No. 21-55164

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE PLS.COM, LLC,
Plaintiff-Appellant,

v.

THE NATIONAL ASSOCIATION OF REALTORS, ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
(JUDGE JOHN W. HOLCOMB)

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST

The United States has primary responsibility for enforcing the federal antitrust laws and a strong interest in their correct application. The United States also has a significant interest in preventing anticompetitive conduct in the real-estate industry. Since the early 2000s, the United States has investigated and challenged rules and practices of Defendant The National Association of Realtors ("NAR") and of multiple listing services. *E.g.*, *United States v. NAR*, No. 1:05-cv-5140 (N.D. Ill. 2005); *United States v. Consolidated Multiple Listing Service, Inc.*, No. 3:08-cv-01786-SB (D.S.C. 2008); *United States v. Multiple Listing Service of Hilton Head Island, Inc.*, No. 9:07-cv-3435-SB (D.S.C. 2007); *see also Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011).

The United States also has a pending consent judgment with NAR, *United States v. NAR*, No. 1:20-cv-3356 (D.D.C. 2020). That consent judgment does not encompass the conduct challenged here—NAR's Clear Cooperation Policy. 2-ER-62.[1]

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[1] On the same day the United States filed the proposed consent judgment, it closed an investigation into the Policy. 2-ER-76. "No

We take no position on the merits of PLS's antitrust claims or on the truth of its factual allegations (which is accepted on a motion to dismiss), but file this brief because the district court appears to have committed several errors of law that could adversely affect antitrust enforcement well beyond the instant context.

First, the district court appears to have adopted a rigid legal rule that a private antitrust plaintiff cannot allege harm to competition without alleging immediate harm to downstream, end-user consumers. But no legal rule requires allegations of downstream harm in all cases, and allegations of downstream harm are not required in the circumstances here where the anticompetitive conduct is directed at market intermediaries (real estate brokers and agents) acting as agents on behalf of sellers.

Second, while the district court did not definitively specify the form the anticompetitive effect on downstream consumers must take, parts of the opinion indicate PLS had to allege increased prices or

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inference should be drawn, however, from the Division's decision to close its investigation into these rules, policies or practices not addressed by the consent decree." *Id.*

reduced output. That proposition is legally incorrect because there are more types of cognizable anticompetitive effects, including reductions in quality, consumer choice, innovation, and harm to the competitive process.

Third, the district court appears to have misread *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) (*Amex*), as setting forth two legal requirements when a defendant operates a two-sided platform: (i) the plaintiff must define the relevant market as two-sided; and (ii) the plaintiff must allege separate injuries to "participants on both sides of the market." Both propositions are legally incorrect. *Amex* does not require defining a two-sided market here as a matter of law. Moreover, even if the relevant market was two-sided, *Amex* does not require a plaintiff to allege separate harm to both sides of the market to state a claim.

We file this brief under Federal Rule of Appellate Procedure 29(a) and urge this Court to correct the apparent legal errors below.

STATEMENT OF ISSUES PRESENTED

1. Whether a private antitrust plaintiff must always allege immediate harm to end-users to allege harm to competition, even when they are not the relevant consumers in the market.

2. Whether cognizable anticompetitive effects are limited to output reductions and price increases.

3. Whether *Amex* required PLS (a) to define a two-sided market as a matter of law even though this case does not involve a two-sided "transaction platform," and (b) to include separate allegations of harm to each side of the market.

STATEMENT

1. Defendant NAR is a trade association that promulgates rules governing the operation of the approximately 600 regional multiple listing services ("MLS") that are affiliated with NAR. First Amended Complaint ("FAC") ¶17 (3-ER-552). In addition, "[t]he vast majority of licensed real estate professionals active in the residential real estate brokerage services industry are NAR members." *Id.* ¶29 (3-ER-555).

Residential real estate in the United States is marketed primarily through NAR-affiliated MLSs. FAC ¶1 (3-ER-549). MLSs are "joint ventures among virtually all licensed real estate professionals operating in local or regional areas" that "combine[] its members' home listings information into a database, usually in electronic form. The MLS then makes these data available to all licensed real estate professionals who are members of the MLS." *Id.* ¶32 (3-ER-555-56). Real estate brokers and agents "regard participation in their local MLS as critical to their ability to compete with other licensed real estate professionals for home sellers and buyers." *Id.*

The FAC alleges that some home sellers prefer to hire brokers or agents to market their homes outside of the NAR-affiliated MLS system. Sellers may, "for reasons of privacy or security," want to "market their home without the wide exposure that comes from listing a property on a NAR-affiliated MLS." Sellers also may want to "test the market for their home without the stigma that comes from listing and then delisting the property on a NAR-affiliated MLS." FAC ¶6 (3-ER-549-50). Listings marketed by brokers and agents outside NAR-

affiliated MLSs are colloquially referred to as "pocket listings." *Id.* ¶7 (3-ER-550).

