

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Mark Filip	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 C 5140	DATE	11/27/2006
CASE TITLE	USA vs. National Association of Realtors		

DOCKET ENTRY TEXT

ENTER MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS COMPLAINT OF THE UNITED STATES: Defendant's motion to dismiss[22] is respectfully denied.

■ [For further detail see separate order(s).]

Docketing to mail notices.

	Courtroom Deputy Initials:	TBK
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America,)	
)	
Plaintiff,)	Case No. 05 C 5140
)	
v.)	
)	Hon. Mark Filip
National Association of Realtors,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER DENYING
DEFENDANT'S MOTION TO DISMISS COMPLAINT OF THE UNITED STATES

Plaintiff, the United States of America ("United States" or "Plaintiff"), has filed this civil antitrust suit against the National Association of Realtors® ("NAR" or "Defendant").¹ (D.E. 1.) The Amended Complaint alleges that NAR has violated Section 1 of the Sherman Act, 15 U.S.C. § 1. (D.E. 6.) The case is before the Court on Defendant's motion to dismiss (D.E. 22) for lack of subject matter jurisdiction and for failure to state claims upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(1) and 12(b)(6). For the reasons stated below, Defendant's motion to dismiss is respectfully denied.

FACTUAL BACKGROUND

NAR is a trade association that establishes and enforces policies and professional standards for its over one million individual member brokers and their affiliated agents and sales

¹ The various docket entries in this case are designated "D.E. ___." The term "Realtor®" is a collective membership mark indicating that a real estate broker or agent so designated is a member of the National Association of Realtors.

associates.² (D.E. 6 ¶ 11.) NAR's member brokers compete with one another in local brokerage services markets to represent consumers in connection with real estate transactions. (*Id.*) NAR's policies govern the conduct of its members in all fifty states, including all Realtors® and all of NAR's local Realtor® associations ("member boards"). (*Id.* ¶ 13.)

At any one time, there are over 1.5 million homes for sale in the United States. (*Id.* ¶ 18.) It goes without saying, and the Court takes judicial notice, that each year many billions of dollars of residential real estate are sold, with realtors taking commissions on such sales.

The vast majority of residential real estate transactions involve the use of a multiple listing service ("MLS"), a cooperative arrangement brokers have developed to pool information about nearly all properties for sale through brokers in a particular market area.³ (*Id.* ¶ 5.) MLSs collect detailed information about nearly all properties available for sale through brokers and are alleged to be indispensable tools for brokers servicing consumers in each MLS's market area. (*Id.*) Defendant's local Realtor associations ("member boards") control a majority of the MLSs in the United States. (*Id.*)

The geographic coverage of the MLS serving each town, city, or metropolitan area normally establishes the outermost boundaries of each relevant geographic market. (*Id.* ¶ 17.) In a substantial majority of markets, a single MLS provides the only available comprehensive compilation of listings. (*Id.* ¶ 21.) The vast majority of brokers believe that they must participate in the MLS operating in their local market to adequately serve their customers and

² The facts are taken from the Amended Complaint and presented in a light most favorable to Plaintiff. With respect to facts relevant to the jurisdictional inquiry, the Court has credited Plaintiff's version of material facts, and, to the extent that Defendant has presented uncontroverted evidence on a point, credited Defendant's evidence in that regard. *Accord, e.g., Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir. 1995) (collecting cases).

³ MLSs list virtually all homes for sale through a broker in the areas they serve. (D.E. 6 ¶ 21.)

compete with other brokers. (*Id.* ¶ 23.)

Most home sellers and buyers engage residential real estate brokers, who typically have access to MLS listings, to facilitate transactions. (*Id.* ¶ 17.) The predominant form of payment for brokerage services is a commission—a percentage of the price paid for the property. (*Id.* ¶ 19.) In a typical transaction, the seller agrees to pay a commission to the broker who has contracted with the seller to market the home (the “listing broker”). (*Id.*) If the listing broker finds the buyer, the listing broker keeps the full commission. (*Id.*) Frequently, however, a second broker (the “cooperating broker”), who is also a member of the MLS, finds the buyer, and the two brokers share the commission. (*Id.*) The commission rate is determined by, *inter alia*, the level of competition between brokers in the relevant market. (*See, e.g., id.* ¶ 3.)

