UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, v. **NATIONAL ASSOCIATION OF REALTORS** Defendant.	Civil Action No. 05 C 5140 Judge Filip Magistrate Judge Denlow

MEMORANDUM OF THE UNITED STATES
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

PROCEDURAL POSTURE 1

FACTUAL BACKGROUND 2

ARGUMENT 6

I. THERE IS A LIVE CONTROVERSY BEFORE THIS COURT 6

A. The United States has jurisdictional standing to sue for injunctive relief even if some illegal conduct ceased prior to litigation. 6

1. Courts regularly enter injunctions against conduct that ceased before the government commenced an enforcement action. 6

2. The authority cited by NAR does not support the "general rule" it asserts. 8

3. The United States' allegations confer standing to pursue its claim for injunctive relief. 10

4. NAR's argument illogically implies that courts have adopted a "general rule" that discourages settlement discussions. 14

B. Dismissing part of the United States' claim would not save significant resources. 15

II. NAR'S POLICIES CONSTITUTE AN UNREASONABLE RESTRAINT OF TRADE 15

A. NAR misunderstands the meaning of "restraint of trade." 16

1. "Restraint of trade" means restraint on competition, not on competitors. 16

2. NAR's policies restrain trade by denying innovative brokers full use of comprehensive MLS listings. 17

B. NAR's policies "restrain" MLSs and innovative brokers even under NAR's cramped interpretation of the Sherman Act. 22

1. MLSs are restrained by NAR-mandated policies. 22

2. NAR's broker members are restrained by NAR-mandated policies. 22

III. THE AMENDED COMPLAINT ADEQUATELY ALLEGES THAT NAR'S MODIFIED VOW POLICY VIOLATES THE ANTITRUST LAWS 24

A. The United States has exceeded its pleading burden. 25

B. The United States has alleged the exercise by brokers of the Initial VOW Policy's "blanket" opt-out right. 27

CONCLUSION 28

TABLE OF AUTHORITIES

Associated Press v. United States, 326 U.S. 1 (1945) 18

Austin Bd. of Realtors v. E-Realty, Inc., No. 00-CA-154, Sept. 13, 2000 Order (Exh. A to NAR Memorandum) 21

Austin Bd. of Realtors v. E-Realty, Inc., No. 00-CA-154, 2000 WL 34239114 (W.D. Tex. Mar. 30, 2000) 5, 20, 21

BCB Anesthesia Care, Ltd. v. Passavant Mem'l Area Hosp. Ass'n, 36 F.3d 664 (7th Cir. 1994) 25

Bennett v. Schmidt, 153 F.3d 516 (7th Cir. 1998) 26

Berry v. Farmland Indus., Inc., 114 F. Supp. 2d 1150 (D. Kan. 2000) 10

Bunker Ramo Corp. v. United Bus. Forms, Inc., 713 F.2d 1272 (7th Cir. 1983) 16

Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988) 17

California Dental Ass'n v. FTC, 526 U.S. 756 (1999) 24

Cantor v. Multiple Listing Service, 568 F. Supp. 424 (S.D.N.Y. 1983) 5

Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101 (7th Cir. 1984) 25

Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) 15, 16

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 8, 9

Commodity Futures Trading Comm'n v. Cheung, No. 93 CIV. 5598, 1994 WL 583169 (S.D.N.Y. Oct. 21, 1994) 8

Commodity Futures Trading Comm'n v. Hunt, 591 F.2d 1211 (7th Cir. 1979) 12

Consolidated Metal Prods., Inc. v. American Petroleum Inst., 846 F.2d 284 (5th Cir. 1988) . . 20

De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212 (1945) 10

DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53 (1st Cir. 1999) 25

FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) 24

FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) 24

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 7

Hosp. Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976) 26

Knutzen v. Eben Ezer Lutheran Housing Ctr., 815 F.2d 1343 (10th Cir. 1987) 11

Lerma v. Univision Commc'ns, Inc., 52 F. Supp. 2d 1011 (E.D. Wis. 1999) 25

Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469 (7th Cir. 2002) 2, 27

National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) 15, 17, 24

NCAA v. Bd. of Regents, 468 U.S. 85 (1984) 16, 24

Ogden Martin Sys. v. Whiting Corp., 179 F.3d 523 (7th Cir. 1999) 1

Oglesby & Barclift, Inc., v. Metro MLS, Inc., 1976-2 Tr. Cas. (CCH) ¶ 61,064,
1976 WL 1309 (E.D. Va. 1976) 5

O'Shea v. Littleton, 414 U.S. 488 (1974) 9, 10, 13

Palda v. Gen. Dynamics Corp., 47 F.3d 872 (7th Cir. 1995) 25

Ransburg Electro-Coating Corp. v. Spiller & Spiller, Inc., 489 F.2d 974 (7th Cir. 1973) 14

San Francisco Baykeeper, Inc. v. Moore, 180 F. Supp. 2d 1116 (E.D. Cal. 2001) 10

Sanner v. Bd. of Trade, 62 F.3d 918 (7th Cir. 1995) 1

Santana Prods., Inc. v. Bobrick Washroom Equip., Inc., 401 F.3d 123 (3d Cir. 2005) 20

Schachar v. American Academy of Ophthalmology, 870 F.2d 397 (7th Cir. 1989) 19

SEC v. Culpepper, 270 F.2d 241 (2d Cir. 1959) 8

SEC v. Keller Corp., 323 F.2d 397 (7th Cir. 1963) 8

SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082 (2d Cir. 1972) 8

Sierakowski v. Ryan, 223 F.3d 440 (7th Cir. 2000) 9

Silver v. New York Stock Exch., 373 U.S. 341 (1963) 24

South Austin Coalition Cmty. Council v. SBC Commc'ns Inc., 274 F.3d 1168 (7th Cir. 2001) 26

Standard Oil Co. v. United States, 221 U.S. 1 (1911) 16

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 8, 10

Stevens v. Northwest Indiana Dist. Council, 20 F.3d 720 (7th Cir. 1994) 10

United States v. American Tobacco Co., 221 U.S. 106 (1911) 17

United States v. Borden Co., 347 U.S. 514 (1954) 10

United States v. Columbia Pictures Indus., Inc., 507 F. Supp. 412 (S.D.N.Y. 1980), *aff'd*, 659 F.2d 1063 (2d Cir. 1981) 25

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) 19

United States v. Multi-List Service, 1990-2 Tr. Cas. (CCH) ¶ 69,267, 1990 WL 252211 (E.D. Mo. 1990) 5

United States v. Nat'l Ass'n of Real Estate Bds., 339 U.S. 485 (1950) 5

United States v. Oregon State Med. Soc'y, 343 U.S. 326 (1952) 7

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 7, 12

United States v. Parke, Davis & Co., 365 U.S. 125 (1961) 7

United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980) 5, 19

United States v. Rockford Mem'l Corp., 898 F.2d 1278 (7th Cir. 1990) 25

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) 10

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 10

Wernsing v. Thompson, 423 F.3d 732 (7th Cir. 2005) 14

Wilk v. American Med. Ass'n, 895 F.2d 352 (7th Cir. 1990) 12, 13, 20

Wooden v. Bd. of Regents, 247 F.3d 1262 (11th Cir. 2001) 9

INTRODUCTION

The United States brought this antitrust case because an association of competitors adopted policies to obstruct competition from innovative brokers. The rules adopted by Defendant National Association of Realtors ("NAR") – a trade association whose members include both traditional, "brick-and-mortar" brokers and their innovative broker competitors – violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

Defendant's motion to dismiss makes three points; all miss the mark. First, this Court has jurisdiction over the Initial VOW Policy despite NAR's assertion that it modified that policy shortly before the United States filed suit. Courts have on many occasions enjoined conduct that had ceased before the United States brought an enforcement action. Second, NAR's VOW policies constitute restraints of trade, despite NAR's protestations to the contrary, because they restrain competition in real estate markets, generally, and the behavior of multiple listing services ("MLSs") and virtual office website ("VOW") operators, in particular. Third, the United States has specifically alleged anticompetitive harm from NAR's Modified VOW Policy. NAR's contrary claim and its assertion of a heightened pleading standard are unfounded.

