Nos. 11-1538, 11-1539, 11-1540, 11-1541

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALBERT ROBERTSON, et al., on behalf of themselves and others similarly situated,

Plaintiffs-Appellees,

v.

SEA PINES REAL ESTATE COMPANIES, INC., a/k/a/ The Sea Pine Real Estate Company, et al.,

Defendants-Appellants.

THOMAS BOLAND, on behalf of himself and others similarly situated,

Plaintiff-Appellee,

v.

CONSOLIDATED MULTIPLE LISTING SERVICE, INC., et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Senior Judge Solomon Blatt)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF INTEREST

The United States is responsible for enforcing the federal antitrust laws and has brought numerous actions challenging anticompetitive rules adopted by multiple listing services (MLSs) under Section 1 of the Sherman Act, 15 U.S.C. § 1, including actions challenging many of the MLS rules at issue here.

In October 2007, the United States sued the Multiple Listing Service of Hilton Head Island, Inc. (HHMLS), alleging that HHMLS rules denied consumers in and near Hilton Head Island, South Carolina, the benefits of competition from low-cost or innovative real estate brokers. Complaint for Equitable Relief for Violation of 15 U.S.C. § 1 Sherman Antitrust Act, *United States v. Multiple Listing Serv. of Hilton Head Island, Inc.*, No. 9:07-cv-3435, Dkt. No. 1 (D.S.C. Oct. 16, 2007). HHMLS consented to a judgment requiring it to eliminate or modify the challenged rules. Final Judgment, *United States v. Multiple Listing Serv. of Hilton Head Island, Inc.*, No. 9:07-cv-3435, Dkt. No. 16 (D.S.C. May 28, 2008).

In May 2008, the United States sued the Consolidated Multiple Listing Service, Inc. (CMLS), alleging that CMLS rules denied

consumers in and near Columbia, South Carolina, the benefits of competition from low-cost or innovative real estate brokers. Complaint for Equitable Relief for Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, *United States v. Consol. Multiple Listing Serv., Inc.*, No. 3:08-cv-01786, Dkt. No. 1 (D.S.C. May 2, 2008). The complaint alleged that participation in CMLS was critical for brokers to compete in the Columbia area and that CMLS had violated Section 1 by adopting and enforcing rules prohibiting members from offering customized packages of brokerage services for reduced fees and by adopting and enforcing exclusionary membership criteria designed to prevent aggressive competitors from joining CMLS. *Id.*

Following fact and expert discovery, the United States moved for summary judgment on its Section 1 claims based on the undisputed evidence that CMLS successfully blocked the entry of low-cost and innovative brokers and that major brokers in the Columbia area charged higher commissions to home sellers in that area than they did in other parts of South Carolina. *See* Mem. in Supp. of the United States' Mot. for Summ. J. on Liability, *United States v. Consol. Multiple Listing Serv., Inc.*, No. 3:08-cv-01786, Dkt. No. 38, at 12-17 (D.S.C. Feb.

17, 2009). Prior to trial, CMLS consented to a judgment requiring it to eliminate or modify the challenged rules. Final Judgment, *United States v. Consol. Multiple Listing Serv., Inc.*, No. 3:08-cv-01786, Dkt. No. 68 (D.S.C. Aug. 27, 2009).

The United States has a significant interest in the issues raised in this appeal because of its prior antitrust enforcement actions against HHMLS, CMLS, and other MLSs. *See generally* U.S. Department of Justice & Federal Trade Commission, *Competition in the Real Estate Brokerage Industry* 63-66 (Apr. 2007) (discussing several recent MLS enforcement actions), *available at* http://www.justice.gov/atr/public/reports/223094.pdf. The United States also has a significant interest in this case because of the far-reaching implications of appellants' erroneous interpretation of Section 1. The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF ISSUES

The United States will address the following issues:

1. Whether the district court correctly held that Section 1 of the Sherman Act can apply to the challenged multiple listing service (MLS) rules, even though the MLS is incorporated.
2. Whether the district court correctly held that the complaints sufficiently alleged Section 1 violations.

STATEMENT OF THE CASE

These are class actions following-on the United States' enforcement actions against the Multiple Listing Service of Hilton Head Island, Inc. (HHMLS) and the Consolidated Multiple Listing Service, Inc. (CMLS), *supra*, by private plaintiffs who allege that they purchased real estate in the Hilton Head area (*Robertson*) and the Columbia area (*Boland*) and paid inflated real estate commissions because of MLS rules. The district court denied defendants' motions to dismiss the actions for failure to state a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, but concurrently certified its order for interlocutory appeal under 28 U.S.C. § 1292(b), which this Court accepted.

STATEMENT OF FACTS

A. The Multiple Listing Services

The complaints allege that HHMLS and CMLS are incorporated joint ventures to which defendant real estate brokers pay dues in exchange for "access to an electronic database of supply, pricing, and property-characteristics information relating to past and current real-estate listings" in the Hilton Head and Columbia areas. JA 15-16 (Introduction), 22-23 (¶¶25, 26), 186 (¶2), 189 (¶¶15, 16). The complaints further allege that members of each MLS compete with each other in the provision of real estate brokerage services to consumers who wish to buy and sell property in their respective service areas. JA 23 (¶¶26, 28), 25 (¶38), 189 (¶16), 190 (¶18), 192 (¶28). Access to the electronic database of listings maintained by the MLSs is "critical for brokerages who wish to serve buyers or sellers successfully" in the Hilton Head and Columbia areas, according to the complaints, because HHMLS and CMLS are "the only multiple-listing service[s]" in their respective areas and access to their databases is necessary to compete. JA 23 (¶29), 26-27 (¶¶39, 45), 190 (¶19), 192 (¶29), 193 (¶35); *see also* JA 26 (¶39) ("brokerages generally believe it would amount to economic

suicide to leave" HHMLS because HHMLS "provides its members the pooling and dissemination information on virtually all properties available for sale in" the Hilton Head area); JA 192 (¶29) (same for CMLS).

B. The Challenged MLS Rules

The complaints allege that the defendant brokerages restrained competition for real estate brokerage services through restrictive MLS rules. JA 23-24 (¶¶30-31), 28-31 (¶¶51-66), 190-91 (¶¶20-21), 195-98 (¶¶41-50). As the complaints explain, defendants restrained competition for real estate brokerage services by "adopt[ing], maintain[ing], and enforc[ing]" rules "affecting the way [MLS] members provide real-estate-brokerage services; participate in [the MLS]; and gain access to [MLS] services, including critical access to the [MLS] database[s]." JA 25 (¶37), 192 (¶27).

In particular, the complaints allege that defendants effectively "stabilized the price of, and reduced customer options for, real-estate brokerage services," JA 28 (¶53), 195 (¶43), by adopting rules that (i) "prevent members from providing a set of real-estate services that includes less than the full array of services that brokers traditionally

have provided – even if a customer prefers to save money by purchasing less than all the services a broker offers" and that (ii) precluded members from offering "exclusive agency" listings by "requir[ing] members to use a standard, pre-approved contract that, among other things, prevents its members from offering to a property seller the option of avoiding paying the broker a commission if the seller finds the buyer on his or her own." JA 24 (¶31), 190-91 (¶21), 196 (¶45).

