same agreement in the "but-for" world; (2) Dr. Schulman did not analyze overall commissions; and (3) seller brokers would have to do additional work in the "but-for" world.

For the reasons discussed in Defendants' concurrently filed motions for judgment as a matter of law ("JMOLs"), the defects in Dr. Schulman's model mean that Plaintiffs have failed to prove impact—a key element of their antitrust claim. *See* HomeServices Defendants'[1] JMOL § III; Keller Williams Realty, Inc.'s JMOL § III.D–E; The National Association of REALTORS®'s JMOL § IV. Defendants therefore are entitled to judgment as a matter of law under Federal Rule of Civil Procedure 50(b). But in the event the Court denies Defendants' JMOLs, a new trial is required both because Dr. Schulman's testimony should not have been admitted and because the jury's verdict (and damages award), which rest entirely on Dr. Schulman's flawed "but-for" world, are against the weight of the evidence. As Plaintiffs offered

[1] The HomeServices Defendants are HomeServices of America, Inc. ("HomeServices"); BHH Affiliates, LLC ("BHH Affiliates"), and HSF Affiliates, LLC ("HSF Affiliates").

no other evidence at trial to prove antitrust injury or their claim for damages, the jury necessarily adopted Dr. Schulman's opinions wholesale in reaching its verdict. This is apparent not only from the lack of any other probative evidence admitted at trial, but also from the fact that the jury awarded the exact amount of damages Dr. Schulman calculated, which is 100% of the cooperative compensation paid by all seller brokers to all buyer brokers during the entire class period. *Compare* Tr. 564:23, *with* ECF No. 1294 at 2 (verdict form). The jury's clear reliance on Dr. Schulman's flawed expert opinion renders its admission prejudicial and entitles Defendants to a new trial. *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055–57 (8th Cir. 2000) (it is prejudicial error to admit an expert's testimony at trial if the expert constructs "a hypothetical market" that "ignore[s] inconvenient evidence" and the jury relies on the expert's testimony in reaching a verdict). Moreover, even considering Dr. Schulman's erroneously admitted testimony, both the jury's finding of antitrust injury and its award of damages were against the weight of the evidence. *See, e.g.*, *id.* at 1057 ("An expert opinion cannot sustain a jury's verdict when it 'is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable . . . .'" (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993)). Thus, Defendants are entitled to a new trial on this basis as well.[2]

[2] As the aforementioned discussion makes clear, in this Rule 59(a) motion, the HomeServices Defendants focus on the erroneous admission of Dr. Schulman's unreliable and speculative testimony, which severely prejudiced Defendants and can be remedied only through a new trial, as well as the fact that the jury's finding of antitrust injury and damages award are against the weight of the evidence. *See infra* § IV. The HomeServices Defendants also move for a new trial on the grounds that (1) the jury's finding of a conspiracy was against the weight of the evidence; (2) legal errors in the jury instructions and pervasive misconduct by Plaintiffs' counsel severely prejudiced Defendants; and (3) the Court made a number of other erroneous evidentiary rulings, including (a) its failure to exclude admission of and references to the Clear Cooperation Policy and Roger Alford's testimony thereto, the Figgs hearsay notes, evidence that three of HomeServices of America's subsidiaries share a common chief executive, irrelevant documents

II. STANDARD FOR NEW TRIAL

Following a jury verdict, a court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). Grounds for granting a new trial include, among others, erroneous evidentiary rulings or a verdict that is against the weight of the evidence. *Child.'s Broad. Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1017 (8th Cir. 2001) (quoting *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940)). Indeed, a court may "grant a new trial even where there is substantial evidence to sustain the verdict," such as where the evidence supporting the verdict is not credible. *Ryan v. McDonough Power Equip., Inc.*, 734 F.2d 385, 387–88 (8th Cir. 1984) (quoting *McGee v. S. Pemiscot Sch. Dist. R–V*, 712 F.2d 339, 344 (8th Cir. 1983)); *see, e.g.*, *id.* at 388 (affirming grant of new trial where the trial court found that although there was "*some* evidence" to support the jury's verdict, "there was an absence of credible evidence" (emphasis in original)).

III. DR. SCHULMAN'S FLAWED "BUT-FOR" WORLD

The only evidence Plaintiffs offered at trial to show they were injured at all, let alone suffered $1.8 billion in damages, was the opinion of their economic expert, Dr. Schulman. Tr. 481:25–482:1 (Dr. Schulman testifying he was hired to opine on whether Plaintiffs "were harmed; and if they were, what was the quantum of damage"). Dr. Schulman reached that staggering figure by concluding (1) that *100% of class members were injured* by the Rule (because, according to Dr. Schulman, none would have authorized in the "but-for" world the same amount of cooperative

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related to commissions, and the settlements by former defendants Realogy and RE/MAX, and (b) its exclusion of evidence demonstrating that Missouri law permits cooperative compensation. To avoid duplicative briefing, the HomeServices Defendants fully join and incorporate by reference the arguments elaborating those grounds in the Rule 59(a) motions filed concurrently by the other Defendants. *See* The National Association of REALTORS® Motion for a New Trial; Keller Williams Realty, Inc.'s Motion for a New Trial.

compensation they authorized in the actual world, notwithstanding that the Rule that says nothing about the amount of commission to be paid), and (2) that each class member paid a *100% overcharge* (because, according to Dr. Schulman, no class member would have authorized his or her seller broker to pay *even a penny* in compensation to a buyer broker in the absence of the Rule). Tr. 563:12–13 ("So the answer is in the U.S., if this rule had never existed, sellers wouldn't be paying buy side agents."); Tr. 563:13–16 ("So every single penny that sellers had to pay a buy side agent here in Missouri during this time period is the measure of antitrust damages."). In other words, Dr. Schulman offered the opinion that *not one* home seller in the entire state of Missouri, from 2015 to 2022, would have authorized payment of a penny to a single buyer broker in a world without the Rule.[3]

The problem for Dr. Schulman—and Plaintiffs—is that this "but-for" world is one of fantasy, not reliable economic analysis faithfully applied to the record evidence. In constructing his "but-for" world, Dr. Schulman compared the markets covered by the four multiple listing services at issue (the "Subject MLSs") with six countries identified in a 2015 industry report known as the D.A.N.G.E.R. Report. Tr. 556:12–557:7, 560:15–19. Of these six countries, Dr. Schulman concluded that Australia provided the "most comparable" benchmark to the Subject MLSs because of similarities between the United States and Australia in terms of "legal structure, [] tradition of laws, and [] tradition of free market economics." Tr. 557:6–7, 558:17–20, 699:24–700:8. Dr. Schulman also determined that in Australia, there is "no industry mandated rule" regarding cooperative compensation and "sellers don't offer to pay buy side agents" there. Tr. 560:12–13, 563:7–8. Based on these findings—and ignoring key, inconvenient evidence *from the*

[3] In Dr. Schulman's flawed "but-for" world, buyer brokers would rarely be used, and their commissions, if any, would be paid by buyers. Tr. 566:11–22.

United States itself that sellers have authorized offers of cooperative compensation both before the Rule came into existence and in regions where the Rule does not exist—Dr. Schulman opined that in the "but-for" world, the Subject MLSs would operate as the real estate market does in Australia, *i.e.*, no home sellers would authorize their brokers to pay any cooperative compensation. Tr. 560:3–14. Dr. Schulman thus constructed his entire "but-for world" around his characterization of what happens in Australia, while dismissing evidence of what happened in the United States before the Rule existed and what happens in regions of the United States where the Rule does not exist today, and ignoring evidence about Australia that undermines his extreme opinions.

IV. ARGUMENT

Defendants are entitled to a new trial (on both liability and damages) because (A) Dr. Schulman's unreliable expert testimony was erroneously admitted at trial; and (B) the jury's finding of antitrust injury, and its corresponding damages award—both of which rely entirely on Dr. Schulman's testimony—are against the weight of the evidence.

A. Dr. Schulman's Testimony Should Not Have Been Admitted

An erroneous evidentiary ruling can serve as the basis for setting aside a verdict or granting a new trial where the ruling "ha[s] a substantial influence on the jury verdict." *Nichols v. Am. Nat'l Ins. Co.*, 154 F.3d 875, 889–90 (8th Cir. 1998). Courts routinely grant new trials on the basis that expert testimony was erroneously admitted if the expert puts forth a "but-for" world that does not "fit the particular facts of the case," such as where it is contrary to undisputed record evidence, fails to incorporate relevant circumstances, ignores inconvenient facts, or relies on invalid assumptions. *Concord Boat*, 207 F.3d at 1055–56 ("Even a theory that might meet certain *Daubert* factors . . . should not be admitted if it does not apply to the specific facts of the case." (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 154 (1999)); *see, e.g.*, *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 777 (8th Cir. 2004) (remanding for new trial on Sherman Act

claims where the expert simply "assumed" that an alleged injury "was caused by defendants' alleged conspiracy"); *Child.'s Broad. Corp.*, 245 F.3d at 1017–19 (affirming grant of new trial where expert "failed to consider the effect of competition on [plaintiff]" and relied on "dubious" assertions).[4]

This case is a repetition of *Concord Boat*, another antitrust case in which the Eighth Circuit reversed a trial verdict because the plaintiffs' injury and damages case rested on unreliable economic opinions that "should have been excluded." 207 F.3d at 1055–57. There, as here, the expert "construct[ed] a hypothetical market which was not grounded in the economic reality" of the relevant market and "ignored inconvenient evidence." *Id.* at 1056. Relying on the Supreme Court's admonition that "[a]n expert opinion cannot sustain a jury's verdict when it 'is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable,'" *id.* at 1057 (quoting *Brooke Grp.*, 509 U.S. at 242), *Concord Boat* held that "the deficiencies in the foundation of [the expert's] opinion" meant his "resulting conclusions were 'mere speculation,'" *id.* (quoting *Virgin Atl. Airways Ltd. v. British Airways PLC*, 69 F. Supp. 2d 571, 580 (S.D.N.Y. 1999)). The same is true here. As a result, Dr. Schulman's opinions in this case can no more "sustain a jury's verdict" than Dr. Hall's could in *Concord Boat*—both because his "but-for" world is contrary to undisputed record evidence and because the methodology he used to construct that "but-for" world was not "grounded in . . . economic reality." *Id.*

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[4] *Cf. In re Wholesale Grocery Prods. Antitrust Litig.*, 946 F.3d 995, 999–1003 (8th Cir. 2019) (affirming order excluding expert whose "benchmark analysis [was] unreliable" because it was premised on a comparison to an inadequate yardstick and failed to "control for non-conspiratorial factors as required to demonstrate antitrust impact"); *Blue Dane Simmental Corp. v. Am. Simmental Ass'n*, 178 F.3d 1035, 1040–41 (8th Cir. 1999) (affirming exclusion of expert testimony where the "methodology [the expert] employed was unreliable" and the expert failed to consider "all independent variables that could affect [his] conclusion").

1. Dr. Schulman's Opinions Regarding Cooperative Compensation In The "But-For" World Ignore Inconvenient Evidence

Most notably, Dr. Schulman's "but-for" world rests on his opinion that in the absence of the Rule, no seller would ever authorize his or her seller broker to offer cooperative compensation. This opinion is flatly contradicted by evidence admitted at trial regarding numerous real estate markets that are not subject to the Rule. For instance, evidence was admitted at trial that cooperative compensation was a well-established practice in the United States long before the Rule was implemented, indicating that in a "but-for" world, the practice would likely continue. *See* Tr. 1912:16–1913:6 (explaining that the practice of cooperative compensation began in the late 1800s, approximately 100 years before the Rule was adopted, and that the practice is a "market outcome"); Tr. 635:5–7 (Dr. Schulman testifying that the practice of "listing brokers offering to pay buyers' agents has existed for decades" in the United States). In fact, cooperative compensation is offered in 99% to 100% of listings on the Northwest MLS and the Real Estate Board of New York ("REBNY"), two multiple listing services in the United States that are not subject to the Rule. Tr. 1849:19–1850:10. Additionally, in For Sale By Owner transactions, sellers typically pay buyer broker commissions, even though those transactions are not listed on the MLS and therefore not subject to the Rule. Tr. 2295:1–20 (broker Jen Davis testifying that when representing buyers in for sale by owner transactions, she is able to negotiate a commission with the seller "90 percent of the time"). Lastly, Plaintiffs' own expert, Todd Reynolds, testified at trial that cooperative compensation sometimes occurs even in Australia, Dr. Schulman's benchmark country. *See* Tr. 836:5–10 (discussing practice of "conjunction agency" in Australia, whereby the agent representing the seller engages a subagent and agrees to share his or her commission if the subagent brings him or her a buyer).