"Demand for pocket listing services has skyrocketed in recent years, particularly in large and competitive real estate markets." FAC ¶7. "In some of these markets, 20 percent or more of residential real estate was being sold outside the NAR-affiliated MLS system, primarily as pocket listings." *Id.*

The FAC alleges that PLS was created in 2017 as an alternative to the NAR-affiliated MLS system. FAC ¶58 (3-ER-561). PLS aggregated pocket listings nationwide, and therefore functioned as a kind of national MLS for pocket listings. *Id.* ¶47 (3-ER-559).

As a private data-sharing network for real estate professionals, PLS shared certain features with NAR-affiliated MLSs. FAC ¶¶59-60 (3-ER-561). But "[u]nlike the NAR-affiliated MLSs, licensed real estate professionals listing on PLS could share as much or as little information about the listing as their client desired. In this way, the PLS combined the powerful network efficiencies of the MLS with the privacy and discretion of the pocket listing." *Id.* ¶61 (3-ER-561).

The FAC alleges that the PLS network benefitted both home sellers and buyers. For sellers, "the PLS offered all of the benefits of the NAR-affiliated MLSs while retaining the privacy and discretion that would be lost by listing with NAR-affiliated MLSs." FAC ¶8 (3-ER-550). For buyers, "the PLS offered an opportunity to learn about properties that were not widely marketed." *Id*.

PLS allegedly posed an actual or potential competitive threat to every NAR-affiliated MLS. FAC ¶¶9-13, 65-68 (3-ER-550-51, 562). "For the NAR-affiliated MLSs, pocket listings are a form of lost market share. The NAR-affiliated MLSs were concerned that a critical mass of pocket listings could be aggregated in a competing listing network, making possible for the first time network-to-network competition to the MLS system." *Id*. ¶69 (3-ER-562).

In November 2019, allegedly in response to the competitive threat posed by PLS, NAR promulgated a mandatory rule, the Clear Cooperation Policy, governing all NAR-affiliated MLSs. FAC ¶13 (3-ER-551-52). The Policy requires NAR members participating in NAR-affiliated MLSs to submit their listings to the MLS within one business day of publicly marketing the property. NAR defines public marketing

to include listing on private "multi-brokerage listing sharing networks" such as PLS. *Id*. There is an exception for "office listings"—listings marketed by agents to other agents within the same brokerage firm—that need not be submitted to the MLS. *Id*. ¶93 (3-ER-567).

The Clear Cooperation Policy allegedly imposes "an 'all or nothing' term on licensed real estate professionals that seek to use listing networks . . . [they] must either submit all such listings to the NAR-affiliated MLSs, or risk losing access to the NAR-affiliated MLSs." FAC ¶106 (3-ER-570-71). And "[b]ecause licensed real estate professionals generally believe that they must submit at least a portion of their listings to NAR-affiliated MLSs to serve their customers, the Clear Cooperation Policy predictably ensures that all listings are submitted to NAR-affiliated MLSs." *Id*. ¶108 (3-ER-571).

The FAC alleges that in the relevant product market for "listing network services," FAC ¶¶97-98 (3-ER-568), the Policy has "substantial anticompetitive effects by eliminating the ability and incentive of licensed real estate professionals to market pocket listings through PLS, or any other listing network[.]" *Id*. ¶112 (3-ER-572). The Policy has "harmed consumers and competition by eliminating from the

market a form of real estate brokerage services desired by consumers, and which lowered barriers to entry for listing networks competing with the NAR-affiliated MLSs[.]" *Id*. ¶115 (3-ER-572).

2. PLS sued NAR and three regional MLSs, alleging that the Policy violates Section 1 of the Sherman Act, 15 U.S.C. § 1, and California's Cartwright Act. Defendants moved, *inter alia*, to dismiss the FAC for failure to state a claim.

The district court granted the motions to dismiss. Mem. Op. on Defs. Mot. to Dismiss Pfs. Am. Compl. [ECF Nos. 50, 53, & 55] (1-ER-2-30). The court held that the FAC failed to allege "antitrust injury" in two respects.

First, the court held that PLS's "allegations do not show a ***plausible*** injury to the ultimate consumers—the home buyers and sellers." Mem. Op. 19 (italics, bold in original); *id*. at 20 ("In the absence of any specific factual allegations to support PLS's conclusions regarding consumer harm, there is no plausible antitrust injury.") (1-ER-20-21). Parts of the opinion further suggested that such harm had to take the form of reduced output or increased prices. *Id*. at 19-20 ("PLS does not allege any facts showing . . . how the output of real

estate brokerage services or off-MLS listing services has decreased."); *id*. ("PLS does not adequately allege that the Clear Cooperation Policy has increased prices for services purchased or otherwise paid for by home sellers and buyers[.]").

