Nos. 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, No. 2:20-cv-04790-JWH-RAO
Hon. John W. Holcomb

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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June 2, 2021

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Pursuant to Appellate Rule 26.1(a), the American Antitrust Institute states that it is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

TREATISES

INTEREST OF AMICUS CURIAE[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See http://www.antitrustinstitute.org.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

AAI believes reversal is warranted for the reasons stated by its fellow amici and Plaintiff-Appellant, and writes separately to make two additional and important points. First, the district court's antitrust standing test, whereby it required Plaintiff to demonstrate harm to ultimate consumers in addition to harm to Plaintiff, to competition, and to direct-purchasing consumers, is at odds with the longstanding antitrust principles embodied in the direct-purchaser rule. If not

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[1] All parties consent to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus curiae or its counsel—has contributed money that was intended to fund preparing or submitting this brief.

[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

overruled, this "ultimate consumer harm" requirement will place a significant and sometimes insurmountable burden on meritorious antitrust cases.

Second, the district court's apparent assumption that consumers would be better served by a single listing service network governed by NAR's listing rules is based on misguided assumptions about the role of courts in antitrust cases and about the economics of network effects and competition between platforms. If the district court's reasoning is allowed to stand, the negative implications for competition and consumers will be profound.

ARGUMENT

I. IMPOSING AN "ULTIMATE CONSUMER" HARM STANDARD FOR ANTITRUST STANDING IS INCONSISTENT WITH THE STRUCTURE OF THE ANTITRUST LAWS AND WOULD UNDERMINE PRIVATE ANTITRUST ENFORCEMENT

The district court's holding that PLS lacks standing because it failed to show harm to ultimate consumers in residential real estate markets—that is, buyers and sellers of homes—is at odds with federal antitrust law's longstanding focus on direct purchasers. In addition to being inconsistent with existing antitrust principles, imposing such an "ultimate consumer harm" requirement for antitrust standing would significantly impair private antitrust enforcement and leave many instances of anticompetitive conduct unredressable.

A. An "Ultimate Consumer Harm" Requirement Contravenes the Logic and Purpose of the Direct-Purchaser Rule

For four decades, federal antitrust law has barred indirect purchasers from bringing damages claims and has prohibited defendants from introducing evidence that direct purchasers passed on any part of the overcharges they paid to down-stream customers, including ultimate consumers. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 725 (1977). This so-called "direct purchaser rule" is rooted in policies and principles that recognize the difficult, and sometimes insurmountable, evidentiary burden of tracing the effects of anticompetitive conduct through multiple stages of a supply chain with any certainty or precision. Courts have instead determined that injury to competition and to the party directly affected by the anticompetitive conduct is sufficient. The district court's attempt to impose an "end-consumer harm" standard contravenes this longstanding federal policy.

Indeed, if the plaintiffs in this case were the direct purchasers of listing network services, i.e. real estate brokers, Defendants would be barred under *Hanover Shoe* from even introducing any evidence that harm from the conspiracy passed through the brokers to home buyers and sellers. *Hanover Shoe*, 392 U.S. at 494; *see also Ill. Brick*, 431 U.S. at 725. And, home buyers and sellers, even if harmed, would have no standing to sue the Defendants under federal antitrust law, because they are not direct purchasers of listing network services; their brokers are. *Ill.*

Brick Co., 431 U.S. at 741-43; *see also Apple, Inc. v. Pepper*, 139 S.Ct. 1514, 1520, 587 U.S. ___ (2019) ("Our decision in *Illinois Brick* established a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers.) (internal citation omitted); 3-ER-561, at ¶ 59 ("Like the NAR-affiliated MLSs, PLS is a private network limited to licensed real estate professionals.").

