UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JENNIFER NOSALEK, RANDY HIRSCHORN, and TRACEY HIRSCHORN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MLS PROPERTY INFORMATION NETWORK, INC.,
ANYWHERE REAL ESTATE INC. (F/K/A REALOGY HOLDINGS CORP.),
CENTURY 21 REAL ESTATE LLC,
COLDWELL BANKER REAL ESTATE LLC,
SOTHEBY'S INTERNATIONAL REALTY AFFILIATES LLC,
BETTER HOMES AND GARDENS REAL ESTATE LLC,
ERA FRANCHISE SYSTEMS LLC,
HOMESERVICES OF AMERICA, INC.,
BHH AFFILIATES, LLC,
HSF AFFILIATES, LLC,
RE/MAX LLC,
POLZLER & SCHNEIDER HOLDINGS CORPORATION,
INTEGRA ENTERPRISES CORPORATION,
RE/MAX OF NEW ENGLAND, INC.,
RE/MAX INTEGRATED REGIONS, LLC
and KELLER WILLIAMS REALTY, INC.,

Defendants.

No: 1:20-CV-12244-PBS

CLASS ACTION

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT, CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS, APPROVAL OF SETTLEMENT NOTICE PLAN, AND SCHEDULING OF FINAL APPROVAL HEARING

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I. INTRODUCTION

Plaintiffs Jennifer Nosalek, Randy Hirschorn, and Tracey Hirschorn ("Plaintiffs"), individually and on behalf of all Settlement Class Members,[1] have entered into a proposed Settlement with Defendant MLS Property Information Network, Inc. ("MLS PIN").[2] The proposed Settlement, if approved, will eliminate in the MLS PIN service area the allegedly anticompetitive rule at the heart of this Action. Specifically, Plaintiffs' complaint concerns two aspects of the MLS PIN rule in Section 5 of the MLS PIN Rules and Regulations: the requirement that a seller offer a commission to the broker for the buyer (Second Amended Complaint [ECF 150] at ¶¶ 47-48) and the restriction that the seller's broker may only change the commission offered before a (counter)offer to purchase is tendered by a prospective buyer to the seller (*id.* at ¶ 49). The Settlement removes both prongs of the allegedly anticompetitive restriction and thereby delivers significant injunctive relief to both the putative class members and others entering into residential real estate transactions in MLS PIN's service area. It will also establish a substantial litigation fund to assist Plaintiffs in continuing to prosecute this Action against the remaining Defendants. The Settlement does not include a settlement with any Defendant other than MLS PIN and guarantees MLS PIN's ongoing cooperation with Plaintiffs' Action against those remaining Defendants.

Plaintiffs respectfully request—and MLS PIN does not oppose—preliminary approval of the proposed Settlement. Plaintiffs' Counsel submits that the proposed Settlement is fair, reasonable, and adequate, and represents an excellent result for Plaintiffs and the Settlement

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[1] Unless otherwise defined, all capitalized terms herein shall have the same meaning as set forth in the Parties' Settlement Agreement.

[2] The individual and class claims of Plaintiffs against all other Defendants in this litigation are ***not*** resolved, are unaffected by this Settlement, and will proceed accordingly.

Class Members. The Settlement was negotiated in good faith and at arm's-length by counsel experienced in antitrust matters, following more than two years of litigation.

Plaintiffs move for an order approving a class action settlement agreement between Plaintiffs and MLS PIN, approving notice to the Settlement Class, and setting a date for a fairness hearing. Specifically, Plaintiffs ask the Court to:

(1) Preliminarily approve the Settlement as set forth in the Settlement Agreement;

(2) Preliminarily certify the Settlement Class pursuant to Fed. R. Civ. P. 23(b)(2);

(3) Preliminarily appoint Plaintiffs Jennifer Nosalek, Randy Hirschorn, and Tracey Hirschorn as the Settlement Class Representatives;

(4) Preliminarily appoint Robert A. Izard and Seth R. Klein of Izard Kindall and Raabe LLP, and Christopher A. Lebsock and Jose Roman Lavergne of Hausfeld LLP counsel as Class Counsel;[3]

(5) Approve the proposed Settlement Notice;

(6) Appoint Kroll Settlement Administration LLC as Settlement Administrator; and

(7) Schedule a Final Approval Hearing.

II. PROCEDURAL BACKGROUND

Following substantial independent factual investigation and legal analysis conducted by the firms that are seeking to be appointed co-lead class counsel, the Complaint was filed in this Court on December 17, 2020. (ECF No. 1). The Complaint alleged that MLS PIN, a property

[3] Jim Glaser of Jim Glaser Law also serves as counsel to the individual Plaintiffs in this Action but is not seeking appointment as Class Counsel.

listing service, and the Broker Defendants conspired to artificially inflate the commission paid by home sellers to buyer-brokers in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.[4]

MLS PIN's rules, in particular Section 5, required seller-brokers to include a unilateral commission offer to the buyer-brokers in MLS PIN's Pinergy, a centralized database of properties listed for sale in Massachusetts, portions of New Hampshire, and Rhode Island (the "MLS PIN Service Area") (the "Buyer-Broker Commission Rule"). Consequently, Plaintiffs contend the Buyer-Broker Commission Rule prevented commission rates from falling to competitive levels and enabled buyer-brokers to avoid doing business with or otherwise retaliate against seller-brokers attempting to offer lower rates. MLS PIN has not conceded or admitted liability or damages and maintains that it has meritorious defenses.

On December 10, 2021, the Court issued a Memorandum and Order denying the motion to dismiss by all Defendants on the issue of causation and the individual motions to dismiss by Broker Defendants Home Services of America, Inc., HSF Affiliates, LLC, and BHH Affiliates LLC (collectively, "HomeServices"), Keller Williams Realty, Inc., and RE/MAX LLC. (ECF No. 94). Plaintiffs filed their Second Amended Complaint on January 9, 2023. (ECF No. 150).

Since the denial of the motion to dismiss, the Plaintiffs have engaged and continue to engage in substantial negotiations with all Defendants, including MLS PIN, concerning discovery, which remains ongoing. MLS PIN in particular has produced substantial documentation to date, including but not limited to historical iterations of the rule at issue, MLS PIN ownership interests, form participation agreements for brokers, and granular listing data for all transactions covered by Plaintiffs' claims. Declaration of Seth R. Klein ("Klein Decl.") at ¶ 3.

[4] An additional claim arising under Massachusetts, New Hampshire, and Rhode Island state law was subsequently voluntarily dismissed by Plaintiffs.

