UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Case No. 24-cv-20805-KMM

YA MON EXPEDITIONS, LLC, BLUEBERRY ENTERPRISES, LLC, MAGNA CHARTA, LLC, PRIDE CONTRACTING, INC., KIP LAMAR SNELL, and JUAN GALAN, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

ALLIED MARINE, INC., GALATI YACHT SALES, LLC, HMY YACHT SALES, INC., MARINEMAX, INC., NORTHROP & JOHNSON YACHTS-SHIPS, LLC, FRASER YACHTS FLORIDA, INC., FRASER YACHTS CALIFORNIA CORPORATION, MARINEMAX EAST, INC., ONEWATER MARINE INC., DENISON YACHTS INTERNATIONAL, LLC, YACHTING ASSETS AND OPERATIONS LLC, UNITED YACHT SALES, LLC, INTERNATIONAL YACHT BROKERS ASSOCIATION, INC., YACHT BROKERS ASSOCIATION OF AMERICA, INC., CALIFORNIA YACHT BROKERS ASSOCIATION, INC., NORTHWEST YACHT BROKERS ASSOCIATION, BOATS GROUP, LLC, and YATCO, LLC

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF THEIR JOINT MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED CLASS ACTION COMPLAINT

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INTRODUCTION

It is no surprise that Plaintiffs assert that the alleged conduct in this case cannot be "meaningfully distinguish[ed]" from that in the National Association of Realtors ("NAR") real estate cases they rely upon. Opp'n to Mot. to Dismiss 16, ECF No. 184 ("Opp'n"). Plaintiffs drafted their complaint specifically to convey that false impression. But the allegations in the Complaint[1] that purportedly make this case "just like" the real estate cases are conclusory and in conflict with the sources on which they supposedly rely, entitling them to no weight. The law requires Plaintiffs to do more than parrot allegations from other cases while insinuating that the allegations in this case are "far worse." *Id.* at 1.

The few *non-conclusory* allegations regarding the actual industry at issue in this case, including allegations about market structure, bear no resemblance to those that enabled some plaintiffs in the real estate cases to state a claim. The Complaint and Opposition both confirm that the yacht industry has many independent actors operating across multiple levels of the market, such that no Defendant could possibly implement, monitor, and enforce a mandatory rule binding all Defendants in a single, overarching conspiracy. The yacht industry has no centralized set of rules governing all MLSs, and no single set of applicable association rules—factors that paved the way for finding an industry-wide agreement in the NAR real estate cases. Moreover, the various alleged guidelines Plaintiffs rely upon neither require commission splitting nor set commission rates, nor are they uniform across Defendants. These core distinctions render the alleged conspiracy implausible, and Plaintiffs' contrary arguments are meritless. And because there are no centralized MLS or association guidelines, Plaintiffs cannot allege anticompetitive effects or a cognizable relevant market in which Defendants have market power.[2]

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[1] Citations to the "Complaint" refer to the Consolidated Class Action Complaint, ECF No. 140.
[2] On September 4, 2024, Defendant Yatco, LLC filed its Motion to Compel Arbitration and Stay Proceedings, ECF No. 185, pursuant to this Court's Order granting Yatco permission to do so.

ARGUMENT

1. Plaintiffs' Superficial Analogy To The NAR Real Estate Cases Fails

Plaintiffs make much of the fact that a few of the Defendants have used the term "MLS" in their marketing materials. Opp'n 17-18. But there is nothing inherently anticompetitive about a "multiple listing service" that collects listings onto a search platform for effective dissemination and access—and that is all that an "MLS" does. *See* Compl. 1, 15; Opp'n 1, 17 & n.11; *see also United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1368 (5th Cir. 1980) (the matching of buyers and sellers facilitated by MLS systems serves "enormously procompetitive objectives").

Nor is there anything nefarious about IYBA's alleged definition of "MLS" as "member listing service." The label "MLS" is, fundamentally, irrelevant to Plaintiffs' claims. When it comes to the facts actually salient to their claims, Plaintiffs fail to grapple with the fundamental differences between the yachting and real estate industries. These differences are reflected in both the actual allegations in the Complaint and Plaintiffs' own description of the cases they rely upon.

No Centralized MLS. Plaintiffs identify the relevant agreement in the NAR real estate cases as one to "fix real estate commissions *by requiring franchisees to join local MLSs and NAR*," which "centralizes control over how real estate brokers are compensated with the NAR." Opp'n 18 (emphasis added) (quoting in part *Moehrl v. Nat'l Ass'n of Realtors*, 492 F. Supp. 3d 768, 778-79 (N.D. Ill. 2020)). But as Plaintiffs themselves acknowledge, all real estate MLSs were "jointly own[ed]" by "[l]ocal real estate brokers." *Id.* at 16. Critically, the policies governing all real estate MLSs were issued top-down by a single entity, NAR, including the core rule requiring that every MLS listing include an offer of compensation to the buyer broker. *See Moehrl*, 492 F. Supp. 3d at 774; *Sitzer v. Nat'l Ass'n of Realtors*, 420 F. Supp. 3d 903, 914 (W.D. Mo. 2019). This fact was

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Due to Plaintiffs' position in ECF No. 180, in an abundance of caution, Yatco is not seeking affirmative relief in this litigation until the Court rules on Yatco's Motion to Compel Arbitration. Therefore, neither Yatco nor its counsel have joined in this Reply but reserve the right to do so in the event that the Court denies Yatco's Motion to Compel Arbitration.

key—*every single individual* with access to the MLS was a broker or agent who was a member of NAR, and was obligated to follow its rules as implemented by the single operative MLS in each region, according to NAR rules. *See Moehrl*, 492 F. Supp. 3d at 774.