Second, the court reasoned that "[t]he real estate market is a typical two-sided market where different products or services are offered to two distinct groups of customers—home sellers and home buyers." Mem. Op. 20 (1-ER-21). The court stated that "*Amex* sets forth a pleading standard in antitrust cases involving two-sided platforms: a plaintiff must allege (and later prove) injury to participants on both sides of the market." *Id*. at 21 (1-ER-22). Accordingly, the court held, "PLS must allege a plausible injury to ***both*** home sellers ***and home buyers***, which it has not done." *Id*. (italics, bold in original).

The court added that, if not for its findings on "antitrust injury," the court would have found "that PLS has alleged facts plausibly to show that the Clear Cooperation Policy is a *prima facie* unreasonable restraint of trade under the Rule of Reason framework," Mem. Op. 28 (1-ER-29), and that PLS plausibly alleged concerted action against NAR

and two of the MLS defendants, but not against the third MLS defendant, *id*. at 26-27 (1-ER-27-8).

ARGUMENT

The district court couched its decision in terms of "antitrust injury," which is a limitation on private antitrust suits under Section 4 of the Clayton Act, 15 U.S.C. § 15a. "Antitrust injury" means injury caused by the defendant's conduct that is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). A private plaintiff therefore must show that "his loss flows from an anticompetitive aspect or effect of the defendant's behavior, since it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition." *Rebel Oil Co. v. ARCO*, 51 F.3d 1421, 1433 (9th Cir. 1995). Antitrust injury examines the *plaintiff's* injury and whether it stems from harm to competition rather than from some other source, such as enhanced competition. For example, in *Brunswick* the plaintiff did not show antitrust injury from the challenged acquisitions because it "complain[ed] that by acquiring the failing [bowling] centers [defendant]

preserved competition, thereby depriving [plaintiff] of the benefits of increased concentration." 429 U.S. at 488.

The district court's specific holdings here, however, have nothing to do with normal antitrust-injury analysis. For instance, the court's holding that PLS had to allege harm to downstream consumers is not tied to PLS's alleged injury at all, but rather concerns how to allege anticompetitive conduct under Section 1 of the Sherman Act. Likewise, the court's holdings on *Amex* and two-sided markets are far afield from normal antitrust-injury analysis. *Amex* was a governmental enforcement action (where proof of antitrust injury is not required), and the Supreme Court said nothing about antitrust injury, holding only that the government failed to prove anticompetitive effects in the two-sided credit-card transactions market at trial. 138 S. Ct. at 2284-85. In short, while the district court used language from antitrust injury analysis, it held in substance that PLS alleged injury only to itself and not to competition or consumers. Mem. Op. 19-21, 23 ("At worst, the Clear Cooperation Policy is neutral to competition."); 24 (the Policy "may harm PLS by discouraging the use of PLS's platform, [but] that

injury to PLS's business model does not translate to consumer harm.") (1-ER-20-22, 24, 25).

Moreover, the district court's holdings that PLS failed to allege anticompetitive conduct inherently contradict its determination later in the opinion that PLS plausibly alleged a *prima facie* unreasonable restraint of trade (Mem. Op. 28, 1-ER-29). As this Court has recognized, establishing a *prima facie* case itself encompasses a showing that the conduct has an actual or likely adverse effect on competition. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008); 1 J. Kalinowski, *Antitrust Laws and Trade Regulation* §12.02[1] (2d ed. 2017) ("Initially, it is the burden of the plaintiff to demonstrate that the agreement at issue has had, or is likely to have, a substantial adverse effect on competition.").[2] This contradiction flows from the district court's misapplication of relevant antitrust principles.

[2] Courts use a multi-step, burden-shifting framework to determine whether a restraint violates the Rule of Reason. *See Amex*, 138 S. Ct. at 2284. The first step requires the plaintiff to prove that the challenged restraint has a substantial actual or likely anticompetitive effect that harms consumers in the relevant market (sometimes called the *prima facie* case). *See id.* The plaintiff can show that directly—by "proof of actual detrimental effects [on competition] . . . such as reduced output,

A. An Antitrust Plaintiff Need Not Plead Immediate Injury to Downstream, End-User Consumers in the Circumstances Alleged Here.

The district court cited no authority for its requirement that a private plaintiff must allege immediate injury "to the ultimate consumers—the home buyers and sellers," Mem. Op. 19 (1-ER-20).[3] There is no such legal rule requiring allegations of harm to downstream consumers in every antitrust case, for at least two reasons.

First, the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers."

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increased prices, or decreased quality in the relevant market," *id*. (internal quotations and citations omitted)—or indirectly, by "proof of market power plus some evidence that the challenged restraint harms competition." *Id.* If the plaintiff makes its initial showing, the burden "shifts to the defendant to show a procompetitive rationale for the restraint." *Id*. But whether a defendant's conduct is "economically justified" at step two "depends upon a question of fact and therefore is not cognizable in support of a motion to dismiss." *Covad Commc'ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, 676 (D.C. Cir. 2005).