PROCEDURAL POSTURE

For purposes of a motion to dismiss, the factual allegations in a complaint are accepted as true, and the complaint is construed in favor of the plaintiff. *See, e.g., Sanner v. Bd. of Trade*, 62 F.3d 918, 925 (7th Cir. 1995) (Rule 12(b)(1) challenge to the plaintiff's standing); *Barnes v. Briley*, 420 F.3d 673, 677 (7th Cir. 2005) (Rule 12(b)(6) challenge to the sufficiency of claims). At this stage, courts draw all reasonable inferences in favor of the plaintiff. *See Ogden Martin Sys. v. Whiting Corp.*, 179 F.3d 523, 526 (7th Cir. 1999). Even though NAR has styled its motion as a motion to dismiss, it has improperly injected factual assertions that the Court should

not consider in this context. *See Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 479 (7th Cir. 2002).[1]

FACTUAL BACKGROUND

Buying a home is the most expensive transaction in the lives of many Americans. Real estate brokers and agents, who act as middlemen in these transactions, collect billions of dollars in commissions each year. To protect that revenue stream from the competitive threat posed by innovative brokers seeking to harness the potential of the Internet, NAR adopted policies aimed at eliminating or reducing such competition.

Traditional brokers provide real estate listings to customers by hand, mail, fax, or e-mail. The innovative brokers who are the targets of NAR's policies provide property listings through password-protected Internet sites that NAR refers to as "virtual office websites," or "VOWs." Am. Complaint ¶¶ 2-3, 25-26. VOWs provide information that allows customers to educate themselves at their own pace and on their own schedule about the markets in which they are considering a purchase. By helping customers educate themselves, VOW operators can operate more efficiently than their brick-and-mortar competitors. *Id.* ¶ 27. With lower cost structures,

[1] As discussed below, NAR's argument in Section III of its motion – *i.e.*, that the United States did not properly plead that NAR's Modified VOW Policy will produce anticompetitive effects – turns directly on an improper (and incorrect) factual assertion that the United States alleged that brokers have only withheld their listings from selected VOWs (a selective opt out) and not from all VOWs (a blanket opt out). *See* NAR Memorandum at 19. NAR also makes a number of additional factual assertions that the United States disputes and on which the United States will be prepared to submit evidence at the appropriate time. The additional factual issues that NAR improperly raises include (1) the date on which NAR adopted its Modified VOW Policy, *see id.* at 8 ("the 2003 VOW Policy was rescinded on August 31"); (2) the magnitude of differences between the Initial and Modified VOW Policies, *see id*. at 21 (there are "obvious and material differences between the two Policies"); and (3) the absence of continuing effects of the Initial VOW Policy, *see id.* at 12 ("the [Modified VOW Policy] is the only policy that can have any impact in the marketplace going forward").

some brokers operating VOWs have offered rebates or reduced commissions to their customers. *Id*. A rebate or commission discount of just one percentage point yields substantial savings. Consumers who choose these innovative brokers thus not only receive the benefits of the high-quality, efficient services offered by many VOW operators; they also stand to save significant amounts of money.

Threatened by the broker-members who operate VOWs, NAR's traditional brokers, through NAR, devised a tool to thwart this new mode of competition. Knowing that, to compete effectively, brokers must be able to show customers virtually *all* relevant listings in the MLS system, NAR required its affiliated MLSs to adopt policies that restrict VOW operators' ability to use their Internet websites to deliver listings to their customers. These policies provided a powerful response to the competitive threat because, in a substantial majority of markets, a single NAR-affiliated MLS provides the only available comprehensive compilation of listings. *Id.* ¶ 21.

On May 17, 2003, NAR announced the first iteration of such policies ("Initial VOW Policy"). *Id.* ¶ 31. Among other competition-restricting elements, this policy included an "opt-out" provision that allowed a broker to forbid VOW operators – either some of them (through a "selective" opt out) or all of them (through a "blanket" opt out) – from providing that broker's listings to customers through a VOW. *Id.* ¶¶ 6, 32. Before NAR adopted the Initial VOW Policy, all broker members of an MLS, including all VOW operators, could provide any relevant listing in the MLS to any bona fide customer by the delivery method of their choice. *Id.* ¶ 33. After NAR adopted this policy, all broker members of an MLS retain this right – except VOW operators.

Shortly after NAR adopted the Initial VOW Policy, the United States commenced an antitrust investigation into the policy's permissibility under the antitrust laws, and NAR vigorously defended its legality throughout the course of the investigation. *See* NAR Memorandum at 1. While the United States' investigation caused NAR to postpone the date by which NAR obligated its local Associations of Realtors to implement the Initial VOW Policy, NAR did not caution its local Associations against implementing the Initial VOW Policy earlier, and approximately 200 did so. *See id*. at 1-2; Am. Complaint ¶ 31. Over the next two and a half years, brokers in several NAR-affiliated MLSs exercised their opt-out rights and withheld their clients' listings from VOWs operated by their competitor brokers. *Id.* ¶ 34. In one case, all of the competitors of one VOW-operating broker exercised their blanket opt-out rights, forcing the broker to abandon his website. *Id.*

The United States and NAR engaged in extensive pre-complaint discussions that did not lead to a settlement. Then, when the United States communicated its decision to sue NAR for its effort to stifle competition, NAR changed the name of its policy but retained most of the Initial VOW Policy's anticompetitive terms.[2] On September 8, 2005, the day the United States filed its Complaint, NAR announced these changes. *Id.* ¶ 38.[3] But the Modified VOW Policy continues to restrict the ability of VOW operators to serve their customers, thus continuing the illegal

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[2] The United States alleged that the Initial and Modified VOW Policies contain several other provisions, besides the opt-out provisions, that reduce the competitive threat VOW operators pose to established brokers. Am. Complaint ¶¶ 29, 35-36, 40-41. NAR acknowledges that its motion focuses primarily on the opt-out provisions and that it ignores the other harmful provisions of the Modified VOW Policy. NAR Memorandum at 6 n.8.