The reasons underpinning this so-called "direct purchaser rule" underscore the ways in which the district court's "ultimate consumer harm" requirement is misguided and out of step with antitrust law. Among the primary rationales for the direct-purchaser rule are "facilitating more effective enforcement of the antitrust laws" and "avoiding complicated damages calculations," *Pepper*, 139 S.Ct. at 1524, and more generally the "'belief that simplified administration improves anti-trust enforcement.'" *Pepper*, 139 S.Ct. at 1522 (quoting 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durance, Antitrust Law ¶ 346e, p. 194 (4th ed. 2014 (hereinafter "Areeda & Hovenkamp"))). The Supreme Court has long held that allowing those who purchased a product or service indirectly from the defendant to sue for antitrust damages would undermine these goals, by forcing courts to wade into questions about whether and how much of any damages were passed on by direct purchasers.

Regardless of what one believes about the merits of these justifications or of the direct-purchaser rule itself, the Supreme Court has been crystal clear that the

direct-purchaser rule represents a bright line in federal antitrust law. *Pepper*, 139 S.Ct. at 1520 ("*Illinois Brick* established a bright-line rule") (internal citation omitted); *Kansas v. Utilicorp*, 497 U.S. 199, 217 (1990) ("[E]ven assuming that any economic assumptions underlying the Illinois Brick rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions."). And, it is plain that the same analysis that the Supreme Court has long avoided with the direct-purchaser rule would almost always be required to effectuate the district court's "ultimate consumer harm" requirement for antitrust standing.

B. An "Ultimate Consumer Harm" Standard Would Undermine the Ability of Antitrust Law to Redress Anticompetitive Conduct

If plaintiffs are required to establish ultimate consumer harm to demonstrate antitrust standing in this Circuit, the consequences for private enforcement of the antitrust laws will be severe. Except in the small number of cases where the direct purchasers *are* the ultimate consumers, such a rule would burden all private antitrust plaintiffs with an additional substantive element to plead and prove.

Moreover, in many otherwise meritorious cases, an "ultimate consumer harm" requirement would mean that no private plaintiff has standing to bring a damages suit, and that harm goes uncompensated and conduct underdeterred. This could occur, for example, where the excluded competitor or the direct purchaser

lacks access to the evidence of harm to the ultimate consumers but the ultimate consumers, as indirect purchasers, lack standing. Or, where anticompetitive conduct takes place in the market for an input to a long and diverse production chain, making the tracing of its impact down the chain to ultimate consumers infeasible. *Illinois Brick*, 431 U.S. at 732 ("Indeed, the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution."). Or, tracing harm to end consumers may be impossible because an intervening event—such as a second price fixing conspiracy—makes it impossible to accurately discern the impact of the upstream conspiracy on ultimate consumers.[3] *See Dow Chem. Co. v. Seegott Holdings, Inc.* (*In re Urethane Antitrust Litig.*), 768 F.3d 1245 (10th Cir. 2014) (upholding jury verdict in favor of direct purchasers of polyurethane chemical products) *and In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968 (N.D. Ohio 2015) (denying summary judgment to defendants in antitrust conspiracy claim against direct purchasers of polyurethane chemical products, alleging they fixed prices in the downstream foam products market).

[3] Although there are methods for measuring harm to indirect purchasers that do not involve tracing an overcharge through the distribution chain, they are not always available.

Even in cases where plaintiffs *could* make this showing, doing so would add complexity and impose additional costs and burdens on the courts. *Somers v. Apple, Inc.*, 729 F.3d 953, 962 (2013) (disallowing indirect purchaser claim because it "would lead to litigation on contradictory, duplicative theories of recovery necessitating 'evidentiary complexities and uncertainties'"); *Best Buy Co. v. Hitachi, Ltd.* (*In re Cathode Ray Tube (CRT) Antitrust Litig.*), 2016 U.S. Dist. LEXIS 166397, 211 (Nov. 15, 2016) ("[A]llowing evidence of pass-on calculations, even when offered for reasons other than determining damages, risks wasting time, confusing the issues, and causing undue delay."). Moreover, requiring direct purchaser or excluded competitor plaintiffs to show harm to ultimate consumers to establish antitrust standing would lead to thorny evidentiary issues about the use to which such evidence could be put and would risk confusing juries and undermining the rule against pass-on as a defense. *In re CRT Antitrust Litig.*, 2016 U.S. Dist. LEXIS 166397, at 211 ("[E]vidence of pass on also risks misleading the jury and unfairly prejudicing the [plaintiffs].").