NAR’s member boards control a majority of the MLSs in the United States. (*Id.* ¶ 5.) NAR promulgates rules governing the conduct of MLSs and requires its member boards to adopt these rules. (*Id.* ¶ 22.) NAR’s MLS rules provide for sanctions against member brokers found to have violated MLS rules. (*See, e.g., id.* ¶¶ 22, 37)

Beginning with the popular growth of the Internet in the late 1990s, a number of NAR member brokers began creating password-protected websites that enabled potential home buyers, once they had registered as customers of the broker, to search the MLS database themselves and to obtain responsive MLS listings over the Internet. (*Id.* ¶¶ 26-27.) These websites came to be known as virtual office websites or VOWs, and brokers who operated primarily or exclusively through a VOW came to be known as VOW-operating brokers. (*Id.* ¶ 26-27.) Certain brokers used password-protected websites and Internet-intensive business models to lower their cost structures by reducing overhead; by transferring search functions to customers; and by reducing

time spent showing homes to customers, as experience has shown that buyers who search listings themselves frequently tour fewer homes in person before making a purchase. (*Id.* ¶ 27.) Lower cost structures permitted VOW brokers to offer discounted commissions to sellers or to offer commission rebates to buyers. (*Id.*) Brokers also used the Internet to support a “referral” business model, in which the VOW operator refers potential customers to other brokers in exchange for a fee. (*Id.* ¶ 29.)

The United States alleges that the VOW brokers presented a competitive challenge to brokers who provide listings to their customers only or principally by traditional, non-Internet methods. (*Id.* ¶ 30.) In this regard, the United States avers, “[m]any traditional brick-and-mortar brokers fear the ability of VOW operators to use Internet technology to attract more customers and provide better service at a lower cost.” (*Id.*) The United States further alleges that Defendant’s subsequent VOW policies (discussed further below) were designed to impede competition of this new form. (*Id.* ¶ 31; *see also id.* ¶ 8 (“Defendant—an association of competitors—has agreed to policies that suppress new competition and harm consumers.”).) In support of this contention, the United States alleges that Defendant, the nation’s largest real estate franchisor and owner of the nation’s largest real estate brokerage, asserted in a white paper that it was “not feasible” for traditional brokers to compete with large Internet companies that operated or affiliated with brokers operating VOWs. (*Id.* ¶ 3.) The United States further avers that the chairman of the board of RE/MAX, the nation’s second-largest real estate franchisor, publicly expressed concern that VOW brokers would place downward pressure on brokers’ commission rates. (*Id.*) In this regard, one broker further complained that because of the lower cost structure of brokers who provide listings to their customers over the Internet, “they are able to kick-back

1% of the sales price to the buyer.” (*Id.*⁴) The United States further alleges that the head of NAR’s working group on the VOW regulation argued that new rules were needed to alter the prior traditional MLS arrangements (by which “a broker could provide any relevant listing in the MLS database to any customer—by whatever method the customer or broker preferred, including via the Internet” (*id.* ¶ 33)), because VOW brokers were “scooping up market share just below the radar.” (*Id.* ¶ 3.)

Against this backdrop, the United States explains, on May 17, 2003, NAR’s Board of Directors adopted a “Policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants (‘Virtual Office Websites’)” (hereinafter “Initial VOW Policy”). (*Id.* ¶ 31.) NAR mandated that all 1,600 of its member boards implement the Initial VOW Policy by January 1, 2006. (*Id.*) However, shortly after NAR adopted the Initial VOW Policy, the United States Department of Justice launched an investigation of the policy and its potential anticompetitive effects. (D.E. 23 at 1.) In light of this investigation, NAR advised its member boards that they need not implement the Initial VOW Policy. (*Id.*) Approximately 200 member boards nonetheless implemented the Initial VOW Policy and received NAR’s approval of their implementing rules. (D.E. 6 ¶ 31.)