[3] NAR refers to this policy as the "Internet Listings Display Policy" or its "2005 ILD Policy." It refers to the Initial VOW Policy as the "Virtual Office Website Policy" or its "2003 VOW Policy."

restraint on competition.[4] *Id*. NAR's Modified VOW Policy still denies innovative brokers the guaranteed right to use their Internet sites to show customers the same set of listings that traditional brokers can provide to customers by any other delivery means. *Id.* ¶ 39. Under both the Initial and Modified VOW Policies, NAR discriminates against these innovative brokers by limiting their ability to use their efficient, Internet-based tools to respond to customer requests for listings.

This litigation concerns the most recent in a series of repeated attempts by dominant groups of brokers to restrict competition they do not like.[5] NAR's policies deny consumers the benefits of the high-quality, low-priced services offered by these efficient brokers. As the products of an agreement among competitors, these policies violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

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[4] NAR has advised its member MLSs not to implement the Modified VOW Policy until this litigation is resolved. *See* Am. Complaint ¶ 38.

[5] *See, e.g., United States v. Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950) (commission fixing); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) (MLS requirement that members maintain an active real estate office open during customary business hours (as well as other restrictions)); *Cantor v. Multiple Listing Service*, 568 F. Supp. 424 (S.D.N.Y. 1983) (MLS rule requiring all brokers to use only uniform MLS yard signs); *Austin Bd. of Realtors v. E-Realty, Inc.*, No. 00-CA-154, 2000 WL 34239114 (W.D. Tex. Mar. 30, 2000) (MLS denial of data for use by broker in operation of its virtual office website); *Oglesby & Barclift, Inc., v. Metro MLS, Inc.*, 1976-2 Tr. Cas. (CCH) ¶ 61,064, 1976 WL 1309 (E.D. Va. 1976) (collective setting of commissions); *United States v. Multi-List Service*, 1990-2 Tr. Cas. (CCH) ¶ 69,267, 1990 WL 252211 (E.D. Mo. 1990) (requiring contribution of 15 listings and approval by competitors as a condition of membership).

ARGUMENT

I. THERE IS A LIVE CONTROVERSY BEFORE THIS COURT

NAR asserts that this Court lacks jurisdiction to adjudicate the United States' request for injunctive relief against the Initial VOW Policy because NAR modified its Initial VOW Policy before the United States filed its Complaint. NAR Memorandum at 8. The essence of NAR's argument is that, by dragging out settlement negotiations until it modified its policy, NAR successfully tricked the United States and deprived the Court of jurisdiction.

But NAR's gambit does not deprive the United States of standing to pursue its claim for injunctive relief, and thus it does not deprive this Court of jurisdiction to consider it. The "general rule" that NAR asserts – that a plaintiff lacks jurisdictional standing if conduct ceases before a case is filed – does not exist. The United States' allegations of a single, continuing combination, NAR's ability and incentive to return to the suspended conduct absent relief, and the existence of present adverse effects establish standing to obtain an injunction against NAR's policies. Moreover, NAR's argument implausibly implies that courts have devised a rule that discourages pre-complaint settlement discussions. Finally, NAR is incorrect to suggest that the partial dismissal it seeks would reduce discovery burdens, because both the Initial and Modified VOW Policies share common purposes and a common origin.

A. The United States has jurisdictional standing to sue for injunctive relief even if some illegal conduct ceased prior to litigation.

1. Courts regularly enter injunctions against conduct that ceased before the government commenced an enforcement action.

Decisions in numerous cases enjoining conduct that ceased prior to the filing of a complaint show that the "general rule" NAR proposes simply does not exist. On the contrary,

"the cessation of violations, whether *before or after* the institution of a suit . . . is no bar to the issuance of an injunction." *Hecht Co. v. Bowles*, 321 U.S. 321, 327 (1944) (emphasis added).

In *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), the Supreme Court found that the United States was "entitled to" an injunction, even though the defendant had abandoned its anticompetitive conduct before the United States commenced its enforcement action. *Id*. at 48. An injunction was appropriate because "courts have an obligation, once a violation of the antitrust laws has been established, to protect the public from a continuation of the harmful and unlawful activities." *Id*.[6]

Here, NAR has instructed its affiliated MLSs to suspend enforcement of its Initial (or Modified) VOW Policy until this litigation has been resolved, *see* Am. Complaint ¶ 38, demonstrating that, as in *Parke, Davis*, the Department's "investigation [and subsequent litigation] was a reason for the discontinuance of the program." 362 U.S. at 48. Under such circumstances, the Court found, it is not appropriate to "lightly infer[] an abandonment of the unlawful activities from a cessation which seems timed to anticipate suit." *Id.*; *see also United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952) ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit . . . .").

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[6] The Supreme Court reiterated this principle in a later proceeding in the *Parke, Davis* litigation. On remand, the district court had found that the defendants conduct would not recur. That finding did not divest the courts of jurisdiction and, when the Supreme Court took *Parke, Davis* a second time, it declared that the government was "entitled to a judgment on the merits" and ordered the district court to "retain the case on the docket" to hear future motions by the United States for injunctive relief. *See United States v. Parke, Davis & Co.*, 365 U.S. 125, 126 (1961).

Likewise, in *SEC v. Keller Corp.*, 323 F.2d 397 (7th Cir. 1963), the Court of Appeals found that jurisdiction and the propriety of the injunction issued by the district court did not turn on a finding that the defendants' securities fraud continued after the SEC filed its complaint. As the court explained, the defendants' past conduct "gives rise to the inference that there was a reasonable likelihood of future violations. And, this is true even though appellants had ceased their illegal activities prior to the commencement of this action." 323 F.2d at 402.[7] NAR's last-minute tweaks to its policy, after asserting for over two and a half years (and counting) that the Initial VOW Policy was legal, leave a "reasonable likelihood" of NAR's return to the policy it claims to have abandoned.

2. The authority cited by NAR does not support the "general rule" it asserts.

To support its assertion of a "general rule" at odds with the Supreme Court's *Parke, Davis* decision and other decisions in law enforcement cases enjoining conduct that ceased before litigation commenced, the best NAR can do is to rely on one Eleventh Circuit case – which does not actually stand for NAR's proposition – and other cases brought by private plaintiffs under citizen-suit provisions of environmental statutes, *see, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), or suits by private plaintiffs to enjoin the application of statutes or government policy. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95

[7] *See also, e.g., SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972) ("It is well settled . . . that cessation of illegal activities in contemplation of an SEC suit does not preclude the issuance of an injunction enjoining violations."); *SEC v. Culpepper*, 270 F.2d 241, 249 (2d Cir. 1959) ("[A]ppellants' cessation of their illegal activities prior to the commencement of this action would not preclude the issuance of an injunction . . . ."); *Commodity Futures Trading Comm'n v. Cheung*, No. 93 CIV. 5598, 1994 WL 583169, at *2-3 (S.D.N.Y. Oct. 21, 1994) (denying motion to dismiss after finding that violations ceased only after "an investigation of the unlawful activity had begun").

(1983). None of the cases upon which NAR relies was a government law enforcement action, and none supports the existence of the general rule NAR proposes.