Dr. Schulman's opinion that no cooperative compensation would occur in the "but-for" world is also belied by the trial evidence demonstrating that at least some sellers are unilaterally incentivized to authorize offers of cooperative compensation (and that some seller brokers are so incentivized as well). For instance, broker Jen Davis testified that she would still offer cooperative compensation absent the Rule because "it helps our sellers" in that it drives interest, and "[w]e want more buyers in our sellers' homes." Tr. 2287:7–25; *see also* Tr. 1674:12–16 (broker Krista Wilson explaining that buyer brokers help sellers "get . . . the most eyeballs on the house. So the more buyers you have that see the property, the more likely you are to get the terms and price that you're looking for"). The evidence also showed that cooperative compensation benefits sellers because sellers "want the highest market price for their house, and that means they need more buyers to see their house so they can get more bidders for their property. And that happens when you have motivated buyer brokers helping the buyers get there." Tr. 1793:24–1794:4; *see also* Tr. 1739:17–1740:6 (David Stevens testifying that "home sellers benefit far better" in the current system because buyer brokers "bring[] more traffic and more competition to the sale of that home for the seller of that home"); Tr. 2314:10–13 (Jen Davis testifying that "[i]t's more likely that we're going to get to the closing table when both parties have . . . representation. It's more likely that the seller will actually get to close on the property."); D-3886 at 134, 138 (survey finding that three of the top five things home sellers "most want from [a] real estate agent" are help marketing their home to potential buyers, selling their home within a specific timeframe, and finding a buyer for their home).

Relatedly, Dr. Schulman ignored evidence that in slow markets, sellers sometimes offer bonuses to successful buyer brokers (in addition to cooperative compensation), suggesting that, at least under some circumstances, sellers are incentivized to compensate buyer brokers. Tr.

2289:24–2290:7. Dr. Schulman also failed to account for the fact that some sellers—including former named Plaintiff Scott Trupiano—price their homes in order to "net" a certain amount regardless of commission and are agnostic about cooperative compensation. *See, e.g.*, Trupiano Dep. Tr. 220:11–231:07 (D-9000) (Trupiano testifying that the 8.3% listing commission attached to his home sale "didn't matter" to him because he had pre-defined with his seller broker the amount of money he needed to "net" from the transaction and the house was priced accordingly). In such a situation, the elimination of a cooperative compensation payment owed to the broker would result in a corresponding reduction of the price, allowing the seller to "net" the same amount. A seller who would respond to the elimination of a cooperative compensation payment with a corresponding reduction in price suffers no damage.

Dr. Schulman also ignored that home sellers regularly allocate part of the purchase price towards costs that might otherwise be covered by the buyer in order to close the sale—for example, by contributing to closing costs, paying for repairs, and purchasing home warranties. *See* Tr. 340:8–17 (named Plaintiff Jeremy Keel succeeded in getting a home seller to pay $4,000 towards his closing costs); Tr. 252:14–253:1 (named Plaintiff Hollee Ellis offered to contribute towards the buyer's closing costs and pay for a home warranty in order to help the "house . . . sell quicker" even though it was not "required"). Dr. Schulman fails to explain why this common and longstanding practice would not extend to offers to pay buyer broker costs in at least some cases absent the Rule. Dr. Schulman's theory of injury also ignores that many of the class members both sold and purchased homes during the class period, and thus benefitted from the Rule in instances where their buyer broker fees (which they did not pay out of pocket) were higher than the cooperative compensation their seller brokers paid. *See, e.g.*, Tr. 1855:17–1856:19 (Dr. Wu testifying that named Plaintiff Jerod Breit "would have [paid] $6,000 more in commissions" in a

world where buyers pay their broker commission directly).

Lastly, another opinion offered by Dr. Schulman—*i.e.*, that buyer brokers would rarely, if ever, be used in the "but-for" world suffers from similar defects. In fact, this opinion was contradicted *by three of the four* class members who testified at trial. *See* Trupiano Dep. Tr. 46:19–21, 112:20–21 (D-9000) (former named Plaintiff Scott Trupiano testifying that if he were to buy another house, he would "choose to continue to use" the buyer broker he used in his "past three home transactions"); Tr. 399:12–19, 415:3 (named Plaintiff Jerod Breit testifying that he would have been "willing and able" to pay his buyer broker when he was acting as a home buyer, and that he "valued" his buyer broker); Tr. 238:19–20 (named Plaintiff Hollee Ellis testifying that buyer brokers "serve a purpose"). Dr. Schulman's opinion regarding the near elimination of buyer brokers also flies in the face of evidence admitted at trial that buyers continue to be represented by buyer brokers in markets without the Rule, such as the Northwest MLS and REBNY. *See* Tr. 1850:11–18.

* * *

In sum, contrary to Dr. Schulman's opinion, the evidence admitted at trial demonstrates that the Rule is not the sole reason sellers authorize their brokers to offer compensation to buyer brokers (nor is the Rule the sole reason that seller brokers make such offers). Rather, the trial record indicates that in a world without the Rule, cooperative compensation would still be offered in at least some instances. Similarly, Dr. Schulman's opinion that buyer brokers would rarely be used in the "but-for" world was flatly contradicted by the evidence admitted at trial—including the testimony of the named Plaintiffs themselves. As in *Concord Boat*, then, Dr. Schulman's "but-for" world is "not grounded in the economic reality" of the Subject MLSs "for it ignored inconvenient evidence." 207 F.3d at 1056.

2. Dr. Schulman's "But-For" World Also Rests On Nonsensical Assumptions

Dr. Schulman's "but-for" world also rests on three invalid assumptions—(1) Australia provides a proper benchmark for determining what the "but-for" world would look like absent the Rule; (2) if buyer brokers were largely eliminated (as Dr. Schulman's "but-for" world posits they would be), home prices on the Subject MLSs would remain exactly the same; and (3) the overall commission rate that Plaintiffs paid their seller brokers would decrease by the exact amount their brokers paid in cooperative compensation to buyer brokers. These faulty assumptions render Dr. Schulman's opinions unreliable. *See In re Wholesale Grocery Prods. Antitrust Litig.*, No. C09-2090ADM, 2018 WL 3862773, at *7–8 (D. Minn. Aug. 14, 2018) (excluding expert whose benchmark model was founded on an "unvalidated" assumption that made his opinions "unreliable").

First, Dr. Schulman's model rests on the unfounded assumption that Australia provides an appropriate benchmark in this case. As noted *supra* p. 5, Dr. Schulman selected Australia as his benchmark in part because it was identified in a 2015 industry report. However, the author of that report, Stefan Swanepoel, testified at trial (by way of deposition designation) that the countries identified in that report were selected because they were *not* "comparators" to the United States. Swanepoel Dep. Tr. 54:10–54:21 (D-9001) (I "deliberately did not list" "countries which are almost identical to the United States"; rather, I listed countries that "specifically were not comparators"). Moreover, other evidence was admitted at trial that demonstrates that the real estate market in Australia is markedly different from that of Missouri.[5] For instance, while auction

[5] Notably, Dr. Schulman based his selection of Australia as a benchmark in part on his determination that Australia and the United States share a common legal "heritage." Tr. 699:19–700:3. But Missouri law expressly authorizes the sharing of commissions between seller agents and buyer agents. *See* Mo. Rev. Stat. § 339.800 (2023); *see also* Mo. Code Regs. Ann. tit. 20, § 250-8.090 (2023). The Missouri legislature's codification of and express authorization for this

sales are common in Australia, they are rarely used in the United States. *See* Tr. 1846:22–1847:5. Additionally, buyer brokers in the United States perform various services that are performed by other professionals in Australia, such as lawyers and accountants. Tr. 1847:6–12. Ultimately, in selecting Australia as a benchmark, Dr. Schulman conveniently ignored two far more obvious benchmarks—(1) domestic markets in which the Rule does not exist (*i.e.*, the Northwest MLS and REBNY); and (2) the residential real estate market in the United States before the Rule's adoption in 1996. *Supra* p. 8; *see, e.g.*, *In re Elec. Books Antitrust Litig.*, No. C11-2293DLC, 2014 WL 1282293, at *25 (S.D.N.Y. Mar. 28, 2014) (endorsing the "'before-and-after' method," which looks to pre-conspiracy prices to determine prices in the "but-for" world as a "well accepted method of measuring antitrust damages" and collecting cases).

Second, Dr. Schulman's damages calculation makes clear that his "but-for" world rests on the nonsensical assumption that in a world with *no* cooperative compensation and few (if any) buyer brokers, home prices would remain the same.[6] This assumption is at odds with basic economic theory, as eliminating most buyer brokers (as Dr. Schulman posits would occur) would undoubtedly have ripple effects across the Subject MLSs, including with respect to home pricing. For instance, as noted above, evidence was admitted at trial that buyer brokers drive "traffic and more competition," which in turn helps sellers get the terms and price they are looking for. Tr. 1739:17–1740:6. In fact, Dr. Schulman's assumption is belied by his own testimony regarding "steering," which, according to Dr. Schulman, occurs when buyer brokers face weakened incentives to bring potential buyers to a home due to a relatively low offer of cooperative

practice further undermines Dr. Schulman's nonsensical conclusion that sellers in Missouri would never voluntarily agree to authorize buyer broker commissions in the "but-for" world.

[6] That Dr. Schulman relies on this assumption is clear from his testimony that his damages calculation is equivalent to "all the buy side commissions paid by home sellers that listed with one of the agent's brokers affiliated with" one of Defendants. Tr. 564:20–565:2.

compensation. Under those circumstances, Dr. Schulman's analysis indicates that homes take "significantly longer . . . to sell" and there is "a higher probability of not selling." Tr. 675:14–18. If, as Dr. Schulman posits, *disincentivized* buyer brokers impact the timing and probability of a home sale, then surely the *near elimination of* buyer brokers would also impact the housing market in myriad ways, including with respect to home prices. Dr. Schulman's model does not, however, attempt to account for the effect of these changes on the Subject MLSs, rendering his damages calculation wholly unreliable.

Dr. Schulman's assumption that home prices in the "but-for" world would remain the same is further contradicted by evidence that many buyers find paying a down payment difficult. *See* Tr. 1725:19–21 (David Stevens testifying that "36 percent of consumers find it very difficult to save for a down payment, and another 30 percent find it somewhat difficult"); *see also* Tr. 408:13 (named Plaintiff Jerod Breit found it "challeng[ing]" to save enough money for his first down payment). In fact, the evidence admitted at trial demonstrated that the added out-of-pocket cost that buyers would be forced to shoulder in a world without the Rule *would* impact home prices (particularly in sales involving cash-constrained buyers). *See* Tr. 1726:25–1727:1–2 (David Stevens testifying that eliminating cooperative compensation would "cause extraordinary, serious damage, particularly to first-time homebuyers and cash-constrained homebuyers"); Tr. 1789:8–15 (Dr. Wu testifying that if real estate costs were to increase by two to three percent, buyers might (1) make lower offers; (2) limit their home search to less expensive homes; or (3) drop out of the market entirely); *see also* Tr. 342:2 (named Plaintiff Jeremy Keel testifying that, as a buyer, not having to pay his buyer broker out of pocket was "a help" to him).