The complaints also allege that the MLSs effectively excluded low-cost and internet-based brokerages from participating in the MLS by establishing unreasonably "burdensome prerequisites for membership." JA 28 (¶53), 30 (¶65), 195 (¶43), 198 (¶50). For example, the *Robertson* complaint alleges that HHMLS had rules (i) "requiring that brokerage-members: (1) maintain a physical office within the MLS Service Area; (2) reside within the area served by the MLS; (3) operate their offices during hours deemed reasonable by the MLS; [and] (4) hold a South Carolina real-estate license as their primary license," JA 28-29 (¶54); (ii) requiring new applicants to undergo a credit check and "obtain letters of recommendation from three current brokerage-members," JA 29 (¶58); (iii) authorizing the board of trustees "to impose

discriminatory requirements on Internet-based real-estate brokerages," JA 30 (¶60); and (iv) "requir[ing] publicly held brokerages to make a significant payment to the MLS every time a share of stock changed hands," JA 30 (¶62). Similarly, the *Boland* second amended complaint alleges that CMLS had rules: (i) "requir[ing] that its members have 'active involvement' in all aspects of the transaction, including 'in the marketing, sale, and closing of the property,'" JA 195-96 (¶44); (ii) "requir[ing] that members be 'primarily in the real estate business within the primary areas served by the [MLS],'" JA 197 (¶47); (iii) "refus[ing] to admit brokers who didn't have a commercial office[] in the [area]," *id.*; (iv) giving the board of trustees "unfettered discretion to reject applicants for membership," *id.*; and (v) "impos[ing] an excessive initial fee on new members, well above [the] costs of adding them to the membership," JA 197 (¶48).

"Taken together," the complaints explain, these rules reduced competition for real estate brokerage services because they "discouraged competition on price, and inhibited competitive actions that would have altered the status quo." JA 30-31 (¶66), 197 (¶49). "As a result," the complaints allege, real estate buyers in the Hilton Head and Columbia

areas such as plaintiffs "had fewer choices of service options and paid higher prices for real-estate-brokerage services than did customers in other parts of the country and higher prices than they would have paid absent defendants' conspiracy and anticompetitive conduct." *Id.*

C. The District Court Decision

Defendants moved to dismiss the complaints for failure to state a claim under Section 1 of the Sherman Act (and for other relief). JA 41-43, 206-07. Defendants argued, *inter alia*, that the adoption and enforcement of the challenged rules could not constitute an agreement subject to Section 1, as a matter of law, because HHMLS and CMLS were incorporated and therefore each MLS and its board of trustees was a single entity under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). *See* JA 42, 207; Mem. in Supp. of Am. Mot. to Dismiss and Mot. to Strike, No. 9:10-95-SB, Dkt. No. 20-1, at 4-6 (D.S.C. Feb. 25, 2010) (*Robertson Mem.*); Mem. in Supp. of Mot. to Dismiss, No. 3:09-cv-01335-SB, Dkt. No. 26-1, at 7-9 (D.S.C. Mar. 31, 2010) (*Boland Mem.*). The *Boland* defendants also argued that the complaints should be dismissed because the allegations of antitrust violations were too conclusory to satisfy Rule 8 of the Federal Rules of

Civil Procedure under the standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). JA 207; *Boland Mem.* at 9-15.

The district court denied the motions (in relevant part). JA 296-309. The court first rejected defendants' single-entity arguments. JA 296-99. As the court explained, the Supreme Court's recent decision in *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201 (2010), made clear that "substance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1." JA 297 (citations omitted). Applying that rule to the complaints, the court concluded that "the alleged conspiracy joins independent centers of decisionmaking that are capable of conspiring under section 1." JA 298. As the court explained:

> [A]though the CMLS and the HHMLS are themselves single entities, their boards are made up of independent brokerages who govern themselves and are economically separate from each MLS, and the independent brokerages have economic interests that are entirely distinct from those of each MLS. Moreover, the brokerages who make up the MLS boards directly compete for business both with each other and with non-MLS brokerages. Were the Defendant board member brokerages always acting solely on behalf of the CMLS or the HHMLS – without any distinct economic interests of their own – then perhaps the intraenterprise conspiracy doctrine would apply. However, that does not appear to be the competitive reality.

Id. (footnote omitted).

The court also concluded that plaintiffs sufficiently alleged Section 1 violations. JA 299-309. The court rejected the *Boland* defendants' argument that, under *Twombly*, plaintiffs must, as a matter of law, plead "the time of the alleged agreement, the place at which the agreement took place, the identities of all persons involved in the agreement, and the specific details of the agreement" to challenge MLS rules under Section 1, holding that no further elaboration was necessary in the circumstances here. JA 302-04. The court also rejected the *Boland* defendants' argument that plaintiffs failed adequately to plead anticompetitive effect of the challenged rules. JA 304-09. The court observed that plaintiffs alleged "that the complained-of rules and regulations preclude brokerages from offering less than the full array of services, even when a consumer may prefer to purchase less than the full array of services" and "that the complained-of rules and regulations require MLS member brokerages to use a standard, pre-approved contract that would not allow a brokerage to offer to a seller the option of avoiding paying a commission if the seller actually finds the buyer on his own." JA 308. In the court's view, these

allegations established "harm to the competitive process, which then caused harm to the consumer," which sufficed to state a Section 1 claim under the rule of reason. JA 308-09.[1]

The court nevertheless thought that these issues were "difficult" and certified its order for interlocutory appeal under 28 U.S.C. § 1292(b), JA 312-13, which this Court accepted, JA 108-11, 289-92.

SUMMARY OF ARGUMENT

A. The district court correctly held that Section 1 of the Sherman Act can apply to the challenged CMLS and HHMLS rules limiting price competition among its members and excluding new, aggressive competitors from participating in the MLSs. Courts have reviewed allegedly anticompetitive MLS rules under Section 1 for many years, even when the MLS was incorporated. Appellants' argument that their collective decisions should be treated as that of a "single entity" outside the scope of Section 1 unless appellees show that those decisions are contrary to "the best interests of the MLS" (Br. 22) misapprehends the applicable law and conflicts with the Supreme

[1] In other rulings not addressed by this amicus brief, the district court dismissed appellees' allegations of fraudulent concealment and struck allegations in the *Robertson* complaint pertaining to the government's HHMLS enforcement action. JA 309-11.

Court's recent decision in *American Needle*, which confirms the broad application of Section 1 to incorporated joint ventures controlled by competitors (such as CMLS and HHMLS). The broad-based immunity sought by appellants could significantly harm antitrust enforcement in a wide variety of industries.

B. The district court correctly rejected appellants' challenges to the sufficiency of the pleadings under *Twombly*. Appellants' contention that the complaints fail adequately to allege agreements subject to Section 1 is largely premised on their erroneous legal argument that appellees must show the challenged conduct did not benefit the MLSs. Moreover, they misinterpret *Twombly* to impose wooden requirements that the complaint contain particular "magic words." And they misread *Twombly* to require detailed allegations regarding the circumstances in which the challenged rules were adopted, even though their existence is not a matter of inference or dispute. Appellants' challenges to the sufficiency of the allegations of anticompetitive effect also are unpersuasive. The complaints allege that the challenged rules "harm[ed] the competitive process, which then caused harm to the consumer," JA 308, by interfering with MLS members' ability to offer

reduced commission rates and excluding aggressive competitors from participating in the MLS, which led to higher prices and decreased innovation. The district court exercised sound judgment in finding these allegations sufficient.

ARGUMENT

I. The District Court Correctly Held That Section 1 Of The Sherman Act Can Apply To MLS Rules Even If The MLS Is Incorporated

A. Courts Have Long Reviewed MLS Rules Under Section 1

The courts have long applied Section 1 of the Sherman Act to anticompetitive rules adopted and enforced by organizations controlled by real estate brokers. In *United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485 (1950) (*NAREB*), the Supreme Court applied the Sherman Act to a conspiracy among the members of the Washington Real Estate Board to "fix the commission rates for their services when acting as brokers in the sale, exchange, lease, and management of real property in the District of Columbia." *Id.* at 487, 492-95. The Court noted that the Board members had agreed to abide by its code of ethics, which prescribed "standard rates of commission" and prohibited the solicitation of business "at lower rates." *Id.* at 488. Although it upheld a district court finding that particular associations

did not participate in the conspiracy, the Court expressly noted that the United States "clearly" could rely on the defendants' "code of ethics and by-laws" as evidence of a "restraint of trade." *Id.* at 495.