In *Wooden v. Bd. of Regents*, 247 F.3d 1262 (11th Cir. 2001), a case NAR argues "represents a particularly clear instance of [the] general rule," NAR Memorandum at 9, the court found that the plaintiff lacked standing to seek an injunction against a University of Georgia ("UGA") affirmative action policy because he had been admitted to the university as a transfer student and there was "no likelihood . . . that he will ever again be exposed to UGA's allegedly discriminatory freshman admission process." *Wooden*, 247 F.3d at 1285. The court noted that the university ended the policy before the plaintiff's suit, but the court's observation served only to explain that the plaintiff could not have been affected by, and thus could not have benefitted from, an injunction against the *revised* policy. *Id*. The court did not hold or state that Georgia's modification to its policy would deprive the court of jurisdiction to enter injunctive relief in a suit brought by an appropriate plaintiff.

In each of the remaining cases on which NAR relies, the courts denied the plaintiff's requested injunctive relief not simply because the defendant had ceased the challenged conduct before the plaintiff filed its complaint, but because each plaintiff failed to establish the "irreducible constitutional minimum" of jurisdictional standing, an "injury in fact" that is traceable to defendant's conduct and is redressible by the requested injunction. *See Steel Co.*, 523 U.S. at 102-03.[8] Here, by contrast, the United States is an appropriate plaintiff acting to

[8] Three of the cases on which NAR relies concluded that the plaintiff's allegations of future harm and prospects of future injury were too speculative to warrant an injunction against government policies, because the plaintiff in each was not sufficiently likely to personally encounter the challenged policy in the future. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-09 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 493-97 (1974); *Sierakowski v. Ryan*, 223 F.3d 440,

redress "injury to its sovereignty arising from violation of its laws," *see Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000), and to protect the public interest in the enforcement of the antitrust laws. *See United States v. Borden Co.*, 347 U.S. 514, 518-19 (1954). Under these circumstances, this Court possesses jurisdiction to enjoin NAR from enforcing its Initial VOW Policy. *See United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 342-43 (1897) ("It is . . . argued that the United States have no standing in court to maintain this bill . . . . We think that [§4 of the Sherman Act] invests the government with full power and authority to bring such an action as this, and, if the facts be proved, an injunction should issue."); *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 221 (1945) ("[N]o one questions the jurisdiction of the District Court to enter an appropriate injunction against future conduct violative of the Anti-Trust Acts.").

3. The United States' allegations confer standing to pursue its claim for injunctive relief.

To the extent the authority cited by NAR supports a "general rule" concerning jurisdiction, it is that a plaintiff possesses standing to maintain a case for injunctive relief if the plaintiff alleges (a) "a continuing violation," *Steel Co.*, 523 U.S. at 108, (b) "the imminence of a future violation," *id*., or (c) "continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). The allegations in the United States' Amended Complaint support this Court's jurisdiction on all three grounds.

444-45 (7th Cir. 2000). In another, the court found that the injury suffered by the plaintiff was not traceable to the challenged conduct. *Stevens v. Northwest Indiana Dist. Council*, 20 F.3d 720, 724 n.11 (7th Cir. 1994). And in the remainder, the court determined that an injunction could not redress the environmental injury suffered by the plaintiff. *Steel Co.*, 523 U.S. at 108-09; *Berry v. Farmland Indus., Inc.*, 114 F. Supp. 2d 1150, 1154 (D. Kan. 2000); *San Francisco Baykeeper, Inc. v. Moore*, 180 F. Supp. 2d 1116, 1120-21 (E.D. Cal. 2001).

The Amended Complaint alleges that the Initial and Modified VOW Policies are part of a "single, ongoing contract, combination or conspiracy," Am. Complaint ¶ 4, and that the Modified VOW Policy "continues" the alleged antitrust violation that began with the Initial VOW Policy. *Id*. ¶ 38. The United States alleged further that the two versions of the policy constitute one continuing conspiracy among NAR and its member brokers to restrain competition (as would any further revisions to the policy that are "equivalent" in their harmful effect on competition):

> NAR's adoption of the above-referenced provisions in its Initial VOW Policy and its Modified VOW Policy, or equivalent provisions, constitutes a contract, combination, or conspiracy by and between NAR and its members which unreasonably restrains competition in brokerage service markets throughout the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Am. Complaint ¶ 44. Moreover, the Amended Complaint alleges that:

- "*both* the Initial VOW Policy and the Modified VOW Policy[] thus *prevent brokers from guaranteeing customers access* through the Internet to all relevant listing information," ¶ 42 (emphasis added);
- "Unless permanently restrained and enjoined, defendant *will continue to engage in conduct that restricts competition* . . . in violation of . . . the Sherman Act," ¶ 43 (emphasis added); and
- "The aforesaid contract, combination, or conspiracy *has had and will continue to have anticompetitive effects*," ¶ 45 (emphasis added).

Thus, NAR's premise – that its illegal conduct has ceased – finds no support in the Amended Complaint, which alleges only a change in form, not a change in substance. *See Knutzen v. Eben Ezer Lutheran Housing Ctr.*, 815 F.2d 1343, 1355-56 (10th Cir. 1987) ("Appellants also have a strong argument that the appellees never truly ceased the [illegal] conduct, but that the [conduct] merely changed form . . . [and, t]hus, the appellees never actually did cease their objectionable conduct and the appellants' claims are not moot").

NAR also asserts that the United States "has not alleged, and cannot allege, that there is any threat that NAR plans to return to the abandoned [Initial] VOW Policy in the future." NAR Memorandum at 11. But the Amended Complaint alleges that NAR "will continue to engage in conduct that restricts competition from innovative brokers." Am. Complaint ¶ 43. Indeed, the Amended Complaint alleges that NAR adopted its Modified VOW Policy only after the United States informed NAR of its plans to file its Complaint, *see id.* ¶ 4, and NAR continues to defend the permissibility under the antitrust laws of the selective opt-out provision. *See* NAR Memorandum at 12-18; *cf. Commodity Futures Trading Comm'n v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979) (basing a finding that future violations were likely and that an injunction was appropriate in part on the fact that defendants "consistently maintained that their conduct was blameless"). Absent an injunction here, NAR could restore its Initial VOW Policy – or at least revive any suspended components – immediately after the cloud of litigation is lifted. As in *Parke, Davis*, "[t]here is no evidence that . . . ceasing its [illegal] efforts . . . was forced upon [NAR] by business and economic conditions in its field." 362 U.S. at 47.

In *Wilk v. American Med. Ass'n*, 895 F.2d 352, 367 (7th Cir. 1990), the Court of Appeals upheld this court's finding that an injunction was justified by the likelihood that the American Medical Association ("AMA") would return to its illegal boycott of chiropractors. This court recognized that, like NAR, the AMA faced pressure from its membership to return to its illegal conduct and that, without an injunction, it would inevitably bend to its members' wishes. *Id.* ("[T]he AMA's 'present assurances were good only until the next chiropractic battle.'" (citation omitted)). Similarly, without an injunction, the environment in which "traditional brokers who are concerned about competition from Internet-savvy brokers," *see* Am. Complaint ¶ 3, could

again lead NAR to respond to those concerns and return to the policies it claims to have abandoned. *See id.* ¶ 43. The Amended Complaint alleges precisely the same trade association conduct that, in *Wilk*, established a likelihood of recurrence.