At the same time, Plaintiffs engaged in intensive and lengthy settlement discussions with MLS PIN. Beginning in September 2022 and through the following nine months, counsel for Plaintiffs and MLS PIN engaged in multiple rounds of phone conferences and correspondence, including exchanging several drafts of the Settlement Agreement and amendments to MLS PIN's Rules and Regulations. Klein Decl. at ¶ 4. In negotiating the Settlement, Plaintiffs' principal goal was to end the allegedly anticompetitive Buyer-Broker Commission Rule altogether, thereby protecting all future home sellers (including Settlement Class Members who may sell their current homes in the future) from potential damage from sales transactions. Plaintiffs also obtained MLS PIN's financial statements and, as discussed further below (in Part IV.A.3.a), negotiated a settlement fund based on MLS PIN's financial status and the practical limits of monetary recovery they could obtain from the company.

III. PROPOSED SETTLEMENT

The executed Settlement Agreement is submitted herewith as Exhibit A to the Klein Declaration. The material terms thereof are summarized as follows:

The Settlement Class: The Settlement Class is defined (with certain standard exclusions) as: Sellers who paid, and/or on whose behalf sellers' brokers paid, Buyer-Broker Commissions during the Settlement Class Period in connection with the sale of Residential Real Estate listed on Pinergy. Settlement Agreement at ¶ 3(a).[5]

[5] The Settlement Class Period is defined as "January 15, 1997, through and including the date of the Final Judgment and Order of Dismissal." Settlement Agreement at ¶ 2(hh). A class extending through or even beyond Final Judgment is not unusual. *See Crane v. Sexy Hair Concepts, LLC,* No. 17-cv-10300, 2019 WL 2137136, at *1 (D. Mass. May 14, 2019) (approving settlement class period extending to and beyond final approval of settlement)*; Kingsborough v. Sprint Commc'ns Co.,* Case No. 14-cv-12049, ECF Nos. 17-2 at 3 (defining "Compensation Period"), 44 (D. Mass. 2015) (same). Extending the Class Period through Final Judgment makes particular sense in the context of an action for injunctive relief certified under Fed. R. Civ. P. 23(b)(2).

Injunctive Relief to the Settlement Class: The principal benefit of the Settlement is injunctive relief that targets what Plaintiffs contend are MLS PIN's past and current anticompetitive conduct and may save members of the Settlement Class and others who sell their homes in the future millions of dollars in tangible benefits. The Settlement Agreement, if finally approved by the Court, requires MLS PIN to amend the MLS PIN Rules and Regulations to disallow the allegedly anticompetitive practice by (1) eliminating the requirement that a seller must offer compensation to a buyer-broker; (2) requiring the broker for the seller to provide notice to the seller that (a) the seller is not required to offer compensation to the buyer-broker and (b) if the buyer-broker requests compensation from the seller, the seller can decline; and (3) ***if*** the seller elects to make an initial offer to the buyer-broker and the buyer makes a counter offer (effectively rejecting the seller's offer), then any commission to be paid to the buyer-broker is negotiated among the seller, the buyer, the seller-broker and the buyer-broker.[6]

For example, under the rule proposed in the Settlement, when a seller first retains a seller-broker, the seller-broker is required to tell the seller that the seller has the option of whether to include an offer of compensation to the buyer-broker in the MLS PIN listing. If the seller chooses to list the home for $250,000 and the listing includes a 3% offer of compensation to the buyer-broker, the buyer can accept that offer, the parties are bound, and the seller pays the buyer-broker a 3% commission. But if the buyer counteroffers only $225,000, the seller is free to counteroffer to accept the $225,000 sales price on the condition that the seller does not pay the

[6] Specifically, the Settlement Agreement (at ¶ 9(a)) provides that MLS PIN must amend its Rules and Regulations to adopt specific language, which language is attached to the Settlement Agreement as Exhibits 3a (redline) and 3b (clean). Although the Settlement Agreement allows MLS PIN to change the specific language of the amended Rules and Regulations after three years, MLS PIN is prohibited from reinstating the Buyer-Broker Commission Rule. Settlement Agreement at ¶ 9(a).

buyer-broker, and any commission to be paid by the seller to the buyer-broker is subject to negotiation between the seller, the buyer, the seller-broker and the buyer-broker. In other words, the buyer-broker commission is subject to negotiation like any other contract term.

Monetary Relief to the Settlement Class: In addition to the foregoing injunctive relief, MLS PIN has agreed to pay $3,000,000.00 into a settlement fund. Settlement Agreement at ¶ 11. The Settlement Agreement and [Proposed] Final Approval Order contain a contribution bar provision in accord with the United States Supreme Court opinion in *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630 (1981).

Plaintiffs' Counsel anticipate filing a Fee, Expense, and Litigation Fund Application during the Final Approval process that will seek out of this fund up to $900,000 in attorneys' fees as well as incurred costs and expenses of up to $200,000 and up to $2,500 to each of the named class representatives (for a total of $7,500) as lead plaintiff awards. In addition, Kroll Settlement Administration LLC ("Kroll"), the settlement administrator proposed by the parties, has estimated that the cost of the proposed Notice Plan (discussed below) will be approximately $250,000, which MLS PIN will advance and then be permitted to credit against and deduct from the total funds payable to Plaintiffs' Counsel pursuant to any order of the Court concerning Plaintiffs' Counsel's Fee, Expense and Litigation Fund Application. Plaintiffs anticipate requesting that the balance of at least $1,642,500 (or more, depending on the specific fees sought) be set aside in a litigation escrow fund and used to pay future expenses incurred in the litigation against the remaining Defendants for the benefit of Settlement Class Members.

Cooperation: The Settlement Agreement ensures MLS PIN's continued cooperation in Plaintiffs' prosecution of their claims against the remaining Defendants even after settlement by

guaranteeing MLS PIN will respond to document requests and interrogatories and will allow for up to three depositions. *See* Settlement Agreement at ¶ 10.

Notice Plan: Although, as a proposed class settlement pursuant to Fed. R. Civ. P. 23(b)(2), Notice to the Settlement Class is not required, the Settlement Agreement contains a multi-pronged Notice Plan to ensure maximum Class Member and public awareness. As noted above, the parties have selected Kroll, a national class action administration firm with significant experience, as their proposed Settlement Administrator. *See generally* Declaration of Jeanne C. Finegan (Managing Director and Head of Kroll Notice Media Solutions) ("Finegan Decl."). *First,* Kroll will mail individual postcard notice ("Postcard Notice") to all Settlement Class Members who sold residences over the last four years. By definition, those Settlement Class Members have moved from these now-sold residences, so Kroll will run each of those sellers through the National Change of Address (NCOA) database, which goes back four years, to obtain updated mailing address information. *See* Finegan Decl. at ¶¶ 16-18. *Second,* Kroll will run an industry-standard social media campaign targeted specifically at Massachusetts residents, where ninety-eight percent of properties listed on Pinergy are located. *Id.* at ¶¶ 19-34. *Third,* Kroll will cause to be published a national ad in USA Today. *Id.* at ¶¶ 35-36. *Fourth,* Kroll will cause to be issued a press release alerting interested media outlets about the Settlement. *Id.* at ¶¶ 37-38. Copies of the forms of the postcard, online / social media, publication and press release notices are attached to the Finegan Declaration at Exhibits B, C, D, E and F.