Since *NAREB*, the lower courts have consistently applied Section 1 to allegedly anticompetitive agreements reflected in MLS rules or membership criteria. *See, e.g.*, *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1570, 1579, 1582 (11th Cir. 1991) (genuine issue of material fact existed whether MLS rule requiring membership in real estate association to use MLS violated Section 1); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1361 n.20, 1374-87 (5th Cir. 1980) (various MLS membership criteria were facially unreasonable under Section 1); *cf. Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824-36 (6th Cir. 2011) (substantial evidence supported FTC's conclusion that "an internal rule within an MLS regarding its distribution of certain types of real-estate listings to the public," violated Section 5 of the FTC Act, which encompasses violations of Section 1 of the Sherman Act), *petition for cert. filed*, No. 11-16 (U.S. June 28, 2011); *Reifert v. South Cent. Wis. MLS Corp.*, 450 F.3d 312, 316-21 (7th Cir. 2006) (applying Section 1 to rule requiring realtors to join real estate board to participate in

MLS); *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1141, 1144-54 (9th Cir. 2003) (applying Section 1 to "support fee" charged by real estate associations to MLS they jointly owned); *Pope v. Miss. Real Estate Comm'n*, 872 F.2d 127, 130 (5th Cir. 1989) (examining real estate board's "exclusion of nonmembers from the MLS" through use of "membership fee schedule" under Section 1); *Penne v. Greater Minneapolis Area Bd. of Realtors*, 604 F.2d 1143, 1145, 1148-50 (8th Cir. 1979) (real estate board's dissemination of commission rate information on MLS it owned and operated was subject to Section 1). Though the courts in these cases seldom had occasion to address an argument that the corporate structure of the joint venture precluded liability under Section 1, they proceeded on the theory that "[t]he concerted action necessary to establish a Section 1 violation exists in the agreement of [the MLS] members to adopt and apply [the challenged] rules and membership criteria." *Realty Multi-List,* 629 F.2d at 1361 n.20 (citing *Silver v. NYSE*, 373 U.S. 341 (1963), and *Associated Press v. United States*, 326 U.S. 1 (1945)).

B. *American Needle* Confirms That Section 1 Broadly Applies To Incorporated Joint Ventures Controlled By Competitors

Despite this long judicial history applying Section 1 to allegedly anticompetitive MLS rules, appellants argue that the challenged rules should be treated as actions of a single intra-corporate entity to which Section 1 does not apply under *Copperweld* and *American Needle* if the "rules were adopted by the MLS Boards in the normal course of governing the MLS" and were not "contrary to the best interests of the [MLS]." Appellants Br. 17, 22. Appellants, however, misinterpret *Copperweld* and *American Needle*.

1. Appellants (Br. 16) liken their situation to that in *Copperweld*, in which the Court held that a corporate parent and its wholly owned subsidiary are incapable of conspiring for purposes of Section 1 because any agreement between them does not represent the "joining of economic resources that had previously served different interests." 467 U.S. at 771. *Copperweld*, however, did not involve a joint venture controlled by competing firms, such as an MLS, and appellants cite no case applying its reasoning to an MLS. Post *Copperweld*, courts have consistently applied Section 1 to conduct associated with incorporated MLSs. *See Freeman*, 322 F.3d at 1140-41

(MLS was operated by a corporation that was jointly owned by real estate associations); *see also Reifert*, 450 F.3d at 315 (MLS was wholly owned subsidiary of real estate trade association); *Thompson*, 934 F.2d at 1569 (MLS was wholly owned subsidiary of a real estate board). Indeed, the Ninth Circuit specifically rejected an argument that *Copperweld* precluded Section 1 scrutiny of conduct associated with an MLS owned by a corporation. *Freeman*, 322 F.3d at 1147-49.

Moreover, *American Needle* squarely holds that the conduct of an incorporated joint venture controlled by competing firms may constitute an agreement for purposes of Section 1. *American Needle* involved an antitrust challenge to licensing decisions of NFL Properties (NFLP), a separately incorporated instrumentality of the National Football League and its teams. The NFL and the teams argued that the challenged conduct was outside the scope of Section 1 because the league and the teams should be viewed as a single economic entity when licensing intellectual property. The Court unanimously rejected that argument, noting that it has "repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle

for ongoing concerted activity." 130 S. Ct. at 2209-10 (citations omitted). And the Court reaffirmed the vitality of many pre-*Copperweld* precedents applying Section 1 to actions of professional organizations or trade groups in which competitors participated. *See id.* at 2210 & nn.3-4.

The *American Needle* Court emphasized that "substance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1." 130 S. Ct. at 2211 (quoting *Copperweld*, 467 U.S. at 773 n.21). Thus, it explained, the relevant "question is not whether the defendant is a legally single entity or has a single name," but whether the challenged agreement "joins together separate decisionmakers" and deprives the marketplace of "actual or potential competition." *Id.* at 2211-12 (citations omitted). Applying those principles, the Court held that the challenged licensing decisions "clear[ly]" were "concerted action," even though NFLP was separately incorporated, because in making such decisions, it acted as "an instrumentality' of the [32 NFL] teams." *Id.* at 2214-15 (quoting *United States v. Sealy, Inc.*, 388 U.S. 350, 352-54 (1967)).

Appellants improperly seek to limit *American Needle* to its facts, stating that "[t]he activity at issue" in *American Needle* was not the promulgation of rules but "the licensing and marketing of each team's trademarked goods." *See* Appellants Br. 16-17. But the Court's reasoning in *American Needle* is not so limited. In the final section of the *American Needle* opinion, the Supreme Court expressly recognized that its analysis applied to a "host of collective decisions" by the teams and the league, including "the production and scheduling of games." 130 S. Ct. at 2216; *cf. NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104-20 (1984) (applying Section 1 to NCAA television plan eight days after *Copperweld* was decided).

Appellants incorrectly suggest (Br. 17) that the teams had no "common objective[s]" when creating NFLP, claiming that is a "material[]" distinction with the instant case. But, in fact, NFLP's articles of incorporation "state[d] that the teams formed NFL Properties '[t]o conduct and engage in advertising campaigns and promotional ventures on behalf of the [NFL] and the member [teams].'" *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 744 (7th Cir. 2008). The Supreme Court expressly found that the "NFL teams have common

interests such as promoting the NFL brand" that could be served through intellectual property licensing. 130 S. Ct. at 2213; *see also id.* at 2208 ("NFL teams share a vital economic interest in collectively promoting NFL football" (quoting 538 F.3d at 743)). And the Court emphasized that the relevant inquiry was not whether NFLP was "a legally separate entity that centralizes the management of their intellectual property," or whether it promoted "the common interests of the whole," because "illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties." *Id.* at 2213 (internal quotation marks omitted). Rather, the Court declared, the pertinent issue was whether the teams controlling NFLP had "distinct, potentially competing interests" so that its licensing decisions necessarily affected actual or potential competition. *Id.*

Similarly, appellant brokerages are independent corporations that "govern themselves and are economically separate from each MLS." JA 298; *cf. Am. Needle*, 130 S. Ct. at 2212 (focusing on the fact that the teams are "substantial, independently owned, and independently managed business[es]"). Appellants apparently concede (Br. 21) that

appellant brokerages "are involved in the same trade and compete with one another" in the provision of real estate brokerage services. It necessarily follows that they are separate economic entities with "distinct, potentially competing interests" regarding the provision of those services, *Am. Needle*, 130 S. Ct. at 2213, and are subject to Section 1 for MLS rules suppressing actual or potential competition for them. *Cf. NCAA*, 468 U.S. at 99 (holding that, by "participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another").

Appellants claim that it is "'rare'" for "[a]greements made by the board of a single corporation" to be subject to Section 1. Appellants Br. 18 (quoting *Am. Needle*, 130 S. Ct. at 2215). But relatively few corporations are joint ventures controlled by competitors, as are CMLS and HHMLS. It is "substance, not form" that governs the application of Section 1. *Am. Needle*, 130 S. Ct. at 2211 (quoting *Copperweld*, 467 U.S. at 773 n.21).