Finally, the United States has alleged present adverse effects directly caused by the Initial VOW Policy, including asserting that two hundred local Associations of Realtors had adopted the Initial VOW Policy, *see* Amended Complaint, ¶ 31,[9] and that the Initial VOW Policy suppressed competition from innovative brokers. *See id*. ¶¶ 34-35, 42. The effects of this anticompetitive conduct "will continue to" reverberate in the future. *See id.* ¶ 45. Thus, even if NAR had completely abandoned its conduct with no possibility of resurrection, these allegations of ongoing adverse consequences would be sufficient to confer standing on the United States to obtain relief intended to redress the harm to competition caused by the Initial VOW Policy. *See O'Shea*, 414 U.S. at 495-96.[10]

[9] Although "NAR advised its member boards," on the day the United States filed its Complaint, "to suspend application and enforcement" of the Initial VOW Policy, *see* Am. Complaint ¶ 38, "advis[ing]" to suspend is not "revoking."

[10] The United States has requested relief intended to undo the chilling effect on competition created by the Initial VOW Policy and to provide assured protection to the class of competition that the Initial VOW Policy impeded. *See* Am. Complaint, Request for Relief ¶ d ("that the defendant be restrained and enjoined from requiring or permitting its member boards or the MLSs with which they are affiliated to adopt rules that restrict – or condition MLS access or MLS participation rights on – the method by which a broker interacts with his or her customers, competitor brokers, or other persons or entities"); *see also Wilk v. American Med. Ass'n*, 895 F.2d 352, 366-71 (7th Cir. 1990) (prospective relief ordered to, *inter alia*, redress the lingering effects of association group boycott activity).

4. NAR's argument illogically implies that courts have adopted a "general rule" that discourages settlement discussions.

As the prior discussion shows, the "general rule" NAR claims is not to be found in the cases. Of course this is not the general rule: NAR necessarily implies that courts created a rule with foreseeable, illogical consequences for the administration of justice. The United States initiated this action against NAR only after lengthy settlement discussions, *see* Joint Initial Status Report, § K, and after notice by the United States to NAR that the United States would be filing its Complaint. *See* Am. Complaint ¶ 38. If a defendant could effectively immunize itself from suits for injunctive relief by racing to make last-minute changes to its conduct before suit was filed, which could be reversed after litigation ceased, governmental plaintiffs would avoid engaging in settlement discussions before initiating suit. "[S]ettlements are judicially encouraged and favored as a matter of sound public policy." *Ransburg Electro-Coating Corp. v. Spiller & Spiller, Inc.*, 489 F.2d 974, 978 (7th Cir. 1973) (citing *Williams v. First National Bank*, 216 U.S. 582 (1910)). NAR's rule would force the United States to forgo pre-complaint settlements in favor of a "sue first and ask questions later" policy. It is unreasonable for NAR to suggest that courts have created, or that this Court should establish, a rule with such an effect.[11]

[11] If adopted, the rule that NAR proposes would also deprive courts of jurisdiction to enter many antitrust consent decrees. After discussion with the government, investigated parties sometimes will stop their allegedly illegal activities and then agree to enter into a consent decree that prohibits them from returning to the just-abandoned conduct. Courts are required to approve such consent decrees under the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h). Although courts are "obliged" to police subject matter jurisdiction *sua sponte*, *see Wernsing v. Thompson*, 423 F.3d 732, 743 (7th Cir. 2005), no court has refused to enter such a decree on the grounds that NAR posits – *i.e.*, that the Court lacks Article III jurisdiction because the conduct ceased before the suit was filed.

B. Dismissing part of the United States' claim would not save significant resources.

NAR argues that resources would be saved by dismissing the claim about the Initial VOW Policy. NAR Memorandum at 12. But NAR modified its policy only because of this impending lawsuit. Thus, the reasons for the Initial VOW Policy are the reasons for the modified version, tempered only by a desire to avoid a lawsuit. Because "[k]nowledge of intent may help the court to interpret facts and to predict consequences," *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918), the United States would present evidence of the origins of both policies even at a trial at which only the Modified VOW Policy was directly at issue.

II. NAR'S POLICIES CONSTITUTE AN UNREASONABLE RESTRAINT OF TRADE

Having conceded that the VOW Policies "are the product of a combination among NAR's members," NAR Memorandum at 12, NAR nevertheless argues that this product does not restrain trade. NAR maintains that the broker opt-out provisions in the Initial and Modified VOW Policies are not "restraints" because the decision whether to opt out is left to the discretion of an individual broker, *i.e.*, the opting-out broker is not "restrained."[12] But NAR can make this argument only by misconstruing the term "restraint of trade" as that term is used in the Sherman Act.[13] Agreements among members of a professional association that govern the way in which members compete with one another are horizontal restraints of trade. *See National Soc'y of*

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[12] The scope of NAR's argument is dangerously broad. If NAR were correct, then the Sherman Act would not even be implicated if NAR adopted a policy that allowed brokers to withhold listings from "any broker who charges less than a six percent commission."

[13] *See* 15 U.S.C. § 1 ("Every contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . , is declared to be illegal.").

Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978). By collectively changing the rules of the game to allow certain favored brokers to deprive disfavored brokers of the full use of the MLS, the opt-out provisions limit, and thus "restrain," competition between traditional and VOW-operating brokers. In any case, even under NAR's mechanical reading of "restraint," its policies are "restraints" because MLSs must adopt them and because VOW operators are restrained from competing as they otherwise would.

A. NAR misunderstands the meaning of "restraint of trade."

1. "Restraint of trade" means restraint on competition, not on competitors.

The Supreme Court has for many years interpreted the word "restraint" broadly in the context of the Sherman Act. As Justice Brandeis noted in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918), "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *See also NCAA v. Bd. of Regents*, 468 U.S. 85, 98 (1984) ("every contract is a restraint of trade"); *Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1283 (7th Cir. 1983) (noting that Section 1's prohibition of every contract, combination, or conspiracy, in restraint of trade is "literally all encompassing").

Because the notion of a "restraint" encompasses almost any sort of agreement, the Supreme Court long ago made clear that there had to be some limits, or else the Sherman Act could be read to bar all commercial dealings. But the manner in which the Court resolved the problem was not by artificially narrowing the word "restraint" to apply only to a particular type of conduct; rather, the Court held that the Sherman Act, properly interpreted, bars only "unreasonable" restraints of trade. *See Standard Oil Co. v. United States*, 221 U.S. 1, 59-62

(1911). Restraints actionable under the Sherman Act are – like the opt-out provisions – those that result in harm to competition. As the Supreme Court has explained:

> [t]he term "restraint of trade" in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular *economic consequence*, which may be produced by quite different sorts of agreements in varying times and circumstances.

Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731 (1988) (emphasis added); *see also National Soc'y of Prof'l Eng'rs*, 435 U.S. at 694-95 (1978) (the Sherman Act "prohibits unreasonable restraints on *competition*") (emphasis added); *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911) (actionable restraints of trade are those that "unduly restrict[] competition . . . either because of their inherent nature or effect, or because of the evident purpose of the acts").