All four forms of Notice will direct Settlement Class Members and members of the public to a Settlement website established by Kroll, which will make available for download all important information in the Action, including copies of pleadings, the Settlement Agreement, and will provide detail about Settlement Class Member rights to object, Plaintiffs' Counsel's fee

and expense requests, and other information about the Final Approval process. Finegan Decl. at at ¶ 40. Kroll will also make available to Class Members contact information for Class Counsel on the website and through phone support, so that Class Members may inquire directly of Class Counsel concerning any questions they have. *Id.*

IV. ARGUMENT

A. The proposed settlement meets the standard for preliminary approval.

"Settlement agreements enjoy great favor with the courts as a preferred alternative to costly, time-consuming litigation." *Fid. & Guar. Ins. Co. v. Star Equip. Corp.*, 541 F.3d 1, 5 (1st Cir. 2008) (internal quotations and citations omitted); *accord In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005) ("[T]he law favors class action settlements.") (citing *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)). This Court has recognized as much in this Action. *See Mot. Hearing by Video, Bauman v. MLS Property Information Network, Inc.,* No. 1:20-CV-12244-PBS, Tr. 69-70 (D. Mass. Sept. 20, 2021).

Approval of a class action settlement under Rule 23(e) involves a two-step process: First, counsel submits the proposed terms of settlement, and the court makes a preliminary fairness evaluation. *See* Manual for Complex Litigation (4th) § 21.632 (2004). In this preliminary evaluation, the court determines only whether the settlement has "obvious deficiencies" or whether "it is in the range of fair, reasonable, and adequate." *In re M3Power Razor Sys. Mktg. & Sales Prac. Litig.*, 270 F.R.D. 45, 62 (D. Mass. 2010) (citing Manual for Complex Litigation (4th) § 21.632 (2004)). Second, "the more fully informed examination required for final approval will occur in connection with the Final Fairness Hearing, where arguments for and against the

proposed settlement will be presented after notice and an opportunity to consider any response provided by the potential class members." *Id.*

Under Rule 23(c)(1)(B), a court should grant preliminary approval if it determines that it "will likely be able to" certify the class for settlement purposes and approve the settlement. *Miller v. Carrington Mortg. Servs.*, No. 19-16, 2020 WL 2898837, at *4 (D. Me. June 3, 2020), *report and recommendation adopted*, No. 19-16, 2020 WL 3643125 (D. Me. July 6, 2020). Determining whether the court will "likely" be able to approve the Settlement requires a preliminary consideration of the final approval factors set out in Rule 23(e)(2). *See* Fed. R. Civ. P. 23(e)(1)(B)(i).[7] As this Court recently summarized,

> The factors by which a proposed settlement is judged are whether: (i) the class representatives and class counsel adequately represented the class; (ii) the proposed settlement was negotiated at arm's length; (iii) the relief obtained for the class is adequate; and (iv) the proposed settlement treats class members equitably relative to each other.

Nat'l Ass'n of Deaf v. Mass. Inst. of Tech., No. 15-30024-KAR, 2020 WL 1495903, at *3 (D. Mass. March 27, 2020) (citing Fed. R. Civ. P. 23(e)(2)). "The court performs this analysis in the shadow of the 'strong public policy in favor of settlements,' *P.R. Dairy Farmers Ass'n v. Pagan*, 748 F.3d 13, 20 (1st Cir. 2014) (internal quotations omitted), particularly in class action litigation." *Medoff v. CVS Caremark Corp.*, No. 09-554, 2016 WL 632238, at *5 (D.R.I. Feb. 17, 2016) (citing *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 259 (D.N.H. 2007).

Consideration of all relevant factors determine that the proposed settlement is likely to be finally approved under Rule 23(e)(2) and should therefore be preliminarily approved.

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[7] Although factors used to analyze whether a settlement is fair, reasonable, and adequate are the same at preliminary and final approval, in the first case the "determination remains preliminary in the sense that it is subject to any additional information—including further factual development or objections by class members—that may come to light prior to or during the fairness hearing." *Rapuano v. Trustees of Dartmouth Coll.*, 334 F.R.D. 637, 643 (D.N.H. 2020).

1. The class representatives and proposed class counsel adequately represent the Settlement Class.

The adequacy determination under Rule 23(e)(2)(A) looks to whether "the interests of the class representatives do not conflict with the interests of any of the class members . . . and that Plaintiffs' counsel are qualified and experienced and provided vigorous representation during the course of the case." *Nat'l Ass'n of Deaf v. Mass. Inst. of Tech.*, No. 15-30024-KAR, 2020 WL 1495903, at *3 (D. Mass. Mar. 27, 2020) (citing *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985)). In citing *Andrews*, the *Nat'l Ass'n of Deaf* court expressly linked the adequate representation inquiry under Rule 23(e)(2)(A) to the adequacy inquiry required for class certification under Fed. R. Civ. P. 23(a)(4). *Accord In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 31 (E.D.N.Y. 2019). This is a familiar inquiry. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625-26 (1997) (courts look at whether the representatives' interest is antagonistic to or in conflict with those of the class members). Where, as here, the injuries suffered by the named Plaintiff are the same as those that the class is alleged to have suffered, the adequacy requirement is usually satisfied. *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 63 (D. Mass. 1997).

Ms. Nosalek, Mr. Hirschorn, and Ms. Hirschorn have been exemplary representatives. They have spent significant time on behalf of the putative class, gathering their relevant documents, responding to Defendants' discovery requests, and otherwise consulting with counsel and maintaining oversight of the litigation. Klein Decl. at ¶ 6. In addition, their antitrust claims under Section 1 of the Sherman Act are the same as the claims being advanced by all Settlement Class Members.

Class Counsel are well-qualified and have vigorously prosecuted this Action. Izard, Kindall & Raabe and Hausfeld LLP are active practitioners with long experience with antitrust

and class action ligation. *See* Klein Decl. at Exs. B (Izard Kindall & Raabe firm resume), C (Hausfeld firm resume). Courts have recognized counsels' expertise in the field and have repeatedly adjudged Lead Counsel adequate under Rule 23(a)(4) and 23(g). Class Counsel have demonstrated throughout this litigation that they understand this area of antitrust law, have prosecuted this Action with vigor and commitment, and believe this is a fair settlement and in the best interest of the Settlement Class Members.