As the *American Needle* Court observed, "the most significant competitive threats arise when joint venture participants are actual or potential competitors." 130 S. Ct. at 2213 (quoting 7 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478a, at 318 (2d ed. 2003)). That is no less true when the joint venture is incorporated, as was also true in *American Needle* and in *Sealy* (in which the Court expressly held Section 1 to apply). *See id.* at 2214; *Sealy,* 388 U.S. at 352; *see also Am. Needle*, 130 S. Ct. at 2213 ("An ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label."); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214-15 (D.C. Cir. 1986) (Bork, J.) (rejecting argument that *Copperweld* shielded scrutiny of policy approved by corporation's board of directors and noting that the board members were "actual or potential competitors," which was "sufficient to take this case out of the *Copperweld* rule").

2. Appellants also assert that cases focusing on whether a corporate director had an "independent personal stake" in the challenged conduct teach that collective decisions by trustees of an incorporated MLS (such as CMLS and HHMLS) are immune from

Section 1 so long as the decisions were not "contrary to the best interests of the [MLS]." Appellants Br. 22-23. But that is not how the Supreme Court approached the issue in *American Needle*. The Court explained that the relevant inquiry was not whether the challenged conduct promoted "the common interests of the whole" but whether the alleged conspirators had "distinct, potentially competing interests" such that their joint decisions affected actual or potential competition. *See* pp. 20-21, *supra*.

None of the cited "personal stake" cases involves an MLS or an analogous corporate structure, in which an incorporated joint venture is controlled by firms that compete independently outside the venture. Thus, they shed little light on the "functional considerations" that lie at the heart of the Section 1 inquiry. *Cf. Am. Needle*, 130 S. Ct. at 2209 (the relevant inquiry requires "a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate").

Indeed, most of the cited "personal stake" cases are not even antitrust cases.[2] As such, they do not address the central issue guiding the application of Section 1 – whether the challenged restraint "raise[s] the antitrust dangers that § 1 was designed to police." *Am. Needle*, 130 S. Ct. at 2211 (citations omitted); *see also id.* at 2208 ("The meaning of the term 'contract, combination . . . or conspiracy' is informed by the 'basic distinction' in the Sherman Act 'between concerted and independent action' that distinguishes § 1 of the Sherman Act from § 2." (citations omitted)).

The analysis in the cases that do address the antitrust laws is fully consistent with *American Needle*'s focus on whether the challenged agreement affects actual or potential competition. In *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391 (4th Cir. 1974), a publisher of a free newspaper composed almost entirely of advertising sued another paper and its president for conspiring to eliminate it. This Court held that the paper and its president were capable of conspiring under Section 1, because there was evidence of the

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[2] *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166 (4th Cir. 2002); *Detrick v. Panalpina, Inc.*, 108 F.3d 529 (4th Cir. 1997); *Bushi v. Kirven*, 775 F.2d 1240 (4th Cir. 1985); *ShoreGood Water Co. v. U.S. Bottling Co.*, No. RDB 08-2470, 2009 WL 2461689 (D. Md. Aug. 10, 2009) (unpublished).

president's affiliation with another company selling advertising from which it was "reasonable to infer that [he] could benefit personally from the elimination of [the paper]." *Id.* at 400 & n.16 (noting "[t]he Supreme Court's generous treatment of conspiracy allegations" in past cases). Thus, the alleged conduct involved independent interests joining in a conspiracy to eliminate a competitor.

In *Oksanen v. Page Memorial Hospital*, 945 F.2d 696 (4th Cir. 1991) (en banc), a physician sued a hospital and its staff after his privileges were revoked following a peer review process. Following the Supreme Court's "functional approach to the question of intracorporate characterization" in *Copperweld*, this Court held the hospital could not conspire with its staff for engaging in peer review because the staff had only "indirect economic interests" in that process and little control over the hospital's ultimate employment decision. *Id.* at 703-05. This Court nevertheless held that a different conclusion was warranted with respect to the plaintiff's claim that the medical staff conspired among themselves. *Id.* at 706. Because the staff "can be comprised of physicians with independent and at times competing economic

interests," the court concluded that they "have the capacity to conspire as a matter of law." *Id.*

Perhaps the best example is *Gregory v. Fort Bridger Rendezvous Ass'n*, 448 F.3d 1195 (10th Cir. 2006), on which the *Boland* appellants relied in their Rule 5 petition seeking an interlocutory appeal. *See* JA 260-62. In *Gregory*, traders sued a nonprofit organization, alleging a conspiracy to exclude them from selling replica pre-1840 goods. The Tenth Circuit found "a plurality of actors necessary to establish [concerted action under] § 1" noting that, "unlike a typical corporation in which the officers and directors are not separate actors pursuing separate economic interests, the members of the [organization] horizontally compete for the sale of replica pre-1840 goods." *Id.* at 1203. The court expressly rejected the argument that an association of horizontal competitors should be exempted from liability under the antitrust laws "so long as its board members are acting within the scope of their authority and with the intention to benefit the association as a whole," because that "would eviscerate the protections of the Sherman Act." *Id.* at 1202. As the court explained, such a rule would authorize even explicit price fixing because such an association "would have the

'authority' to decide at what price to sell their products, and supracompetitive pricing would benefit the whole group, rather than any individual competitor." *Id.* But "this type of price-fixing agreement is exactly what the antitrust laws were designed to prohibit." *Id.*

3. Appellants argue (Br. 21) that it is improper for the court to focus on whether the alleged conspirators "compete with one another" because that "would impugn any action by any sports league, agricultural cooperative, joint venture, or multiple listing service." But the Court made clear in *American Needle* that much joint venture conduct may be subject to Section 1 yet nevertheless is lawful. 130 S. Ct. at 2206. As the Court explained, the question of whether Section 1 applies is "antecedent" to whether Section 1 has been violated. *Id.*[3]

Appellants essentially seek a broad-based immunity from Section 1 for the conduct of incorporated joint ventures controlled by competitors. Such a rule is contrary to *American Needle* and could significantly harm antitrust enforcement in a wide variety of industries.

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[3] In several prior cases in which courts applied Section 1 to MLS rules, they ultimately found no Section 1 violation. *See, e.g.*, *Reifert*, 450 F.3d at 320-21; *Pope*, 872 F.2d at 130.

II. The District Court Correctly Held That The Complaints Are Sufficient To Plead Section 1 Violations

The district court correctly concluded that the complaints are sufficient to plead Section 1 violations. Appellants' challenges to the sufficiency of the pleadings are unavailing.

A. The Complaints Sufficiently Allege Section 1 Agreements

The complaints adequately allege agreements among appellants to adopt and apply the challenged MLS rules and thereby restrain competition. JA 25 (¶37), 192 (¶27). According to the complaints, appellant brokerages are independent companies that "are supposed to compete with each other to provide real-estate-brokerage services to customers" in the Hilton Head and Columbia areas but have restricted price and service competition among themselves and excluded competition from internet-based and low-cost brokerages though adopting and agreeing to abide by the challenged MLS rules. JA 25 (¶38), 28-31 (¶¶51-66), 192 (¶28), 195-98 (¶¶41-50); *see also* pp. 5-9, *supra* (describing the allegations in the complaint).

Appellants contend that the complaints, nevertheless, did not adequately allege Section 1 agreements because they did not specifically "allege the existence of separate economic actors pursuing separate

economic interests." Appellants Br. 19; *see also id.* at 23 ("nowhere in the complaints may be found the words: 'separate economic actors,' 'separate economic interests,' 'independent personal stake,' 'personal stake,' or 'independent'"). Appellees, however, are not required to include "magic words" in order to survive a motion to dismiss. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.,* 637 F.3d 435*,* 448 (4th Cir. 2011). The critical consideration under *American Needle* is whether appellant brokerages have "distinct, potentially competing interests" in the challenged rules. *See* pp. 20-21, *supra*. That they do logically follows from the complaints' allegations that they compete in the provision of real estate brokerage services outside the MLS. *Id.* Appellants' insistence on additional allegations is based on their misunderstanding of *American Needle*, *id.*, and is contrary to Rule 8. *See Twombly*, 550 U.S. at 555 ("a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations").