2. NAR's policies restrain trade by denying innovative brokers full use of comprehensive MLS listings.

Effective competition in the real estate marketplace depends on having access to – and the ability to show customers – virtually all listings of homes for sale. *See* Am. Complaint ¶¶ 21, 23. Typically, the local MLS provides the only comprehensive source of listings, and no MLS member broker can withhold listings from use by a traditional broker. *Id*. ¶¶ 21, 33. But if even a single broker takes advantage of NAR's anti-VOW "opt out," thus restricting a VOW operator's use of that broker's listings, the VOW operator's ability to compete is significantly handicapped. *See id*. ¶ 6 ("the policies allow traditional brokers to block the customers of web-based competitors from using the Internet to review the same set of MLS listings that the traditional brokers provide to their customers.").

Delegating the exercise of the opt-out right to individual members does not absolve NAR of liability for creating the restraint and the mechanism for its enforcement. In *Associated Press v. United States*, 326 U.S. 1 (1945), the Supreme Court found that a rule similar to NAR's opt-out provisions constituted a restraint of trade. The by-laws at issue in *Associated Press* provided that any member could veto a local competitor from joining the association. *Id*. at 10-11. Exercise of the veto right was – like a broker's exercise of opt-out rights – left to the sole discretion of an individual member. *Id*.

Associated Press held that it was a restraint of trade for an organization of competitors with market power to collectively give each individual member power to exclude a competitor. *Id*. at 12. The Court did so in spite of the AP's argument – essentially identical to NAR's – that its rule merely permitted its members the freedom to associate with any publishers they pleased. *Id*. at 14-15. The Supreme Court found that it was "obviously fallacious" to view the AP's veto right as merely providing members "full freedom" over their property. *Id*. at 15-16. Rather, the publisher members of the AP "pooled their economic and news control power," and "exert[ed] that power," through the rules creating the veto right, to curtail competition. *Id*. at 16. It is equally fallacious for NAR to assert that, because its opt-out provisions provide some brokers additional "freedom of action," *see* NAR Memorandum at 13, those policies do not restrain trade. Like the members of the AP, NAR's members pool their listings, and exert their combined power, through adoption of the opt-out rights, to curtail competition from VOW-operating brokers.

NAR evidently accepts that the veto right at issue in *Associated Press* restrained trade and attempts to distinguish the veto right from the opt-out provision on the ground that each

individual AP member held the power to block a competitor's access to news generated by all other publishers, while NAR's opt-out provisions apply only to a broker's "own" listings. NAR Memorandum at 18. But such a distinction would be relevant only to whether the restraint here is as bad as the one condemned in *Associated Press*, not to whether the opt-out rule is a "restraint" at all. Moreover, the asserted distinction does not exist here. As alleged in the Amended Complaint, denying the use of even a portion of the listings severely handicaps competition in much the same way as a complete veto over access to the joint venture. Thus, while a broker under NAR's policies cannot block a competitor from showing *all* MLS listings on its VOW, the opt-out constitutes an effective veto of competition because access to *comprehensive* MLS listings is critical to the ability of brokers to compete.[14] *See* Am. Complaint ¶¶ 21, 23.

NAR also argues that the decision in *Schachar v. American Academy of Ophthalmology*, 870 F.2d 397 (7th Cir. 1989), supports its interpretation of the meaning of "restraint of trade." NAR Memorandum at 14-15. In *Schachar*, an industry association issued a press release declaring a particular medical procedure "experimental." 870 F.2d at 398. Because the association did not force doctors to stop performing the procedure, however, the Court found

[14] MLSs are a good example of a service subject to network effects, because their comprehensiveness determines their utility. *See United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1373 n.42 (5th Cir. 1980) ("[T]he larger the [MLS], the more effectively it may operate."). With products or services characterized by network effects, such as telephone systems, "an individual consumer's demand to use (and hence her benefit from) the telephone network . . . increases with the number of other users on the network whom she can call or from whom she can receive calls." *United States v. Microsoft Corp*., 253 F.3d 34, 50 (D.C. Cir. 2001) (citation and quotation omitted). Of course, as the network's size and effectiveness increases, the more important MLS participation becomes to a broker, and "the greater the danger of anticompetitive exclusions becomes." *Realty Multi-List*, 629 F.2d at 1373 n.42.

there was no restraint. *Id*. NAR analogizes that, because its policies do not require brokers to withhold their listings from VOW operators, it, too, has not restrained trade. NAR Memorandum at 16-17. But NAR's creation of the opt-out right is much more than the collective expression of an opinion that VOWs are "experimental."[15] Unlike in *Schachar*, NAR created a regulatory regime allowing its members to "prevent[] [VOW operators] from doing what [they] wish[]," *id*. at 399, which is to provide customers access via the Internet to the same comprehensive set of listings that customers can obtain if they work with traditional brokers.

NAR's reliance on *Austin Board of Realtors v. E-Realty, Inc.* is similarly misplaced because the court never reached a decision on the merits about whether an MLS's discriminatory policy constituted a restraint. There, the court initially issued a preliminary injunction prohibiting the Austin Board of Realtors from withholding MLS listings from a VOW operator seeking to enter the Austin market. *E-Realty*, No. 00-CA-154, 2000 WL 34239114, at *5 (W.D. Tex. Mar. 30, 2000). The court found that the VOW operator was likely to succeed on the merits

[15] NAR's citation to *Wilk v. American Med. Ass'n*, 895 F.2d 352 (7th Cir. 1990), is misleading. The AMA did not, as NAR states, "change the rule to permit members to refer patients to a chiropractor 'if the physician believes that the referral is in the patient's best interests.'" NAR Memorandum at 15 (quoting *Wilk*, 895 F.2d at 356). In fact, the AMA completely eliminated the ethical rule found to constitute a group boycott and did not adopt a new rule. It was the complete abandonment of *any* rule that ended the boycott. 895 F.2d at 356. NAR's opt-out policy is similarly much more of a detrimental restraint on competition than a marketing campaign about the safety of a competing product (as in *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123 (3d Cir. 2005)) or a decision not to grant trade association certification to a particular manufacturing design, when that decision did not bar customers from accessing the product (as in *Consolidated Metal Prods., Inc. v. American Petroleum Inst.*, 846 F.2d 284 (5th Cir. 1988)). NAR cites both of those cases in its no-restraint argument as if to suggest that NAR's VOW policies are analogous to them. But in neither *Santana* nor *Consolidated Metal* did a trade association dictate the way in which members were allowed to compete with one another, as NAR does through its VOW Policies.

of its antitrust claim because the delivery of listings over the Internet was "equivalent" to more traditional delivery means such as a fax or e-mail, and the Austin Board could not adequately justify the discriminatory treatment of the VOW operator. *Id.* at *4. The court also found that denial of MLS access would cause irreparable harm to the VOW operator, and that issuance of the preliminary injunction would advance the public interest "in faster, more efficient and lower cost real estate services." *Id*. at *5.

