

Court revives antitrust claims against NAR in pocket listing suit

Judge says Top Agent Network 'adequately alleged' NAR's Clear Cooperation Policy is a 'group boycott.' Meanwhile, NAR signals it may be open to repealing the rule

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An antitrust lawsuit against the National Association of Realtors and the San Francisco Association of Realtors brought by private listing service Top Agent Network (TAN) is moving forward after a district court granted the company's motion for reconsideration of the case's dismissal.

The ruling comes as NAR appears to signal that it is open to repealing the policy at issue in the case — a rule the 1.5-million-member trade group has said is meant to curb pocket listings.

On Monday Judge Vince Chhabria of the U.S. District Court for the Northern District of California granted TAN's motion after the U.S. Court of Appeals for the Ninth Circuit sent the case back to the lower court in August. The appeals court opined that TAN's case was similar enough to the claims in [another case](#) brought against NAR by pocket listing service ThePLS.com to treat the claims the same way.

Both suits challenge NAR's Clear Cooperation Policy (CCP), which requires listing brokers to submit a listing to their MLS within one business day of marketing a property to the public.

[According to NAR](#), the rule is meant to effectively end the practice of publicizing listings for days or weeks without making them universally available to other agents. TAN and ThePLS.com, however, allege the rule is anticompetitive and violates state and federal antitrust laws, including the Sherman Antitrust Act.

"Top Agent Network has adequately alleged that the Policy constitutes a per se group boycott in violation of the Sherman Act," Chhabria wrote in his [July 22 order](#).

"In considering whether the plaintiff in PLS.com had done so, the Ninth Circuit noted that 'PLS's competitors coerced its suppliers (sellers' agents) not to supply PLS with listings (or to do so only on highly unfavorable terms), and they did so for the express purpose of preventing PLS, a new entrant to the market after decades of little to no competition, from competing with the MLSs. . . . PLS also alleges that the effort succeeded.'

"Substituting 'Top Agent Network' for 'PLS,' the same is true here."

In a statement, SFAR CEO Walt Baczkowski told Inman, "It's an ongoing case so I really cannot comment other than we are disappointed in the judge's decision to grant the motion for reconsideration. We will be reviewing all options."

While prior to the appeals court's ruling Chhabria had considered TAN's claims as they relate to the real estate market itself, the appeals court agreed with TAN that the proper market to consider the claims is the market for real estate listing services. The vast majority of such services nationwide are affiliated with NAR.

“Looking to that upstream [real estate listing services] market, the complaint adequately alleges that Top Agent Network’s injury flows from the Policy’s anticompetitive effects: The Policy harms competition by impeding agents’ ability to choose to post listings to Top Agent Network’s listing service, and this in turn harms Top Agent Network by restricting its supply of listings,” Chhabria wrote.

“And the Policy does not have countervailing procompetitive effects on this market: while many—indeed most—agents cannot join Top Agent Network, the Policy does not increase those agents’ choice of listing services.

“Moreover, as PLS.com noted, it would be inappropriate at this stage in the case to compare the Policy’s anticompetitive and procompetitive effects.”

Chhabria allowed TAN’s antitrust claims under the federal Sherman Act and California’s Cartwright Act and Unfair Competition Law to proceed, but a claim for intentional interference with contractual relations remains dismissed.

“Discovery may proceed immediately,” Chhabria wrote.

Chhabria did not decide whether TAN’s case should be evaluated under a per se or rule of reason analysis at this stage in the case; the latter would allow the court to consider the CCP’s alleged procompetitive effects while the former would not.

The district court put a case management conference on its docket for Aug. 30 and gave the parties until Aug. 23 to submit a joint case management statement.

According to [RISMedia](#), at a hearing last week, NAR’s outside counsel, Ethan Glass, revealed that the trade group had reached a deal with ThePLS.com to extend the statute of limitations in that case and was dismissed from that suit without prejudice, meaning ThePLS.com could re-file its claims against NAR at a later date.

“Where we landed is that we gave them a tolling agreement on the statute of limitations to give us time to figure out whether or not we were amenable to repealing the Clear Cooperation Policy,” Glass said at the hearing.

Chhabria replied, “In light of the [appellate court’s] decision, why hasn’t the National Association of Realtors done that yet? I mean, I feel like a long time has passed since that decision came down.”

Asked about Glass’s comment and whether NAR had made any progress in changing the policy, a NAR spokesperson told Inman in a statement, “NAR and PLS.com stipulated to dismissal of PLS.com’s action on January 26, 2024. NAR did not agree to make any rule changes as part of its agreement with PLS.com.”

“We are pleased that the judge in our antitrust case against NAR reversed his earlier order dismissing our complaint, and we look forward to proving at trial that the CCP is anti-competitive and greatly limits sellers’ choice in how best to market their homes,” TAN CEO David Faudman told Inman in a statement.

“The CCP has been a disaster from the start that should never have been enacted. We are confident we will win at trial and this misguided policy will be struck down once and for all.”

TAN filed the suit in May 2020 and the district court [tossed TAN's case](#) in August 2021. TAN subsequently [appealed](#) that decision. The company submitted its opening brief to the appeals court in January 2023 and the U.S. Department of Justice [submitted an amicus brief](#) in the case in March, arguing that the lower court had made legal errors when it tossed TAN's suit.

"We continue to believe that the District Court properly dismissed this case back in August 2021," a NAR spokesperson told Inman in a statement.

"We will continue to advance our positions in support of this outcome before the Court."

Read the order: [ORDER Granting 113 Motion for Reconsideration 07222024.pdf \(google.com\)](#)

Editor's note: This story has been updated with comments from NAR and TAN.