UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, JEREMY KEEL, HOLLEE ELLIS, and FRANCES HARVEY, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	Case No: 4:19-cv-00332-SRB
vs.	)	Judge Stephen R. Bough
THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX, LLC, and KELLER WILLIAMS REALTY, INC.,	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF FINAL APPROVAL OF KELLER WILLIAMS REALTY, INC.'S NATIONWIDE CLASS SETTLEMENT

Defendant Keller Williams Realty, Inc. ("Keller Williams") writes in support of final approval of its settlement with plaintiffs and the settlement class. The Court should approve the settlement because it is fair, reasonable, and adequate under Fed. R. Civ. P. 23(e)(2) for the reasons set forth at length in class plaintiffs' submission, Dkt. No. 1469. To avoid duplication, Keller Williams makes this brief submission to address matters specific to its settlement.

I. BACKGROUND

On February 1, 2024, after nearly five years of litigation and a jury trial, Keller Williams reached a class settlement, subject to the Court's approval, agreeing to pay $70 million and make certain changes to its business practices. The non-monetary terms of the class settlement with Keller Williams are substantially similar to those of the class settlements with Anywhere and RE/MAX defendants. But, having been reached at a later time, the Keller Williams settlement also resolves the putative nationwide class action, *Umpa*, which is also pending before this Court.

Umpa v. National Association of Realtors, et al., No. 23-cv-00945-SRB (W.D. Mo. filed Dec. 27, 2023). This Court has preliminarily approved the settlement. Dkt. No. 1372.

By the time of settlement, Keller Williams had filed before this Court a motion for judgment as a matter of law on several compelling grounds. Dkt. No. 1354. Had the Court denied its motion, Keller Williams stood ready to appeal any judgment against it, and retained for that role Paul D. Clement—one of the nation's foremost appellate advocates and former Solicitor General of the United States.

Although Keller Williams had been motivated to continue litigating the case—if necessary, through appeal—in order to resolve the dispute and put the burden of litigation behind it, Keller Williams ultimately agreed to settlement terms demanded by class counsel that substantially strained its financial resources. Keller Williams lacked cash on hand for even the first installment of the $70 million settlement, and had to borrow funds to make that payment. Indeed, as an alternative to settlement, Keller Williams began planning for contingencies with the assistance of bankruptcy counsel. During settlement negotiations, Keller Williams provided class counsel highly confidential information sufficient to evaluate its financial condition. The parties ultimately reached a settlement with the assistance of a nationally known mediator.

Since preliminary approval, the class has overwhelmingly embraced the settlement. Keller Williams understands that the claims administrator sent more than 27 million email notices and more than 10 million postcard notices. Nearly 200,000 claims have been filed. Yet only 61 class members have opted out. An even more infinitesimally small fraction of the class has objected to the settlement.

II. THE RISKS, COSTS, AND DELAYS OF FURTHER LITIGATION AGAINST KELLER WILLIAMS FAVOR FINAL APPROVAL

Class settlement with Keller Williams easily satisfies the requirements for final approval. The federal rules direct courts considering whether a class settlement "is fair, reasonable, and

adequate" to evaluate (among other things) "the costs, risks, and delay of trial and appeal." Fed. R. Civ. P. 23(e)(2)(C)(i). In the Eighth Circuit, courts look to the so-called *Van Horn* factors: "(1) 'the merits of the plaintiff's case[ ] weighed against the terms of the settlement,' (2) 'the defendant's financial condition,' (3) 'the complexity and expense of further litigation,' and (4) 'the amount of opposition to the settlement.'" *In re Uponor, Inc., F1807 Plumbing Fittings Prod. Liab. Litig.*, 716 F.3d 1057, 1063 (8th Cir. 2013), quoting *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988).

1. Continued Litigation Against Keller Williams Presented Considerable Risks For The Class.

The first *Van Horn* factor favors final approval. Where a settlement is reached after a jury verdict, courts consider, among other things, "the risk of the jury verdict being overturned either on defendants' motion for judgment as a matter of law or on appeal. . . ." *Vladimir v. U.S. Banknote Corp.*, 976 F. Supp. 266, 266-67 (S.D.N.Y. 1997) (granting final approval and vacating a jury verdict after assessing that "the jury verdict is vulnerable").

Here, Keller Williams raised several highly meritorious issues in its motion for judgment as a matter of law, Dkt. No. 1354—and would have pursued them on appeal.