2. The proposed settlement is the product of good faith, informed, arm's-length negotiations.

Rule 23(e)(2)(B) instructs the court to consider whether the proposed Settlement was negotiated at arm's length. Negotiation leading to a settlement is a key factor in deciding whether to grant preliminary approval. Where "a settlement is untainted by collusion and is fair, adequate, and reasonable . . . and the parties have bargained at arms-length, there is a presumption in favor of the settlement." *Lupron*, 228 F.R.D. at 93; *see also In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 76-77 (D. Mass. 2005); *New Eng. Carpenters Health Benefits Fund v. First DataBank, Inc.*, 602 F. Supp. 2d 277, 282 (D. Mass. 2009). These kinds of negotiations guard against any "obvious deficiencies" in a settlement. *In re Skechers Toning Shoe Prods. Liab. Litig.*, No. 11-md-2308, 2012 WL 3312668, at *8 (W.D. Ky. Aug. 13, 2012).

As recounted above, Plaintiffs' Counsel and MLS PIN's Counsel engaged in multiple rounds of arm's-length, hard-fought settlement discussions over the course of nine months. These discussions were based upon the record in this Action, briefing on motions to dismiss, thousands of pages of documents produced by MLS PIN (including both substantive and financial documents), proposed amendments to MLS PIN's Rules and Regulations, and Plaintiffs' Counsel's extensive experience in prosecuting antitrust and class action cases. Klein

Decl. at ¶ 4. The final Settlement was brokered and accepted by the parties only after these extensive and thorough negotiations.

3. The relief provided for the Settlement Class is more than adequate.

Rule 23(e)(2)(C) provides the factors for adequate relief:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3).

Fed. R. Civ. P. 23(e)(2)(C). As discussed below, the proposed Settlement provides meaningful, immediate, and continuing benefits to the Settlement Class, while avoiding potentially years more of costs and delays, and the risks inherent in all class action litigation if this Action were to go to trial.

a. The costs, risks, and delay of trial and appeal make the relief provided by the Settlement even more valuable.

The Settlement has very significant value when considered against the substantial costs, risks, and delays of continued litigation. *See* Fed. R. Civ. P. 23(e)(2)(C)(i). When Plaintiffs brought this action, MLS PIN was not contemplating amending the Buyer-Broker Commission Rule. This Settlement, however, eliminates both prongs of the anticompetitive rule alleged in the Second Amended Complaint. The relief provided by the Settlement, thus, is concrete, guaranteed, and immediate. Should the Settlement obtain preliminary and then final approval, future home sellers will be informed of their right not to offer compensation to buyer-brokers, and, if they do, that they will be free to renegotiate any buyer-broker commission should the buyer make a counteroffer rather than accepting the initial offer of sale outright. Without this

Settlement, it could be several years at best before the substantive rule change embodied in the Settlement would be implemented, even assuming Plaintiffs win at trial. Courts overwhelmingly recognize that the delay of resolution of the litigation by itself is a significant consideration in approving a settlement. As the Court explained in *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254 (S.D.N.Y. 2003), "even if a [plaintiff] or class member was willing to assume all the risks pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery." *Id.* at 261. Inevitable litigation delays "not just at the trial stage, but through post-trial motions and the appellate process, would cause Settlement Class Members to wait years for any recovery, further reducing its value." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 467 (2d Cir. 1974)).[8]

Moreover, with regard to the financial component of the Settlement, Plaintiffs note that MLS PIN (unlike the remaining Broker Defendants) does not profit directly from the challenged conduct and is capitalized only to the extent needed to conduct ongoing operations. Based on the MLS PIN financial statements reviewed by Plaintiffs' Counsel, Plaintiffs believe that MLS PIN does not have the resources of the Broker Defendants, who are well funded and will remain jointly and severally liable for the challenged conduct. Accordingly, Plaintiffs believe that MLS

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[8] *See also In re Marsh & McLennan, Cos. Sec. Litig.*, No. 04 Civ. 8144(CM), 2009 WL 517546, at *5 (S.D.N.Y. Dec. 23, 2009) (noting the additional expense and uncertainty of "inevitable appeals" and the benefit of Settlement, which "provides certain and substantial recompense to Class members now"); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1322 (S.D. Fla. 2005) (likelihood that appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement); *Cardiology Assocs., P.C. v. Nat'l Intergroup, Inc.*, No. 85 CIV. 3048 (JMW), 1987 WL 7030, at *3 (S.D.N.Y. Feb. 13, 1987) ("[E]ven assuming a favorable jury verdict, if the matter is fully litigated and appealed any recovery would be years away.")

PIN was not and is not in a position to contribute significantly to individual Class Member monetary recoveries. However, Plaintiffs respectfully submit that the creation of a $3 million Settlement Fund with a substantial litigation fund (assuming the Court ultimately awards attorneys' fees, costs, expenses, and lead plaintiff awards in the amounts requested) will benefit the Class by funding Plaintiffs' active prosecution of their and the Class' claims against the Broker Defendants who remain in the Action, including funding expert testimony.

b. The distribution to the Settlement Class is effective.

The Advisory Committee's Notes to the 2018 amendments to Rule 23(e) indicate that "[m]easuring the proposed relief may require evaluation of any proposed claim process . . . ." Here, no such process is needed. The Settlement Agreement if approved, will deliver immediate and significant injunctive relief to better protect against future anticompetitive conduct involving MLS PIN's Service Area, including, MLS PIN's agreement to not "materially (re)instate the Buyer-Broker Commission Rule that is the subject of this Agreement" Settlement Agreement" at any time. ¶ 9(a).

In addition, and in accordance with the Settlement, Plaintiffs' Counsel will submit a motion to the Court for Attorney's Fees, Reimbursement of Expenses, Payment of Lead Plaintiff Awards and for creation of a Litigation Fund to fund future expenses, all to be funded by a payment of $3,000,000.00. The Class Notice will advise Settlement Class Members that Plaintiffs intend to request that approximately two-thirds of the settlement be set aside and used for the benefit of the Settlement Class to pay future expenses incurred in the litigation against the remaining Defendants. *See* Finegan Decl. at Exs. B, C, D, E and F. Allowing a portion of class

settlement funds to be used for future expenses is a well-accepted practice.[9] The size and complexity of the litigation will necessarily lead to significant expenses, and, as the Action progresses to class certification, the expenses – particularly those associated with experts – will increase substantially. Klein Decl. at ¶ 7. Economic and damages models that describe the mechanisms and impact of anticompetitive behavior are common in antitrust litigation. Given the scope and complexity of the issues in this Action, Plaintiffs' Counsel will incur substantial costs for the expert reports and opinions necessary to support class certification. *Id.*