[3] The citation that most closely precedes the district court's holding is *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), which the court cited for the proposition that "[a]n antitrust injury does not arise . . . unless and until the challenged restraint also injures consumers." Mem. Op. 18 (1-ER-19). But *Atlantic Richfield* nowhere says that a plaintiff must allege *immediate* injury to downstream, *end-user* consumers in every case.

Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948). The Act "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices[.]" *Id.* The Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

Because "[a] healthy and unimpaired competitive process is presumed to be in the consumer interest," harm to downstream consumers is legally presumed from proof of harm to the competitive process. *Fishman v. Est. of Wirtz*, 807 F.2d 520, 536 (7th Cir. 1986). Thus, as *Fishman* explained, the law does not "place[] on the plaintiff, as a prerequisite to maintain an antitrust suit, the burden of articulating how the welfare of the ultimate consumer has been diminished by an injury to competition at *another level.*" *Id.* Rather, the "antitrust laws are concerned with the competitive *process,* and their application does not depend in each particular case upon the ultimate demonstrable consumer effect." *Id*. (emphases in original). Therefore, harm to

competition at any level—upstream, midstream, or downstream—no matter the identity of the beneficiaries of that competition—sellers, intermediaries, or customers—is enough to ground an antitrust violation.

This Court made a similar point in *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192 (9th Cir. 2012). Discussing *United States v. Loew's*, 371 U.S. 38 (1962), this Court explained that the Supreme Court

> observed that the restraint injured competition because the movie studios' block booking forced the television stations to forego purchases of movies from other distributors. *Id*. at 49. *The relevant injury in Loew's was to competition, not to the ultimate consumers*, because the challenged practice forced television stations to forego the purchase of other movies, and therefore created barriers to entry for competing movie owners.

Id. at 1203 (emphasis added); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (antitrust laws protect against conduct that "harm[s] the competitive *process* and *thereby* harm[s] consumers") (second emphasis added).

Second, in some antitrust markets downstream consumers are not the relevant consumers in the market. To the extent that proof of harm to consumers is required, it is enough to show harm to the relevant consumer. For mergers that eliminate competition at the wholesale

level, for example, the plaintiff need not show that a reduction in wholesale competition ultimately harmed consumers. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir. 2001) ("no court has ever held that a reduction in competition for wholesale purchasers is not relevant unless the plaintiff can prove impact at the consumer level").

Likewise, when a "monopsonist"—a dominant buyer with the power to depress input prices below the competitive-market level, which is the mirror-image of a "monopolist" seller with the power to raise prices—imposes restraints that artificially depress payments to suppliers, the suppliers are the relevant consumers—not the end-user consumers, who may experience higher prices only "in the long run." *W. Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 104 (3d Cir. 2010). For instance, in *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000), this Court rejected the argument that antitrust injury could not be alleged because a conspiracy did not injure the ultimate consumers of cheese products. "Most courts understand that a buying cartel's low buying prices are illegal and bring antitrust injury and standing to the victimized suppliers." *Id*. at 988-89; *see also Mandeville Island Farms*, 334 U.S. at 235 (challenge to monopsony restrictions

stated a claim "even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers").

Accordingly, allegations of immediate harm to downstream, end-user consumers are not required in the circumstances here. PLS alleged that the relevant product market is an upstream market for network listing services. FAC ¶¶97-99 (3-ER-568). Home sellers and buyers do not participate directly in that market; instead, brokers and agents pay fees to, list properties on, and use the information from listing services. An MLS's business, and PLS's ability to compete with MLSs, depends on brokers and agents choosing on behalf of sellers to list properties on the service. *Id.* ¶¶109-13 (3-ER-571-72). The relevant direct "consumers" in this market therefore are brokers and agents—not home buyers and sellers. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147 (9th Cir. 2003) (agents had standing to sue realtor associations that provided support services to an MLS); *Thompson v. Metropolitan Multi-List*, 934 F.2d 1566, 1571 (11th Cir. 1991) (agent-members of realtors' association, who were the relevant

"consumers of the multilisting service," had antitrust standing to bring claim for conspiracy to monopolize the multi-list market).

Analogous cases illustrate that courts allow antitrust suits to proceed when the defendant's conduct restrains intermediaries on whom the plaintiff's business depends, even if end-users are harmed only derivatively. For example, in *Volvo North America Corp. v. Men's International Professional Tennis Council*, 857 F.2d 55 (2d Cir. 1988), the court held that the plaintiff owner-producers of professional tennis tournaments sufficiently alleged antitrust injury by alleging that the monopolist defendants used "Commitment Agreements" to restrict the supply of tennis players that could be available for tournaments that would compete with the defendants' "sanctioned" tournaments. *Id*. at 68-70. The restraint was imposed on persons the plaintiffs' business depended on (tennis players), not on downstream consumers.