First, Keller Williams respectfully submitted that the Court erred in instructing the jury to evaluate the alleged conspiracy as a *per se* violation of Section 1 of the Sherman Act, instead of instructing it to "balance the competitive harm against the competitive benefit" of the alleged conspiracy under the rule of reason. ABA Model Jury Instructions in Civil Antitrust Cases § 3.A. *Per se* condemnation is reserved for narrow categories of "manifestly anticompetitive" conduct, *Cont'l T.V. v. GTE Sylvania Inc*., 433 U.S. 36, 50 (1977), that "would always or almost always tend to restrict competition and decrease output," *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (internal quotation marks omitted). And other courts have declined to apply that condemnation to MLS rules. *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351,

1368–69 (5th Cir. 1980) (applying the rule of reason and noting the "enormously procompetitive objectives" and "significant economic efficiencies" offered by MLSs); *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 290 (4th Cir. 2012) ("Because trade associations may be protective of consumer interests and not just inimical to them, the cooperative actions of MLS members are not per se unreasonable.").

Here, the trial record contained ample evidence that the relevant rule offered significant benefits to home sellers, including by stimulating demand for sellers' homes and ensuring that cash-constrained buyers remain potential purchasers. *See, e.g.*, Oct. 26, 2023 Trial Tr. 1739:17–24 (D. Stevens) (testifying that sellers benefit because "there are so many buyer brokers representing all these potential homebuyers," which "brings more traffic and more competition" for sellers' properties); Oct. 23, 2023 Trial Tr. 936:10–937:11 (S. Millett) (explaining how the presence of buyer agents helps home sellers by increasing interest in sellers' properties, producing "better pricing offers" and helping homes sell more quickly). The rule also helped agents to work together in bringing even troubled transactions to the closing table. *See* Oct. 30, 2023 Trial Tr. 2314:9–13 (J. Davis) ("It's more likely that we're going to get to the closing table when both parties have . . . representation. It's more likely that the seller will actually get to close on the property."). Were this Court or the Eighth Circuit to agree with Keller Williams on this score, plaintiffs faced a risk of losing the verdict. *See, e.g.*, *Constr. Aggregate Transp., Inc. v. Fla. Rock Indus., Inc.*, 710 F.2d 752, 757 (11th Cir. 1983) ("We reverse and remand for a new trial because the trial court erred in instructing the jury on a theory of per se illegality [under Sherman Act § 1].").

Second, plaintiffs faced a significant risk that the trial record would be insufficient to support the jury's determination that home sellers were direct purchasers with antitrust standing to sue for damages under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Here, plaintiffs purchased nothing from Keller Williams (or other defendants) and paid nothing to buyer agents.

The indirect purchaser doctrine is thus "a source of significant uncertainty for the plaintiffs" who face the risk of being deemed indirect purchasers without standing to sue. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 226 (E.D.N.Y. 2013) (approving class settlement), *rev'd and vacated on other grounds,* 827 F.3d 223 (2d Cir. 2016).

Third, plaintiffs faced the risk that the trial record would be insufficient for a reasonable jury to find that Keller Williams participated in any conspiracy. "Unless an antitrust plaintiff offers 'evidence that tends to exclude the possibility' of independent action, an inference of conspiracy is unreasonable." *Pumps & Power Co. v. S. States Indus. Inc*., 787 F.2d 1252, 1256 (8th Cir. 1986) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)) (finding judgment notwithstanding the verdict appropriate because the record contained no proof, beyond speculation, upon which a finding of concerted action could rationally be based). Here, plaintiffs presented no evidence of any meeting involving Keller Williams at which the relevant rule was discussed, of any communication involving Keller Williams relating to the rule, or even of any internal Keller Williams documents that addressed it. Nor could the jury infer a conspiracy involving Keller Williams from its involvement in the National Association of Realtors, because Keller Williams is not a member of NAR. Oct. 23, 2023 Trial Tr. 1041:4–6 (R. Goldberg). And Keller Williams has never been meaningfully involved in NAR policymaking activities. *See, e.g.*, Dkt. No. 1288-1, Tr. 134:18–134:21 & 134:23–24 (C. Sylvester) (Keller Williams had "no involvement whatsoever" in NAR or other industry organizations).

Fourth, plaintiffs faced the risk that the trial record would not support a finding that the rule inflated or stabilized commission rates. To the contrary, the evidence showed that the rule required only that listing brokers make an offer of compensation, but left the amount of the offer to the complete discretion of the listing agent. P-0216 at 38; Oct. 19, 2023 Trial Tr. 589:12–14 (C. Schulman) ("Q And there's no rule that mandates a specific amount the seller's agent has to offer

to buyer's agents, correct? A That's correct.").