II. COMPETITION *BETWEEN* PLATFORMS IS PROTECTED BY THE ANTITRUST LAWS REGARDLESS OF THE PRESENCE OF NETWORK EFFECTS

Underlying the district court's opinion is its mistaken belief that the elimination of competition between platforms is not harmful to competition, so long as the remaining platform has terms of service that the court believes are efficient or pro-

consumer. This is wrong as a matter of antitrust law—by enacting the antitrust laws, Congress determined that competition, not courts, should determine which companies' terms of service best serve consumers. The district court's determination is also wrong as a matter of economics—competition *between* platforms benefits consumers, even if (indeed, *because*) the platforms have different terms of service, and this can be true even if having two platforms reduces the benefits to platform users from network effects. The large and negative policy implications that would flow from the district court's reasoning underscore why it must not be allowed to stand.

The district court would excuse Defendants' alleged forcing of all listings onto the MLS and off competing platforms, because it has concluded that the MLS terms or service are better for buyers and because real estate listing platforms enjoy network effects. 1-ER-5 ("The value of the network services provided by an MLS is largely a function of the number of members within the network."); *id.* ("Indeed, one of the most important market efficiencies created by an MLS 'is manifested in the reduction of the obstacles brokers must face in adjusting supply to demand…."). It is not the court's role, however, to decide which among competitors has better terms or to decide that consumers are better off without competition at certain levels of the market. Moreover, the presence of network effects does not make implausible PLS's allegation that consumers and competition were harmed

by NAR's conduct. Particularly in markets subject to network effects, allowing dominant players to exclude competitors can and does harm competition and consumers notwithstanding the fact that consumer benefit from network effects may be reduced. If left uncorrected, the negative policy implications from the district court's opinion to the contrary would be profound.

A. The Antitrust Laws Embody Congress's Policy Choice in Favor of Competition that Courts Must Respect

The Supreme Court has characterized arguments that competition should be sacrificed for the sake of a higher social good as "nothing less than a frontal assault on the basic policy of the Sherman Act." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978). It has explained, "[e]ven assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *Id.*; *see also United States v. Crescent Amusement Co.*, 323 U.S. 173, 187–88 (1944) ("Congress has made that choice…."); *accord United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927). Allowing "a defense based on the assumption that competition itself is unreasonable … would create the 'sea of doubt' on which Judge Taft refused to embark in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898), and which [the Supreme] Court has firmly avoided ever since." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 696.

Defendants argued, and the district court appears to have accepted, that even if Defendants did conspire to eliminate a listing network competitor, that conduct is not illegal because consumers are better served by the terms of service of the NAR-affiliated MLS networks—which require selling agents to include large amounts of information about the listing—than by those of its would-be competitor, PLS. 1-ER-22, at n.84 (faulting plaintiffs for not "explain[ing] how buyers are otherwise benefited by off-MLS listings"); 1-ER-25 ("Basic economics dictates that increased information about market conditions stimulates more competition among real estate professionals, whose goal is, at least in part, to match a buyer and a seller as quickly and efficiently as possible."). Such reasoning is antithetical to the antitrust laws, as it delves into the very question of whether competition is good or bad that the Supreme Court warned against in *National Society of Professional Engineers*. 435 U.S. at 695. It is not the courts' job to pick winners and losers in markets. If the information the NAR-affiliated MLS requires for listings does make for more efficient home sales that benefit home buyers, then the NAR-affiliated MLS requires only a level playing field to out-compete PLS on the merits. There is no reason to allow, as the district court's holding would, NAR and its MLS affiliates to conspire to contractually exclude PLS from the market.

To decide this case based on the court's perception of which product—the NAR-affiliated MLS or PLS—better serves consumers not only usurps the role of

Congress, but is pointless. If the NAR-affiliated MLS is a truly superior product that benefits consumers, then it will beat PLS in the marketplace. In such a scenario, if competition from PLS does anything, it should only spur the NAR-affiliated MLS to make its existing product even better than it already is. The NAR-affiliated MLS system has long been a monopoly, which suggests its existing terms of trade have room for improvement. The demonstrated demand for PLS before the Clear Competition Policy was imposed likewise reveals that the NAR-affiliated MLS is system is not meeting all the needs of the marketplace. To allow NAR to eliminate PLS, not through competition on the merits, but through a conspiracy to exclude PLS from the marketplace entirely, is to deprive consumers of the benefits of the dynamic engine of competition that Congress intended the antitrust laws to protect.