Similarly, *Potters Medical Ctr. v. City Hospital Ass'n*, 800 F.2d 568, 575-77 (6th Cir. 1986), held that a small hospital could sue a monopolist hospital that restricted its own doctors' staff privileges, among other things, to reduce the supply of staff physicians available to the small competitor, which in turn harmed plaintiff's in-patient

admissions and revenue. Again, the restraints were imposed on persons critical to the plaintiffs' business (doctors), and the court did not demand any showing of immediate harm to downstream end-users (patients). *See also Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990) (plaintiff "stated a claim capable of surviving a motion to dismiss" for predatory hiring of its computer programmers by a monopolist, although the restraint was imposed on employees, not on software end-users).

The sufficiency of alleging harm to intermediaries is further demonstrated by well-established precedent on exclusive dealing. Although exclusive dealing can be pro-competitive in some circumstances, including when it is used by a small competitor, when a market is dominated by one firm exclusive dealing can be the means of perpetuating market or monopoly power. "[C]reating or increasing market power through exclusive dealing is the means by which the defendant is likely to increase prices, restrict output, reduce quality, slow innovation, or otherwise harm consumers." *McWane, Inc. v. FTC*, 783 F.3d 814, 827 (11th Cir. 2015) (citation omitted).

Monopolist manufacturers often try to impose exclusive-dealing requirements on their distributors or other intermediaries to prevent them from buying products from rival manufacturers. Courts in those cases have found that plaintiff-rivals proved harm to competition with evidence such as the degree of foreclosure in the market; increases in the rival's costs; distributors finding it infeasible to drop the monopolist and switch to the rival; and lack of alternative channels of distribution for the plaintiff-rivals. *McWane,* 783 F.3d at 835; *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 271, 286-88 (3d Cir. 2012); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005); *Microsoft*, 253 F.3d at 70-71.[4]

None of these cases required proof (and, accordingly, did not require pleading) of immediate harm to product end-users, because the end-users were harmed derivatively by damage to the competitive process itself, such as the delay in the rival's market entry:

[4] Although exclusive dealing may take the form of contracts, an express exclusivity requirement is not necessary as long as "'the practical effect' . . . is to prevent such use [of a competitor's goods]." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 326 (1961) (citation omitted). *Accord ZF Meritor,* 696 F.3d at 270 ("*de facto* exclusive dealing claims are cognizable under the antitrust laws") (internal quotations and citations omitted).

> A set of strategically planned exclusive-dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its product, or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth.

ZF Meritor, 696 F.3d at 271 (quoting P. Areeda & H. Hovenkamp, *Antitrust Law* ¶1802c, at 64 (2d ed. 2002)); *see also McWane,* 783 F.3d at 838 (FTC found that defendant's exclusive-dealing program deprived rivals "of distribution sufficient to achieve efficient scale, thereby raising costs and slowing or preventing effective entry"); *Dentsply*, 399 F.3d at 191 (restraint on dealers "has a significant effect in preserving Dentsply's monopoly" by keeping rivals' sales "below the critical level" necessary to threaten Dentsply).[5]

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[5] Here, the Clear Cooperation Policy does not ban listing on alternative networks like PLS, but "just as 'total foreclosure' is not required for an exclusive dealing arrangement to be unlawful, nor is complete exclusivity required with each customer." *ZF Meritor,* 696 F.3d at 283. *Cf. Microsoft*, 253 F.3d at 71 (exclusive contracts did not totally foreclose competitors but kept "usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly"); *Realcomp II, Ltd.*, 635 F.3d at 830-31 (MLS website policy limiting exposure of discount listings was anticompetitive despite exceptions to the policy).

B. Reductions in Quality, Consumer Choice, and Innovation Are Cognizable Anticompetitive Effects.

The district court never specified the precise form that allegations of immediate harm to downstream consumers had to take, but parts of the opinion indicate that PLS had to allege decreased output or increased prices. Mem. Op. 19-20, 24 (1-ER-20-21, 25).