Finally, Dr. Schulman's damages calculation rests on the unsupported assumption that in a world without the Rule, the overall commission rate that Plaintiffs paid their seller brokers would

decrease by the exact amount that those brokers paid in cooperative compensation, even though Plaintiffs agreed to pay their seller brokers an *overall commission*, *see, e.g.*, Tr. 314:16–315:15 (named Plaintiff Rhonda Burnett agreed to pay an "overall commission amount of 6 percent" and "authorized the broker to cooperate and share the commission payable under this contract with other brokers"). In fact, common sense dictates otherwise—*i.e.*, the fact Plaintiffs agreed to pay a particular overall commission to their seller brokers suggests that at least some class members would be willing to pay the same total commission in the "but-for" world, particularly if (as Dr. Schulman wrongly assumes) the sale price of their home is unchanged. Such class members are *not even injured*, let alone damaged to the tune of 100% of the cooperative commissions their seller brokers paid. Other Plaintiffs may well be willing to pay a commission in the "but-for" world that is less than they actually paid but greater than the difference between what they paid to the seller broker and the amount of cooperative compensation that went to the buyer broker, in which case the amount of damage calculated by Dr. Schulman is overstated. Moreover, despite relying on this assumption, Dr. Schulman conceded at trial that he "did not do an analysis of sell side commissions," or an analysis of how much sellers paid overall in commissions. Tr. 668:4–669:4. Finally, evidence was admitted at trial that in a world without buyer brokers, seller brokers would be required to take on additional work and would thus likely maintain commission rates at the same level, or at least seek a higher commission than they actually received when buyer brokers were performing valuable services. *See* Tr. 2326:14–2327:3 (J. Davis); *see also* Tr. 836:22–837:2 (Plaintiffs' witness Todd Reynolds testifying that total commissions are the same in Australia irrespective of whether the cooperative "conjunction agency" approach is used). Ultimately, Dr. Schulman's reliance on this erroneous assumption renders his damages calculation fatally flawed.

* * *

In sum, Dr. Schulman's "but for" world rests on unsupported assumptions that are contrary to the record evidence and ignore inconvenient facts. His opinion thus should not have been admitted at trial. As "the jury clearly relied on his opinion in reaching its verdict because the damages it awarded to [Plaintiffs] were identical to the detailed figures Dr. [Schulman] had calculated . . . . It cannot be said that the verdict would have been the same without the expert testimony, and its admission affected [Defendants'] substantial rights." *Concord Boat*, 207 F.3d at 1057. Defendants are therefore entitled to a new trial. *See Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1333 (8th Cir. 1985) (granting motion for a new trial where the court could not "say with certainty that the jury's decision would have been the same absent [the erroneously admitted] evidence").

B. The Jury's Verdict And Damages Award Are Against The Weight Of The Evidence

Even if it was not error to allow Dr. Schulman to testify at trial, a new trial would still be required because the jury's finding of antitrust injury, and its damages award based on 100% overcharge, are against the weight of the evidence. *See Concord Boat*, 207 F.3d at 1063 (holding that the defendant was entitled to judgment as a matter of law because "[e]ven considering the erroneously admitted testimony of [plaintiff's expert], the [plaintiffs] failed to offer a 'legally sufficient evidentiary basis for a reasonable jury to find for [them]'" (quoting *Weisgram v. Marley Co.*, 528 U.S. 440, 453–54 (2000))). "In determining whether a verdict is against the weight of the evidence, a trial court can rely on its own reading of the evidence—it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict.'" *Ryan*, 734 F.2d at 387 (quoting *McGee*, 712 F.2d at 344).

A "jury may not rest its verdict on an expert's conclusion 'without some underlying facts and reasons, or a logical inferential process to support the expert's opinion.'" *St. Louis Convention & Visitors Comm'n v. Nat'l Football League,* 154 F.3d 851, 863 (8th Cir. 1998) (quoting *Sullivan*

v. Nat'l Football League, 34 F.3d 1091, 1105 (1st Cir. 1994)). In *St. Louis Convention*, the Eighth Circuit held that the defendants were entitled to judgment as a matter of law on the plaintiffs' Section 1 claim because there was no "evidence tending to show that [the plaintiff's expert's] economic model actually applied" to the facts of the case. *Id.* at 859, 863–64. There, the plaintiff's expert opined that the NFL's relocation rules "had a direct effect on the [plaintiff's] lease price" because in a "but-for" world without those rules, teams would "seek out the best lease opportunities and . . . bid against each other on them." *Id.* at 858. Because the expert "rested his conclusions on economic theory that states that in a freely competitive market NFL teams would want to move to the most advantageous lease opportunity," but "there was no evidence which tended to show that this was actually the case," the Eighth Circuit held there was "no evidence on which the jury could have drawn a logical inference from [the expert's] opinion." *Id.* at 863; *see also Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1108 (8th Cir. 1996) (holding that the district court erred in denying defendants' motion for judgment as a matter of law where the plaintiffs' expert's opinion on causation was speculative); *Sip-Top, Inc. v. Ekco Grp., Inc.*, 86 F.3d 827, 830 (8th Cir. 1996) (a defendant is entitled to judgment as a matter of law if the plaintiff relies on speculation alone).

As in *St. Louis Convention*, here there is no "evidence tending to show that" Dr. Schulman's "economic model actually applied" to the Subject MLSs. 154 F.3d at 863. Indeed, as discussed in detail above, Dr. Schulman's "but-for" world is *contradicted by* and *inconsistent with* the evidence admitted at trial regarding the realities of the Subject MLSs. For instance, Dr. Schulman built his "but-for" world in reliance on the assumption that sellers do not have unilateral incentives to authorize offers of cooperative compensation, but the trial record indicates just the opposite, *i.e.*, that in a world without the Rule, there are many reasons why sellers would authorize such offers (just as they often pay buyer closing costs). *Supra* p. 10. Relatedly, Dr. Schulman

built his "but-for" world on the assumption that the Subject MLSs are sufficiently similar to Australia to treat the latter as an appropriate benchmark, but as discussed above, the real estate markets in Australia and Missouri are markedly different. *Supra* pp. 12–13. And perhaps most significantly, Australia provides no support for Dr. Schulman's ultimate conclusion that no offers of cooperative compensation would be made absent the Rule because cooperative compensation *is* offered in at least some instances there. *Supra* p. 8.

Ultimately, as in *St. Louis Convention*, there is "no evidence on which the jury could have drawn a logical inference from [Dr. Schulman's] opinion," because the trial record shows that his economic model does not "actually appl[y]" to the facts of this case. 154 F.3d at 863. Thus, because the jury's finding of antitrust injury and award of damages relied exclusively on Dr. Schulman's testimony, both the jury's verdict and the damages award are against the weight of the evidence. Accordingly, a new trial must be granted. *Ryan*, 734 F.2d at 387–89 (affirming grant of a new trial where the "court found the jury's verdict to be against the weight of the evidence").

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court order a new trial.

Dated: January 8, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 8, 2024, an electronic copy of the foregoing was filed with the Clerk of the Court by using the CM/ECF system and service upon all counsel of record will be accomplished by the CM/ECF system.

/s/ Robert D. MacGill
Robert D. MacGill

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, JEREMY KEEL, HOLLEE ELLIS, and FRANCES HARVEY, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	Case No. 4:19-cv-00332-SRB **CLASS ACTION** **ORAL ARGUMENT REQUESTED**

SUGGESTIONS IN SUPPORT OF THE HOMESERVICES DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

TABLE OF CONTENTS

Page

INTRODUCTION 1

STANDARD OF REVIEW 3

ARGUMENT 4

I. Plaintiffs Presented No Legally Sufficient Evidence That the HomeServices Defendants Agreed with the Other Defendants to Follow and Enforce NAR's Cooperative Compensation Rule 4

A. Plaintiffs Presented No Direct Evidence That the HomeServices Defendants Entered into Any Agreement 5

B. Plaintiffs Presented No Circumstantial Evidence That Tends to Exclude the Possibility of Independent Action by the HomeServices Defendants 6

1. Meetings and Participation in Trade Organizations Are Not Evidence of Conspiracy 7

2. Internal Communications and Coordinated Action Between a Corporation and Its Wholly-Owned Subsidiary Cannot Be Used to Show an Unlawful Agreement, and the Conduct of One Such Entity Cannot Be Imputed to the Other 11

3. A Theory Premised on Evidence of Parallel Conduct, Without More, Is Not Sufficient to Permit Inference of an Agreement 17

II. Trial Confirmed That Plaintiffs Are Not Direct Purchasers from the HomeServices Defendants and Thus Lack Standing 20

III. Plaintiffs' Damages Expert's Testimony Was Inadmissible and Failed to Establish Impact 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Tobacco Co. v. United States,
328 U.S. 781 (1946).....18

Apple Inc. v. Pepper,
139 S. Ct. 1514 (2019).....20, 21, 23, 24, 26

Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,
459 U.S. 519 (1983).....20

In re Baby Food Antitrust Litig.,
166 F.3d 112 (3d Cir. 1999).....5, 11

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....17, 18, 19

Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan,
203 F.3d 1028 (8th Cir. 2000) 6, 18

In re Broiler Chicken Antitrust Litig.,
--- F. Supp. 3d ---, 2023 WL 7220170 (N.D. Ill. Nov. 2, 2023) 18

Campos v. Ticketmaster Corp.,
140 F.3d 1166 (8th Cir. 1998) 20, 25

Concord Boat Corp. v. Brunswick Corp.,
207 F.3d 1039 (8th Cir. 2000) 26, 29

Copperweld Corp. v. Indep. Tube Corp.,
467 U.S. 752 (1984).....11, 12

Craftsmen Limousine, Inc. v. Ford Motor Co.,
363 F.3d 761 (8th Cir. 2004) 7

In re Dynamic Random Access Memory Antitrust Litig.,
No. M 02-1486, 2007 WL 9752971 (N.D. Cal. Feb. 20, 2007).....13

ES Dev., Inc. v. RWM Enters., Inc.,
939 F.2d 547 (8th Cir. 1991) 5

Evergreen Partnering Grp., Inc. v. Pactiv Corp.,
832 F.3d 1 (1st Cir. 2016).....10

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

First Nat'l Bank of Ariz. v. Cities Serv. Co.,
391 U.S. 253 (1968) 10

Freeman v. San Diego Ass'n of Realtors,
322 F.3d 1133 (9th Cir. 2003) 25

In re High Fructose Corn Syrup Antitrust Litig.,
295 F.3d 651 (7th Cir. 2002) 9

Ill. Brick Co. v. Illinois,
431 U.S. 720 (1977) 20, 23, 24

Insulate SB v. Advanced Finishing Sys.,
797 F.3d 538 (8th Cir. 2015) 25

Johnson v. City of Shorewood,
360 F.3d 810 (8th Cir. 2004) 9

Kansas v. UtiliCorp United,
497 U.S. 199 (1990) 20, 24

Larson v. Miller,
76 F.3d 1446 (8th Cir. 1996) 4

Liberty Mut. Fire Ins. Co. v. Scott,
486 F.3d 418 (8th Cir. 2007) 4

Lovett v. Gen. Motors Corp.,
998 F.2d 575 (8th Cir. 1993) 4, 6, 19

Marion Healthcare, LLC v. Becton Dickinson & Co.,
952 F.3d 832 (7th Cir. 2020) 25

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 6, 17

McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.,
798 F.2d 323 (8th Cir. 1986) 7

McDonald v. Johnson & Johnson,
722 F.2d 1370 (8th Cir. 1983) 20, 21

In re Midwest Milk Monopolization Litig.,
730 F.2d 528 (8th Cir. 1984) 23, 24, 25

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

Mitchael v. Intracorp, Inc.,
179 F.3d 847 (10th Cir. 1999) 11

Monsanto Co. v. Spray-Rite Serv. Corp.,
465 U.S. 752 (1984).....18

Pegram v. Herdrich,
530 U.S. 211 (2000).....22

Roesch, Inc. v. Star Cooler Corp.,
671 F.2d 1168 (8th Cir. 1982) 4, 9, 10

Smith v. N. Mich. Hosps., Inc.,
703 F.2d 942 (6th Cir. 1983) 10

St. Louis Convention & Visitors Comm'n v. NFL,
154 F.3d 851 (8th Cir. 1998) 16, 17, 26