B. The District Court's Reliance on Alleged Procompetitive Benefits of Defendant's Conduct was Both Procedurally Improper and Substantively Flawed

The district court's determination that "[a]t worst, the Clear Competition Policy is neutral to competition" is both an improper conclusion at the motion to dismiss stage and based on a flawed understanding of the role of platform competition and network effects. Plaintiff has argued why the court's weighing of procompetitive benefits against anticompetitive harms at the motion to dismiss stage was improper, and we will not repeat those arguments here. Instead, we focus on

the substance of the pro- and anti-competitive effects of exclusionary conduct in platform markets with network effects. Contrary to the district court's apparent holding, the presence of network effects in residential listing network services markets makes Defendants' alleged conduct more, not less, dangerous to competition.

The district court was correct that "[t]he value of the network services provided by an MLS is largely a function of the number of members within the network." 1-ER-5. But the district court misunderstood the competitive implications of this fact in concluding, "the Clear Cooperation Policy has some plainly procompetitive aspects." 1-ER-24. It proceeded to recite various perceived benefits from concentrating listings on a single listing network: "all MLS members have access to information about listings that are publicly marketed by other MLS members" and "increased information about market conditions stimulates more competition among real estate professionals, whose goal is, at least in part, to match a buyer and a seller as quickly and efficiently as possible" 1-ER-24–25.

The mere presence of network effects does not render the suppression or exclusion of competing networks by the dominant network beneficial to consumers or to markets. A network effect or "positive network externality" "is a value that increases as the number of other participants in the venture increases." Areeda & Hovenkamp ¶ 2223c2 (citing MLS platforms as paradigmatic example of products exhibiting network effects). As such, when network effects are present,

consumers do benefit from having a large number of users concentrated on a platform. But, this benefit is not pro-competitive—indeed, it stems from a lack of competition.[4] And, that lack of competition simultaneously harm consumers, by being depriving them of the benefits of competition.

Even if it were proper for the district court to have engaged in balancing harms and benefits from Defendants' alleged conduct at this stage of the litigation, the district court erred in concluding without analysis that the benefits to consumers of concentration due to network effects outweighed the harm to consumers from the loss of platform competition from PLS. Economists have long recognized that only where network effects are particularly strong will their welfare benefits offset the harm to the market and consumers from the elimination of competition. *See, e.g.*, Marc Rysman, *Competition Between Networks: A Study of the Market for Yellow Pages*, 71 Rev. of Econ. Studies 483, 504 (2004) ("In this market, network effects are not strong enough to imply that the benefits of monopolization outweigh the benefits of competition."); *see also*, Paul A. Johnson, *Network Effects, Antitrust, and Falsifiability*, 5 J. Antitrust Enforcement 341, 344 (2017) (noting "the ambiguity of introducing competition into industries that exhibit network effects"). It is entirely plausible that the negative impact on consumers and the

[4] This dynamic is also why markets characterized by network effects are prone to tipping to monopoly.

market for listing networks from Defendants' alleged elimination of competition outweighed any positive network effects that result from forcing all listings onto the MLS. *See* Brief of Amicus Curiae Law Professors in Support of Appellant, at Section III.B, *PLS.com, LLC v. National Assoc. of Realtors*, No. 21-55164 (9th Cir. June 2, 2021) (explaining how Plaintiffs' plausibly alleged harm to real estate brokers *and* home buyers and sellers).

Moreover, to find legal a conspiracy by a dominant platform to exclude a competing platform *because* of the consumer benefits of network effects is particularly misguided. Network effects are widely recognized as a significant threat to competition and can present a formidable barrier to entry. Accordingly, antitrust enforcers are particularly sensitive to exclusionary conduct in the presence of network effects, because exclusion is a particularly effective means of squashing competition in such markets. Areeda & Hovenkamp ¶ 2223c2 ("[P]ositive network effects heighten antitrust concern about open-membership ventures' exclusion policies, because they make the creation of alternatives to the venture less likely, more costly, less desirable, and perhaps even economically impossible.")