Anticompetitive effects are not so limited, however. While price increases and output reductions can be powerful anticompetitive effects, other types of cognizable anticompetitive effects include:

- Quality reductions. *See Amex*, 138 S. Ct. at 2284 ("[d]irect evidence of anticompetitive effects" include "decreased quality in the relevant market") (internal quotation marks and brackets omitted). NAR's motion to dismiss acknowledged this. *See* 3-ER-400.[6]

- Reduced consumer choice. *See Glen Holly Ent., Inc. v. Tektronix, Inc.*, 352 F.3d 367, 374 (9th Cir. 2003) ("[o]ne form of antitrust injury is 'coercive activity that

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[6] *Accord, e.g.*, *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 62-63 (2d Cir. 2019) (testimonial evidence of reduced quality in computer technology sufficiently established harm to competition even without proof of price effects or reduced output); *Reg'l Multilisting Serv. of Minn., Inc. v. Am. Home Realty Network, Inc.*, 960 F. Supp. 2d 958, 985 (D. Minn. 2013) (plaintiff adequately alleged anticompetitive effects because NAR/MLS "dual agency" policy caused "both the buyer and the seller [to] lose any right to independent advice and representation from the agent and broker").

prevents its victims from making free choices between market alternatives'") (citation omitted); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) ("an agreement limiting consumer choice by impeding the ordinary give and take of the marketplace . . . cannot be sustained under the Rule of Reason") (internal quotations and citation omitted).

- Hampered innovation. *See US Airways*, 938 F.3d at 63 (discussing evidence that "Sabre's 'policy, agreements, contracts and such . . . have just really slowed down the pace of innovation rather dramatically.'").

- Harm to the competitive process, including "reducing the importance of consumer preference in setting price and output." *NCAA v. Bd. of Regents*, 468 U.S. 85, 107 (1984); *accord Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1101 (1st Cir. 1994) ("the overall market effects of the [NFL] policy are plainly unresponsive to consumer demand," and thereby harmed competition); pp. 15-16, 21-22, *supra*.

Here, PLS plausibly alleged that the Clear Cooperation Policy had each of these effects. PLS alleged that, in the market for network listing services, the Policy "ensur[es] that the NAR-affiliated MLSs will always offer a superset of the listings available on any listing network," and thereby "degrades the quality of competing listing networks." FAC ¶110 (3-ER-571); *see also id.* ¶112 (Policy "eliminat[es] the ability and incentive of licensed real estate professionals to market pocket listings through PLS, or any other listing network, thereby harming

competition in the market for the provision of listing network services") (3-ER-572). PLS further alleged that listings on NAR-affiliated MLSs are inferior in quality because they lack the privacy and flexibility of pocket listings valued by some sellers. *Id*. ¶¶6, 8, 61, 115 (3-ER-549-50, 561, 572-73).

PLS also alleged that the Policy restricts agents' choice to market homes off the MLS system, FAC ¶¶111-13 (3-ER-571-72); *see* Mem. Op. 17 (1-ER-18) (deeming these allegations plausible)—and restricts the ability of home sellers to choose brokers and agents who can offer that service. FAC ¶115 ("NAR restrained the ability of licensed real estate professionals to offer [pocket listings]") (3-ER-573). The upshot of the Policy, as the district court recognized, Mem. Op. 23 (1-ER-24), is that sellers wanting to market their homes through agents but off the MLS system must either (1) use the "office listing," which in practice means hiring a large brokerage that the seller may not prefer, or that may not include the agent that the seller prefers, or (2) hire one of the minority of brokers and agents who are not NAR members. *Cf. Blue Shield of Va. v. McCready*, 457 U.S. 465, 483 (1982) ("Those subscribers were compelled to choose between visiting a psychologist and forfeiting

reimbursement, or receiving reimbursement by forgoing treatment by the practitioner of their choice.”).[7]

The FAC also reasonably supports the inference that the Policy hampers innovation. PLS alleged that NAR-affiliated MLSs have been “slow to innovate and unresponsive to consumer demand,” with “obsolete” software and “outdated technology.” FAC ¶42; *see also id*. ¶¶43-45 (3-ER- 558). PLS attributes this inefficiency in part to the regionally- fragmented nature of the NAR-MLS system. *See id*. ¶¶43, 46. NAR’s Policy, by impeding the growth of *national* listing networks like PLS, perpetuates the fragmented and inefficient status quo. *See id*. ¶¶46, 64 (3-ER-559, 562).

And PLS alleged harm to the competitive process. FAC ¶115 (“NAR’s restraint on the ability of licensed real estate professionals to offer pocket listings has . . . rendered the provision of those services

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[7] The district court noted that the Policy “does not proscribe real estate professionals from making a choice about the listing network platforms in which they choose to participate.” Mem. Op. 23 (1-ER-24). That assertion contradicts PLS’s repeated allegations, taken as true on a motion to dismiss, that the Policy discouraged brokers and agents from listing off the MLS system. The district court also asserted that “consumers are not deprived of any choice in products or services.” *Id*. But downstream consumers are not the relevant consumers in PLS’s alleged market for listing services. *See* pp. 16-18, *supra*.

unresponsive to consumer demand.") (3-ER-573). Thus, even without allegations of reduced output or increased prices, PLS sufficiently alleged that the Policy had anticompetitive effects.

C. The District Court Misread *Amex*.

In *Amex*, the Supreme Court held that American Express's anti-steering provisions did not violate Section 1 of the Sherman Act. The Court held that the relevant market for analyzing the proof at trial was two-sided, including both merchants and cardholders, because credit-card networks are best understood as a "transaction platform," which supplies only one product—the transaction—that is jointly and simultaneously consumed by a cardholder and a merchant. 138 S. Ct. at 2285-86.