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[9] *See, e.g., Newby v. Enron Corp.*, 394 F.3d 296, 305-306 (5th Cir. 2004) (affirming 37.5% set aside for establishment of a $15 million litigation expense fund from the proceeds of a partial settlement); *In re Disposable Contact Lens Antitrust Litig.*, No. 3:15-md-02626, Docket No. 1165, (M.D. Fla. June 1, 2021) (approving request to set aside $664,206.86 to "be deposited into their litigation fund for future expenses reasonably necessary to the prosecution of this Action."); *In re Auto Parts Antitrust Litig.*, No. 12-MD 2311, 2018 WL 7108072, at *2 (E.D. Mich. Nov. 5, 2018) (approving request to set aside nearly $3.5 million for use in future litigation expenses); *In re Auto Parts Antitrust Litig.*, No. 12-MD 2311, 2016 WL 9459355, at *2 (E.D. Mich. Nov. 29, 2016) (approving request to set aside nearly $10 million for use in future litigation expenses); *In re Auto Parts Antitrust Litig.*, No. 12-MD 2311, 2015 WL 13715591, at *2 (E.D. Mich. Dec. 7, 2015) (approving request to set aside nearly $3 million for use in future litigation expenses); *In re Transpacific Passenger Air Transp. Litig.*, No. C 07-05634, 2015 WL 3396829, at *3 (N.D. Cal. May 26, 2015) (approving counsel's request for a $3 million future litigation fund); *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2011 WL 717519, at *13-14 (E.D. Mich. Feb. 22, 2011) (approving class counsel's request to use proceeds from early settlement to pay litigation expenses); *see also* Manual (Fourth) at Section 13.21 ("[p]artial settlements may provide funds needed to pursue the litigation . . . ."); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827, Order Granting Direct Purchaser Class Plaintiffs' Motion for the Advancement of Litigation Expenses From Settlement Funds (N.D. Cal. Feb. 17, 2011) (ECF No. 2474) (granting $3 million in future litigation expenses); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) (concluding that a partial "settlement provides class plaintiffs with an immediate financial recovery that ensures funding to pursue the litigation against the non-settling defendants"); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008) (approving request to set aside to pay outstanding and future litigation costs); *In re WorldCom. Inc. Sec. Litig.*, No. 02 CIV 3288 (DLC), 2004 WL 2591402, at *22 (S.D.N.Y. Nov. 12, 2004) (creating a $5 million fund for the continuation of litigation against non-settling defendants); *In Re Brand Name Prescription Drugs Litig.*, No. 1:94-cv-00897, MDL No. 997 (N.D. Ill. Feb. 18, 1998) (ECF No. 3162) (granting $6 million disbursement "for advancement of trial preparation expenses of Class Counsel").

Plaintiffs also expect to incur significant costs related to ongoing discovery from third parties and the Defendants. These costs include the significant expense of hosting and reviewing documents and electronic data. Klein Decl. at ¶ 7. Plaintiffs' Counsel therefore believes that the amount they are requesting be set aside for future expenses – $1,642,500 or more, depending on the fees and expenses ultimately sought and awarded – is reasonable and would benefit the overall success of this Action. *Id.*

c. Attorneys' fees will be paid only after Court approval and in an amount justified by the Settlement.

Rule 23(e)(2)(C)(iii) requires evaluation of the terms of any proposed attorneys' fees, including timing of payment. The Settlement provides that attorneys' fees will be paid from the settlement fund only after a motion is made, Settlement Class Members have a chance to object, and the Court determines the appropriate amount. Settlement Agreement at ¶ 11. Under the Settlement, MLS PIN will not object to the fee request. *Id.* The forms of Notice will explain in summary terms how Class Counsel will be paid, including that counsel will make an application to the Court for attorneys' fees of no more than $900,000 (as well as past expenses of no more than $200,000 and Lead Plaintiff Awards totaling $7,500). *See* Finegan Decl. at Exs. B, C, D, E and F. Detailed information will be presented prominently on the website. *Id.* at ¶ 40.

Counsel who recovers funds for a class are entitled to reasonable attorneys' fees and reimbursement of expenses. *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980). "Courts have wide discretion in awarding attorneys' fees." *In re Ranbaxy Generic Drug Application Antitrust Litig.*, No. 19-md-02878, 2022 WL 4329646, at *3 (D. Mass. Sept. 19, 2022) (citing *In re Thirteen Appeals arising out of the San Juan Dupont Plaza Hotel Fire*, 56 F.3d 295, 307 (1st Cir. 1995)). In addition to ensuring that class counsel is fairly compensated, the district court is obliged to

function as "a quasi-fiduciary to safeguard the corpus of the fund for the benefit of the plaintiff class." *In re Fidelity/Micron Sec. Litig.*, 167 F. 3d 735, 736 (1st Cir. 1990).

"The district court may calculate attorneys' fees by either the percentage of the fund ("POF") method or the lodestar method." *Ranbaxy,* 2022 WL 4329646*,* at *3 (citing *Thirteen Appeals*, 56 F.3d at 307). The reasonableness of a requested "percentage of fund" typically turns on several factors:

> (1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations.

In re Neurontin Mktg. & Sales Practices Litig., 58 F. Supp. 3d 167, 170 (D. Mass. 2014) (quoting *In re Lupron Mktg. & Sales Practices Litig.*, No. MDL 1430, 01-CV-10861-RGS, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005)).

Plaintiffs will request that the Court award $900,000 for attorneys' fees, which constitutes 30% of the settlement fund. Plaintiffs respectfully submit that this percentage is reasonable. "As a percentage of the relevant common fund, standard awards in the First Circuit range from 20% at the low end to 33% at the high end." *Ranbaxy,* 2022 WL 4329646, at *3.[10]

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[10] *See Conley v. Sears, Roebuck Co.*, 222 B.R. 181, 187 (D. Mass. 1998); *In re Puerto Rican Cabotage Antitrust Litig.*, No. 08-MD-1960 (DRD), 2011 WL 4537726, at *9-10 (D.P.R. Sept. 13, 2011) (23%); *In re Am. Dental Partners, Inc. Sec. Litig.*, No. 08-CV-10119-RGS, 2010 WL 1427404, at *1 (D. Mass. Apr. 9, 2010) (22.5%); *New Eng. Carpenters Health Benefits Fund v. 1st Databank, Inc.*, No. 05-CV-11148-PBS, 2009 WL 2408560, at *1-2 (D. Mass. Aug. 3, 2009) (20%); *Sylvester v. Cigna Corp.*, 401 F. Supp. 2d 147 (D. Me. 2005) (33%); *see generally* Theodore Eisenberg & Geoffrey P. Miller, Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008, J. Empirical Legal Stud. 248, 260 (2010) (Table 4) (finding that 20% was both the median and mean attorneys' fees awarded in the First Circuit between 1993 and 2008); Theodore Eisenberg, Geoffrey P. Miller & Roy Germano, Attorneys' Fees in Class Actions: 2009-2013, 92 N.Y.U. L. Rev. 937, 951 (2017) (Table 3) (finding the median attorneys' fees awarded in the First Circuit between 2009 and 2013 was 22% and the mean 26%).