Summit Health, Ltd. v. Pinhas,
500 U.S. 322 (1991).....4

In re Text Messaging Antitrust Litig.,
782 F.3d 867 (7th Cir. 2015) 7, 8, 9, 11, 20

In re Travel Agent Comm'n Antitrust Litig.,
583 F.3d 896 (6th Cir. 2009) 10

United States v. Bestfoods,
524 U.S. 51 (1998).....13

United States v. Concentrated Phosphate Exp. Ass'n,
393 U.S. 199 (1968).....25

Walmart Inc. v. Cuker Interactive, LLC,
949 F.3d 1101 (8th Cir. 2020) 4

Weit v. Cont'l Ill. Nat'l Bank & Tr. Co. of Chi.,
641 F.2d 457 (7th Cir. 1981) 10

Wilk v. Am. Med. Ass'n,
895 F.2d 352 (7th Cir. 1990) 7

Yannacopoulos v. Gen. Dynamics Corp.,
75 F.3d 1298 (8th Cir. 1996) 25

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

Rules

Fed. R. Civ. P. 50(a) 3

Fed. R. Civ. P. 50(b) 1, 4, 29, 30

Fed. R. Civ. P. 51(c)(1).....25

INTRODUCTION

At the end of a 12-day trial, the jury in this case found that each of the HomeServices Defendants[1] conspired with each of the other Defendants to follow and enforce NAR's Cooperative Compensation Rule (the "Rule"), even though there was *no evidence* that *any* HomeServices Defendant was *ever* involved in the adoption of the Rule, participated in any meeting or conversation where the Rule was discussed, took *any* action to enforce the Rule, whether as a result of an agreement or independently, or *ever* so much as thought about or discussed the Rule, whether internally or with anyone else. The jury also found that the entire Plaintiff class—no member of which ever bought anything directly from or paid anything directly to any HomeServices Defendant—was injured to the tune of nearly *$1.8 billion in damages*, based on the testimony of Plaintiffs' expert that without the Rule, no Plaintiff would have authorized the payment of any amount of cooperative compensation to the buyer broker, despite ample record evidence that sellers have legitimate reasons to authorize such payments even without the Rule, and in fact have done so in jurisdictions and timeframes in which the Rule was not operative.

The HomeServices Defendants are entitled to judgment as a matter of law under Rule 50(b) because there is no legally sufficient evidentiary basis to support the jury's verdict against them. Specifically, the HomeServices Defendants are entitled to judgment as a matter of law for at least the following reasons.

First, there is no legally sufficient evidence that any of the HomeServices Defendants agreed to anything with any of the other Defendants, let alone to follow and enforce the Rule. Indeed, the testimony of the HomeServices Defendants uniformly established that there was no such agreement. Faced with this clear and unequivocal testimony, Plaintiffs resorted to purported

[1] The HomeServices Defendants are HomeServices of America, Inc. ("HomeServices"); BHH Affiliates, LLC ("BHH Affiliates"), and HSF Affiliates, LLC ("HSF Affiliates").

parallel conduct and innuendo, virtually all of which had nothing to do with the Rule itself. Plaintiffs also improperly glossed over the entirely legitimate corporate separateness of each HomeServices Defendant, confusing the jury as to which entities made which statements and improperly suggesting that communications between and overlapping leadership among HomeServices-affiliated entities is somehow evidence of an unlawful agreement in violation of federal antitrust law. Even Plaintiffs' expert, Dr. Schulman, conceded that he had seen no evidence of communications between Defendants about broker commissions and offered no opinion as to whether an agreement existed.

Second, there is no legally sufficient evidence that Plaintiffs directly purchased anything from any of the HomeServices Defendants, as is necessary to confer standing to sue for damages. It is a "bright line" rule of antitrust law that only "direct purchasers" may recover antitrust damages. To be direct purchasers, Plaintiffs must have transacted business directly with a conspiring Defendant. Here, the record is devoid of evidence that any Plaintiff transacted business directly with any HomeServices Defendant, and for good reason. Plaintiffs made payments to their own local brokers, which then shared that commission with the buyer brokers and—with Plaintiffs' informed consent and based on agreements with the buyer brokers—paid most of the remaining real estate commission to the independent contractor sales agents that represented Plaintiffs. Plaintiffs themselves conducted no business directly with any HomeServices Defendant, and thus lack standing to sue them for damages under federal antitrust law. Indeed, in opposing arbitration before this Court and the Eighth Circuit, Plaintiffs repeatedly argued that their contract for real estate services had nothing to do with the HomeServices Defendants, with whom they *admitted* they had not transacted directly.

Third, there is no legally sufficient evidence that all members of the Plaintiff class were

impacted or suffered injury as a result of the challenged conduct, let alone support for the colossal award of nearly $1.8 billion in damages that represents every bit of cooperative compensation paid by Plaintiffs' brokers to buyer brokers over the seven-year class period. Plaintiffs' proof of the fact of damage—also referred to as "impact" or "injury," and a necessary element of Plaintiffs' antitrust claim—rested entirely on Dr. Schulman's testimony that without the Rule, *no* member of the Plaintiff class would have authorized payment of the same commission to the buyer's agent in the "but-for" world that the buyer's agent actually received. Dr. Schulman took this extreme position of necessity, because if some class members would have done so, there would have been no way to assess, much less prove, impact and damages on a class-wide basis with common evidence. Plaintiffs' proof of the amount or quantum of damages similarly rests on Dr. Schulman's testimony that absent the Rule, no member of the class would have authorized payment of so much as a penny of compensation to a buyer's agent. If any member of the class would have done so, then the amount of damages awarded by the jury is wrong, and damages cannot be proven on a class-wide basis with common evidence. For the reasons fully developed herein, Dr. Schulman's testimony should never have been admitted in this case and is so fundamentally flawed that the jury's findings of impact and damages cannot stand.

For all of these reasons, the Court should enter judgment as a matter of law in favor of the HomeServices Defendants.[2]

STANDARD OF REVIEW

A party is entitled to judgment as a matter of law where "a reasonable jury would not have a legally sufficient evidentiary basis" to find for the nonmoving party. Fed. R. Civ. P. 50(a). Where, as here, the Court does not grant a motion for judgment as a matter of law made under

[2] The HomeServices Defendants also join in full in the Rule 50(b) motions filed by NAR and Keller Williams and incorporate the arguments in those motions herein.

Rule 50(a), the moving party may renew its motion under Rule 50(b). Fed. R. Civ. P. 50(b). A court reviewing a renewed motion for judgment as a matter of law under Rule 50(b) must "resolve factual conflicts in the nonmovant's favor," "take as true all facts supporting the nonmovant that the evidence tends to prove," "construe all reasonable inferences in the nonmovant's favor," and "deny the motion if the evidence would allow reasonable jurors to reach different conclusions." *Walmart Inc. v. Cuker Interactive, LLC*, 949 F.3d 1101, 1108 (8th Cir. 2020). But a court should not "give a party the benefit of unreasonable inferences, or those at war with the undisputed facts," *Liberty Mut. Fire Ins. Co. v. Scott*, 486 F.3d 418, 422 (8th Cir. 2007) (quoting *Larson v. Miller*, 76 F.3d 1446, 1452 (8th Cir. 1996)), and "the range of permissible inferences from ambiguous evidence is limited in a section one case," *Lovett v. Gen. Motors Corp.*, 998 F.2d 575, 578 (8th Cir. 1993). A plaintiff must therefore produce "proof beyond speculation to support the verdict." *Liberty Mutual*, 486 F.3d at 422 (quoting *Larson*, 76 F.3d at 1452). "[I]f an antitrust plaintiff does not present sufficient evidence in [its] case-in-chief to support a finding in [its] favor, a district court has a duty to direct a verdict in favor of the defendant." *Roesch, Inc. v. Star Cooler Corp.*, 671 F.2d 1168, 1171 (8th Cir. 1982), *on reh'g*, 712 F.2d 1235 (8th Cir. 1983).

ARGUMENT

I. Plaintiffs Presented No Legally Sufficient Evidence That the HomeServices Defendants Agreed with the Other Defendants to Follow and Enforce NAR's Cooperative Compensation Rule

"[T]he essence of any violation of § 1 is the illegal agreement itself." *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991). Thus, if Plaintiffs failed to present evidence at trial sufficient to prove that the HomeServices Defendants actually agreed with one or more of the other Defendants to follow and enforce the Rule, the HomeServices Defendants are entitled to judgment as a matter of law in their favor. Here, it is not even a close call.

The uniform testimony of the HomeServices Defendants' witnesses was that there was no

agreement of any kind with respect to the Rule. And for their part, Plaintiffs presented no evidence whatsoever—direct or circumstantial—sufficient to permit the jury to infer the existence of an unlawful agreement. There was no direct evidence of conspiracy at all, and the circumstantial evidence on which Plaintiffs hung their case is insufficient to prove the claimed conspiracy because it does not tend to exclude the possibility of independent conduct. Plaintiffs' own expert, Dr. Schulman, conceded that he had seen no evidence of so much as a communication between the defendants with respect to broker commissions, and he would not offer the opinion that any agreement existed. The HomeServices Defendants are thus entitled to judgment as a matter of law based on Plaintiffs' complete failure to prove the agreement on which their claims are based.

A. Plaintiffs Presented No Direct Evidence That the HomeServices Defendants Entered into Any Agreement

Plaintiffs in an antitrust case can prove the essential element of an agreement through either direct or circumstantial evidence. *See ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 554 (8th Cir. 1991). Direct evidence is evidence that is "explicit and requires no inferences." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999). Here, Plaintiffs allege that Defendants entered into an illegal agreement to follow and enforce the Rule. Direct evidence of such an agreement might include a writing directly setting out that the parties so agreed or testimony directly acknowledging the existence of such an agreement. There is no such direct evidence anywhere in the record.

Despite the voluminous record, Plaintiffs could point to no evidence at all that directly showed the supposed agreement on which their case is built. The uniform testimony at trial was to the contrary. The HomeServices Defendants' witnesses testified unequivocally that there was no such agreement. *See, e.g.*, Tr. 1345:20–25, 1346:13–1347:17 (Peltier); Tr. 1372:11–14, 1372:25–1373:3, 1384:23–1385:20 (Blefari); Tr. 1531:16–1532:13 (Warner). And as Plaintiffs

effectively conceded, they never produced *any* direct evidence that the HomeServices Defendants agreed with any other Defendant to follow and enforce the Rule: Their retained economic expert, Dr. Schulman, testified that after over a thousand hours of personal study—supported by a team that engaged in over five thousand additional hours of study—he had seen neither testimony nor documents showing Defendants even discussing the buyer-broker commissions at the heart of this case. Tr. 541:6–19, 571:6–72:21 (Schulman).

B. Plaintiffs Presented No Circumstantial Evidence That Tends to Exclude the Possibility of Independent Action by the HomeServices Defendants

In the absence of direct evidence, a court must "decide whether a reasonable juror could infer the existence of a conspiracy from the circumstantial evidence," bearing in mind that "the range of permissible inferences from ambiguous evidence is limited in a section one case." *Lovett*, 998 F.2d at 578. When resting a § 1 claim on circumstantial evidence, Plaintiffs must come forward with evidence that "tends to exclude the possibility" of independent action. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 584 (1986). Conduct that is "as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 588. As the Eighth Circuit has held, "if it is as reasonable to infer from the evidence a . . . conspiracy as it is to infer permissible activity, then the plaintiffs'[] claim, without more, fails." *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1032 (8th Cir. 2000).

Lacking any substantive circumstantial evidence of the alleged agreement, Plaintiffs decided to play a shell game rather than prove their case, citing to facts and allegations that, even if true, are not probative of Plaintiffs' actual antitrust claim, and which certainly do not "tend to exclude" the possibility of lawful, entirely independent action by the HomeServices Defendants. *See Matsushita*, 475 U.S. at 584. Such distraction, aimed at nothing more than confusing the jury,

cannot and does not suffice to prove that HomeServices agreed with anyone else to follow or enforce the Rule.