The district court here over-read *Amex* in two ways. First, it improperly held that *Amex* required a two-sided market definition here as a matter of law. Mem. Op. 21 (1-ER-22). This was incorrect because, as alleged, the market for network listing services is not a two-sided "transaction platform" and does not require a two-sided market as a matter of law. Second, the court improperly held that, under *Amex*, "PLS must allege a plausible injury to ***both*** home sellers ***and home***

buyers," faulting PLS for not alleging separate injury to home buyers. *Id*. at 21-22 (italics, bold in original). This is incorrect because, even if a two-sided market was defined here, alleging separate harm to both sides of the platform is not required under *Amex*.[8]

1. This Case Does Not Require a Two-Sided Market Definition as a Matter of Law.

Amex held that the credit-card market was two-sided because American Express operated a two-sided "transaction platform." 138 S. Ct. at 2280 ("credit-card networks are a special type of two-sided platform known as a 'transaction' platform"); 2286 ("two-sided transaction platforms, like the credit-card market, are different. These

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[8] Initially, it is not clear that *Amex* should apply to horizontal restraints as alleged in this case. *Amex* involved a challenge to vertical restraints, and the Supreme Court observed that horizontal restraints were "markedly different," 138 S. Ct. at 2290 n.10. Indeed, when defining the relevant market in *Amex*, the Second Circuit had expressly distinguished the vertical restraints at issue from the horizontal restraints in a different case involving Visa and Mastercard. *United States v. Am. Express Co.*, 838 F.3d 179, 198-99 (2d Cir. 2016); *cf. In re NCAA Grant-In-Aid Cap Antitrust Litig.*, 2018 WL 4241981, *3-*6 (N.D. Cal. Sept. 3, 2018) (declining to apply *Amex* in part because the challenged restraints were horizontal). Precise definition of a relevant market is not required in a horizontal restraint case when a plaintiff alleges actual, detrimental effects on competition. *See Indiana Fed'n of Dentists*, 476 U.S. at 460-61.

platforms facilitate a single, simultaneous transaction between participants."); *US Airways,* 938 F.3d at 56-57 (concluding that *Amex*'s central holding was limited to "transaction platforms"). The Court expressly distinguished two-sided "transaction platforms" like credit-card networks from other types of two-sided platforms like newspapers—which it called "nontransaction platforms"—and stated that defining "one-sided" markets on different sides of a nontransaction platform may be appropriate. *See* 138 S. Ct. at 2286, 2287 & n.9 (newspapers are a type of two-sided platform, but "the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such").

In distinguishing transaction platforms from nontransaction platforms, the Court explained that a transaction platform is more properly understood as offering a single product—a transaction—rather than two different products to different sides. *See* 138 S. Ct. at 2286. Moreover, a critical feature of a transaction platform is that it connects different groups of customers in "simultaneous transactions." *See id*. ("These platforms facilitate a single, simultaneous transaction between participants."); *id*. at 2298 (Breyer, J., dissenting). Thus, simultaneity

is a "key feature": "The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other." *Id.* at 2280. For these reasons, the *Amex* Court found it necessary to define the relevant market to include both sides of the credit-card transaction platform (rather than defining separate markets on each side of the platform) when analyzing the challenged restraints' competitive effects.

Neither an MLS nor PLS's platform qualifies as a transaction platform because neither performs simultaneous transactions, or indeed any transactions at all. PLS alleged that "listing networks do not involve a simultaneous sale between buyers and sellers of real estate" and that "[n]o transaction between buyers and sellers occurs on these networks," FAC ¶99 (3-ER-568)—factual allegations that must be taken as true on a motion to dismiss. A real estate sale is transacted by a contract between seller and buyer, not by a listing service. An MLS functions more like a dating service, but on dating websites like Match.com or OkCupid.com "the website does little more than introduce two people to each other." Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 Colum. Bus. L. Rev. 35, 88

(2019). "What, if anything, happens later occurs largely off the site[,]" so these services are not properly included in *Amex*'s "single market" definition. *Id*. Similarly, "real estate websites such as realtor.com and Zillow.com identify real properties that are for sale or rent. Having settled on a property, a prospective purchaser then contacts the broker by email or telephone and, after subsequent negotiations, there may be a sale. But none of this comes close to the kind of simultaneous one-to-one transaction that was present in *Amex*." *Id*. at 87-88.