There is no such centralization here. Plaintiffs concede that Boats Group and Yatco are "independent" marketplaces, Opp'n 16, meaning no Association Defendant (or Broker Defendant) has any say over their operations. In contrast to NAR's role in the NAR real estate cases, Association Defendants[3] *do not* control access to most of the alleged "MLSs" in the yacht industry, or to a single dominant MLS. The independence of the Marketplace Defendants is borne out by the lack of any non-conclusory allegations that platform access hinges on Association membership, and by Plaintiffs' concession that Boats Group provides access to non-brokers. *See infra* at 6-7. Moreover, the Complaint fails to allege any economic incentive for independent Marketplace Defendants to join a conspiracy to raise broker fees. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986) ("[I]f [the defendants] had no rational economic motive to conspire . . . the conduct does not give rise to an inference of conspiracy.").

No Centralized Association Rules. In the NAR real estate cases, pleading an "agreement" was straightforward because there was only one, centralized national trade association: the NAR governed each and every MLS with the same set of NAR rules that were enforced by the local associations, and access to the MLS (to post or search listings) was limited to NAR members bound by NAR rules, including the commission compensation rule. *See* Opp'n 12 (quoting *Moehrl*, 492 F. Supp. 3d at 777 ("the purported anticompetitive restraints here are a product of written rules issued by the NAR that each . . . Defendant expressly imposes upon their franchisees

[3] The full list of Defendants and their grouping is provided in Defendants' Motion to Dismiss at 14 nn.2-4, ECF No. 178 ("Motion").

and realtors")). Indeed, NAR *did not even contest* the existence of an agreement within its membership in the case Plaintiffs principally rely upon. *Moehrl*, 492 F. Supp. 3d at 777.

Here, there are four Association Defendants, not one. Each one has different guidelines, rules, forms, and policies, *none* of which actually requires the kind of commission sharing at issue in the NAR real estate cases. The four Association Defendants also do not have identical membership, as in the case of NAR. And there are multiple independent platforms that are *not* governed by any Association Defendant and available not only to brokers, but also to yacht buyers and sellers. Thus, plausibly alleging that *all* four Association Defendants conspired to adopt anticompetitive rules—and that all Association, Broker, and Marketplace Defendants conspired to implement those rules—is an insurmountable hurdle that was not present in the NAR real estate cases. Given the disaggregation of the yacht industry marketplaces and associations, Plaintiffs must do more than just assert that there is one rule, because no rule actually applies to all supposedly conspiring Defendants.[4]

2. Plaintiffs Mischaracterize Their Allegations And Fail To Plausibly Allege A Conspiracy

Plaintiffs acknowledge that "[t]he lynchpin of Section 1 is an agreement." Opp'n 6. Plaintiffs bear the burden of plausibly alleging an agreement to "force preowned yacht sellers to pay commissions to buyers' brokers and to pay overall commissions at higher rates." *Id.* at 1. To do so, they must allege facts supporting the inference that twelve Broker, four Association, and two Marketplace Defendants entered into that agreement. Yet Plaintiffs have made no non-conclusory allegations that *any* of the Defendants have forced sellers to pay buyer brokers'

[4] Plaintiffs also misstate the question as whether "Defendants are adhering to the seller-pays-commissions program, which was also a central feature of the realtors' conspiracy." Opp'n 20. The actual relevant question for the Court is whether Plaintiffs have plausibly alleged the existence of *an agreement* among all of these Defendants to adhere to a single overarching commission pricing rule, rather than each independently and unilaterally pursuing a successful commercial strategy. In any event, they have not plausibly alleged either.

commissions or fixed commission rates. They certainly have not plausibly shown that *all* Defendants have done so. Nor have Plaintiffs plausibly alleged any "high level communications" or any "exchange of pricing information" between any Defendants. *Id.* at 12-14.

Instead, Plaintiffs misleadingly characterize a variety of irrelevant and benign Association guidelines as providing "uniform contract terms," "uniform codes," or a "uniform system of anticompetitive conduct." *See id.* at 9, 13, 14, 18, 31. But such "impermissible group pleading" and "formulaic allegations of conspiracy" are "wholly insufficient, no matter how frequently asserted." *In re Crop Inputs Antitrust Litig.*, No. 21-2993, 2024 WL 4188654, at *11 (E.D. Mo. Sept. 13, 2024). And Plaintiffs' own allegations show that these repeated assertions are false.

Plaintiffs try to obscure the pleading standard, suggesting that because they have alleged a complicated antitrust conspiracy, they should be absolved of the need to plausibly allege each Defendant's participation in it. *Id.* at 6-12; *see also infra* at 11-13 (discussing Plaintiffs' improper group pleading). But "complexity" does not excuse Plaintiffs from the pleading requirements of *Twombly*, and the cases upon which they rely do not suggest otherwise.