1. Meetings and Participation in Trade Organizations Are Not Evidence of Conspiracy

Because Plaintiffs failed to adduce any evidence implicating the HomeServices Defendants in an actual agreement, they resorted to evidence of different meetings and interactions between various independent contractor agents and individuals associated with the Defendant corporations and organizations, despite a complete lack of evidence that those run-of-the-mill meetings and interactions served as the occasion for any kind of discussion of conspiracy among the Defendants.

First, Plaintiffs repeatedly pointed to evidence of membership in various organizations by individuals associated with the HomeServices Defendants. For example, Plaintiffs emphasized that Ron Peltier, the former CEO of HomeServices of America, had served on NAR's 900-member board of directors, Strandmo Dep. Tr. 150:13–151:12 (P-2894), and that Gino Blefari, HomeServices of America's current CEO, had attended NAR's RES Advisory Group meetings "[o]n and off" for 25 years, Blefari Dep. Tr. 60:4–9 (P-2900). But neither of these facts supports an inference of agreement. There is no evidence any of these meetings related to the Cooperative Compensation Rule. And in any event, the law does not permit a finding of an unlawful agreement merely because the defendants interacted at trade conventions or in similar professional contexts. *See Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 771 (8th Cir. 2004); *see also Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 374 (7th Cir. 1990) ("[A] trade association is not, just because it involves collective action by competitors, a walking conspiracy."). The plaintiff must further show some reason for believing that the alleged unlawful agreement resulted from those interactions. *See McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 327–28 (8th Cir. 1986); *see also In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 878 (7th Cir. 2015) (concluding that, without evidence of "what information was exchanged" at meetings, there was "no basis for an

inference that [defendants] use[d] the meetings to plot price increases"). Plaintiffs offered no such additional evidence.[3]

Mr. Peltier and Mr. Blefari's testimony in fact *belies* any suggestion that the HomeServices Defendants participated in any alleged conspiracy. Mr. Peltier testified that his membership on NAR's 900-member board was merely "a token," and he was not even sure he had ever voted on any issue while on the board. Tr. 1343:13–1344:1 (Peltier). He also testified that he had no recollection of having heard of any Cooperative Compensation Rules before this lawsuit, Tr. 1345:16–19 (Peltier), and that he had never discussed commission rates with the other defendants, Tr. 1346:11–12 (Peltier). Mr. Blefari testified that HomeServices of America does not modify the commission policies of franchisees or subsidiaries and imposes no requirement that they follow the Cooperative Compensation Rule or join NAR or an MLS. Tr. 1368:19–1370:13 (Blefari). He also testified that the Rule had never been discussed at any of the large-broker RES Group meetings. Tr. 1372:25–1373:3 (Blefari).

Second, Plaintiffs offered evidence of other random connections between defendants to suggest that routine professional encounters should engender suspicion in jurors' minds. For example, Dana Strandmo, HomeServices of America's Chief Administrative Officer, acknowledged that he was invited to a meeting of the Council of Multiple Listing Services (CMLS)—an entity with no relation to the substance of this case and a meeting he did not believe he attended. Strandmo Dep. Tr. 17:5–18:1, 21:3–22 (P-2894). Plaintiffs also referenced BHH

[3] They offered, instead, further irrelevant evidence, such as the fact that Mr. Goffstein, President of nonparty Alliance Real Estate, sent an email to someone at a different real estate agency in which he mentioned discussing an upcoming vote before the board of the MARIS MLS (of which they were both members). Goffstein Dep. Tr. 76:7–80:11 (P-4561). But that evidence does not give rise to any inference supporting the alleged conspiracy. Alliance Real Estate is *not* a party—it is a subsidiary of HomeServices of America, Inc. and a BHH franchise. And there is no evidence that the meeting (or email) had anything to do with the Cooperative Compensation Rule.

training materials in which Mr. Blefari stated that one should "include" one's competitors. *See* P-1598. Far from evidence of conspiracy, these comments had nothing to do with the NAR rule at issue and relayed sales techniques designed to help agents "*differentiate themselves*" from competitors. *Id.*; *see Text Messaging*, 782 F.3d at 872–73 (holding evidence of *express collusion* is necessary to support an allegation of a Sherman Act violation). Indeed, the unrebutted interpretation of this statement was consistent with the actual statements made, that Mr. Blefari was "discussing with the homeowner that by listing the property and exposing it to the marketplace, all companies have access to that listing and can sell it, not just his company[,] at the same time," Warner Dep. Tr. 57:18–23 (P-2897), and Mr. Strandmo's testimony that it was advice to focus on the value of one's own services rather than the shortcomings of other firms, Strandmo Dep. Tr. 161:1–23 (P-2894). Moreover, there is no evidence that any HomeServices training was developed as the result of an agreement with competitors. At bottom, none of this is joint conduct or even a meeting among competitors. And even assuming that Mr. Strandmo *did* attend the CMLS meeting or that Mr. Blefari was suggesting that competitors should somehow be considered in sales pitches, the law does not permit finding an agreement based merely on the fact that the alleged conspirators met or talked about each other. *See Johnson v. City of Shorewood*, 360 F.3d 810, 817–18 (8th Cir. 2004); *Roesch*, 671 F.2d at 1171–72; *see also In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654 (7th Cir. 2002) ("[A]n agreement involving actual, verbalized communication[] must be proved in order for a price-fixing conspiracy to be actionable").

Third, Plaintiffs elicited testimony that the internal policy manual of nonparty Alliance Real Estate (a recently-acquired HomeServices subsidiary and BHH franchise) requires its agents to join NAR. Goffstein Dep. Tr. 46:22–50:6 (P-4561). But Plaintiffs elicited no testimony that this requirement was even directed by the HomeServices Defendants, much less that it was the

result of any form of agreement between the HomeServices Defendants and any other Defendants. As discussed *infra* at 11–17, this exchange was but one of many instances in which Plaintiffs illicitly sought to use independent decisions of HomeServices Defendants' subsidiaries or franchisees and improperly to attribute them to the HomeServices Defendants—notwithstanding the fact that there is no evidence that HomeServices directed the decisions of those organizations or that the relevant conduct was carried out pursuant to an agreement with any competitor.

Thus, even taken together, Plaintiffs' evidence falls well short of the "'significant probative evidence tending to support [their] complaint'" required to displace Defendants' legitimate explanations for their conduct. *Smith v. N. Mich. Hosps., Inc.*, 703 F.2d 942, 948 (6th Cir. 1983) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)); *see also Weit v. Cont'l Ill. Nat'l Bank & Tr. Co. of Chi.*, 641 F.2d 457, 462 (7th Cir. 1981) ("[T]he mere opportunity to conspire, even in the context of parallel business conduct, is not necessarily probative evidence."); *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 832 F.3d 1, 14 (1st Cir. 2016) (stating that a defendant's "mere participation" in a trade organization "does not create a triable issue"); *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 911 (6th Cir. 2009) ("[A] mere opportunity to conspire does not, standing alone, plausibly suggest an illegal agreement" because that fact "is more likely explained by their lawful, free-market behavior.").

Even if Plaintiffs had found evidence of discussions about pricing among competitors (which they did not), that still would not have sufficed to support a claim of illegal price-fixing under § 1. Plaintiffs must also make a further showing: that the discussion resulted in an agreement that was causally related to later pricing decisions. *See Roesch*, 671 F.2d at 1171–72 (holding that mere discussion of pricing is inadequate to show conspiracy under § 1 because such discussions may "arise in the normal course of business and do not indicate illegal concerted

action"); *accord Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 859 (10th Cir. 1999); *Baby Food*, 166 F.3d at 125; *see also Text Messaging*, 782 F.3d at 873 (noting that the Sherman Act "imposes no duty" on firms to compete in price). Trial produced no evidence at all establishing such discussions, much less linking any such discussions to any conduct of the HomeServices Defendants.

2. Internal Communications and Coordinated Action Between a Corporation and Its Wholly-Owned Subsidiary Cannot Be Used to Show an Unlawful Agreement, and the Conduct of One Such Entity Cannot Be Imputed to the Other

Throughout trial, Plaintiffs made constant reference to the conduct of nonparty HomeServices subsidiaries and franchisees as well as to communications and coordination between the HomeServices Defendants and those subsidiaries and franchisees, insinuating both that the referenced conduct was evidence of an unlawful conspiracy and that the HomeServices Defendants are liable for the conduct of the subsidiaries and franchisees. Both insinuations are false, and Plaintiffs' strategy encouraged the jury to find liability on a legally invalid basis.

First, despite acknowledging the *Copperweld* rule—under which a parent and its wholly-owned subsidiary cannot conspire in violation of § 1 of the Sherman Act—Plaintiffs repeatedly referred to a mishmash of evidence regarding intracorporate policies, communications, and staffing as though they were evidence of wrongdoing. *See, e.g.*, Tr. 15:16–21, 535:7–14 (Ketchmark) (acknowledging the rule of *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984)); *but see* Tr. 15:23–24 (Ketchmark) (emphasizing that the HomeServices Defendants and their subsidiaries "acted, as it relates to this rule, as a single entity"); Tr. 68:23–69:23 (Ketchmark) (same); Goffstein Dep. Tr. 17:19–18:9 (P-4561) (testimony that if Kevin Goffstein, President of Alliance, received a request from Mr. Blefari, he would respond); Blefari Dep. Tr. 60:12–65:11 (P-2900) (testimony that Mr. Blefari was copied on email from a nonparty subsidiary, Intero, regarding target commission rates). Without an antecedent unlawful agreement between

competitors, such communications do not and cannot give rise to the inference of a broader conspiracy.

Plaintiffs also repeatedly drew attention to evidence of references to the common 6% broker fee. *See, e.g.*, Strandmo Dep. Tr. 98:1–101:24, 103:5–107:15, 110:1–112:14 (P-2894) (regarding P-1582, an internal PowerPoint from Intero Real Estate Services, a California brokerage subsidiary, wherein Intero referred to earning a "full commission"); Blefari Dep. Tr. 60:12–65:11 (P-2900); Goffstein Dep. Tr. 73:7–75:17 (P-4561). But because Plaintiffs never showed any intercorporate agreement with respect to broker fees, intracorporate discussions on that topic are categorically not actionable under the antitrust laws. A parent and its wholly-owned subsidiary "have a complete unity of interest" and therefore "the very notion of an 'agreement' in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning." *Copperweld*, 467 U.S. at 771. The coordinated activity of a parent and its subsidiary thus cannot be probative of the existence of an unlawful intercorporate agreement, and fixation on such evidence could only have had the purpose of confusing the jury.

Second, Plaintiffs repeatedly incorrectly suggested that the jury could treat the HomeServices Defendants as liable for the conduct of nonparty HomeServices subsidiaries and franchisees and could treat that conduct as if it were the conduct of the HomeServices Defendants themselves. *See, e.g.*, Goffstein Dep. Tr. 12:2–14:14 (P-4561) (responding to Plaintiffs' examination on whether it is proper for nonparties Alliance and ReeceNichols to have overlapping leadership); Goffstein Dep. Tr. 67:23–69:14 (P-4561) (testimony regarding internal commission policy wherein Alliance asks its sales agents representing buyers to collect at least 2.7% plus a $295 fee); Goffstein Dep. Tr. 79:2–10 (P-4561) (testimony that Alliance's president has served on the board of directors for MARIS, a NAR-affiliated MLS in St. Louis); Warner Dep. Tr. 70:1–

74:5 (P-2897) (responding to Plaintiffs' examination on whether some HomeServices subsidiaries have overlapping leadership). Plaintiffs offered no evidence to show that any such conduct was directed by a HomeServices Defendant. Indeed, the unrefuted testimony was to the contrary. *See, e.g.*, Tr. 1536:4–7 (Warner) (testimony that BHH Affiliates does not, and contractually is prohibited from managing franchisees' day-to-day operations); Tr. 1337:12–1339:21 (Peltier) (testimony that HomeServices, as a founding principle, does not operate the companies that it acquires or change their day-to-day policies); D-3101 at 48 (contractually prohibiting BHH Affiliates from directing "day-to-day activities of" the franchisees' "employees, officers, managers, independent contractors, or others who work for [the] [f]ranchisee"). Regardless, such evidence had nothing to do with the Rule or any agreement with a competitor. Plaintiffs thus had no grounds for imputing antitrust liability to the HomeServices Defendants on the basis of the internal policies and procedures of their subsidiary brokers, having failed to show an inter-enterprise agreement with respect to the Rule and having failed to show that the HomeServices Defendants exercise control over the day-to-day operations of wholly-owned subsidiaries. It is "a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries," *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (internal quotation marks omitted), and Plaintiffs thus proffered to the jury evidence that could not permissibly form the basis of a finding of liability, *see In re Dynamic Random Access Memory Antitrust Litig.*, No. M 02-1486, 2007 WL 9752971, at *4–5 (N.D. Cal. Feb. 20, 2007) (applying the *Bestfoods* rule in the antitrust context and rejecting parent/subsidiary vicarious liability).