Indeed, in antitrust class action lawsuits in particular, courts in the First Circuit frequently award 33%, ***more than*** the percentage sought by counsel here. *See In re Solodyn Antitrust Litig.*, No. 14-md-2503, 2018 WL 7075881, at *2 (D. Mass. July 18, 2018) (Casper, J.) (awarding one-third of the settlement fund to counsel); *In re Asacol Antitrust Litig.*, No. 1:15-CV-12730-DJC, 2017 WL 11475275, at *4 (D. Mass. Dec. 7, 2017) (Casper, J.) (awarding one-third of the settlement fund to counsel); *In re Prograf Antitrust Litig.*, No. 1:11-MD-02242-RWZ, 2015 WL 13908415, at *1 (D. Mass. May 20, 2015) (Zobel, J.) (awarding one-third of the settlement fund to counsel); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (Young, J.) (awarding one-third of the settlement fund to counsel). The reason for this is clear: antitrust litigation is inherently expensive and complex. "This antitrust litigation, like all litigation of its species, promises to be extremely complex and time intensive and there is no question that if settlement fails, the Defendants will mount a strong defense." *In re Packaged Ice Antitrust Litig.*, No. 08-MDL-01952, 2011 WL 6209188, at *19 (E.D. Mich. Dec. 13, 2011). Plaintiffs' Counsel are exposed to recovering nothing in this litigation (and continue to face that risk with the non-settling Defendants). "[W]ithin the set of colorable legal claims, a higher risk of loss does argue for a higher fee." *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 746 (7th Cir. 2011).

Proposed Class Counsel has devoted a substantial amount of time to this Action over three years. Since the Action was first filed and as of June 2023, Izard, Kindall & Raabe and Hausfeld LLP have collectively spent over 2800 hours litigating this Action, including time spent researching the legal theory and working on drafting the initial complaint, successfully responding to Defendants' motion to dismiss, engaging in discovery, reviewing relevant

documents, conducting settlement negotiations, and drafting the present motion.[11] Moreover, counsel anticipates additional work to be done concerning final approval of the Settlement (and, of course, considerable work remains to be done in connection with claims against the non-settling Defendants).

"The First Circuit Court of Appeals does not require courts to cross check the percentage of the fund against the lodestar calculation to determine the reasonableness of the requested attorneys' fees." *In re Ranbaxy Generic Drug Application Antitrust Litig.*, at *5 (citing *Thirteen Appeals*, 56 F.3d at 307). However, as of June 2023, Izard, Kindall & Raabe and Hausfeld LLP have accrued a lodestar of over $1,840,000. Accordingly, the $900,000 fee sought constitutes a ***negative*** multiplier. Compared to the antitrust cases cited above, the requested lodestar multiplier here of 0.49 is far below the multipliers commonly awarded in antitrust cases. *See Prograf*, 2015 WL 139084185, at *4 (lodestar multiplier of 2.35); *Relafen*, 231 F.R.D. at 82 (lodestar multiplier of 2.02); *Solodyn*, 2018 WL 7075881, at *2 (lodestar multiplier of 0.82).

Finally, public policy considerations favor Plaintiffs' fee request because of the public benefits from civil antitrust actions. There is a "need in making fee awards to encourage attorneys to bring class actions to vindicate public policy (e.g., the antitrust laws) as well as the specific rights of private individuals." *In re Folding Carton Antitrust Litig.*, 84 F.R.D. 245, 260 (N.D. Ill. 1979); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 534 (E.D. Mich. 2003). Society benefits when those who have violated laws fostering fair competition and honest pricing are required to provide relief to affected consumers in civil proceedings. *Vendo v. Lektro-Vend Corp.*, 433 U.S. 623, 635 (1977) ("Section 16 undoubtedly embodies congressional policy

[11] Should this Court grant preliminary approval to the Settlement, a detailed breakdown of Class Counsel's lodestar and expenses will be submitted in conjunction with Plaintiffs' Motion for Final Approval of the Settlement and Fee, Expense and Litigation Fund Application.

favoring private enforcement of the antitrust laws, and undoubtedly there exists a strong national interest in antitrust enforcement."); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (concluding that it is "especially important to provide appropriate incentives to attorneys pursuing antitrust actions because public policy relies on private sector enforcement of the antitrust laws").[12]

d. There are no side agreements to disclose.

Rule 23(e)(2)(C)(iv) requires the Court to consider any side agreements that must be disclosed under Rule 23(e)(3). This is because side agreements can result in inequitable treatment of class members. Fed. R. Civ. P. 23(c) advisory committee's note to 2018 amendments. Here, the Settlement before the Court is the only existing agreement, and there are no side agreements.

4. The Settlement treats Settlement Class Members equitably relative to each other.

The Court must also consider whether the Settlement treats Settlement Class Members equitably relative to one another. *See* Fed. R. Civ. P. 23(e)(2)(D). Here, the Settlement treats Settlement Class Members equitably because the injunctive relief will benefit all Settlement Class Members who sell a house in the MLS PIN Service Area by not having to pay allegedly artificially inflated commission to buyer-brokers. *Fero v. Excellus Health Plan, Inc.*, Case No. 6:15-cv-06569, 2022 WL 1292133, at *4 (W.D.N.Y. April 29, 2022) (approving settlement of a 23(b)(2) class where "the proposed Settlement Agreement treats class members equitably relative to each other and provides benefits equally to the members of the Injunctive Relief

[12] As discussed above, Plaintiffs will also seek up to $200,000 in reimbursement of already incurred past expenses and $2,500 for each Lead Plaintiff (for a total of $7,500) as Lead Plaintiff Awards.

Class."); *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 660 (S.D.N.Y. 2015) (approving settlement of a 23(b)(2) class where a "licensing scheme was directed at all members of the proposed class" and "the contemplated settlement provides the future conduct relief necessary to protect all members of the proposed settlement class"); *cf. Littlejohn v. Copland,* 819 F. App'x 491, 493 (9th Cir. 2020) (future purchasers "would derive value from the Settlement's injunctive relief [and] there was no evidence that defendant had changed or was planning to change its labeling practices prior to agreeing to the Settlement"). Additionally, the settlement fund will benefit all Settlement Class Members by paying future litigation expenses.