Prior to the adoption of the Initial VOW Policy, a broker could provide any relevant listing in the MLS database to any customer by the method the customer or broker preferred, including the Internet, and including a VOW. (*Id.* ¶ 33.) No “opt-out” rights existed with respect

⁴ The record is unclear as to what the prevailing commission rate(s) are nationwide or in local markets. However, the quotation provided in the United States’ operative complaint is clear that the reduced commission is substantially more than simply 1% of the commission typically charged. Or, to put things in more concrete terms, the quotation suggests that the commission is being reduced by 1% of the home price; thus if the traditional commission rate was 6%, the reduction in price charged to the consumer is 1/6 of that rate, or a 16.67% reduction.

to any means of delivery—no broker was permitted to withhold his or her listings from a rival broker, seemingly under virtually any circumstances. (*Id.*) In addition, nearly all of NAR’s member boards required all participants in their affiliated MLSs to submit, with minor exceptions, all of their clients’ listings to the MLS. (*Id.*)

The Initial VOW Policy contained an opt-out provision that forbade any broker participating in an MLS from conveying a listing to his or her customers via the Internet without the permission of the listing broker. (*Id.* ¶ 32.) The opt-out provision allowed brokers to direct that their clients’ listings not be displayed on any VOW (a “blanket opt-out”). (*Id.*) The opt-out provision also allowed brokers to direct that their clients’ listing not be listed on a particular subset of targeted competing broker’s or brokers’ VOW(s) (the “selective opt-out”). (*Id.*)

According to the United States, the working group that formulated Defendant’s Initial VOW policy understood that the opt-out rights were fundamentally anticompetitive and harmful to consumers. (*Id.* ¶ 7.) Two members of the working group wrote that the opt-out right would be “abused beyond belief,” with traditional brokers selectively withholding listings from particular VOW-based competitors, as they previously had been unable to do. (*Id.*) The chairman of the working group, according to the United States, also admitted that the opt-out right was likely to be exercised by brokers notwithstanding that “it may not be in the seller’s best interest to opt out.” (*Id.* (internal punctuation omitted).) However, the chairman “took comfort in the fact that the rule did not require brokers to disclose to clients that their listings would be withheld from some prospective purchasers as a result of the brokers’ opt-out decision, thus providing brokers ‘flexibility without conversation.’” (*Id.*)

The Initial VOW Policy also contained an “anti-referral” provision that, with minor

exceptions, forbids VOW operators from referring their customers to “any other entity” for a fee. (*Id.* ¶ 35.) In contrast, no NAR rule limits referrals for a fee by brokers who do not convey MLS listings to customers over the Internet. (*Id.*)

The Initial VOW Policy was obligatory and enforceable. (*Id.* ¶ 37.) Under the terms of the policy, member boards were prohibited from adopting rules “more or less restrictive than, or otherwise inconsistent with” the policy. (*Id.*) Appendix A to the Initial VOW Policy provided for remedies and sanctions for violations of the policy, including financial penalties and termination of MLS privileges. (*Id.*)

On August 31, 2005, after Plaintiff informed NAR of its intention to bring this action, NAR advised its member boards to suspend application of the Initial VOW Policy.⁵ (D.E. 24-1 at 2; D.E. 24-3, Ex. 2 (“Internet Listing Display Policy”) at 1.) On the same day, NAR rescinded the Initial VOW Policy and announced the adoption of a new “Internet Listings Display Policy” and its revision of an MLS membership policy (together, the “Modified VOW Policy”). (D.E. 24-1 at 2.) The Modified VOW Policy mandated that all NAR members enact rules implementing the Internet Listings Display Policy by July 1, 2006. (D.E. 24-3, Ex. 2 at 5.) NAR subsequently communicated to its member boards that they “wait to adopt” the policy “until [the instant] litigation is over.” (D.E. 6 ¶ 38.)

The Modified VOW Policy did not include the selective opt-out provision that was in the Initial VOW Policy. (D.E. 23 at 7.) However, Section I.3 of the Modified VOW Policy contains a blanket opt-out provision that forbids any broker participating in an MLS from conveying a

⁵ The Amended Complaint alleges that the Modified VOW Policy was enacted on September 8, 2005 (D.E. 6 ¶ 38), but this does not appear to be correct. In any event, this minor discrepancy concerning dates is not material for any present purpose.