Continental Ore Co. v. Union Carbide & Carbon Corp., for example, does not hold that plaintiffs can avoid pleading facts against each defendant sufficient to allege participation in a conspiracy. 370 U.S. 690 (1962). Rather, that decision focused on whether the evidence at trial, taken as a whole, established that the defendants' unlawful acts caused the Plaintiff's injury. *Id.* at 700-01. "Subsequent decisions have acknowledged that the holding in *Continental Ore* was not intended to limit a court's individual assessment of the legality of the various components of an alleged conspiracy." *In re Processed Egg Prods. Antitrust Litig.*, 206 F. Supp. 3d 1033, 1042 (E.D. Pa. 2016), *aff'd*, 962 F.3d 719 (3d Cir. 2020); *see Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1366-67 (Fed. Cir. 1999) ("*Continental Ore* did not hold . . . that the degrees of support for each legal theory should be added up."). Piling defective allegations upon defective allegations

does not add up to conspiracy, as "the whole is not more than the sum of the parts." *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1260 (W.D. Wash. 2009).

Contrary to Plaintiffs' assertions, Defendants' Motion to Dismiss does not divorce individual allegations from context or "dismember[]" them from the whole. *See* Opp'n 6 (quoting *Cont'l Ore Co.*, 370 U.S. at 699). Rather, Defendants examined the conduct alleged to evaluate whether it, both individually and collectively, plausibly suggests a conspiracy. It does not.

a. Plaintiffs Fail To Plausibly Allege Any Conduct By The Marketplaces To Suggest Participation In A Conspiracy

Plaintiffs concede that their claim hinges on the assertions that "MLS Defendants require that yacht sellers to be [sic] represented by a broker in order to list a boat on the MLS" and "force[] any yacht seller using a broker to pay" the commission of the buyer broker. *Id.* at 3, 10. But the Complaint's factual allegations flatly contradict these assertions. The allegations regarding the marketplaces at issue have four critical flaws.

First, despite identifying boats.com and Boat Trader as relevant "MLSs" in their Complaint, ¶¶ 54, 60, Plaintiffs do not contest that these marketplaces allow *anyone* (*i.e.*, brokers, owners/sellers, and buyers) access to "the MLSs." Nor do they contest that neither boats.com nor Boat Trader has any rules regarding commission-sharing. *See* Mot. 11-12, 35-36. This is fatal to Plaintiffs' claims. The lack of such rules means Boats Group has *not* conditioned access to at least two of its marketplaces (Plaintiffs' alleged "MLSs") on adherence to any rules (let alone allegedly anticompetitive ones). Boats Group is not plausibly involved in the alleged conspiracy because its actions with regard to these marketplaces are explicitly *contrary* to the alleged conspiracy's aims.

Plaintiffs' only response is that boats.com and Boat Trader are "primarily targeted" towards boats under 35 feet, whereas their claims are limited exclusively to boats 33 feet and over. Opp'n 10 n.8, 34-35. But that is irrelevant. Plaintiffs do not argue that these marketplaces are limited to boats of a certain size—anyone can sell a boat of *any* size on these marketplaces, and Plaintiffs do

not allege otherwise.[5] Nor do they deny that individual sellers and brokers can use these marketplaces to get "MLS" access without any kind of commission sharing requirement.

Second, Plaintiffs fail to identify any rule or policy of YachtWorld (the third Boats Group "MLS") that supports the inference that Boats Group has participated in a conspiracy to fix broker prices. They argue without elaboration that this marketplace "require[s] co-brokerages," Opp'n 9, and "enforces the rules of Broker Defendants,"[6] *id.* at 20. But the Complaint contradicts this conclusory argument, as Plaintiffs allege that only "[a]bout 70-percent of all brokerage sales [on YachtWorld] are co-brokered." *Id.* at 17 (quoting Compl. ¶ 126). Plainly, YachtWorld does not *require* co-brokerage agreements. And Plaintiffs do not explain how any YachtWorld guideline regarding co-brokerage agreements could be indicative of an agreement with the other Defendants.

Third, Plaintiffs assert that Yatco's participation in the alleged conspiracy is illustrated by "requir[ing] [a] listing broker to be an Association Defendant member or to have two existing YATCO members vouch for them." *Id.* at 20. This is both wrong and insufficient to plead any kind of agreement with regard to broker commissions. The Complaint (quoting Yatco's website) makes clear that any member of "a professional association" (not limited to those named in the Complaint) can sell on Yatco. Compl. ¶ 123. Plaintiffs have included no allegations regarding any rules for the myriad other associations not identified in the Complaint that meet Yatco's membership criterion. And Plaintiffs concede that a broker can post a listing *without joining an association* at all by having two "YATCO members vouch for them." Opp'n 20.

Fourth, Plaintiffs are virtually silent as to any allegations about YachtBroker.org (now known as Yachtr). All they say is that it "is owned and controlled by Association Defendants."

[5] Nor could they consistent with their obligations under Rule 11. Anyone can sell a boat on boats.com "[r]egardless of selling price, type or size." *See* Mot., Ex. C., *Sell your boat fast today on boats.com*, Boats, https://www.boats.com/sell-my-boat/, ECF No. 178-3.

[6] Which Broker Defendants and what supposed rules are left to the Court's imagination.

Id. That is incorrect, because Yachtbroker/Yachtr is owned by only *one* Association Defendant (IYBA). And they say *nothing* about its guidelines, and have not alleged any facts suggesting that Yachtbroker/Yachtr has any rules implementing the alleged conspiracy. *See* Compl. ¶¶ 83-120 (section titled "Anticompetitive Rules" does not mention Yachtbroker or Yachtr a single time).