B. The proposed notice to Settlement Class Members constitutes sufficient notice.

Notice is not required for a class certified under Fed. R. Civ. P. 23(b)(2). *See* Fed. R. Civ. P. 23(c)(2)(A); *see also Stathakos v. Columbia Sportswear Co.*, No. 4:15-CV-04543-YGR, 2018 WL 582564, at *3 (N.D. Cal. Jan. 25, 2018) ("In injunctive relief only class actions certified under Rule 23(b)(2), federal courts across the country have uniformly held that notice is not required.") (collecting cases); *Lilly v. Jamba Juice Co.*, No. 13-CV-02998-JST, 2015 WL 1248027, at *9 (N.D. Cal. Mar. 18, 2015) ("Because, even if notified of the settlement, the settlement class would not have the right to opt out from the injunctive settlement and the settlement does not release the monetary claims of class members, the Court concludes that class notice is not necessary."); *Jermyn v. Best Buy Stores, L.P* , No. 08 CIV. 214 CM, 2012 WL 2505644, at *12 (S.D.N.Y. June 27, 2012) (quoting *Green v. Am. Express Co.*, 200 F.R.D. 211, 212-13 (S.D.N.Y. 2001) ("Courts have held that no notice is required under several circumstances, including . . . 'when the settlement provides for only injunctive relief, and therefore, there is no potential for the named plaintiffs to benefit at the expense of the rest of the

class, . . . when there is no evidence of collusion between the parties, and . . . when the cost of notice would risk eviscerating the settlement agreement.'").

Although notice to the Settlement Class is not required under 23(b)(2), the parties have agreed to implement a robust Notice Plan as discussed in Part III above, including individual Postcard Notice to all Settlement Class Members who have sold residences in the last four years, social media notice, publication notice, and a press release. In light of the fact that notice is not required here at all, these measures more than satisfy the requirements of due process, Rule 23(e) of the Federal Rules of Civil Procedure, and all other applicable laws and rules. *See, e.g., Fero v. Excellus Health Plan, Inc.*, Case No. 6:15-cv-06569, 2022 WL 1292133, at *4 (W.D.N.Y. April 29, 2022) (finding "that the Notice and Notice Program satisfied the applicable requirements of Fed. R. Civ. P. 23(c)(2)(B) and 23(e), and fully comply with all laws and the Due Process Clause of the United States Constitution, constituting the best notice that was practicable under the circumstances of this Action, particularly given that notice is not required for a Rule 23(b)(2) class. Among other things, notice . . . was posted on Plaintiffs' Website [], and was the subject of a press release announcing this settlement and directing Class Members and the public to Plaintiffs' Website.").

V. THE COURT SHOULD PRELIMINARILY CERTIFY THE SETTLEMENT CLASS

The Settlement Class meets all of the requirements of Fed. R. Civ. P. 23(a) and 23(b)(2). Those requirements are addressed briefly here.

A. Rule 23(A)

1. Numerosity

The Settlement Class as defined easily meets Rule 23(a)'s numerosity requirement. Based on MLS PIN's data, the Settlement Class includes over 524,610 Class Members who sold homes

listed on MLS PIN during the Settlement Class Period. Joinder is simply a logistical impossibility. *See, e.g.*, *Gorsey v. I.M. Simon & Co.*, 121 F.R.D. 135, 138 (D. Mass. 1988) (800 to 900 member class made joinder impracticable). Indeed, "[no] minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009).

2. Commonality

To meet the commonality requirement, the representative plaintiff is required to demonstrate that the proposed class members "have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). In other words, commonality requires that the claims of the class "depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Commonality is a "low hurdle." *S. States Police Benevolent Ass'n v. First Choice Armor & Equip., Inc.*, 241 F.R.D. 85, 87 (D. Mass. 2007). As this Court has recognized, antitrust cases frequently involve common issues. *Natchitoches Parish Hosp. Service Dist. v. Tyco Int'l, Ltd.*, 247 F.R.D. 253, 264 (D. Mass. 2008) (Saris, J.) ("Plaintiffs readily meet the commonality requirement, as Plaintiffs identify a number of issues related to whether a violation of the antitrust laws occurred that are common to the proposed class[, including] whether Tyco engaged in illegal agreements, contracts, combinations, and/or conspiracies").

Here, the Court should find that there is at least one main, common question in this Action: whether Defendants violated Section 1 of the Sherman Act by conspiring, through

adoption of the challenged restraint, to artificially inflate the buyer-broker commissions paid by the Settlement Class Members. *See Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) ("Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question."); *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1180 (N.D. Cal. 2013) ("Where an antitrust conspiracy has been alleged, courts have consistently held that the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist." (internal quotation marks omitted)). Indeed, because proof of the alleged conspiracy focuses on the Defendants' standardized conduct as opposed to the conduct of individual class members, "[a]ntitrust liability alone constitutes a common question that 'will resolve an issue that is central to the validity' of each class member's claim 'in one stroke.'" *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d at 1180 (quoting *Wal-Mart*, 564 U.S. at 350)). Thus, the existence of a common question is sufficient to satisfy the commonality requirement.

3. Typicality

Typicality "determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *In re Pharm. Indus. Average Wholesale Price Litig.*, 277 F.R.D. 52, 58 (D. Mass. 2011). To be typical within the meaning of Rule 23 simply requires "that the named plaintiffs' claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members, and are based on the same legal theory." *Walker v. Osterman Propane, LLC,* 411 F. Supp. 3d 100, 111 (D. Mass. 2019). "Further, Rule 23(a)(3) tolerates even significant differences between the named plaintiff and the proposed class members as long as the named plaintiff's experience is 'reasonably coextensive' with the

experiences of the rest of the class." *Ouadani v. Dynamex Operations E., LLC*, 405 F. Supp. 3d 149, 162 (D. Mass. 2019) (quoting *DaSilva v. Border Transfer of MA, Inc.*, 296 F. Supp. 3d 389, 405 (D. Mass. 2017)). In the antitrust context, typicality "will be established by plaintiffs and all class members alleging the same antitrust violation by the defendants." *In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 168 (S.D. Ind. 2009) (internal quotation marks omitted).

Plaintiffs and Settlement Class Members listed their homes on MLS PIN's Pinergy, where the Defendants implemented the challenged restraints; thus, and consequently, Plaintiffs' alleged claim share the same essential characteristics as the rest of the class, and typicality is established. *See id.* (internal quotation marks omitted) ("If the named class members' claims are based on the same legal theory or arise from the same course of conduct, factual differences in date, size, manner, or conditions of purchase, the type of purchaser, or other concerns do not make plaintiffs atypical.")