Fifth, plaintiffs faced the risk that they failed to show harm to competition considering both sides of the relevant two-sided market, as required by *Ohio v. American Express Co.* ("*Amex*"), 138 S. Ct. 2274, 2287–88 (2018). This error has imperiled jury verdicts in the years since *Amex*. *See US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 58 (2d Cir. 2019) (vacating a jury verdict for failure to give appropriate two-sided market instruction).

Sixth, plaintiffs faced the risk that their damages calculation would fail as a matter of law because it simply assumes that, had sellers and listing agents not offered compensation to buyer agents, the overall commission rate that sellers paid to their listing agents would have been reduced by precisely the amount paid to buyer agents. There is no evidence in the record that supports this conclusion and, indeed, evidence is to the contrary.

Where, as here, plaintiffs faced considerable risks—whether in the context of a judgment as a matter of law or on appeal—the $70 million settlement is an excellent result for the class. *See Keil v. Lopez*, 862 F.3d 685, 696 (8th Cir. 2017) ("As courts routinely recognize, 'a settlement is a product of compromise and the fact that a settlement provides only a portion of the potential recovery does not make such settlement unfair, unreasonable or inadequate.'" (quoting *In re BankAmerica Corp. Sec. Litig*., 210 F.R.D. 694, 708 (E.D. Mo. 2002))). The vulnerabilities in plaintiffs' case balanced against the value of the settlement strongly favor approval.

2. Keller Williams's Financial Condition Favors Final Approval.

As to the second *Van Horn* factor, Keller Williams's financial condition favors approval. Courts consider the limitations of a defendant's financial resources when approving a settlement. *See, e.g.*, *In re Charter Commc'ns, Inc., Sec. Litig.*, 2005 WL 4045741, at *8 (E.D. Mo. June 30, 2005) (citing counsel's declaration that "but for the settlement, [defendant] may have been forced into bankruptcy" and granting final approval). That is true even where a settlement is reached for

an amount lower than a jury verdict. *See, e.g.*, *Thompson v. Midwest Found. Indep. Physicians Ass'n*, 124 F.R.D. 154, 157-161 (S.D. Ohio 1988).

Here, the financial condition of Keller Williams amply supports approval of the settlement. Keller Williams lacked cash on hand for even the first installment of the $70 million settlement, and had to borrow funds to make that payment. Indeed, the class risked being deprived of any material (or quick) recovery from Keller Williams, which was exploring contingencies and retained bankruptcy counsel following the jury verdict. As plaintiffs' submission in support of final approval makes clear, the nationwide scope of the settlement class and the inclusion of Keller Williams's franchisees and their agents among the released parties both reflect appropriate, fair, and customary settlement terms. These terms were also indispensable to reaching the settlement—and to the substantial monetary and non-monetary relief the class received in the settlement—because they enable Keller Williams to continue operating as a franchisor and maintaining its relationship with franchise brokerages.

Settling with Keller Williams also did not circumscribe plaintiffs' option of seeking full recovery from the National Association of Realtors and HomeServices of America, Inc., BHH Affiliates, LLC, and HSF Affiliates, LLC—who were each jointly and severally liable for the jury verdict. Indeed, after settling with Keller Williams, the class was able to reach an additional $418 million settlement with the National Association of Realtors, Dkt. No. 1458-1, and an additional settlement with the HomeServices defendants. Dkt. No. 1462.

Two objections submitted to the Court incorrectly assert that objectors are "entitled" to documents concerning the financial condition of Keller Williams provided to class counsel during the settlement negotiations. Dkt. Nos. 1441, 1448. These objectors are wrong: In the absence of allegations of collusive settlement or other impropriety (which these objectors do not make), courts uniformly hold that objectors are not entitled to discovery of settlement discussions. *See e.g., Int'l*

Union, United Auto., Aerospace, & Agr. Implement Workers of Am. V. Gen. Motors Corp., 497 F.3d 615, 637 (6th Cir. 2007) (affirming denial of discovery request because "objecting class members 'are not automatically entitled to discovery'"); *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 325 (3d Cir. 1998) (affirming denial of settlement-related and fee-related discovery); *In Re Flint Water Cases*, 63 F.4th 486, 499-501, 507-09 (6th Cir. 2023) (affirming denial of two separate discovery requests and holding that objectors have "no substantive right" to discovery); *Herrera v. Charlotte Sch. Of L., LLC*, 818 F. App'x 165, 178 (4th Cir. 2020) (affirming denial of objector's discovery request). Similarly, "[a] settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion." 2 McLaughlin on Class Actions § 6:7 (15th ed. 2018) (collecting cases).