Plaintiffs have therefore failed to plead parallel conduct among the Marketplace Defendants or to allege conduct indicating that these independent entities are enforcing any rules of the Broker or Association Defendants. Because the Marketplace Defendants are "core" to Plaintiffs' allegations, Opp'n 3, this pleading failure is fatal to the claims in this case.[7]

b. Plaintiffs Fail To Allege Any Conduct By The Association Defendants To Plausibly Suggest Participation In A Conspiracy

The Complaint alleges that the Association Defendants have a wide range of different guidelines, but *none* of them require a boat seller to pay a buyer broker's commission. Plaintiffs' contrary assertions are contradicted by their own allegations, and are predicated on a bait and switch. They repeatedly assert that all Association Defendants have a certain rule, but then cite allegations in the Complaint that apply to only select Association Defendants (and describe permissive guidelines, not mandatory rules), apparently hoping that the Court will not notice.

First, Plaintiffs mischaracterize the various kinds of guidelines alleged in the Complaint. In their Opposition, Plaintiffs assert that the Association Defendants have imposed "uniform codes of conduct" that require yacht sellers to pay buyer's broker commissions and "fix commissions at 10% of the sales price." Opp'n 13 (citing Compl. ¶¶ 10, 64-67, 77-78, 83-108).[8] But the cited

[7] Plaintiffs' conclusory allegations with respect to the Marketplace Defendants are flatly contradicted by material incorporated by reference into their Complaint, *see* Mot. 6-7 & n.7, 11-12, 35, and Plaintiffs have *conceded* that these critical allegations are false with respect to at least two of the alleged MLSs, *see* Opp'n 10 & n.8. Allowing a further amended complaint would therefore be futile, and the Complaint should be dismissed with prejudice. *See infra at* 20.

[8] Plaintiffs also assert that unidentified Association rules "prohibit[] brokers from competing for commissions." Opp'n 13. But these high-level statements about "cooperation" in the Complaint

allegations are conclusory and many do not actually mention any rules of any Defendant, never mind a uniform "rule" across all Defendants. Compl. ¶¶ 10, 64-67. Plaintiffs allege only that (1) IYBA provides a form contract that contemplates the possibility of commission-sharing, *id.* ¶ 92; (2) CYBA's code of ethics contemplates that commission percentages and shares "should" be designated, *id.* ¶ 96; (3) YBAA has created a form contract that provides for commission sharing, *id.* ¶¶ 77-78; (4) YBAA's code of ethics contemplates that commissions will "generally" be shared based on negotiations on a particular sale, *id.* ¶ 87; and (5) IYBA, CYBA, and NYBA have guidelines that contemplate that any (non-mandatory) shared commission agreements be negotiated prior to submission of an offer, *id.* ¶¶ 90, 93, 96, 101.

None of this requires a seller to pay a buyer broker's commission. Providing form contracts that brokers *may* use does not support the inference that any relevant terms are *required*, nor do Plaintiffs allege that any rule *requires* the use of any form contract. At most, these allegations identify guidelines that contemplate the possibility that commission sharing *could* be negotiated. It is simply false, as is apparent on the face of the documents and guidelines referred to by Plaintiffs, that any of the guidelines at issue "preclude[] competitive bidding," let alone that *all* of the Association Defendants have rules that do so. *See* Opp'n 10 (citing *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).[9] Nor are there any factual allegations whatsoever supporting the conclusory allegation that Association Defendants "fix commissions at 10%." *Id.*

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are irrelevant to the issue of broker commissions and do not come close to suggesting anticompetitive conspiratorial conduct, as explained in the Motion (13-14).

[9] Plaintiffs' reliance on *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), actually demonstrates why Plaintiffs' allegations are insufficient. In that case, a single association maintained "ethical rules" for the entire profession. *Id.* at 696. The rules set by the defendant association operated "as an absolute ban on competitive bidding" for engineering services: "[the Engineer] *shall* not solicit or submit engineering proposals on the basis of competitive bidding." *Id*. at 683 n.3, 696 (emphasis added).

at 13. On this point, both the Complaint and the Opposition are contradicted by allegations conceding that commissions vary. *See* Compl. ¶ 5; Mot. 6.

Second, Plaintiffs do not actually allege that the Association Defendants have adopted the same rules or guidelines. *See also* Mot. 12-13 (explaining that Plaintiffs have failed to allege parallel conduct because none of the allegations cover all Association Defendants). For example, the allegations described above do not indicate that *all* Association Defendants provide form contracts with similar terms. Nor do they even contemplate the same structure for the negotiation of any commission sharing. Given what they have actually alleged, Plaintiffs' argument that all Association Defendants have "uniform codes of conduct" is absurd.

Third, virtually all of the guidelines (and obviously the provision of sample forms) that constitute the core of Plaintiffs' allegations are non-binding. Plaintiffs have cited no cases undermining the proposition that "[i]t is well-settled that non-mandatory trade association rules do not give rise to antitrust liability." Mot. 14; *see also Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 832 F.3d 1, 9-10 (1st Cir. 2016) ("[The] antitrust laws allow trade associations to make nonbinding recommendations."); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349 (3d Cir. 2010) ("[N]either defendants' membership in the [trade association], nor their common adoption of the trade group's suggestions, plausibly suggest conspiracy."); *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1156 (9th Cir. 2001) (suggestions insufficient to support inference of agreement); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1459 & n.34 (11th Cir. 1991) (same). That principle applies with even greater force here, where Plaintiffs make the extraordinary request that the Court infer an agreement from a wide variety of different guidelines, across four associations, *none of which directly pertains to the object of the alleged conspiracy*.