NAR argued below that MLS's are transaction platforms under *Amex* because they "facilitate" transactions between buyers and sellers. *See* 3-ER-391-92, 2-ER-283-84. But facilitating transactions is not the correct legal standard for identifying a transaction platform under *Amex*. Many different types of nontransaction platforms facilitate transactions off the platform. For instance, newspaper ads (particularly the classified ads) facilitate the consummation of transactions with the advertiser, yet *Amex* stated that "the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such." 138 S. Ct. at 2286. Likewise, many typical one-sided services facilitate transactions even though they do not involve platforms at all. These

are different from transaction platforms like credit-card networks, which themselves simultaneously consummate the transaction. Thus, NAR's proposed standard for transaction platforms would radically expand *Amex*'s holding.

Because the relevant platforms in this case are not transaction platforms, the district court erred in holding that defining a two-sided market was required as a matter of law. *See In re Delta Dental Antitrust Litig.*, 484 F. Supp. 3d 627, 637 (N.D. Ill. Sept. 4, 2020) (rejecting defense argument to apply *Amex* at motion-to-dismiss stage in part because dental insurance market lacked simultaneity of exchange and therefore was not a transaction platform); *In re NCAA Grant-In-Aid Cap Antitrust Litig.*, 2018 WL 4241981 at *3-*6 (declining to apply *Amex* in part because "the relevant interactions are not transactional or simultaneous").[9]

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[9] Because *Amex*'s holding was limited to transaction platforms, the Supreme Court did not reach the issue of whether there might be circumstances in which a two-sided market may be appropriate even though the case involves a nontransaction platform. The Court did suggest, however, that defining two-sided markets may be appropriate for the small subset of nontransaction platforms where the facts show there are strong indirect network effects going in both directions and

2. Even If the Relevant Market Here Was Two-Sided, Alleging Separate Harm to Both Sides Is Not Required.

Amex described several ways to show anticompetitive effects in the two-sided credit-card transactions market as a whole. *See* 138 S. Ct. at 2287; *see also* pp. 13 n.2, 23-24 *supra* (discussing how plaintiffs can show anticompetitive effects).

Contrary to the district court's understanding, the Supreme Court did not hold that proof of separate harm to "both sides" of a platform is necessary to prove harm in a two-sided market. Proving harm on both sides of the platform is one way of showing anticompetitive effects in a two-sided market but not the only way.

Indeed, in the *Amex* litigation itself, the Second Circuit suggested that the government could show anticompetitive effects on the market by proving "*net harm to Amex consumers as a whole*—that is, both cardholders and merchants—by showing that [the anti-steering rules]

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rivals compete on both sides of the platform. 138 S. Ct. at 2286-87 & n.9. Nevertheless, NAR did not argue below that this case involves such a nontransaction platform; rather, it argued solely (and erroneously) that a two-sided market was required as a matter of law under *Amex* because the case involved a two-sided transaction platform. *See* 3-ER-391-92, 2-ER-283-84.

reduced the quality or quantity of credit-card purchases." 838 F.3d at 206-07 (emphasis added). Net harm includes situations where harm on one side outweighs benefits on the other side. Nothing in the Supreme Court's opinion affirming the Second Circuit's judgment casts doubt on the proposition that proving "net harm" would be sufficient.

Post-*Amex* cases have followed the Second Circuit's reasoning and held sufficient allegations or proof of net harm to participants on both sides of a two-sided platform. *See US Airways*, 938 F.3d at 59 ("In a market that took into account both sides of the Sabre platform, the prices would be supracompetitive only to the extent that the net prices charged to travel agents . . . and airlines . . . combined exceeded the prices that would have been charged in a competitive market."). In *FTC v. Surescripts, LLC*, 424 F. Supp. 3d 92, 103 (D.D.C. 2020), the court found that the FTC's allegations of harm to both sides of two-sided markets were sufficient but never said that allegations of separate harm were necessary. To the contrary, the court relied on a net-harm allegation as showing "'anticompetitive effects in the market as a whole.'" *Id.* at 102-03 (citation omitted).

NAR itself, in its motion to dismiss, read *Amex* to require only net harm to consumers of a platform as a whole. 3-ER-400 ("Because the market at issue here is two-sided, PLS had to allege that the net effect of NAR's challenged conduct—considering both real estate buyers and sellers—is higher prices, reduced output, or diminished quality for consumers. *See Amex*, 138 S. Ct. at 2287[.]").

Moreover, requiring allegations of harm on both sides of a platform just to state a claim under the Sherman Act raises significant antitrust policy concerns, because there can be situations in which competition is harmed in a two-sided market even though there is not separate harm on both sides. For instance, a platform could pay participants on one side to enable exclusion on the other side, causing harm "overall" to the market. *Cf. US Airways*, 938 F.3d at 59 (Sabre paid participants on one side of its platform, travel agents, to use the platform).

CONCLUSION

The Court should hold that PLS did not need to allege immediate injury to end-users; a reduction in output or increase in prices; a two-sided market; or separate harm on both sides of that market.

Respectfully submitted.

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FOR THE NINTH CIRCUIT

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