And because the objectors seek documents that are not in the litigation record, they get no relief from the Sixth Circuit's opinion they cite, *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Cir. 2016) (cited by Dkt. No. 1441 at 12), which pertains not to requests for discovery but to efforts by objectors to unseal court records in the underlying litigation. "[T]here is an obvious difference (so obvious that one wonders how a party could overlook it) between limiting the right of class members to take new discovery after settlement, and denying them the right to view materials already in the court record." *Id*., at 308. And courts interpreting *Shane Group* have not construed it as authorizing discovery by objectors. *See Church v. Van Buren Cnty.*, 2023 WL 9064863, at *3 (W.D. Mich. July 24, 2023) (reasoning that *Shane Group* "concerned whether the district court abused its discretion in sealing court records related to a settlement, not whether absent class members were entitled to discovery").

Accordingly, Keller Williams's financial condition—amply documented by the parties' submissions before this Court—rendered class plaintiffs' $70 million settlement an excellent result for the class.

3. Continued Litigation Against Keller Williams Guaranteed Increased Costs and Significant Delays in Achieving Any Recovery.

As to the third *Van Horn* factor, the complexity of the case and expense of further litigation also favor approval. In addition to a risk of reversing the jury verdict, a potential appeal by Keller Williams threatened to increase the cost of litigation and delay any recovery for years. And where an appeal following final judgment adverse to defendants is "a virtual certainty," the elimination of associated costs and delays favors final approval because the "[s]ettlement represents a speedy and effective way for the parties to resolve their dispute." *Zilhaver v. UnitedHealth Grp., Inc.*, 646 F. Supp. 2d 1075, 1080 (D. Minn. 2009).

Prior to reaching the settlement, Keller Williams was prepared to exhaust every avenue in protecting its interests—including litigating post-trial motions and appealing any final judgment against it. Indeed, Keller Williams retained former Solicitor General Clement to vigorously prosecute any appeal. In light of Keller Williams's readiness to continue litigation, the complexity of the case and the expense of further litigation strongly favors approval.

In addition to resolving the instant case pending before this Court, the Keller Williams settlement also resolved the *Moehrl*, *Nosalek*, and *Umpa* actions. In *Moehrl,* there were still pending motions for summary judgment, and even if plaintiffs had prevailed, the parties still faced a trial with an uncertain outcome. *Moehrl v. The National Association of Realtors*, No. 19-cv-1610-ARW (N.D. Ill.). In *Nosalek*, summary judgment was also pending, and Keller Williams's mediation obligation was deferred until after summary judgment was adjudicated. *Nosalek v. MLS Property Information Network, Inc., et al.*, No. 20-cv-12244-PBS (D. Mass.) (Dkt. No. 245). And, as this Court is aware, *Umpa* was still in the pleadings stage. *Umpa v. National Association of Realtors, et al*, No. 23-cv-00945-SRB (W.D. Mo.). Keller Williams was prepared to litigate all actions against it. By reaching this settlement, the class avoided extensive risks, costs, and fees inherent to prosecuting these complex actions. And in doing so, plaintiffs achieved immediate

recovery for class members nationwide.

4. Overwhelming acceptance of the settlement by the class favors final approval.

Because the opposition to the class settlement is extraordinarily minimal, the fourth *Van Horn* factor strongly militates in favor of approval. After tens of millions of potential class members received direct notice, only 61 opted out—less than one thousandth of one percent. An even smaller number filed objections. Where, as here, the class overwhelmingly supports the settlement and opposition is infinitesimally small, final approval is warranted. *See In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 933 (8th Cir. 2005) (finding an opposition rate was miniscule when the objection rate was 0.00068% and the opt-out rate was 0.0024%); *See also In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 933 (8th Cir. 2005) ("The district court has a duty to the silent majority as well as the vocal minority." (citing *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995))).

III. CONCLUSION

For the foregoing reasons, in addition to the reasons presented by plaintiffs, the Keller Williams settlement is fair, reasonable, and adequate and should receive final approval.

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Respectfully submitted,

/s/ Boris Bershteyn

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 3, 2024, an electronic copy of the foregoing was filed with the Clerk of the Court by using the CM/ECF system, and service upon all counsel of record will be accomplished by the CM/ECF system.

/s/ Boris Bershteyn
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