4. Adequacy of Representation

Rule 23(a)(4) requires that the plaintiff will fairly and adequately protect the interests of the class. This requires a determination that, first, "the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced, and able to vigorously conduct the proposed litigation." *Ouadani v. Dynamex Operations E.*, LLC, 405 F. Supp. 3d 149, 163 (D. Mass. 2019) (quoting *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985)).

Plaintiffs have no interests that are antagonistic to or in conflict with those of the Settlement Class. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) (courts look at whether the representatives' interests are in any way antagonistic to or in conflict with those of

the class members). To be disqualifying, any conflict must involve the subject matter of the suit and may not be merely minor or collateral. *Berman v. Narragansett Racing Ass'n, Inc.*, 414 F.2d 311, 317 (1st Cir. 1969). Where the injuries suffered by the named plaintiff are the same as those that the class is alleged to have suffered, the adequacy requirement is usually satisfied. *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 63 (D. Mass. 1997). Plaintiffs have also retained qualified, experienced counsel to prosecute the litigation. *See* Part V.C. below (discussing appointing of Class Counsel under Rule 23(g)). Accordingly, the Court should find that the adequacy of representation requirement has been met.

B. Rule 23(b)(2)

Rule 23(b)(2) certification is appropriate where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (internal quotation marks omitted). Thus, a Rule 23(b)(2) class may only be certified "when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.*

Here, Plaintiffs seek an injunction barring Defendants from maintaining and enforcing the challenged restraint through MLS PIN's Pinergy. The Settlement Class will include home sellers in MLS PIN's Service Area that currently or in the future list their home for sale. To obtain injunctive relief, an antitrust plaintiff "need only demonstrate a significant threat of injury

from an impeding violation of the antitrust law or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 130 (1969).

Pursuant to Rule 23(b)(2), certification is appropriate when plaintiffs request an injunction that provides the same benefit to each Settlement Class Member. Here, MLS PIN's rules, specifically Section 5, allegedly failed to ensure that home sellers would not pay artificially inflated commissions to buyer-brokers in violation of Section 1 of the Sherman Act, an alleged failure that was common to all members of the Class, and one which can be remedied by adopting and amending the MLS PIN rules and regulations. Thus, because the injunctive relief asks for a single injunction that applies generally, including to the Settlement Class Members, and Plaintiffs have standing to represent the Settlement Class, certification is proper under Rule 23(b)(2).

C. Rule 23(g)

A class certification order must "appoint class counsel under Fed. R. Civ. P. 23(g)." *Garcia v. E.J. Amusements of N.H., Inc.*, 98 F. Supp. 3d 277, 292 (D. Mass. 2015) (quoting Fed. R. Civ. P. 23(c)(1)(B)). Rule 23(g) directs courts to consider "the work counsel has done to identify or investigate potential claims; counsel's experience in complex actions, class actions, and similar cases; counsel's knowledge of the applicable law, and the resources that will be committed to the case." *Scott v. First Am. Title Ins. Co.*, No. 06-286, 2008 WL 4820498, at *2 (D.N.H. Nov. 5, 2008) (citing Fed. R. Civ. P. 23(g)). These factors strongly support appointment of Izard, Kindall & Raabe LLP and Hausfeld LLP as Class Counsel.

Class Counsel has invested significant resources in identifying and investigating the claims in the action. Counsel conducted a thorough and diligent investigation prior to the filing of the complaint, successfully defended Defendants' motion to dismiss against Plaintiffs and

litigated a Motion to Compel for Document Production from Defendant Realogy Holdings Corp. Class Counsel has also served and responded to Requests for Production and Interrogatories, and conducted multiple meet and confers with Defendants, including MLS PIN, and with third parties regarding discovery in this matter. As demonstrated by their firm resumes, Izard, Kindall & Raabe LLP and Hausfeld LLP are among the leading firms in the country in antitrust class actions, and together and separately have been appointed to represent plaintiffs in antitrust class action in a multitude of cases. *See* Klein Decl. Exs. B & C (firm resumes). Moreover, Izard, Kindall & Raabe LLP and Hausfeld LLP have committed the necessary resources to litigate this Action aggressively. Indeed, as per the present motion, Class Counsel have already successfully negotiated a settlement with MLS PIN that eliminates the allegedly anticompetitive rule. Izard, Kindall & Raabe LLP and Hausfeld LLP recognize, however, that there is still considerable work to be done, including continued litigation with the non-settling Defendants, and final approval of the Settlement. The firms will provide the same resources and expertise for those remaining objectives as they have provided to date.

VI. PROPOSED SCHEDULE

As set forth in the [Proposed] Preliminary Approval Order submitted with Plaintiffs' Motion for Preliminary Approval, should this Court grant preliminary approval to the Settlement, the parties respectfully propose the following schedule for sending notice to the Settlement Class and scheduling a final approval hearing:

EVENT	SCHEDULED DATE
Deadline for commencement of Notice Plan (mailing of Postcard Notice, start of social media campaign, publication of first publication notice, issuance of press release, and launch of Settlement website)	40 days after entry of Preliminary Approval Order
Motion(s) for and memoranda in support of (i) Final Approval of Settlement and (ii) Fee, Expense and Litigation Fund Application	45 days after entry of Preliminary Approval Order
Last day for objections to the Settlement to be filed with the Court and sent to counsel	28 days before date set by Court for Final Approval Hearing
Parties file responses to any filed objections and any other reply briefs in support of Final Approval and Fee, Expense and Litigation Fund Application	14 days before date set by Court for Final Approval Hearing
Final Approval Hearing	At the convenience of the Court, not less than 110 days after entry of Preliminary Approval Order

VII. CONCLUSION

The proposed class action Settlement Agreement is fair, reasonable, and adequate. For the foregoing reasons, the Plaintiffs request that the Court:

(1) Preliminarily approve the Settlement as set forth in the Settlement Agreement;

(2) Preliminarily certify the Settlement Class pursuant to Fed. R. Civ. Proc. 23(b)(2);

(3) Preliminarily appoint Plaintiffs Jennifer Nosalek, Randy Hirschorn, and Tracey Hirschorn as the Settlement Class Representatives;

(4) Preliminarily appoint Robert A. Izard and Seth R. Klein of Izard Kindall and Raabe LLP, and Christopher A. Lebsock and Jose Roman Lavergne of Hausfeld LLP counsel as Class Counsel;

(5) Approve the proposed Settlement Notice;

(6) Appoint Kroll Settlement Administration LLC as Settlement Administrator; and

(7) Schedule a Final Approval Hearing.

Dated: June 30, 2023

Respectfully submitted,

/s/ Seth R. Klein

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed with the Court and electronically served through the CM-ECF system which will send a notification of such filing to all counsel of record.

Dated: June 30, 2023

_*/s/ Seth R. Klein*_____________________
Seth R. Klein