After the court entered its preliminary injunction, the Austin Board adopted new rules under which the VOW operator's "access [to the MLS] cannot be terminated," and then moved the court to dissolve the preliminary injunction. *See Austin Bd. of Realtors v. E-Realty, Inc.*, No. 00-CA-154, Sept. 13, 2000 Order (Exh. A to NAR Memorandum) at 3. Based on the court's decision to grant the Austin Board's motion and lift the preliminary injunction, NAR suggests that the *E-Realty* court found that no restraint of trade remained. NAR Memorandum at 16. The court said no such thing. While concluding that the revised policy no longer threatened the VOW operator with immediate irreparable injury, *E-Realty*, September 13, 2000 Order at 4, the court also refused to dismiss the VOW operator's antitrust claim, finding that the "underlying question remains" of whether it "is anticompetitive" for brokers to have "the option not to share their listings" with the VOW operator. *Id*. at 5. This is exactly the issue presented in the instant case.[16]

[16] The *E-Realty* court never resolved this issue as the parties settled the case shortly after the court issued its September 13, 2000, order.

B. NAR's policies "restrain" MLSs and innovative brokers even under NAR's cramped interpretation of the Sherman Act.

Even under NAR's unduly narrow interpretation of "restraint of trade," the opt-out provisions in its VOW Policies restrain trade by requiring local Associations of Realtors to adopt conforming policies and by forbidding members from using VOWs in the manner they desire.

1. MLSs are restrained by NAR-mandated policies.

NAR *requires* all of its affiliated MLSs (*i.e.*, those owned by NAR's local Associations of Realtors) to incorporate the VOW policies as a whole, including the opt-out provisions, into their rules. Am. Complaint ¶¶ 31, 38. Thus, as a factual matter, even under NAR's interpretation of the word "restraint," the policies restrain. Every local MLS is "restrained" from adopting MLS rules that would allow VOWs to compete on equal terms.[17]

2. NAR's broker members are restrained by NAR-mandated policies.

NAR's policies may not restrain the traditional brokers who dominate NAR,[18] but they certainly restrain the innovative brokers who might upset the *status quo*. Brick-and-mortar brokers have not been restrained from delivering listing information to their customers in their manner of choice. And brick-and-mortar brokers are – as NAR notes – free to opt out or not opt

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[17] *See* Initial VOW Policy (Exh. 1 to Affidavit of Laurene K. Janik ("Janik Aff."), submitted with NAR's motion to dismiss), § I.4 ("MLSs may not adopt rules or regulations that are more *or less restrictive* than . . . these policies." (emphasis added)); Modified VOW Policy (Exh. 2 to Janik Aff.), § I.7 ("MLSs may not adopt rules or regulations that are inconsistent with these policies.").

[18] That NAR can blithely assert that its opt-out provisions "impose no restraints whatsoever on any of NAR's members," NAR Memorandum at 12, speaks volumes about how it views its role to be the protection of the interests of traditional brick-and-mortar brokers. Its identification with these brokers seems so complete that it cannot perceive the obvious restrictions on the actions of VOW operators, who are themselves broker members of NAR.

out of having their listings delivered via a rival's website. But that rival is not free to deliver listing information to its customers in its manner of choice – the Internet. That broker is forbidden from delivering a listing through the Internet without the permission of the listing broker. Moreover, if the innovative broker competes using its VOW, by delivering complete listings in the face of an "opt-out," the innovator faces NAR-specified enforcement action.[19] Indeed, in *Schachar*, the Court of Appeals recognized that, in trade association cases, a crucial question is whether the agreement at issue involves "enforcement devices." 870 F.2d at 399. The innovative VOW-operating member of NAR is thus "restrained" in any sense of the word.

The restraint on competition is even clearer in this light: customers want "information about all listed properties." Am. Complaint ¶ 21, *see id.* ¶ 23. For innovative brokers to compete effectively for customers, they must be able to assure customers that they can provide access through their websites to the same listings that the customers can obtain from all other brokers.[20] The mere threat of opt out contained in NAR's rules prevents innovative brokers – and no others – from competing for customers by making this assurance. As the Amended

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[19] Appendix A to the Initial VOW Policy (Exh. 1 to Janik Aff.) expressly prescribes sanctions for brokers who do not abide by the terms of the Policy. *See* Am. Complaint ¶ 37. While the Modified VOW Policy no longer contains an explicit sanction, NAR's MLS rules, which its local Associations of Realtors are obligated to adopt, *see id*. ¶ 22, provide for such sanctions. *See, e.g.*, NAR's 2006 "Handbook on Multiple Listing Policy," Part 2, § F.1 (providing for the imposition of sanctions upon brokers determined to have violated MLS rules).

[20] NAR may claim that its policies do not restrain VOW operators from delivering complete MLS listings to customers by hand, mail, fax or e-mail, *i.e.*, the brick-and-mortar methods of delivery available to other brokers. But this merely highlights that the VOW Policies deny VOW-operating brokers the right to compete by using their comparative advantage – the ability to deliver complete listings in the manner their customers prefer.

Complaint alleges, this assurance is a meaningful form of competition, and there is no question that it is restrained by the opt-out provisions. *See id.* ¶¶ 21, 23 & 42.[21]

III. THE AMENDED COMPLAINT ADEQUATELY ALLEGES THAT NAR'S MODIFIED VOW POLICY VIOLATES THE ANTITRUST LAWS

NAR's final argument is that the United States has failed to meet its burden of pleading that the Modified VOW Policy will produce anticompetitive effects because it "has provided no factual basis or economic theory to support its conclusory allegation that the [Modified VOW Policy] will produce the same effects in the marketplace that plaintiff asserts the [Initial VOW Policy] would have produced." NAR Memorandum at 19. NAR specifically asserts that all of the United States' allegations of anticompetitive effect are based on the exercise by brokers of the selective opt-out (opting out of a particular VOW) provision of the Initial VOW Policy, "an opt out right that does not exist under the [Modified VOW Policy]," which has only a blanket opt out (opting out of all VOWs). *Id*. Thus, NAR's argument depends on a claim that the United States has not alleged harm from a blanket opt out.

NAR is wrong both as a matter of law and as a matter of fact.

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[21] NAR also asserts that differences between its opt-out provisions and the rules at issue in a number of other Section 1 cases (none of which addresses a case at the motion to dismiss stage) compel a finding that the opt-out provisions do not restrain trade. In those cases, as NAR characterized them, the Supreme Court found antitrust violations only in "rules or other actions that compel the conduct of [the membership association's] members or limit their independent freedom of action." NAR Memorandum at 13-14 (citing *NCAA v. Bd. of Regents*, 468 U.S. 98 (1984); *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963)). In essence, NAR makes the illogical claim that because the rules condemned in these cases have characteristics that are different in some respects from NAR's VOW Policies, NAR's VOW Policies are not an antitrust violation. Of course, NAR's claim says nothing about whether its rules also restrain trade. The discussion above makes it clear that they do.