Appellants also criticize the district court for failing to require allegations identifying the specific "time, place, and participants" in the alleged conspiracy, citing *Twombly* and *Estate Construction Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 222 (4th Cir. 1994).

Appellants Br. 24, 26. But appellants disregard important differences between the circumstances in those cases and here.

In *Twombly*, the plaintiffs sought to infer an agreement from defendants' parallel failures to enter particular service markets for several years, which "common economic experience" showed could have occurred absent an agreement. 550 U.S. at 550-51, 564-65. In those circumstances, the Supreme Court held that the plaintiffs were required to provide additional details about the alleged agreement in order to "give the defendant[s] fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Similarly, in *Estate Construction*, two real estate developers alleged a conspiracy to drive them out of the real estate business in violation of Section 1. 14 F.3d at 221 & n.15. This Court affirmed the dismissal of the Section 1 claim, because the complaint failed to include facts indicating "that a conspiracy existed" and "lack[ed] completely any allegations of communications, meetings, or other means through which one might infer the existence of a conspiracy." *Id.* at 221.

Here, by contrast, the challenged agreements are embodied in specific written MLS rules identified in the complaints. It is not a matter of inference, nor even a subject of dispute, that these rules have been adopted. The additional factual details appellants demand are unnecessary to provide "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (citation omitted).

B. The Complaints Sufficiently Allege Anticompetitive Effect

The complaints adequately allege the anticompetitive effect of the challenged MLS rules. As the district court noted, the complaints explain how the challenged rules "harm[ed] the competitive process, which then caused harm to the consumer" by interfering with MLS members' ability to offer customized services and reduced commission rates and by excluding low-cost and internet-based brokerages from participating in the MLS, causing the commissions paid by consumers to be higher than they otherwise would be. JA 308; *see also* p. 11, *supra* (discussing two examples). The complaints also allege that the challenged MLS rules lead to decreased innovation by excluding aggressive competitors from participating in the MLSs. *See* JA 24

(¶32), 27 (¶47), 28 (¶53), 30-31 (¶66), 191 (¶22), 194 (¶¶37, 40), 195 (¶43), 197 (¶49).

Appellants claim (Br. 31-35) that these allegations are too "conclusory" to be credited. But appellees were required only to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Whether that standard is satisfied is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). Here, judicial experience confirms the anticompetitive potential of similar MLS rules. *See, e.g.*, *Realcomp II,* 635 F.3d at 824-36 (relying on Section 1 jurisprudence and holding that substantial evidence supported FTC's conclusion that "website policy" that restricted distribution of Exclusive Agency listings on MLS feeds violated Section 5 of the FTC Act); *Realty Multi-List*, 629 F.2d at 1370-87 (holding that MLS rules requiring that members have a favorable credit report and business reputation, maintain an active real estate office open during customary business hours, and pay $1000 for share of stock were facially unreasonable under Section 1 because the rules excluded competing brokers and were not narrowly tailored to accomplish the

MLS's legitimate objectives). The district court reasonably concluded that further elaboration was unnecessary.

Jacobs v. Tempur-Pedic International, Inc., 626 F.3d 1327 (11th Cir. 2010), and *Keller v. Greater Augusta Ass'n of Realtors, Inc.*, 760 F. Supp. 2d 1373 (S.D. Ga. 2011), on which appellants significantly rely (Br. 32), are distinguishable. The complaints found deficient in those cases contained far less detail regarding how the challenged restraints harmed competition than the instant complaints. *See Jacobs*, 626 F.3d at 1340 ("The extent of the complaint's allegation that TPX harmed competition is the statement that the alleged resale price fixing agreements 'have unreasonably restrained, do unreasonably restrain, and will continue to unreasonably restrain trade and commerce in the visco-elastic mattress market . . . by eliminating price competition.'"); *Keller*, 760 F. Supp. 2d at 1378 ("The factual allegations in Plaintiff's complaint recount personal grievances about harm to his own business and not about the negative consequences to competition in the market.").

Appellants argue that the complaints have not sufficiently pleaded a violation of the Rule of Reason because the challenged rules serve "a

plethora of legitimate business purposes." *See* Appellants Br. 27-31. But appellees specifically alleged that the challenged MLS rules harmed competition by stymieing the growth of alternative-brokerage models in the Columbia and Hilton Head areas that would have led to reduced prices and increased innovation. *See* pp. 6-9, *supra*; *see also* JA 27-28 (¶¶46-50), 192-94 (¶¶26-40). That is enough to allege that the challenged rules are unreasonable under Section 1.

In any event, many of appellants' proposed justifications are suspect,[4] and this is not the stage to resolve disputes regarding the reasonableness of the challenged MLS rules, which is better done after discovery with the benefit of evidence and expert opinion. *See, e.g.*, *Andrew v. Clark*, 561 F.3d 261, 269 (4th Cir. 2009) (district court erred

[4] Appellants' attempt to justify the ban on Exclusive Agency listings (Br. 30-31) is highly problematic. Appellants claim that the ban is justified because it prevents real-estate sellers from "free-riding" on the efforts of brokers. *Id.* But attracting customers by offering them more favorable terms is the essence of competition, and a broker concerned that a seller might avoid paying a commission by finding a buyer without the broker's assistance can simply choose not to offer the option of an Exclusive Agency listing. Other brokers still could compete by offering sellers Exclusive Agency terms, so the banning of such listings directly restrains price competition. In addition, several of appellants' other proposed justifications are suspect because they are not clearly related to competition. *Cf. Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695-96 (1978) (ban on competitive bidding was not justified by proffered public safety and ethical objectives).

by resolving "disputed issue of material fact" on "a motion to dismiss pursuant to Rule 12(b)(6)"). The district court exercised sound judgment in concluding that appellees sufficiently alleged violations of Section 1.

CONCLUSION

This Court should affirm the district court's denial of appellants' motions to dismiss the complaints for failure to state a claim under Section 1 of the Sherman Act.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,845 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Century 14-point font.

Dated: August 29, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2011, I electronically filed the foregoing Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I also filed eight copies of the brief with the Clerk of the Court by first-class mail.

I certify that attorneys for each party in the case who are registered CM/ECF users will be served through the CM/ECF system. I further certify that I served a true and correct copy of the brief on the following individuals at the address listed below:

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ADDENDUM

Not Reported in F.Supp.2d, 2009 WL 2461689 (D.Md.)
(Cite as: 2009 WL 2461689 (D.Md.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Maryland.
SHOREGOOD WATER COMPANY, INC., et al.,
Plaintiffs,
v.
U.S. BOTTLING COMPANY, et al., Defendants.

Civil Action No. RDB 08–2470.
Aug. 10, 2009.

West KeySummary**Corporations and Business Organizations 101 2032**

101 Corporations and Business Organizations
101VIII Derivative Actions; Suing or Defending on Behalf of Corporation
101VIII(A) In General
101k2027 Persons Entitled to Sue or Defend; Standing
101k2032 k. Ability to represent other shareholders. Most Cited Cases
(Formerly 101k207.1)

A shareholder was not a suitable representative in a shareholder derivative action where the shareholder sought more than $1.5 million dollars from the corporation allegedly owed to the shareholder. The shareholder's personal interest as a creditor vastly outweighed the shareholder's desire to protect the interests of the corporation through a derivative action and thus, there was a substantial likelihood that the derivative action would be used as weapon in the shareholder's arsenal and was not being employed as a means to protect the corporation.

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MEMORANDUM OPINION

RICHARD D. BENNETT, District Judge.