listing to his or her customers via the Internet without the permission of the listing broker. (D.E. 6 ¶ 39.) The opt-out provision allows brokers to direct that their clients' listings not be displayed on any competitor's website, provided that the broker opting-out does not display any competitor's listings on its own website, if it has one. (*Id.*) When exercised, this provision would prevent a VOW broker from providing over the Internet the same MLS information that can be provided in person, or through any non-Internet technology, without restriction (*id.*), as had previously been the case for any mode of communication, including Internet-based communication. In addition, NAR's Modified VOW Policy specifically exempts its own "Official Site," Realtor.com, from the blanket opt-out that applies to all Internet sites operated by brokers such as the VOW brokers. (*Id.*)

The Modified VOW Policy also permits MLSs to downgrade the quality of the data feed they provide brokers, effectively restraining brokers from providing Internet-based features to enhance the service they offer their customers. (*Id.* ¶ 41.) The Modified VOW Policy further denies MLS membership and access to listings to brokers operating referral services, depriving Internet-based brokers from referring their customers to other brokers for a fee. (*Id.* ¶ 40.)

The United States filed this suit in September 2005 (D.E. 1), and filed an amended complaint in October 2005. (D.E. 6.) The Amended Complaint alleges that NAR, by adopting the Initial VOW Policy and the Modified VOW Policy, violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Specifically, the Amended Complaint maintains that the aforementioned policies constitute a contract, combination, or conspiracy by and between NAR and its members which unreasonably restrains competition in brokerage service markets throughout the United States to the detriment of American consumers. (*Id.* ¶ 44.) The United States "challenges both policies in

this action as part of a single, ongoing contract, combination, or conspiracy.” (*Id.* ¶ 4.) The United States alleges that the aforesaid combination or conspiracy has had and will continue to have anticompetitive effects in the market for residential real estate services by suppressing technological innovation, reducing competition on price and quality, raising barriers to entry, and restricting efficient cooperation among brokers, thereby making express or tacit collusion more likely. (*Id.* ¶ 45.)

Defendant has filed a motion to dismiss (D.E. 22) what Defendant characterizes as “[P]laintiff’s claims challenging the [Initial VOW Policy] and [P]laintiff’s claims challenging the opt-out provisions of both the [Initial VOW Policy] and the [Modified VOW Policy].” (D.E. 23 at 22.) As explained below, this is not a challenge to all of the claims made by the United States in the operative complaint. *Accord, e.g., id.* at 6, n.8.

LEGAL STANDARD

When a defendant challenges standing via a motion to dismiss, “courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Sanner v. Bd. of Trade*, 62 F.3d 918, 925 (7th Cir. 1995) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975), and collecting numerous circuit precedents). “The district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.” *Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir. 1995) (quoting *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993) (per curiam) (further internal quotation marks and

citations omitted)).⁶

“A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of a complaint for failure to state a claim upon which relief may be granted.” *Johnson v. Rivera*, 272 F.3d 519, 520-21 (7th Cir. 2001). In ruling on a motion to dismiss, the court must assume all facts alleged in the complaint to be true and view the allegations in the light most favorable to plaintiffs. *See, e.g., Singer v. Pierce & Assocs., P.C.*, 383 F.3d 596, 597 (7th Cir. 2004). Dismissal for failure to state a claim is appropriate where “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Lee v. City of Chicago*, 330 F.3d 456, 459 (7th Cir. 2003) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).⁷

ANALYSIS

Defendant has filed a motion to dismiss “[P]laintiff’s claims challenging the [Initial VOW Policy] and [P]laintiff’s claims challenging the opt-out provisions of both the [Initial VOW Policy] and the [Modified VOW Policy].” (D.E. 23 at 22.) Defendant argues that Plaintiff lacks standing to obtain injunctive relief for any claim relating to the Initial VOW Policy. (*Id.* at 8.) Defendant further maintains that Plaintiff has failed to state a claim with respect to the opt-out provisions of both VOW policies because neither is a restraint of trade and because Plaintiff has not adequately pleaded anti-competitive effects from the Modified VOW Policy. (*Id.* at 12,

⁶ Contrary to what seems to be Defendant’s implicit suggestion, the fact that Defendant has submitted some limited factual materials does not mean that the United States’ other uncontradicted averments in its operative complaint are thereby rendered inoperative for purposes of the Rule 12(b)(1) analysis. *See generally Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir. 1995) (collecting cases). Otherwise, a defendant could file an affidavit on a minimally relevant or trivial point concerning jurisdiction, and all of the plaintiff’s otherwise unchallenged averments relevant to jurisdictional issues would need to be supported by admissible evidence. Defendant offers no authority in support of such a method of analysis.