Fourth, Plaintiffs misrepresent the substance of the Certified Professional Yacht Broker ("CPYB") certification program. Plaintiffs claim this program "imposes uniform codes of conduct

and promulgates form contracts [sic] terms that require a yacht seller to pay all commissions." Opp'n 18. But Plaintiffs do not allege that any of the Broker Defendants require their brokers to hold CPYB certifications, nor that brokers employed by Broker Defendants are CPYB certified. The CPYB is a voluntary program that a broker need not participate in to become licensed, join any association, or access any marketplace operated by any Defendant. Regardless, the rules of the program do *not* require the sharing of commissions, nor do they set the amount of any commission; in fact, the rules expressly provide that any shared commission *may* be "negotiated on a particular sale" and "reconsidered."[10] And the CPYB Code of Ethics does not require anything of the Association Defendants' members. Nor do CPYB guidelines bind the Marketplace Defendants or the Broker Defendants, who do not require their brokers to hold CPYB certifications.

c. Plaintiffs Make Undifferentiated Allegations About Broker Defendants And Misstate The Pleading Standard

A complaint may not "lump[] all the defendants together in each claim and provid[e] no factual basis to distinguish their conduct." *Lane v. Capital Acquisitions & Mgmt. Co.*, No. 04-60602, 2006 WL 4590705, at *5 (S.D. Fla. Apr. 14, 2006), *aff'd sub nom. Lane v. XYZ Venture Partners, L.L.C.*, 322 F. App'x 675 (11th Cir. 2009). Rather, a complaint alleging an antitrust conspiracy must contain "*specific* allegations linking each Defendant to [the] price-fixing conspiracy." *In re Auto Body Shop Antitrust Litig.*, No. 14-6006, 2015 WL 4887882, at *6 (M.D. Fla. June 3, 2015) (emphasis added), *report and recommendation adopted in relevant part*, No. 14-6006 (M.D. Fla. Aug. 17, 2015), ECF No. 222; *see also id.* at *5 n.2 (collecting cases).

[10] Ex. G, *CPYB Code of Ethics*, CPYB, https://www.cpyb.net/aws/CPYB/pt/sp/code_ethics (last visited Sept. 17, 2024). This website is incorporated by reference in the Complaint ¶¶ 52 n.8, 57 n.9. *See also* Mot. 7 n.7 (explaining that websites cited in the Complaint are incorporated by reference). While Plaintiffs have challenged Defendants' use of judicial notice, Opp'n 3 n.6, they do not contest that websites cited in their Complaint are incorporated by reference and can be relied upon at the motion to dismiss stage.

Plaintiffs fail to meet those requirements. *See* Mot. 21 (citing Compl. ¶¶ 13, 83, 131, 208-09). Even in the portions of the Complaint they identify as containing "robust allegations" of Broker-specific conduct, Opp'n 21, Plaintiffs simply levy broad and collective accusations about all twelve Broker Defendants that essentially boil down to "they all participated in the alleged conspiracy." *See* Compl. ¶¶ 131, 134, 155, 158-61, 192, 208-09; *In re Treasury Sec. Auction Antitrust Litig.*, 595 F. Supp. 3d 22, 42 (S.D.N.Y. 2022) (granting motion to dismiss where plaintiffs did not "link any specific defendant to any specific conversation" and instead used "generic terms" such as "dealers" or "traders" throughout the complaint), *aff'd sub nom. City of Pontiac Police & Fire Ret. Sys. v. BNP Paribas Sec. Corp.*, 92 F.4th 381 (2d Cir. 2024). Plaintiffs cannot hide behind the assertion that the conduct of each Broker Defendant is "identical." Specific allegations regarding the conduct of each Defendant are necessary to state a claim, and the Court should not credit these "conclusory allegations" that amount to "legal conclusions masquerading as facts." *Warren Tech., Inc. v. UL LLC*, 962 F.3d 1324, 1328 (11th Cir. 2020) (citation omitted).

The cases Plaintiffs cite do not suggest otherwise. *First*, "the liberal requirements of notice pleading" do not apply, and have not applied in the seventeen years since *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See* Opp'n 22 (quoting *Crowe v. Coleman*, 113 F.3d 1536, 1539 (11th Cir. 1997)). Plaintiffs cannot dodge their obligation to plausibly plead a claim against each Defendant by invoking cases applying an abrogated pleading standard. *See id.* at 22-23. *Second*, Plaintiffs' cited case, *In re TFT-LCD Antitrust Litigation*, 599 F. Supp. 2d 1179 (N.D. Cal. 2009), actually supports Defendants' position. In that case, the court merely held that it was acceptable to not differentiate between related corporate entities. *Id.* at 1184. That is not the issue here. When the court *was* presented with a complaint like the one here, the court dismissed it for failing to "include allegations *specific to each defendant* alleging that defendant's role in the alleged conspiracy." *Id.* at 1183 (emphasis added) (quoting *In re TFT-LCD Antitrust Litig.*, 586 F. Supp.