***1** Plaintiffs ShoreGood Water Company, Inc., Dennis Kellough, and Bonnie Kellough (together "Plaintiffs"), have filed the present lawsuit against Defendants U.S. Bottling Company, The Image Makers, Ltd., William Voelp, John D. Cecil, and John T. Cecil, Jr. (together "Defendants"). Plaintiffs assert seventeen causes of action that include claims for trademark infringement, civil conspiracy, tortious interference, slander of title, as well as claims for various remedies, including injunctive relief, replevin, detinue of property, dissolution and the appointment of a receiver. Defendants have moved to dismiss several of the causes of action set forth in Plaintiffs' First Amended Complaint. The parties' submissions have been reviewed and no hearing is necessary. *See* Local Rule 105.6 (D.Md.2008). For the following reasons, Defendants' Motion to Dismiss Counts VII through X and Count XVI of the First Amended Complaint (Paper No. 20) is GRANTED in part and DENIED in part. Specifically, the motion is GRANTED as to Counts VII through X, as the shareholder derivative claims set forth in these counts present a conflict of interest with the remaining claims asserted against the corporate defendant. The motion is DENIED as to the civil conspiracy claim set forth in Count XVI.

BACKGROUND

In ruling on a motion to dismiss, "[t]he factual allegations in the Plaintiff [s'] complaint must be accepted as true and those facts must be construed in the light most favorable to the plaintiff[s]." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir.1999).

In 2002, Plaintiffs Dennis and Bonnie Kellough, husband and wife, established the ShoreGood Water Company, Inc. ("ShoreGood"), a bottled water manufacturing company incorporated in the State of Maryland. (Amend.Comp.¶ 13.) The ShoreGood manufacturing facility is located on land owned by the company Dennis S. Kellough,

LLC ("DSK"). (*Id.* ¶ 14.) From 2004 until early 2005, ShoreGood manufactured and transported bottled water for several private label customers. However, by the end of 2004 ShoreGood had yet to gain any profit. (*Id.* ¶ 16.)

Defendants William Voelp ("Voelp") and John D. Cecil ("Cecil") own the Image Makers, Ltd. ("Image Makers"), a corporation organized under Maryland law. FN1 (*Id.* ¶¶ 5, 17.) In August of 2004, Defendants approached Plaintiffs and proposed the idea of entering into a joint venture. (*Id.* ¶ 17 .) The business venture appeared mutually beneficial to the parties, as Defendants represented that they had a customer base for ShoreGood's product but no manufacturing facility, while ShoreGood had a manufacturing facility, but was seeking customers. (*Id.* ¶ 18.) On September 16, 2004, Image Makers, ShoreGood and DSK entered into an "Agreement in Principal" pursuant to which the parties combined operations; Dennis Kellough, Cecil, and Voelp were named as "partners," with each entitled to an equal share of the profits and losses of the combined business. (*Id.* at ¶¶ 19–20; Pls.' Ex. 1, at 1.) The "Agreement in Principal" stated that the agreement was "subject to final legal documentation," but the parties never formally memorialized a final contract or proceeded in any merger transactions. (*Id.* ¶ 21.)

FN1. Plaintiffs allege that, upon information and belief, "Image Makers has forfeited its corporate charter for failure to file personal property tax returns." (Amend.Compl.¶ 5.) It is not clear from the record what sort of business Image Makers is involved in.

***2** In January 2005, Cecil and Voelp organized the U.S. Bottling Company ("U.S.Bottling") by filing articles of incorporation. (*Id.* ¶ 22.) Plaintiffs claim that U.S. Bottling was never properly organized, but that the Defendants exercised powers on its behalf as a *de facto* corporation. (*Id.* ¶¶ 4, 23.) From this point forward, Image Makers and ShoreGood began to be managed by the Defendants through the U.S. Bottling enterprise. (*Id.* ¶ 22.)

Initially, Voelp and Cecil managed the affairs of U.S. Bottling and the Kelloughs had little involvement. (*Id.* ¶ 24.) In January of 2005, Cecil and Voelp informed Dennis and Bonnie Kellough that the company required additional operating funds, and the Kelloughs loaned approximately $350,000 in mortgage proceeds to U.S. Bottling. (*Id.* ¶¶ 25–26.) Around this same period of time, Defendant John T. Cecil, Jr. ("Cecil Jr.") allegedly loaned U.S. Bottling $80,000, which he allegedly subsequently converted to stock in the company in order to obtain an ownership role. (*Id.* ¶ 27.)

In return for turning over management of ShoreGood to U.S. Bottling, U.S. Bottling was allegedly entrusted with responsibility for ensuring that all of ShoreGood's expenses were promptly paid. (*Id.* ¶ 29.) However, in mid–2005, U.S. Bottling stopped making ShoreGood's mortgage and tax payments because of cash-flow problems. In order to avoid foreclosure, the Kelloughs paid these obligations out of their personal funds. (*Id.* ¶ 30.) In January of 2006, Cecil, Voelp, and Cecil Jr. petitioned the Kelloughs for additional operating funds for U.S. Bottling. (*Id.* ¶ 31.) At this point the Kelloughs procured a loan in the amount of $300,000 from their acquaintances, William and Margaret Blanchet, and the proceeds were provided to U.S. Bottling. (*Id.* ¶ 32.) This loan agreement was memorialized in a "Confessed Judgment Promissory Note" that was signed by the parties and dated May 18, 2006. (Pls.' Ex. 2.)

In January of 2007, Cecil, Voelp, and Cecil Jr., again informed the Kelloughs that U.S. Bottling needed additional operating funds, and the Kelloughs loaned to U.S. Bottling approximately $200,000. (*Id.* ¶ 33–34.) Plaintiffs allege that at this time the Kelloughs also paid approximately $700,000 in owed expenses on behalf of U.S. Bottling and ShoreGood, "bringing the Kelloughs' loans to U.S. Bottling to an amount in excess of $1,500,000.00." (*Id.* ¶ 35.)

In 2007 the Kelloughs became more involved in the management of U .S. Bottling and ShoreGood. During this time, they discovered certain irregularities, discrepancies, and other red flags in the companies' records. (*Id.* ¶ 36.) The Kelloughs repeatedly requested full access to the books and records of U.S. Bottling and Image Makers, but such requests were denied by the Defendants, who only disclosed a limited amount of the requested information. (*Id* . ¶ 37.) In May of 2008, Plaintiffs terminated ShoreGood's relationship with U.S. Bottling due to the Defendants' refusal to provide access to their books and records and to provide an accounting for monies received. (*Id.* ¶ 38.)

***3** Since 2004, ShoreGood has owned the federally registered trademark Great Blue, which was registered in connection with goods and services described as "Bottled Drinking Water." (*Id.* ¶ 47.) While U.S. Bottling was managing ShoreGood, U.S. Bottling allegedly marketed and sold bottled drinking water manufactured by ShoreGood under the Great Blue trademark. (*Id.* ¶ 49). Plaintiffs allege that since the termination of the business relationship between ShoreGood and U.S. Bottling in May of 2008, U.S. Bottling has continued to use the Great Blue trademark—without ShoreGood's consent—to sell bottled drinking water that has not been produced by ShoreGood. (*Id.* ¶¶ 51–52.)

Plaintiffs allege that the Defendants committed various forms of misconduct when they were in control of U.S. Bottling and in their interactions with the Kelloughs. Among other things, they claim that Defendants: (1) refused to account to the Kelloughs for funds received; (2) failed to provide notice, or properly hold, meetings of stockholders and directors; (3) failed to properly authorize or issue shares of stock; (4) restricted access to books and records; (5) acted as interested directors of U.S. Bottling on certain transactions; and (6) withheld from the Plaintiffs notice and information concerning certain transactions. (*Id.* ¶¶ 39–46.)