Nonetheless, Plaintiffs argued the case as if every nonparty action was that of HomeServices. *See, e.g.*, Tr. 2338:4–7 (Ketchmark) (arguing in closing that the Burnett Named

Plaintiffs—who listed their subject property with nonparty ReeceNichols, a HomeServices subsidiary—had used "HomeServices' person" to sell their homes); Tr. 2361:13–18 (Ketchmark) (urging the jury to recall that Mr. Goffstein, the president of Alliance, had testified that "[t]hese listing agents, the salespeople over there [at Alliance] have to join NAR" and arguing that this showed "[t]hey're following and enforcing it"). And as to the clustering of commission rates across different defendants' affiliated brokerages, the entirety of Plaintiffs' evidence concerning the HomeServices Defendants involves a handful of documents from HomeServices-owned brokerage subsidiaries, such as nonparties ReeceNichols, Alliance, and Intero, referring to a 6% commission. *See, e.g.*, Blefari Dep. Tr. 35:12–40:15 (P-2900); Warner Dep. Tr. 32:6–34:23, 47:11–49:1 (P-2897). Plaintiffs presented no evidence that those documents reflect anything other than unilateral decisions made by HomeServices subsidiaries or BHH franchisees alone, and their evidence on this point thus amounts at most to showing that corporate brokerage subsidiaries had internal guidelines that encouraged affiliated agents to seek commission rates that match an industry norm.[4] That is not evidence of a conspiracy.

In short, Plaintiffs repeatedly attempted to confuse the jury by presenting evidence relating solely to the conduct of nonparty brokerage companies that are owned by HomeServices and/or have a franchise agreement with BHH Affiliates, when such conduct is neither attributable to the HomeServices Defendants nor actionable as a § 1 violation. Plaintiffs' strategy was improper and could only have served to give jurors the impression that evidence of some amount of internal

[4] Not only is following an industry norm as to commission rates not evidence of a conspiracy, it is not even apparent what purpose—aside from confusing the jury—Plaintiffs had in pursuing the issue at such length, given that Plaintiffs did not allege agreement to fix commission rates and the Rule makes no mention of any specific commission. Moreover, internal pricing documents from HomeServices subsidiaries and franchisees are not the result of directives from a HomeServices Defendant. Tr. 1384:16–22 (Blefari); Tr. 1555:9–12 (Warner); Tr. 1678:3–12 (Wilson).

coordination between a parent and its wholly-owned subsidiary was evidence of an unlawful agreement.

These errors were the more egregious in light of testimony offered by the HomeServices Defendants that showed that the HomeServices Defendants' subsidiaries and franchisees operate autonomously. The allegation that the conduct of HomeServices subsidiaries and franchisees is attributable to the HomeServices Defendants' "following" or "enforcing" a NAR rule is thus incoherent given how the HomeServices Defendants are structured and how they operate.

Start with Ron Peltier, the founder and former CEO of HomeServices of America, and Gino Blefari, the present CEO. Their testimony demonstrated that HomeServices of America could not itself follow the Cooperative Compensation Rule because the rule governs brokers listing properties on MLSs, and HomeServices does not conduct "broker transactions" or belong to an MLS. Tr. 1367:6–16 (Blefari). It is a holding company, and the agents who work with HomeServices subsidiaries are independent contractors. Tr. 1334:4–20 (Peltier). Claiming that HomeServices of America itself follows the Cooperative Compensation Rule is thus nonsensical—and unsupported by any trial evidence. Plaintiffs likewise did not show how HomeServices of America could possibly "enforce" the Rule because there is no evidence that it exercises the requisite control over the MLSs that do enforce the Rule, or over its subsidiaries that are the ones to offer broker services. When HomeServices of America acquires a broker, its policy is to "leave everything in place," Tr. 1334:13–15 (Peltier), allowing it to operate as an "independent compan[y]." Tr. 1334:16–1335:2 (Peltier). Indeed, BHH does not run franchisees' operations at all, much less require them to join NAR or abide by any of its rules (including the Cooperative Compensation Rule). Tr. 1340:4–1342:3 (Peltier); Tr. 1368:7–1370:13 (Blefari). As Mr. Blefari testified, those facts are central to HomeServices' "philosophy on how [it] do[es] business"—"We

believe that . . . real estate is local; that it's best to have them operate the business that they know best. They know better than we do." Tr. 1371:22–25 (Blefari).

Mr. Peltier's and Mr. Blefari's testimony was further supported by testimony offered by Rosalie Warner, Senior Vice President of Network Services at HSF and involved in daily operations of BHH. Tr. 1530:15–18 (Warner). She testified that BHH franchisees "are independently owned and operated," Tr. 1528:24–1529:1 (Warner), and that BHH primarily provides administrative support and consulting, referral, and training services to the franchisees, Tr. 1529:12–1530:11 (Warner). In addition to flatly denying any kind of agreement to follow or enforce the Rule, she further testified that neither BHH nor HSF would "have any way to" enforce compliance with the Rule even if they wished to, that BHH and HSF do not monitor whether franchisees comply with the Rule, and that BHH Affiliates is not permitted to manage franchisee operations. Tr. 1532:2–13, 1536:4–7 (Warner)

Finally, even if Plaintiffs *had* produced evidence sufficient to infer that the HomeServices Defendants directed subsidiaries and franchisees to follow the Rule, independently acting on their own business judgment, right or wrong, does not and cannot make the HomeServices Defendants antitrust violators. Instead, plaintiffs in a § 1 case must prove a "plus" factor by presenting "evidence that tends 'to exclude the possibility that the alleged coconspirators acted independently,'" *St. Louis Convention & Visitors Comm'n v. NFL*, 154 F.3d 851, 861 (8th Cir. 1998) (citations omitted), and must show that defendants' conduct was instead the result of an unlawful agreement. That was *never* done here. Instead, Plaintiffs endlessly belabored various aspects of the HomeServices Defendants' corporate structure, presumably hoping that confused jurors would assume that the evidence regarding the HomeServices' Defendants' intracorporate operations must somehow be illicit. But having a complex corporate structure is not a violation of

the antitrust laws. And when plaintiffs fail to present "evidence 'to exclude the possibility that the [defendants] were acting for independent business reasons,'" jurors may not infer liability from circumstantial evidence that merely *permits* inference of a conspiracy without evidence that also excludes non-conspiratorial explanations. *St. Louis Convention*, 154 F.3d at 861; *see also Matsushita*, 475 U.S. at 588. Plaintiffs' claim thus necessarily fails for the additional reason that the requisite "plus" factor was never adequately pleaded or proved.

3. A Theory Premised on Evidence of Parallel Conduct, Without More, Is Not Sufficient to Permit Inference of an Agreement

The fullest articulation of Plaintiffs' theory of the case was given in the testimony of their retained economic expert, Dr. Schulman, whose testimony alone was also offered to prove impact and damages. That testimony confirmed the total lack of actual evidence underlying Plaintiffs' claim of an illegal agreement here.

Dr. Schulman had "no opinion" as to whether Defendants had formed an unlawful agreement. Tr. 571:6–572:21 (Schulman). Indeed, he testified that after *over a thousand hours* of study—supported by a team that engaged in *over five thousand additional hours* of study—he had seen neither testimony nor documents showing Defendants even *discussing* the buyer-broker commissions at the heart of this case. *Id.* at 541:6–19. Dr. Schulman's testimony was instead based purely on the circumstantial evidence of the comparative stability and clustering of buyer-broker compensation rates in Missouri—the very kind of parallelism that *Twombly* states is inadequate even at the pleading stage. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). Seizing on that data, without any actual evidence of conspiracy, Dr. Schulman conjured a theory on which the observed rates are the result of an illegal agreement, testifying that the alleged conspiracy *could* fit the facts he observed. In that hypothetical conspiracy, he supposed there to have been three mechanisms for implementing the alleged agreement: control, detection, and

punishment, or "steering." Tr. 484:17–25; 523:22–525:8 (Schulman). As Defendant's economic expert, Dr. Wu testified, however, Dr. Schulman's testimony conspicuously skipped the first step: establishing there to have been an agreement antecedent to the other mechanisms he described. Tr. 1816:5–20 (Wu). None of those mechanisms, *even if accurate*, in any way implicate the HomeServices Defendants in an illegal agreement.[5] The most "fundamental" problem with testimony like Dr. Schulman's is that "a litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly." *Blomkest Fertilizer*, 203 F.3d at 1033; *see also In re Broiler Chicken Antitrust Litig.*, --- F. Supp. 3d ---, 2023 WL 7220170, at *10 (N.D. Ill. Nov. 2, 2023) (emphasizing that there must be "some *non-economic* evidence *specifically indicating* express agreement" (emphases added)).

Dr. Schulman's reverse-engineered story conveniently ignores the fact that the observed data is readily explained by lawful conduct. As Dr. Wu extensively testified, price clustering is often a natural and common outgrowth of healthy and lawful competition. *E.g.*, Tr. 1778:9–15, 1825:5–23, 1827:1–12 (Wu). For good reason, the law thus requires that plaintiffs "allege additional facts that tend to exclude independent self-interested conduct." *Twombly*, 550 U.S. at 552 (cleaned up); *see also Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) ("Circumstances must reveal 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'") (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)). Yet Plaintiffs' case established nothing beyond unilateral conduct. That

[5] With respect to control, Dr. Schulman testified only as to NAR's practices and then stated in general and conclusory fashion that the HomeServices Defendants "want to support" NAR's rules. Tr. 513:19–20 (Schulman). With respect to detection, Dr. Schulman's testimony only discussed MLSs. Tr. 514:7-24 (Schulman). And with respect to punishment, Dr. Schulman testified only to the steering behavior that he alleges the Cooperative Compensation Rule incentivizes in individual agents and to Keller Williams training materials. Tr. 524:24–525:8, 527:17–529:20 (Schulman).

is not enough.

As the Eighth Circuit explained in *Lovett*, the mere fact that a theorized conspiracy can explain observed facts is not enough to prove a Sherman Act claim when the alleged offender had fully internal reasons to engage in the challenged conduct. 998 F.2d at 580–81. In *Lovett*, a local General Motors dealer engaged in aggressive cost-cutting behaviors. *Id.* at 578, 581. Rival dealers complained to General Motors, and some time later, General Motors restricted the cost-cutting dealer's supply, eventually putting it out of business. *Id.* at 577. The Eighth Circuit reversed the district court's finding that the facts alleged were sufficient for a jury to find that General Motors had conspired with the rival local dealers that had complained. The court emphasized that cases with "highly ambiguous evidence" "as consistent with . . . independent action . . . as with conspiracy" "should not be submitted to a jury" precisely because, as here, it is "extremely difficult" for a defendant to convince a jury that its own internal motivations guided its behavior. *Id.* at 580–81. Were it otherwise, minimally plausible conspiracy theories would be enough to impose massive liabilities on businesses that were merely independently acting according to their own business interests. *See Twombly*, 550 U.S. at 557–58.