A recognized strategy for competing in the presence of network effects is to offer a differentiated platform product with unique attributes to encourage consumers to engage in multihoming. Multihoming—that is, the ability of users to use more than one network simultaneously—"can be the antidote to strong network

effects." William P. Rogerson & Howard Shelanski, Antitrust Enforcement, Regulation, and Digital Platforms, 168 U. Pa. L. Rev. 1911, 1938 n.90 (June 2020) (*quoting* Jason Furman, et al., Report of the Digital Competition Expert Panel, UNLOCKING DIGITAL COMPETITION 4, at 37 (2019)). Because encouraging multihoming is one of few effective competition strategies in markets with network effects, conduct like that alleged against Defendants which impairs multihoming, can be particularly effective in eliminating competition. *Id.* ("In platform markets, conduct aimed at hindering multihoming on one side of the market may be a particularly effective exclusionary strategy.") (*quoting* Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruptions,* in 20 INNOVATION POLICY AND THE ECONOMY 125, 128 (Josh Lerner & Scott Stern eds., 2020)). Accordingly, that the real estate listing services exhibit significant network effects makes conspiracies to exclude competitors, such as that alleged by PLS, particularly detrimental to competition and not just to competitors.

The role of multihoming in platform competition also explains why the district court's conclusion that Defendant's conduct caused no injury because it involves only "shifting sales" and "does not reduce the output of brokerage services" is incorrect. In a competitive market for home listing services, brokers would subscribe to more than one listing network to take advantage of their differing features and competition between the listing networks would drive down prices for network

membership and spur innovation in network features. Importantly, competition between networks would not necessarily result in more home sales, and that is not the relevant metric; the relevant metric for measuring harm to competition is whether Defendant's conduct reduced output or otherwise injured consumers in the market for network listing services. To the extent that the Clear Cooperation Policy effectively prevents brokers from participating in two network listing services instead of one, it reduces output in network listing services, resulting in antitrust injury.

C. The Policy Implications of Dismissing Complaints Based on Platform Characteristics and Network Effects are Huge and Overwhelmingly Negative

It is hard to overstate the harm to competition that would follow from immunizing dominant companies in platform markets from claims that they have conspired to eliminate competing platforms. Many industries, including credit cards, sports leagues, the provision of telephone and internet services, social media, search, and retail exhibit network effects and platform characteristics to some degree. If the district court's reasoning is accepted, the dominant companies in each of those markets will be able to exclude and extinguish any nascent competing networks with impunity by arguing that consumers benefit by the dominant company's exhaustive network and/or better terms for facilitating network transactions.

The harm to competition, markets, and consumers that would follow is apparent. To be sure, Amazon shoppers would enjoy some benefit in the form of

network effects if Amazon eliminated all other online shopping platforms and forced all online retail onto Amazon.com—one-stop shopping, for example. But, such an emboldened Amazon.com could also raise prices to consumers with impunity while imposing oppressive terms on its sellers. Without developing an extensive record and conducting a complex economic analysis, it would be impossible to say for sure whether the benefits to consumers from one-stop shopping would outweigh the harms to consumers and sellers from an Amazon.com monopoly. Even without extensive analysis, though, one can observe that such a monopoly would eliminate competing online platforms like Walmart.com and Target.com that provide price and product features that many consumers clearly value. Accordingly, the proposition that an Amazon monopoly would harm consumers and competition is surely plausible, and that is all that is required at the motion to dismiss stage.

Markets exhibiting network and platform effects are some of the most competitively significant markets in the modern economy. As such, precedents like the one below, excusing blatant exclusionary conduct on the mistaken premise that consumers actually benefit from monopoly in such markets, are exceptionally dangerous to competition and risk gutting antitrust law across wide swaths of the economy.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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June 2, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Laura M. Alexander

Dated: June 2, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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