Plaintiffs filed their original Complaint in this Court on September 18, 2008. (Paper No. 1.) On December 2, 2008, Plaintiffs filed their First Amended Complaint (Paper No. 18), which contains seventeen counts invoking various causes of action and requests for relief. On December 12, 2008, Defendants filed the pending Motion to Dismiss (Paper No. 20) challenging: (1) Counts VII through X, in which Plaintiff Dennis Kellough purports to sue derivatively on U.S. Bottling's behalf; and (2) Count XVI, in which Plaintiffs seek money damages from Image Makers, Voelp, Cecil, and Cecil Jr., for civil conspiracy.

STANDARD OF REVIEW

Under Rule 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed.R.Civ.P. 8(a). Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted, *see* Fed.R.Civ.P. 12(b)(6), and therefore a Rule 12(b)(6) motion tests the legal sufficiency of a complaint.

A complaint must be dismissed if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Under the plausibility standard, a complaint must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action" in order to survive a motion to dismiss. *Id.* at 555. Well-pleaded factual allegations contained in the complaint are assumed to be true "even if [they are] doubtful in fact," but legal conclusions are not entitled to judicial deference. *See id.* (stating that "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation' " (citations omitted)).

***4** To survive a Rule 12(b)(6) motion, the legal framework of the complaint must be supported by factual allegations that "raise a right to relief above the speculative level." *Id.* On a spectrum, the Supreme Court has recently explained that the plausibility standard requires that the pleader show more than a sheer possibility of success, although it does

not impose a "probability requirement." *Ashcroft v. Iqbal*, —— U.S. ——, ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Instead, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* At bottom, the court must "draw on its judicial experience and common sense" to determine whether the pleader has stated a plausible claim for relief. *Id.*

DISCUSSION

I. Counts VII–X: Derivative Claims

Defendants move this Court to dismiss Counts VII through X, which are styled as shareholder derivative claims brought by Dennis Kellough on behalf of U.S. Bottling. Specifically, these counts assert shareholder derivative actions for conversion against the remaining defendants, and rescission against the individual defendants. Defendants claim that Kellough does not "fairly and adequately" represent the interests of his co-shareholders or of U.S. Bottling.

Rule 23.1 of the Federal Rules of Civil Procedure provides that a "derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." Fed.R.Civ.P. 23.1. The issue of adequate representation is entrusted to the sound discretion of a district court. *Owen v. Modern Diversified Industries, Inc.*, 643 F.2d 441, 443 (6th Cir.1981). Defendants bear the burden of showing that a plaintiff asserting a derivative claim cannot fairly and adequately represent the interests of the shareholders or of the corporation. *Smallwood v. Pearl Brewing Co. .*, 489 F.2d 579, 592 n. 15 (5th Cir.1974).

Defendants argue that Kellough's derivative claims present a conflict of interest because the Plaintiffs have also sued U.S. Bottling directly. Many courts have stopped short of implementing a *per se* rule barring a shareholder from bringing a derivative suit on behalf of a company while simultaneously asserting a direct claim against the same company. *See, e.g.*, *In re TransOcean. Tender Offer Securities Litig.*, 455 F.Supp. 999, 1014 (N.D.Ill.1978); *Bertozzi v. King Louie Int'l., Inc.*, 420 F.Supp. 1166, 1178–80 (D.R.I.1976). *But see Tuscano v. Tuscano*, 403 F.Supp.2d 214, 223 (E.D.N.Y.2005) ("[a]ny individual claims raised by a shareholder in a derivative action present an impermissible conflict of interest"). Instead, courts engage in a fact intensive analysis to determine whether a conflict of interest exists under the circumstances of a particular case. A number of factors have been identified that may guide a court's discretion when conducting this analysis, including:

> ***5** economic antagonisms between representative and class; the remedy sought by plaintiff in the derivative action; indications that the named plaintiff was not the driving force behind the litigation; plaintiff's unfamiliarity with the litigation; other litigation pending between the plaintiff and defendants; the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; plaintiff's vindictiveness toward the defendants; and finally, the degree of support plaintiff was receiving from the shareholders he purported to represent.

Davis v. Comed, Inc., 619 F.2d 588, 593–94 (6th Cir.1980).

This Court has recently questioned the propriety of simultaneous causes of action, noting that "a plaintiff's individual suit against the corporation, while maintaining a simultaneous derivative action, raises a serious question about whether the plaintiff can properly represent the interests of the shareholders." *Argiropoulos v. Kopp*, No. 06–0769, 2007 U.S. Dist. LEXIS 22351, at *22, 2007 WL 954747 (D.Md. Mar. 26, 2007). This Court added that "[w]here a derivative action and a plaintiff's individual monetary recovery are in competition for the same pool of money, it makes it further unlikely that plaintiff will be an appropriate derivative plaintiff." *Id.* at *22–23.

In this case Kellough's interests are clearly antagonistic to the interests of the other shareholders. Plaintiffs have named the remaining shareholders as defendants, and this lawsuit aims to recover funds that the Defendants allegedly misappropriated. Plaintiffs note that they are creditors of U.S. Bottling and that U .S. Bottling is indebted to them "in excess of $1,500,000.00 with no present ability to repay these amounts" and that the company "is now essentially defunct." (Amend.Compl.¶¶ 85, 90, 93.) If the Plaintiffs were to succeed on their individual claims, the shareholders' equity interests would be devastated. This presents a serious conflict that is not merely "theoretical," but is instead real and conspicuous. *Cf. In re TransOcean Tender Offer Securities Litig.*, 455 F.Supp. 999, 1014 (N.D.Ill.1978) (allowing simultaneous prosecution where a conflict is merely "theoretical" and the "asserted 'antagonism' between the primary and derivative actions is merely a 'surface duality' ") (citing *Bertozzi*, 420 F.Supp. at 1179–80).

In *Argiropoulos*, this Court found that a plaintiff was operating under an apparent conflict of interest because he was in a position in which he would be competing with his fellow shareholders to recover the remaining funds in a defunct company. 2007 U.S. Dist. LEXIS 22351, at *22–25, 2007 WL 954747. Similarly, in *Owen v. Modern Diversified Industries, Inc.*, 643 F.2d 441 (6th Cir.1981) a conflict was found to exist when a plaintiff sued to recover upon a substantial debt interest and simultaneously asserted a derivative claim on the basis of a *de minimus* equity interest. The court determined that the plaintiff's derivative claims were being used, not to secure the interests of the remaining shareholders, but instead as a litigation strategy to advance his interests as a creditor. *Id.* at 443–44.

***6** Plaintiffs submit that even if Dennis Kellough's interests appear adverse to the interests of the remaining defendant shareholders, his derivative suit should be allowed to proceed because he constitutes a legitimate "class of one." A sole shareholder may sometimes bring a derivative suit under certain factual situations. *Larson v. Dumke*, 900 F.2d 1363, 1368–69 (9th Cir.1990); *cf. Smith v. Ayres*, 977 F.2d 946, 948 (5th Cir.1992) ("[o]nly in the rarest instances may there be a shareholder derivative action with a class of one").

However, in order for a sole shareholder's derivative claim to proceed, it must fairly represent the interests of the corporation. As the Fifth Circuit Court of Appeals emphasized in a case involving a "class of one" derivative claim, "[a] plaintiff in a shareholder derivative action owes the corporation his undivided loyalty. The plaintiff must not have ulterior motives and must not be pursuing an external personal agenda." *Ayers*, 977 F.2d at 949. In many cases that have permitted single shareholder derivative claims, courts have rested their holding, in part, upon the observation that there was no hint of any conflict between the individual's interests and the interests of the corporation. For instance, in *Halsted Video, Inc. v. Guttillo*, 115 F.R.D. 177 (N.D.Ill.1987), the plaintiff was considered a "legitimate class of one" largely because there was no indication that he was operating under "ulterior motives" or that he would "not adequately enforce" the company's rights in the litigation. *Id.* at 180. *See also Hall v. Tenn. Dressed Beef Co.*, 957 S.W.2d 536, 540 (Tenn.1997) ("[b]ecause there is no evidence in the record to support a finding that [Plaintiff] is incapable of fairly representing the interests of the corporation in the derivative action while maintaining his individual suit, the existence of both is no reason to deny him standing").