Plaintiffs made no attempt whatsoever to square their theory with the unrebutted testimony that, to the extent that HomeServices subsidiaries and franchisees did follow the Rule, that was the decision of each individual broker. And *Twombly* instructs that antitrust plaintiffs do not state a claim (much less obtain judgment) unless they can show that the defendants' behavior is not "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market" as it is consistent with a conspiracy. 550 U.S. at 554; *see also Text Messaging*, 782 F.3d at 877. Moreover, even if some nonparty real estate brokers encourage or require their agents to follow NAR's Cooperative Compensation Rule, that

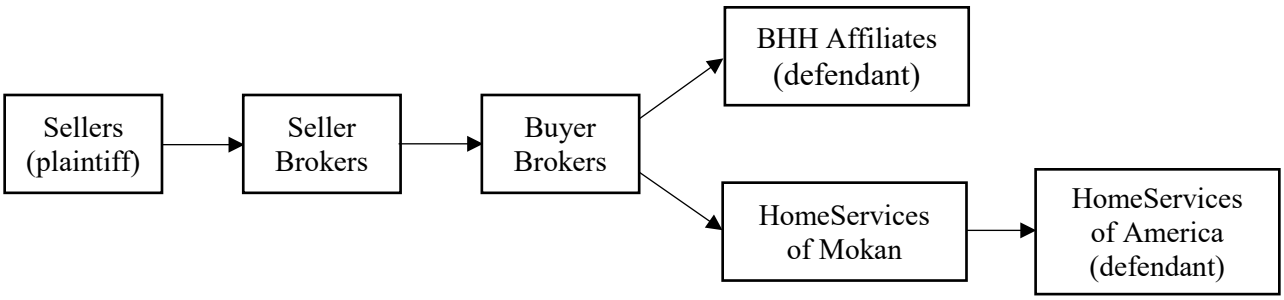
does nothing to show that there was any sort of conspiracy to "follow and enforce" the Rule. In this case, ample testimony established that the action of the HomeServices Defendants' subsidiaries or franchise brokers were due to, and consistent with, independent action. Judgment as a matter of law should therefore be entered.

II. Trial Confirmed That Plaintiffs Are Not Direct Purchasers from the HomeServices Defendants and Thus Lack Standing

The verdict also cannot stand under the bedrock rule that only "direct purchasers" may recover antitrust damages. *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1521 (2019); *accord Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 533–35 (1983); *Kansas v. UtiliCorp United*, 497 U.S. 199, 208 (1990); *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977). Under this "bright line" rule, only "immediate buyers from the alleged antitrust violators" have standing under the Sherman Act. *Pepper*, 139 S. Ct. at 1521 (quoting *UtiliCorp*, 497 U.S. at 207); *see also Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1169–70 (8th Cir. 1998) (noting that indirect purchasers cannot sue even though they "bear[] some portion of a monopoly overcharge"). While Plaintiffs deliberately and purposefully only sued real estate franchisors and holding companies that own real estate brokerage companies, they alleged a massive conspiracy that included "all who own, operate, and participate in the subject MLSs [and] agree to, comply with, and implement the Adversary Commission Rule," ECF 477 ¶ 33 (Second Amended Complaint), including dozens of "the franchisees and brokers of the Corporate Defendants" identified as co-conspirators, *id.* ¶ 35. The trial, however, demonstrated that Plaintiffs are not "direct purchasers" from the HomeServices Defendants; they are "two or more steps removed from" them. *Pepper*, 139 S. Ct. at 1520. As a result, Plaintiffs "may not sue" for damages, *id.*, and the Court should enter judgment for the HomeServices Defendants. *See McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1376–79 (8th Cir. 1983) (holding that "case law mandates a judgment notwithstanding the

verdict" when the plaintiff lacks antitrust standing).

As the Supreme Court explained in its most recent opinion on antitrust standing, a direct purchaser must transact directly with the alleged antitrust violator: "[I]f manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A." *Pepper*, 139 S. Ct. at 1521. Plaintiffs never entered into a required A-B direct relationship with a HomeServices Defendant because no HomeServices Defendant sells broker services, charges commissions, or transacts directly with consumers.[6] In instances where seller brokers transact with a HomeServices-affiliated buyer broker, for example, sellers pay the seller brokers—*multiple* steps away from any HomeServices Defendant:



See P-2200; P-2225; P-2211; Tr. 314:25–315:5 (Burnett); Tr. 268:1–11 (Ellis); Tr. 332:1–12 (Keel); Tr. 425:18–23 (Breit); Tr. 1669:24–1670:11 (Wilson); Tr. 1199:12–25 (Gansho); Tr. 931:8–17 (Millett); Tr. 1589:17–21 (Warner); D-3101 at 11–12; Tr. 1340:2–1342:7 (Peltier); P-4612. Nor are Plaintiffs direct purchasers even when a HomeServices affiliate serves as the seller

[6] As the trial evidence showed, none of the HomeServices Defendants is a listing agent or brokerage. The relevant listing agents are independent contractors of brokerages, which are separate legal entities. Tr. 1370:22–1371:14 (Blefari); Tr. 1658:20–1659:1 (Wilson). Most of those brokerages are independent franchisees of BHH Affiliates. Tr. 1339:15–1342:7 (Peltier). The only exceptions are ReeceNichols, Alliance, and BHHS Kansas City, which are themselves separate, independently-operated subsidiaries of HomeServices of Mokan, LLC, which is owned by HomeServices of America. Tr. 1337:4–1338:10 (Peltier); P-4612.

broker because no such affiliate is a HomeServices Defendant and Plaintiffs still have no direct transaction with a HomeServices Defendant or any other Defendant.

In every instance involving a HomeServices-affiliated broker, sellers transacted with at least one nonparty intermediary—including at least a local nonparty real estate brokerage company.[7] If the brokerage was a franchisee of BHH Affiliates, the subsequent payment that BHH Affiliates received was a royalty that was a small percentage of the brokerage commission charged. Tr. 1589:17–21 (Warner); D-3101 at 11–12. If the brokerage was an indirect subsidiary of HomeServices of America (*e.g.*, nonparty ReeceNichols), profits—much less than the commissions paid—were passed up an ownership chain to HomeServices of Mokan, HomeServices of America, Berkshire Hathaway Energy, and ultimately Berkshire Hathaway, Inc. P-4612; Tr. 1340:8–1342:7 (Peltier); Tr. 1596:20–1597:8 (Frazier).

Plaintiffs can hardly contest this point given that it is the premise of one of their core arguments to the Eighth Circuit regarding the arbitrability of this dispute. In resisting arbitration, Plaintiffs maintained that HomeServices "does not perform brokerage or agent services" and therefore is "a complete stranger" to any direct agreement, "*two* steps removed from the actual party to the Agreement (ReeceNichols)." Brief of Appellees at 5, 39–40, *Sitzer v. Nat'l Ass'n of Realtors*, No. 20-1779 (8th Cir. Sept. 9, 2020). Having advanced this position before the Eighth Circuit, judicial estoppel prevents Plaintiffs from doing an about-face in this Court and taking a diametrically opposing position to assert standing. *See Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000).

Indeed, Plaintiffs time and again testified that they did *not* purchase anything directly from

[7] So too for sales involving brokers related to other Defendants as explained in NAR's and Keller Williams' briefs (which, as noted above, HomeServices joins in full).

the HomeServices Defendants. As Rhonda Burnett agreed, she "authorized specifically *the broker* to cooperate and to share the [six percent] commission payable under the contract *with other brokers*." Tr. 314:25–315:5 (Burnett) (emphases added); *see also* P-2200 (listing agreement stating that Rhonda Burnett agreed to pay a 6% commission, which may be divided between the seller and buyer brokers). Nor was she alone: Ms. Ellis, Mr. Keel, and Mr. Breit each testified that they agreed to pay commissions to *their seller brokers*, and, with Plaintiffs' approval, those seller brokers agreed that they would pay a portion of their *own* commissions to the *buyer brokers*. Tr. 268:1–11 (Ellis); Tr. 332:1–11 (Keel); Tr. 425:18–23 (Breit); P-2225 (Keel Agreement); P-2211 (Breit Agreement). While some brokerages are franchisees of or indirectly owned by the HomeServices Defendants, Tr. 1452:17–20 (Blefari); Tr. 1597:2–8 (Frazier), none are defendants in this case. Under no circumstance did sellers directly transact with HomeServices' employees. Thus, at best, Plaintiffs are consumers, "C," who bought services from seller brokers, "B," who paid buyer brokers, "A"—with the HomeServices' Defendants being paid only fees, royalties, or dividends even further down the chain. *See Pepper*, 139 S. Ct. at 1521.

Permitting Plaintiffs to recover damages despite the lack of a direct relationship would raise the same "express[] concern[s]" that motivate the *Illinois Brick* rule. *In re Midwest Milk Monopolization Litig.*, 730 F.2d 528, 530 (8th Cir. 1984); *see also Illinois Brick*, 431 U.S. at 730–31. One problem is that granting Plaintiffs' standing creates a risk of duplicative liability. *See Midwest Milk*, 730 F.2d at 530. Seller brokers are paid by sellers and remit the alleged overcharge from their own commission. Tr. at 1669:24–1670:2 (Wilson); Tr. at 1199:12–25 (Gansho); Tr. at 931:8–17 (Millett). So seller brokers could pursue the same claims to seek the same commission payments as damages. Another problem is that Plaintiffs' damages theory necessarily entails multiple degrees of pass-on—since intermediaries set commissions—creating the "complexities

and uncertainties of proof inherent in an action based on a passing-on theory" that *Illinois Brick* is designed to avoid. *Midwest Milk*, 730 F.2d at 530; *see also Illinois Brick*, 431 U.S. at 733 & n.13 (emphasizing the "difficult[ies]" in "reconstructing" and "trac[ing] the overcharge through each step in the distribution chain" when plaintiffs are "several steps removed from the defendant," "even if . . . the direct purchaser increased its price by the full amount of the overcharge").

To circumvent the standing requirements, Plaintiffs claim they are "direct purchaser[s]" because "every single one of their witnesses said it's the [P]laintiffs' money." Tr. 2504:7–11 (Ketchmark). This argument badly misses the point. Both direct and indirect purchasers pay money. The question is *to whom they paid that money*. The law is clear that to be direct purchasers, Plaintiffs must be the "immediate buyers from the alleged antitrust violators." *UtiliCorp*, 497 U.S. at 207; *accord Pepper*, 139 S. Ct. at 1520. Because Plaintiffs are not, they lack standing to sue.

Plaintiffs' other attempt to manufacture standing—pointing to settlement statements to try to show they are direct purchasers—fails for the same reason. *See* Tr. 22:7–17, 2504:7–11 (Ketchmark). Those statements show that Plaintiffs paid their *local brokers*, not HomeServices. *See, e.g.*, P-2229; P-2201; P-2212. Any subsequent payments to the buyer brokers came from the seller broker's funds, or, if the buyer did not have an agent, the seller broker retained the entire commission. *See* Tr. 1669:24–1670:2 (Wilson); Tr. 1199:12–25 (Gansho) (similar); Tr. 931:8–17 (Millett) (similar). Either way, local brokers—not sellers themselves—then remitted some portion of the monies to others in the transaction cycle; none of the settlement statements reflect a payment from a seller directly to HomeServices. This is further buttressed by the NAR rules, which, contrary to Plaintiffs' arguments, only apply to what needs to be in a real estate listing on certain multiple listing services. *See* D-3842 at 65–66. According to those rules, the seller broker is only required to make an offer of compensation; if that is unpaid, the buyer brokers can only recover

from the seller broker, not the seller. *See id.* Thus, the "economic reality of the relevant transactions" is that home sellers never paid any commission to HomeServices directly. *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 208 (1968).