2d 1109, 1117 (N.D. Cal. 2008)). *Third*, several of the other cases Plaintiffs rely upon involve *specific* allegations that group together only *two* related defendants. *See Crowe*, 113 F.3d at 1539 (alleging nuisance claim against the present and former adjacent landowners); *Hudak v. Berkley Grp., Inc.*, No. 13-00089, 2014 WL 354676, at *4 (D. Conn. Jan. 23, 2014) (alleging claims against two defendants that were in business together). In contrast, Plaintiffs here have grouped together a dozen largely unrelated entities and presented only conclusory group pleading allegations at a high level of generality. While it may not be implausible to ascribe the same specific conduct to two related defendants, it *is* implausible to assert, without any support, that twelve defendants behaved identically in all respects. Such allegations should not be credited.[11] *See In re Treasury Sec. Auction Antitrust Litig.*, 595 F. Supp. at 43–44 (reliance on group pleading rendered plaintiffs unable "to meet the plausibility standard under *Iqbal* and *Twombly*").

d. Plaintiffs Fail To Allege Evidence Of Plus Factors

Even if they had alleged parallel conduct, Plaintiffs have not plausibly alleged any of the necessary plus factors required to support an inference of an agreement. *First*, Plaintiffs have not alleged any actions taken against Defendants' self-interest. The Opposition attempts to rewrite the Complaint to allege that brokers are not allowed to "compete on commission amounts." Opp'n 15. But the Complaint actually alleges that both the commission amount and the commission sharing arrangement (if there were one) can vary. *See* Compl. ¶ 5. Moreover, even if Plaintiffs had alleged that the Broker Defendants all charge the same commission, this "plus factor" is simply a restatement of "identity of price," which is "mere parallel conduct" and cannot support Plaintiffs'

[11] Plaintiffs' allegations against OneWater are one telling (and characteristic) example of their inappropriate group pleading. As they acknowledge, the only allegation specific to OneWater states that it sells yachts and collects brokerage commissions in Florida. Opp'n 24 (quoting Compl. ¶ 40). The rest of the allegations simply lump OneWater in with every "Defendant" or "Broker Defendant." There literally is not a single other factual allegation against OneWater. This neither provides OneWater notice of the grounds for the claims against it, nor plausibly suggests that OneWater has participated in a conspiracy.

"attempt to allege the necessary agreement." *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co.*, 917 F.3d 1249, 1269 (11th Cir. 2019) (en banc). Finally, Plaintiffs' deficient argument (at best) applies only to Broker Defendants, and in no way plausibly alleges that Association Defendants or Marketplace Defendants have acted against their economic interests.

Second, Plaintiffs raise an assortment of arguments related to market structure and alleged relationships between Defendants and their employees. But they all fall flat given the wide array of Defendants and Plaintiffs' sparse allegations. Plaintiffs suggest that participation in a trade association can be a plus factor. Opp'n 12-13. But there are *four* trade associations here, and the Boats Group and Yatco marketplaces are independent of any associations, Defendants or otherwise. There are no allegations that one trade association serves as a locus for group decision-making. Plaintiffs do not even allege which Broker Defendants are members of which, if any, of the Association Defendants. Nor do they allege any facts about Association Defendant meetings or Broker Defendant attendance at those meetings, let alone that any supposedly anticompetitive "rules" were agreed upon at those meetings.

Plaintiffs point to alleged relationships between various subsets of Defendants. *Id.* at 13-14. But here, too, Plaintiffs describe only a handful of bilateral relationships, relationships between *one* Association Defendant and its members, or relationships among a handful of Defendants at a single level of the market. There are no allegations whatsoever that *all* (or even most) of the Defendants have ever agreed to the terms of the alleged conspiracy or agreed about the supposedly anticompetitive "rules." This is fatal to Plaintiffs' claims.

e. Plaintiffs Fail To Allege Direct Evidence Of An Agreement

Plaintiffs' failure to plead direct evidence of an agreement is even more flagrant. The only "direct evidence" Plaintiffs claim to have pled is an alleged "binding association rule designed to prevent competition." *Id.* at 8 (quoting *Relevent Sports, LLC v. U.S. Soccer Fed'n, Inc.*, 61 F.4th

299, 307 (2d Cir. 2023)). But no such rule exists. At most, Defendants *each* adopted different guidelines from different associations, and there is no evidence—let alone direct evidence—that Defendants all adopted the *same* rule. The Marketplace Defendants are not alleged to have adopted any Association rule. Nor have the Association Defendants adopted any common rules. The independent adoption of non-uniform guidelines by a subset of Defendants cannot possibly constitute evidence (much less direct evidence) of an agreement among *all* Defendants. Simply put, there is no "binding association rule" that all Defendants are alleged to have agreed to.[12]

3. Plaintiffs Fail To Plausibly Allege The Additional Elements Of A Section 1 Claim

a. Plaintiffs Fail To Plead A *Per Se* Claim And Do Not Plausibly Allege A Hub-And-Spoke Conspiracy

Before applying the *per se* rule, courts must consider the restraint in context, including how the parties are related. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 n.4 (1988) ("[A] restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement."). Here, the three groups of Defendants generally do not compete with one another and "[a]greements between competitors are horizontal restraints, while agreements between firms at different levels of distribution impose vertical restraints," as Plaintiffs themselves acknowledge. Opp'n 24. The conspiracy alleged is therefore not a horizontal one warranting *per se* treatment.