⁷ Contrary to the tenor of many of Defendant’s arguments, there are no fact-pleading or heightened pleading requirements for antitrust claims. *See, e.g., S. Austin Coalition Cmty. Council v. SBC Communs., Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001) (collecting numerous precedents).

19.)

I. The Court Does Not Lack Jurisdiction To Adjudicate Issues Concerning the Initial VOW Policy or To Grant Equitable Relief Concerning It

Defendant spends considerable effort attempting to preclude any review or analysis of the Initial VOW Policy. In this regard, it argues that “this Court lacks jurisdiction to adjudicate” issues concerning the Initial VOW Policy or to grant equitable relief that impacts on it. (D.E. 23 at 8 (certain capitalization omitted).) This contention is unpersuasive.

To begin, it is important to explain what Defendant concedes before it attempts to excise issues relating to the Initial VOW Policy and any possible injunctive relief relating to its provisions or their impact. First, although Defendant speaks broadly and at length in terms of Article III case-or-controversy requirements, Defendant does not even suggest that this Court lacks Article III jurisdiction to adjudicate the validity of the Modified VOW Policy or to grant injunctive relief concerning its provisions and effects. (See D.E. 70 at 11, n. 6 (Defendant conceding that the Court properly has jurisdiction to adjudicate the validity of the Modified VOW Policy and to enter injunctive relief, as appropriate).) Defendant also concedes that its motion to dismiss does not attempt to dismiss those portions of the United States’ complaint concerning NAR and its members’ alleged corrosion of data-feed quality, interference with co-branding relationships, and membership rules. (D.E. 23 at 6, n.8.) Those portions of the suit, and the propriety of this Court proceeding concerning them, are therefore unchallenged at the present stage of the litigation.⁸

⁸ A defendant’s concession as to the propriety of federal court jurisdiction of course does not resolve the issue, and a district court needs to assess the propriety *vel non* of subject matter jurisdiction even if both parties stipulate concerning the issue or otherwise concede it. *See, e.g., Drake v. Minnesota Mining & Mfg. Co.* 134 F.3d 878, 883 (7th Cir. 1998). Nonetheless, the Defendant’s concessions about the propriety of the portions of the United States’ suit discussed above are well-taken. Put differently, the Court agrees that subject matter jurisdiction and

Defendant nonetheless seeks to dismiss, pursuant to Fed. R. Civ. P. 12(b)(1), any putative claims of the United States to injunctive relief relating to the provisions of the Initial VOW Policy. (*Id.* at 8.) Specifically, Defendant claims that injunctive relief would not redress any injury caused by the Initial VOW Policy because that policy has been rescinded and replaced by the Modified VOW Policy. (*Id.* at 8-12.) This contention is respectfully rejected.

A. The United States Is Correct That Subject Matter Jurisdiction Is Proper Because of Alleged Continuing Effects of the Initial VOW Policy and The Potential It Could Be Reinstated

The Defendant is generally correct when it argues that there is a “general rule,” by which “[t]here is no case or controversy regarding a request for injunctive relief when the complained of conduct ceased before the lawsuit was brought.” (D.E. 23 at 9-10.) However, the authorities Defendant cites in support of what it labels a “general rule” reflect that the United States properly has Article III standing here. For example, *O’Shea v. Littleton*, 414 U.S. 488 (1974), teaches that “[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.” *Id.* at 495-96 (emphasis added). Under *O’Shea*, a plaintiff must allege something more than exposure to illegal conduct in the past—either continuing violations or continuing effects stemming from them, or a likelihood of defendant resuming the prior conduct as against the Plaintiff—to show that the alleged injury or threatened injury can be redressed by an injunction. *See, e.g., id.*; *Sierakowski v. Ryan*, 223 F.3d 440, 445 (7th Cir. 2000) (stating that, “past wrongs, while not sufficient [alone] to confer standing for injunctive relief, may be evidence that future violations are likely to occur”) (citing, *inter alia*, *O’Shea*, 414 U.S. at 496). The United States has met its

Article III case-and-controversy requirements are satisfied as to these issues, which are central aspects of the suit.