Although Plaintiffs previously attempted to invoke the co-conspirator exception (or some variation on it, such as a "control" exception), *see* ECF 956 at 31–32 (discussing *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 952 F.3d 832, 839 (7th Cir. 2020) and *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003)), they abandoned any such theory at trial and the jury was not instructed on it. ECF 1292. They therefore cannot raise it now to try to defend the judgment post-hoc. *See* Fed. R. Civ. P. 51(c)(1) ("A party who objects to . . . the failure to give an instruction must do so on the record . . . ."); *Yannacopoulos v. Gen. Dynamics Corp.*, 75 F.3d 1298, 1304–05 (8th Cir. 1996) (finding that objections to Court's instruction of a jury must be timely in order not to be waived). But even if they could, the Eighth Circuit has held this exception does not apply "unless the direct purchaser is joined as a defendant," *Campos*, 140 F.3d at 1171 n.4; *see also Insulate SB v. Advanced Finishing Sys.*, 797 F.3d 538, 542 (8th Cir. 2015) ("[I]ndirect purchasers may bring an antitrust claim if they allege the direct purchasers are 'party to the antitrust violation' and join the direct purchasers as defendants.") (quoting *Campos*, 140 F.3d at 1171 n.4); *Midwest Milk*, 730 F.2d at 529–30 (affirming dismissal because Plaintiffs did not name the alleged co-conspirators as defendants); ECF 477 (Second Amended Complaint). Here, Plaintiffs conceded "local agents are not defendants in this case," Tr. 15:2–3 (Ketchmark), and neither is ReeceNichols, nor any BHH Affiliates franchisee.

All evidence admitted at trial thus confirms that Plaintiffs did not purchase any broker services from HomeServices. Rather, they purchased services from seller brokers who in turn paid a portion of their own commission to the buyer brokers—with any royalty, fee, or dividend arriving

to the HomeServices Defendants well down the distribution chain. And with at least one intermediate transaction separating them from HomeServices, Plaintiffs are not "immediate buyers" and therefore lack standing. *See Pepper*, 139 S. Ct. at 1521. The Court should therefore enter judgment in favor of the HomeServices Defendants.

III. Plaintiffs' Damages Expert's Testimony Was Inadmissible and Failed to Establish Impact

In addition to the shortcomings described above, and as discussed more fully in the HomeServices Defendants' Rule 59 motion,[8] Dr. Schulman's testimony should not have been admitted at trial, and it failed to establish a basis on which the jury could permissibly infer impact. The testimony was inadmissible because it rested entirely on the construct of a "but-for world" that itself was premised on assumptions that were incoherent, implausible, or flatly contradicted by other evidence at trial. *See Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055–57 (8th Cir. 2000) (judgment as a matter of law should have been entered for defendants because the plaintiffs' injury and damages case rested on an expert who did "not incorporate all aspects of the economic reality" of the relevant market into his model and "ignored inconvenient evidence"); *see also St. Louis Convention*, 154 F.3d at 863 (affirming entry of judgment as a matter of law where there was no "evidence tending to show that [the plaintiff's expert's] economic model actually applied" to the facts of the case).

According to Dr. Schulman, no offers of cooperative compensation would have been made in the "but-for" world; thus, in his opinion, 100% of class members were injured by the Rule to the tune of 100% of the buyer commissions they paid. Tr. 563:12–16, 566:11–22 (Schulman).

[8] The HomeServices Defendants expressly incorporate the arguments made in their Rule 59 motion addressing impact and damages herein.

But offers of cooperative compensation were made for decades before the Rule came into existence, they are routinely made in markets not subject to the Rule, and they are even made in Dr. Schulman's own cherry-picked benchmark, Australia.[9] *See* Tr. 635:5–7 (Schulman); Tr. 836:5–13 (Reynolds); Tr. 1912:16–22 (Wu). As witnesses testified extensively throughout trial, sellers have numerous incentives to make such offers that have nothing to do with the Rule. For example, Dave Stevens, a former Federal Housing Administration Commissioner, testified that the practice benefits sellers because having sufficient cash on hand is one of the most common barriers to home-buying. Tr. 1727:3–15 (Stevens). Having buyer-broker fees paid for by sellers thus broadens the market of possible buyers because it ensures that buyers who would otherwise be able to afford the home are not priced out by having to pay for both a deposit and a buyer-broker fee with cash on hand. Tr. 1727:22–1728:6 (Stevens). Dr. Wu likewise testified to other ways sellers benefit from the assistance buyers receive from their brokers: for example, by ensuring appropriate financing is in place prior to making offers, Tr. 1794:23–1795:2 (Wu), and by actively seeking out buyers who would be a good fit for homes that have been listed for sale, Tr. 1851:20–23 (Wu). These considerations, in combination with the fact that offers of compensation do not disappear in markets without the Rule, render completely implausible Dr. Schulman's claim that, but for the Rule, *none* of the buyer commissions Plaintiffs paid would still have been paid.

Moreover, in contravention of fundamental economic principles, Dr. Schulman assumed that homes in the "but-for" world would sell for exactly the same price at which they sold in the actual world, notwithstanding the near elimination of buyer brokers (according to Dr. Schulman) and class members' varying goals when listing their homes. *See* Tr. 564:20–565:2 (Schulman).

[9] Todd Reynolds, for example, testified that sellers' agents make offers of compensation for leads "5 to 10 percent of the time." Tr. 836:5–25 (Reynolds).

In fact, this assumption was contradicted by Dr. Schulman's own testimony that buyers' agents are incentivized to "steer" qualified buyers away from listings with comparatively low offers of cooperative compensation, which, according to Dr. Schulman, impacts the likelihood and timing of a sale. Tr. 675:14–18 (Schulman). If, as Dr. Schulman posits, disincentivized buyer brokers impact the timing and probability of a home sale, then surely the near elimination of buyer brokers would also impact the housing market in myriad ways, including with respect to home prices. The assumption that homes would sell for the same price in the "but-for" world also ignores the fact that some sellers are focused on "clear[ing]" a certain amount from the sale of their home, Trupiano Dep. Tr. 220:11–221:16 (D-9000), and thus might reduce the price of their home if they are no longer paying a commission to the buyer's agent. If the price of a class member's home in the "but-for" world falls by an amount equivalent to, or greater than, what was actually paid to the buyer's agent, that class member has suffered no injury.

Relatedly, Dr. Schulman's testimony simply failed to acknowledge—much less resolve—the puzzle of how the services currently provided by buyer brokers would be paid for in his "but-for" world at no direct or indirect cost to the seller. Although Plaintiffs deny that buyer broker services are worth the commissions that are commonly paid, named Plaintiff Jerod Breit admitted that a 1.5% out-of-pocket fee for the broker he used when buying a house would have been a fair value. Tr. 399:20–25 (Breit). And as Mr. Breit tacitly acknowledged, paying that fee would have reduced the amount of money he had on hand to put toward his down payment. *Id.* (Bright); *see also* Tr. 1789:1–18 (Dr. Wu, opining that if real estate costs were to increase by two to three percent, buyers would likely (1) decrease their offers; (2) only consider less expensive homes; or (3) drop out of the market altogether). Again, in this scenario, sellers are not injured at all if the reduction in the sales price matches or exceeds what they saved in buy-side commissions, and they

are at most injured by an amount equal to the difference between the reduction in commission and the reduction in the amount that would-be buyers are able to offer as a result of paying broker commissions themselves. But Dr. Schulman's testimony made no allowance for buyers having less money to put toward the purchase of a home if saddled with the additional expense of a broker fee; Dr. Schulman thus provided no explanation consonant with any known principle of mathematics or economics to explain how the value provided by buyer brokers would be retained at zero net expense to any party.

The insufficiency, and indeed inadmissibility, of Dr. Schulman's testimony entitles the HomeServices Defendants to judgment as a matter of law under Rule 50(b). In an ill-fated attempt to prove impact on a class-wide basis using common evidence, Plaintiffs' injury and damages case relied entirely on Dr. Schulman's opinion that in the "but-for" world, not one member of the class would have independently chosen to authorize payment to the buyer broker of the same amount the buyer broker actually received in cooperative compensation. Without this opinion, which is founded on an unreliable methodology and contrary to undisputed evidence in the record, there is no evidence to support the jury's finding that all class members were impacted by the challenged conduct. Because of these egregious deficiencies in Dr. Schulman's testimony—and the jury's clear reliance on his testimony in reaching its verdict—the Court should enter judgment as a matter of law in favor of HomeServices. *See Concord Boat*, 207 F.3d at 1055–57 (defendants were entitled to judgment as a matter of law based on the erroneous admission of expert opinion where "the jury clearly relied on [the] opinion in reaching its verdict because the damages it awarded . . . were identical to the detailed figures [the expert] had calculated"); *compare* Tr. 564:23 (Dr. Schulman opining that Plaintiffs suffered approximately $1.8 billion in damages), *with* ECF No. 1294 at 2 (jury awarding the exact amount of damages Dr. Schulman calculated). In the

alternative, and as argued in the Rule 59 motion, the Court should find that HomeServices is entitled to a new trial.

CONCLUSION

For the foregoing reasons, the HomeServices Defendants respectfully request that the Court enter judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b).

Dated: January 8, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 8, 2024, an electronic copy of the foregoing was filed with the Clerk of the Court by using the CM/ECF system and service upon all counsel of record will be accomplished by the CM/ECF system.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, JEREMY KEEL, HOLLEE ELLIS, and FRANCES HARVEY, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	Case No. 4:19-cv-00332-SRB **CLASS ACTION** **ORAL ARGUMENT REQUESTED**

THE HOMESERVICES DEFENDANTS' MOTION FOR A NEW TRIAL

Under Federal Rule of Civil Procedure Rule 59(a), and for the reasons explained in the accompanying brief, HomeServices of America, Inc. ("HomeServices"); BHH Affiliates, LLC ("BHH Affiliates"); and HSF Affiliates, LLC ("HSF Affiliates") (collectively, the "HomeServices Defendants") move for a new trial.[1] A new trial is required both because the testimony of Plaintiffs' economic expert (Dr. Schulman) should not have been admitted and because the jury's verdict (and damages award), which rest entirely on Dr. Schulman's flawed "but-for" world, are against the weight of the evidence.

[1] The HomeServices Defendants have also moved for judgment as a matter of law under Fed. R. Civ. P. 50(b). The HomeServices Defendants move for a new trial under Rule 59(a) in the alternative.

The HomeServices Defendants also move for a new trial on the grounds set forth in the Rule 59(a) motions filed concurrently by Defendants The National Association of REALTORS® and Keller Williams Realty Inc. The HomeServices Defendants fully join and incorporate by reference those Defendants' Rule 59(a) motions.

Dated: January 8, 2024

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RHONDA BURNETT, JEROD BREIT, JEREMY KEEL, HOLLEE ELLIS, and FRANCES HARVEY, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	Case No. 4:19-cv-00332-SRB **CLASS ACTION** **ORAL ARGUMENT REQUESTED**

THE HOMESERVICES DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Under Rule 50(b) of the Federal Rules of Civil Procedure, and for the reasons explained in the accompanying brief, HomeServices of America, Inc. ("HomeServices"); BHH Affiliates, LLC ("BHH Affiliates"); and HSF Affiliates, LLC ("HSF Affiliates") (collectively, the "HomeServices Defendants") move for judgment as a matter of law. The HomeServices Defendants are entitled to judgment as a matter of law because Plaintiffs failed to produce evidence of any kind—direct or circumstantial—in support of their claim that the Defendants conspired to "follow and enforce" the Cooperative Compensation Rule. The HomeServices Defendants are further entitled to judgment as a matter of law because no Plaintiff ever transacted directly with any HomeServices Defendant, and Plaintiffs thus lack standing to bring their claim. Finally, the HomeServices Defendants are entitled to judgment as a matter of law because the expert testimony on which

Plaintiffs relied to prove impact and damages was inadmissible and failed to establish that the quantum of alleged damages could be proven on a class-wide basis.

The HomeServices Defendants are also entitled to judgment as a matter of law for the reasons set forth in the separate motions concurrently filed by Defendants The National Association of REALTORS® and Keller Williams Realty, Inc. The HomeServices Defendants fully join and incorporate by reference those Defendants' Rule 50(b) motions.

Dated: January 8, 2024

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