Acknowledging this, Plaintiffs attempt to define a hub-and-spoke conspiracy and insist that the vertical relationships in this case do not defeat application of the *per se* rule. *Id.* at 25. But the Complaint does not allege or even reference a hub-and-spoke conspiracy. Nor do Plaintiffs explain

[12] As described above, Plaintiffs misrepresent the substance of the CPYB Code of Ethics, which does *not* require the sharing of commissions and expressly provides that any shared commission can be "negotiated on a particular sale" and "reconsidered." *See supra* at 11 n.10. Regardless, the CPYB Code of Ethics does not govern all of the Association Defendants' members, nor all of the Broker Defendants, nor (obviously) the Marketplace Defendants.

how that framework applies to their claims. A "hub-and-spoke conspiracy . . . has three elements: (1) a hub, such as a dominant purchaser; (2) spokes, such as competing manufacturers or distributors that enter into vertical agreements with the hub; and (3) the rim of the wheel, which consists of horizontal agreements among the spokes." *In re Disposable Contact Lens Antitrust*, 215 F. Supp. 3d 1272, 1291 (M.D. Fla. 2016) (citation omitted). There is a *single* powerful hub at the core of the conspiracy, coordinating the conduct of the spokes. *See United States v. Apple, Inc.*, 791 F.3d 290, 314 (2d Cir. 2015); *Toys "R" Us, Inc. v. F.T.C.*, 221 F.3d 928, 932-34 (7th Cir. 2000). Even the one case Plaintiffs rely upon involved a single agent acting as the "hub" of the relevant agreements, which were mandatory unilateral pricing policies to which retailers had to adhere. *In re Disposable Contact Lens*, 215 F. Supp. 35 at 1291; *see* Opp'n 25.

Yet here, there are many entities alleged to participate at each level. No single entity (or even two entities) is alleged to serve the critical coordinating "hub" function, and Plaintiffs cannot allege such a "hub." *Cf. Sitzer v. Nat'l Ass'n of Realtors*, 420 F. Supp. 3d 903 (W.D. Mo. 2019) (where, unlike here, the distinguishable nature of the real estate industry and the unique position of NAR enabled plaintiffs to plausibly allege facts in which NAR operated as the "hub"). Nor do Plaintiffs allege a "rim." At most, Plaintiffs allege a convoluted web of vertical and horizontal relationships and alleged agreements, among some—but never all—Defendants. "The Complaint's failure to conform to any of these [horizontal, vertical, or hub-and-spoke] paradigms" illustrates its "multitude of pleading deficiencies." *United Am. Corp. v. Bitmain, Inc.*, 530 F. Supp. 3d 1241, 1256 (S.D. Fla. 2021) (plaintiff failed to plead hub and spoke conspiracy where complaint did not allege that "one Defendant is common to all others," *e.g.*, that one defendant could have operated as the "hub"). Accordingly, Plaintiffs' *per se* claim fails.

b. Plaintiffs Make No Effort To Defend Their Alleged Market And Improperly Rely On Conclusory Allegations To Allege Anticompetitive Effects

Plaintiffs' arguments on market definition and competitive effects fare no better.

No Plausibly Alleged Market. With respect to product market, Plaintiffs allege that the relevant product market is "yacht brokerage services provided to yacht sellers and buyers by yacht brokers with access to the MLS." Compl. ¶ 168. But as Defendants' websites explain, and Plaintiffs acknowledge, alternative services *are* available to yacht sellers and buyers, including services provided by websites like Facebook Marketplace or Craigslist, industry magazines, sales from dealerships or manufacturers, or For Sale By Owner ("FSBO") sales. *See* Mot., Ex. A; Opp'n 27. Indeed, Plaintiffs themselves acknowledge that there are "alternative means of selling or buying a yacht[.]" Opp'n 27. Rather than providing factual allegations of "cross-elasticity of demand or other indications of price sensitivity," as required under *Twombly*, *Jacobs v. Tempur-Pedic International, Inc.*, 626 F.3d 1327, 1338 (11th Cir. 2010), Plaintiffs assert only that "[a]ccess to the MLS [sic] is critical for brokers and agents to assist sellers and buyers," Compl. ¶ 174, and that "there is not a listing service that meaningfully competes with the MLS [sic]," *id.* ¶ 180.

Even if access to "the MLS[s]" were critical, Plaintiffs concede that FSBO sellers do not need brokers in order to list boats on the marketplaces and *can* directly access alleged "MLSs" operated by Defendants. *See* Opp'n 29, 35-36; *supra* at 6-7 & n.5. Yet again, Plaintiffs' concession that *anyone* can access several of the marketplaces at issue in their Complaint is fatal to their claim since FSBO sellers undisputedly *can* "access the inventory [and] market participants of MLSs." Opp'n 27. Excluding them from the alleged product market is legally improper.

With respect to geographic market, Plaintiffs barely defend their allegations, insisting simply that the "Complaint plausibly alleges that the relevant geographic market is the United States." *Id.* at 29. But instead of explaining why this alleged geographic market is plausible, they move the goalposts and insist that all they must do is "provide Defendants with notice and concrete boundaries for discovery purposes." *Id.* (citation omitted). Binding Eleventh Circuit precedent is clear that this is not sufficient to survive a motion to dismiss. *See, e.g.*, *Jacobs*, 626 F.3d at 1338

(rejecting similar argument "because it would absolve [plaintiffs of their] responsibility under *Twombly*" and affirming dismissal for failure to plead relevant market where market was supported only by "skimpy allegations"). The Opposition does not seriously defend Plaintiffs' failure to allege facts showing that buyers and sellers cannot look outside the United States for brokerage services to assist them in buying and selling yachts. *See* Mot. 27-29. Nor does it address *Jacobs* or any of the other cases in which courts in this Circuit have dismissed claims with similarly vague market allegations. Finally, it does not rebut Defendants' argument that the alleged geographic market "clearly excludes relevant geographic areas, purchasers, or suppliers." *Lockheed Martin Corp. v. Boeing Co.*, 314 F. Supp. 2d 1198, 1225 (M.D. Fla. 2004).