A. The United States has exceeded its pleading burden.

Contrary to NAR's argument,[22] the United States has exceeded its burden of pleading a "short and plain statement of the claim showing that [it] is entitled to relief" in alleging that the opt-out provision in NAR's Modified VOW Policy will produce anticompetitive effects.[23] Fed. R. Civ. P. 8(a). The Amended Complaint alleges specifically that the opt-out provision "allows

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[22] NAR bases its challenge to the adequacy of the United States' allegations of anticompetitive effects on a series of clearly distinguishable cases. Although, as discussed in this section, the United States has unquestionably alleged facts to support its assertion that the opt-out provision in NAR's Modified VOW Policy will produce anticompetitive effects, NAR cites cases in which the plaintiff alleged *no facts* relating to an essential element of its cause of action. *See Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1109 (7th Cir. 1984) (finding an "absence of any allegation, either direct or inferential, of an anticompetitive effect" and cautioning against granting motions to dismiss in antitrust cases); *Palda v. Gen. Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995) (determining that the plaintiff "failed to plead any facts relating to" one essential element of its breach of contract claim); *Lerma v. Univision Commc'ns, Inc.*, 52 F. Supp. 2d 1011, 1026 (E.D. Wis. 1999) (finding that the plaintiffs failed to allege any misuse of monopoly power "at all"). Moreover, while NAR does not and cannot allege any implausibility in the United States' claims, it also cites cases in which the plaintiff's antitrust theories were so implausible the court found additional explanation to be necessary. *BCB Anesthesia Care, Ltd. v. Passavant Mem'l Area Hosp. Ass'n*, 36 F.3d 664, 669 (7th Cir. 1994) (concluding that "[h]ow one hospital staffs its needs is so unlikely to be within the ambit of section 1" that additional factual allegations were necessary); *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56-57 (1st Cir. 1999) (finding it "highly implausible" that defendants would conspire to raise prices for defendants' member laboratories, and stating that "improbability is ample reason for the court to demand something more than mere conclusions as to conspiracy").

[23] It is clear that Section 1 of the Sherman Act, 15 U.S.C. § 1, reaches prospective anticompetitive effects. As NAR itself recognizes, *see* NAR Memorandum at 9 n.9, Section 4 of the Sherman Act empowers the United States to bring enforcement actions "*to prevent* and restrain" violations of the Sherman Act. 15 U.S.C. § 4 (emphasis added). In *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278 (7th Cir. 1990), Judge Posner also specifically recognized that Section 1 "prevent[s] transactions *likely to* reduce competition substantially." *Id.* at 1283 (emphasis added). The United States has thus sued under Section 1 and obtained injunctive relief on the basis of a showing that the defendants' transaction or conduct was likely to produce anticompetitive effects. *See, e.g., United States v. Columbia Pictures Indus., Inc.*, 507 F. Supp. 412, 426-32 (S.D.N.Y. 1980), *aff'd*, 659 F.2d 1063 (2d Cir. 1981).

brokers to direct that their clients' listings not be displayed on any competitors' Internet site," and that this provision, "[w]hen exercised . . . prevents a broker from providing over the Internet the same MLS information that brick-and-mortar brokers can provide in their offices." Am. Complaint ¶ 39. As a result, brokers operating efficient, Internet-intensive brokerages face increased "business risk[s] and other costs," and cannot "guarantee[] customers access through the Internet to all relevant listing information." *Id*. ¶ 42. By restraining competition from brokers operating VOWs, the Amended Complaint alleges, NAR's policies "ha[ve] had and will continue to have anticompetitive effects," including "suppressing technological innovation," reducing competition among brokers "on price and quality," and "raising barriers to entry." *Id*. ¶ 45.

No heightened pleading requirements apply to complaints alleging antitrust violations. *South Austin Coalition Cmty. Council v. SBC Commc'ns Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001). As the Supreme Court has said, "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hosp. Bldg. Co. v. Trustees of Rex Hosp.,* 425 U.S. 738, 746-47 (1976) (citation omitted) (reversing grant of motion to dismiss).

The Amended Complaint put NAR on notice that it alleges that both opt-out provisions have produced or will produce anticompetitive effects, as is required. *See Bennett v. Schmidt*, 153 F.3d 516, 518-19 (7th Cir. 1998) ("Defendants received notice that [the plaintiff] believed that their refusal to hire her was racial discrimination; that is all the notice a complaint has to convey.").

B. The United States has alleged the exercise by brokers of the Initial VOW Policy's "blanket" opt-out right.

In the Amended Complaint, the United States alleged that brokers in several markets "have already exercised their opt-out rights" under the Initial VOW Policy, and that "[i]n at least one . . . instance, an innovative broker discontinued operation of his website because all of his competitor brokers had opted out." Am. Complaint ¶ 34. NAR restates this allegation but inserts the word "selective" before "opt-out." NAR Memorandum at 7-8 ("Plaintiff claims that, in those markets in which the 2003 VOW Policy was implemented, brokers exercised their *selective* opt-out right . . . . plaintiff alleges a single instance in which 'all' brokers competing with an 'innovative broker' opted out *with respect to him*, 'making him unable to effectively serve his customers through operation of his site.' According to plaintiff, instances of brokers exercising their *selective* opt-out rights . . . ." (emphasis added, citation omitted)); *see also id*. at 20. Because the Initial VOW Policy included both selective and blanket opt-out provisions, NAR's insertions constitute a new factual assertion – and one that is incorrect.[24] Moreover, NAR improperly is asking this Court to rely on its factual assertion in a motion to dismiss, rather than arguing the allegations of the Complaint, as contemplated in Rule 12(b)(6).[25]

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[24] NAR's confusion is to some extent understandable, as a selective opt out and a blanket opt out are indistinguishable in markets in which only one broker operates a VOW, as either decision would withhold listings from only one competitor. This fact also illustrates how, when a broker exercises any form of opt-out right – whether selective or blanket – the impact on any target of the opt out is identical: the VOW operator cannot use his or her VOW to deliver the broker's listings to customers.

[25] *See Loeb Indus., Inc. v. Sumitomo Corp*., 306 F.3d 469, 479 (7th Cir. 2002) ("Rule 12(b)[(6)] requires that if the district court wishes to consider material outside the pleadings in ruling on a motion to dismiss, it must treat the motion as one for summary judgment and provide each party notice and an opportunity to submit affidavits or other additional forms of proof." (citation omitted)). The wisdom of this requirement is illustrated in this case, where NAR

Solely to correct NAR's misstatement of fact and to make clear how NAR's argument is based on a factual assertion not found in the Amended Complaint, the United States submits the opt-out forms that brokers in Emporia, Kansas completed by selecting "Blanket VOW Opt Out." *See* Exhibit A to the attached Declaration of David C. Kully.[26] Thus, these brokers exercised a blanket opt out, available under both the Initial and Modified VOW Policies, to restrain competition by forcing their more efficient competitor to "discontinue[] operation of his website." Am. Complaint ¶ 34.

CONCLUSION

For the foregoing reasons, NAR's motion to dismiss should be denied.

Respectfully submitted,

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included a factual allegation in its motion to dismiss – despite having done no discovery – and the allegation is flat wrong.

[26] The United States offers these materials solely for the purpose noted. This information does not necessarily constitute all of the evidence that the United States would proffer if this motion were transformed into a summary judgment motion.