As noted above, the crux of Plaintiffs' lawsuit is to recover money allegedly owed—a personal goal focused on an external interest that is at odds with the underlying purpose of a derivative action, which is fiduciary in nature. Plaintiffs seek to recover more than $1.5 million dollars from the individual Defendants and from the spoils of U.S. Bottling, which is now "essentially defunct ." (Amend.Compl.¶¶ 90, 93.) As a result, this Court finds that Plaintiffs' personal interests as creditors in their direct claims vastly outweighs Dennis Kel-

lough's desire to protect the interests of U.S. Bottling through a derivative action. Accordingly, this Court finds that "there is a substantial likelihood that the derivative action will be used as a weapon in the plaintiff shareholder's arsenal," and that it is not being employed as a means to protect the corporation. *Banks v. Whyte*, No. 94–0711, 1994 U.S. Dist. LEXIS 11063, at *2, 1994 WL 418997 (E.D.Pa. Aug. 9, 1994) (internal quotation omitted). Because of this apparent conflict of interest, the shareholder derivative claims in Counts VII through X are hereby dismissed upon a finding that Plaintiff Dennis Kellough is not a suitable representative.

II. Count XVI: Conspiracy Claim

***7** In Count XVI, Plaintiffs assert a claim of civil conspiracy against Image Makers, Cecil, Cecil Jr., and Voelp. In their motion to dismiss, Defendants argue that Maryland does not recognize a cause of action for civil conspiracy and that such a claim is nevertheless barred by the "intracorporate conspiracy doctrine."

Maryland clearly recognizes a cause of action for civil conspiracy, which is defined as "a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or means employed must result in damages to the plaintiff." *BEP, Inc. v. Atkinson*, 174 F.Supp.2d 400, 408 (D.Md.2001). It is well-established that a claim of conspiracy "is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff." *Lloyd v. General Motors Corp.*, 397 Md. 108, 154, 916 A.2d 257 (2007). In this case Plaintiffs have alleged various claims that sound in tort, including trademark infringement, slander of title, and tortious interference with business relations. *See AARP v. Am. Family Prepaid Legal Corp., Inc.*, 604 F.Supp.2d 785, 799 (M.D.N.C.2009) (finding trademark infringement to be tortious in nature); *Lomah Elec. Targetry v. ATA Training Aids Aust. Pty.*, 828 F.2d 1021 (noting that slander of title is a tort). Thus, underlying tort claims have been set forth in this case that may support Plaintiffs' conspiracy claim.

A more difficult question is introduced by the Defendants' assertion of the intracorporate conspiracy doctrine, which may, under certain circumstances, immunize corporate actors from claims of civil conspiracy. This Court has recently noted that:

> [T]he "intracorporate conspiracy doctrine" holds that acts of corporate agents are attributed to the corporation itself, thereby negating the multiplicity of actors necessary for the formation of a conspiracy. In essence, this means that a corporation cannot conspire with its employees, and its employees, when acting in the scope of their employment, cannot conspire among themselves.

Baltimore–Washington Telephone Co. v. The Hot Leads Co., L.L.C., 584 F.Supp. 736, 744 (D.Md.2008) (citing *Marmott v. Maryland Lumber Co.*, 807 F.2d 1180, 1184 (4th Cir.1986)). According to this doctrine, "a conspiracy between a corporation and its agents, acting within the scope of their employment, is a legal impossibility." *Marmott*, 807 F.2d at 1184. Moreover, a plaintiff may not circumvent this immunizing doctrine merely by naming the defendant corporate agents in their individual capacities. *Buschi v. Kirven*, 775 F.2d 1240, 1252 (4th Cir.1985).

However, the United States Court of Appeals for the Fourth Circuit has long recognized an exception to the doctrine where a corporate "officer has an independent personal stake in achieving the corporation's illegal objectives." [FN2] *Greenville Pub. Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir.1974); *see also Akande v. TransAmerica Airlines, Inc.*, No. 1039–N, 2006 Del. Ch. LEXIS 47, at *7, 2006 WL 587846 (Del. Ch. Feb. 28, 2006) (noting that the intracorporate conspiracy doctrine does not apply "when the officer or agent of the corporation steps out of her corporate role and acts pursuant to personal motives"). In order

for this exception to apply, there must be a showing that the interests of the company and the conspirators are clearly distinct. *See United States v. Gwinn,* No. 5:06–cv–00267, 2008 U.S. Dist. LEXIS 26361, at *82–83, 2008 WL 867927 (S.D.W.Va. Mar. 31, 2008) ("[u]nder the independent personal stake exception, the agent must have a personal interest in the illegal activity wholly separate and independent of his relationship with the corporation") (quotations omitted). The exception will not apply if the commission of the illegal conduct is found to benefit both the corporation and the agent. *Id.* at *86 ("when an agent ... acts in a manner that benefits both himself and his corporation for similar reasons, the narrow independent personal stake exception is not applicable").

> FN2. The Fourth Circuit Court of Appeals has recognized another exception to the intracorporate conspiracy doctrine under which a corporate agent is denied immunity for any unauthorized actions. *Buschi v. Kirven,* 775 F.2d 1240, 1252–53 (4th Cir.1985).

***8** Defendants construe the Amended Complaint as providing that the alleged conspirators—Image Makers, Cecil, Cecil Jr., and Voelp—"conspired with and acted on behalf of U.S. Bottling Company/ShoreGood, and thus intracorporately ...." Defs.' Mot. to Dismiss at 14. However, after viewing the factual allegations in a light most favorable to the Plaintiffs, this Court notes that the Plaintiffs have alleged that the conspirator Defendants organized a scheme whereby they used U.S. Bottling as a vehicle to advance their personal interests and that this scheme adversely impacted both U.S. Bottling and the Plaintiffs. The individual Defendants are alleged to have diverted to their personal accounts certain funds that the Kelloughs had previously loaned to U.S. Bottling. *See* Amend Compl. ¶ 26 (alleging that Defendants deposited "checks payable to U.S. Bottling into an account maintained by Image Makers"). In addition, one or more of the individual defendants are alleged to have "entered into transactions with Defendant U.S. Bottling which were not fair and reasonable to Defendant U.S. Bottling or Plaintiff ShoreGood." (*Id.* at 45.) Thus, the Plaintiffs allege a personal stake of the individual Defendants independent of the corporation.

In *Eplus Technology, Inc. v. Aboud,* the Fourth Circuit applied the personal-stake exception under analogous circumstances. 313 F.3d 166, 179–80 (4th Cir.2002). In *Eplus* the main defendant was alleged to have organized an illegal "bust-out scheme" with her co-employees whereby they siphoned off money from their company for their personal gain. *Id.* The court found that the conspirators were pursuing their personal stake in achieving an illegal objective that was detrimental to, and therefore distinct from, the interests of the corporation. *Id.* Here the Plaintiffs have alleged a similar situation in which the Defendant conspirators are alleged to have personally diverted money that had been entrusted to U.S. Bottling, and thereby injured the Plaintiffs and the company. Consequently, this Court finds that the Plaintiffs' allegations in Count XVI, if borne out by the evidence, would support a cause of action for civil conspiracy.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss Counts VII through X and XVI of the First Amended Complaint (Paper No. 20) is GRANTED as to the shareholder derivative claims set forth in Counts VII, VIII, IX, and X, and is DENIED as to the civil conspiracy claim set forth in Count XVI. A separate Order follows.

D.Md.,2009.
ShoreGood Water Co., Inc. v. U.S. Bottling Co.
Not Reported in F.Supp.2d, 2009 WL 2461689 (D.Md.)

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