No Anticompetitive Effects. Plaintiffs also ignore their obligation to make *specific* factual allegations when pleading actual harm to competition. *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1072-73 (11th Cir. 2004). As the Eleventh Circuit has explained, bare allegations that conduct raised prices—like those in the Complaint—are insufficient to plausibly allege actual harm. In *Jacobs*, plaintiffs alleged that the defendant violated the Sherman Act "by enforcing the vertical retail price maintenance agreements with its distributors and by engaging with its distributors in horizontal price fixing." 626 F.3d at 1332. This was alleged to "eliminat[e] price competition" and cause consumers to lose "hundreds of millions of dollars." *Id.* at 1339-40. The court held that this was insufficient to allege actual harm to competition because beyond plaintiff's "bald statement[s]," there was "nothing establishing the competitive level above which [the defendant's] allegedly anticompetitive conduct artificially raised prices." *Id.* at 1339.

The same is true of Plaintiffs' allegations here. Plaintiffs allege that Defendants' conduct has raised the price of brokerage services, but Plaintiffs do not describe the "competitive level" of such services or provide any allegations beyond "bald statements" that prices are above the

competitive level. This is not enough under *Jacobs*. If it were, the burden of pleading actual harm to competition would become a mere triviality insofar as *any* antitrust plaintiff could simply assert without support that a challenged practice raised prices.

Plaintiffs also do not sufficiently allege potential harm to competition. Where a plaintiff fails to "provide allegations plausibly suggesting actual harm to competition," the "only avenue of relief" is to allege "potential harm." *Id.* This requires a plaintiff to plead that "defendants possessed power in [a cognizable relevant] market" and make "specific allegations linking market power to harm to competition in that market.'" *Spanish Broad. Sys.*, 376 F.3d at 1073 (citation omitted). Plaintiffs decline to defend their pleading deficiencies regarding market power, claiming "[i]t is not necessary to reach Defendants' other argument regarding the sufficiency of Plaintiffs' allegations of indirect evidence of market power." Opp'n 32. Thus, Plaintiffs have not pled anticompetitive effects in either way.

4. <u>Plaintiffs Ignore The Deficiencies Of Their Concerted Refusal To Deal Claim</u>

Plaintiffs do not even attempt to address the deficiencies of their concerted refusal to deal claim, contending only that "YachtWorld, YachtBroker, and YATCO all disallow FSBO listings," *id.* at 33, while completely ignoring the incontrovertible fact that several of the Defendants' marketplaces (Boats Group's boats.com and Boat Trader) *do* accept FSBO listings. *See supra* at 6-7 & n.5; Mot. 7 n.7. Plaintiffs cannot (1) allege a conspiracy predicated on Defendants' alleged control of "MLSs," (*see, e.g.*, "MLS Defendants require that yacht sellers [are] represented by a broker in order to list a boat on the MLS," Opp'n 10), but then (2) insist that only some of those alleged MLSs count with respect to their refusal to deal claim, *see id.* at 35 (asserting that boats.com and Boat Trader are not "relevant listing MLSs").

Plaintiffs' refusal-to-deal allegations about Broker Defendants are also insufficient. The Opposition points only to the conclusory allegation that "Broker Defendants" have purportedly

agreed to refuse to deal with unrepresented buyers. *Id.* at 36 (citing Compl. ¶ 209). This kind of conclusory group pleading is far from sufficient to state a claim. *See supra* at 11-13; Mot. 20-21. Nor does the allegation that 70% of brokered listings on one marketplace are co-brokered plausibly suggest that *all* twelve Broker Defendants have refused to deal with all un-brokered buyers, particularly given the silence about all other marketplaces and the conceded arrangements of the remaining 30% of non-co-brokered transactions that occur through YachtWorld.

This claim also does not implicate Association Defendants, Compl. ¶¶ 206-11, so at the very least this claim should be dismissed as to the Association Defendants.

Request for Hearing

Pursuant to Local Rule 7.1(b)(2), Defendants respectfully request 20 minutes of oral argument for each side on this Motion. Plaintiffs do not oppose this request.

Conclusion

For the foregoing reasons, Plaintiffs' Consolidated Class Action Complaint should be dismissed. Plaintiffs should not be granted leave to amend. The Complaint was drafted by a large group of Plaintiffs' counsel over the course of several months, and built off of earlier-filed complaints. Their claims are completely without merit, and cannot possibly be cured, so amendment would be futile. While Plaintiffs have requested leave to amend, Opp'n 38, they have not provided any information regarding such an amended complaint in their briefing that could render their claims plausible.[13]

[13] Plaintiffs are incorrect that the undersigned Defendants have waived their right to arbitration by filing this Motion. *See* Opp'n 37-38. Waiver is the deliberate abandonment of a known right. Defendants are still determining whether the various contracts at issue in the Complaint are subject to arbitration agreements. Plaintiffs have not provided the materials necessary to make all of those determinations. Thus, no rights have been waived. Moreover, the Court need not address this issue in resolving this Motion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the Service List below in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing on this 18th day of September, 2024.

/s/ Sean A. Burstyn