TODD R. GREGORIAN (CSB No. 236096)
tgregorian@fenwick.com
MATTHEW BECKER (CSB No. 291865)
mbecker@fenwick.com
FENWICK & WEST LLP
555 California Street, 12th Floor
San Francisco, CA 94104
Telephone: 415.875.2300
Facsimile: 415.281.1350

JAMES D. PETRUZZI (CSB NO. 115175)
jim@petruzzi.com
THE PETRUZZI LAW FIRM
10497 Town & Country Way, Suite 753
Houston, TX 77024
Telephone: 713.840.9993
Facsimile: 713.877.9100

Attorneys for Plaintiff
HOMELIGHT, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HOMELIGHT, INC.,

Plaintiff,

v.

DMITRY SHKIPIN, an individual and HOMEOPENLY, INC.,

Defendants.

DMITRY SHKIPIN, an individual,

Counter-Plaintiff,

v.

HOMELIGHT, INC.,

Counter-Defendant.

Case No.: 3:22-cv-03119-VC

PLAINTIFF HOMELIGHT, INC.'S MOTION TO DISMISS COUNTERCLAIMS

Date: September 1, 2022
Time: 2:30 p.m.
Dept: Zoom link
Judge: Honorable Vince Chhabria
Trial Date: None Set

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NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT

PLEASE TAKE NOTICE that on September 1, 2022, or as soon thereafter as this matter may be heard, either in Courtroom 4 of this Court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, by Zoom videoconference per the Court's current procedures for civil law and motion, Plaintiff HomeLight, Inc. ("HomeLight") will and hereby does move the Court for an order granting Plaintiff's Motion to Dismiss Dmitry Shkipin's ("Shkipin") Counterclaims with prejudice for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

This Motion is based upon this Notice; the accompanying Memorandum of Points and Authorities; any reply memorandum; the pleadings and files in this action; and such other matters as may be presented at or before the hearing.

RELIEF REQUESTED

HomeLight respectfully requests that the Court dismiss the Counterclaims (styled "Cross-Complaint") in its entirety under Rule 12(b)(6) of the Federal Rules of Civil Procedure because it fails to allege any plausible claims for relief.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Dmitri Shkipin is the CEO of HomeOpenly, a failed real-estate platform that was intended to connect real estate agents with buyers and sellers while at the same time earning revenue by selling advertising space on its website. HomeOpenly and Mr. Shkipin promote their platform through their website, on which they have published a series of advertorial "reviews" and articles attacking HomeLight and other real estate companies with claims that those businesses are engaged in illegal price fixing, violate other state and federal laws, defraud or mislead the public, or otherwise harm consumers.[1] HomeLight brought this action to protect its brand and reputation from these false and misleading attacks. Dkt. 1. In response, Shkipin has doubled down on his falsehoods by attempting to turn them into legal claims. Dkt. 17 (hereafter, "Counterclaims" or "CC"). Because his claims are not just factually baseless, but also legally flawed and in some cases barred by Shkipin's own allegations, they should be dismissed:

Sherman Act §§ 1 & 2. As alleged in the counterclaims, HomeLight allows real estate agents to list on its service and matches them to interested home buyers and sellers, charging a referral fee for any completed transactions. CC ¶ 3; *see also* Dkt. 17-9. HomeOpenly attempted to provide the same service but without charging such fees and requiring instead that real estate agents agree not to list on other services. CC ¶¶ 14, 15, 57. Shkipin argues that HomeLight (and the many other "Referral Fee Networks" expressly named in the counterclaims, including those operated by Zillow, Redfin, and Movoto) have diverted consumers to their services and away from his, and that his business "cannot coexist" with these other businesses "in the long run." CC ¶¶ 13, 83. In essence, Shkipin alleges that these other services have out-competed him in the market, making this case like this Court's recent decision in *Top Agent Network, Inc. v. Nat'l Ass'n of Realtors*, 554 F. Supp. 3d 1024 (N.D. Cal. 2021). Despite the florid antitrust-sounding language in the pleading, no amount of squinting at the page can turn legitimate competition into a Sherman

[1] There are more than a dozen businesses that Defendants openly attack across many pages on their website. *See, e.g.*, *Side, Inc. v. HomeOpenly, Inc.*, N.D. Cal. Case No. 4:20-cv-03537, Dkt. 1.

Act violation, and these claims fail for multiple independent reasons: Mr. Shkipin has not suffered an antitrust injury (an injury from harm to competition rather than the competition itself), he has not alleged anticompetitive conduct, and he failed to define a relevant market or allege that HomeLight has market power in any such market.

Lanham Act (15 U.S.C. § 1125). Shkipin labels his next count "trademark misuse," but attempts to plead a false advertising claim. Here, Shkipin's theory is that the business model used by HomeLight and a wide swath of the industry is a "sham," and that because these entities operate a "'sham' brokerage" their services are not legitimate and thus their advertising claims for those services are false or misleading. CC ¶¶ 21, 114-115. But Mr. Shkipin's own pleading admits his claims of a "sham" are his own wishful thinking as a competitor. He alleges that the referral fees charged by HomeLight and other similar businesses violate federal anti-kickback regulations (RESPA Section 8 (12 U.S.C. § 2607) and CFPB Regulation X (12 C.F.R. § 1024.14)) because they do not fall within the broker-to-broker safe harbor in those rules. CC ¶¶ 21. But he expressly admits that "HomeLight is a licensed real estate broker . . . under California DRE License 01900940" and that it partners with other real estate brokers and agents (CC ¶¶ 3-4), and thus is eligible for the safe harbor. He alleges no specific facts about any transaction that would show an actual RESPA violation, and he further admits that federal agencies have not enforced RESPA according to his own personal beliefs about what the statute means. CC ¶ 66.

The remaining allegedly false statements are listed in short quotations and out of context and include statements that HomeLight is a referral service; the HomeLight services are free to users and that agents do not pay to be listed; that agents recommended through HomeLight can save a user money on a home purchase; and that HomeLight matches users with top listing agents in their local neighborhood by analyzing millions of home transactions to generate unbiased recommendations. CC ¶ 20. There is no explanation of how these statements are allegedly false, and the counterclaims elsewhere allege facts showing the opposite for many of them—for example, that HomeLight does refer buyers and sellers to agents, that HomeLight does not charge consumers for its services, that agents do not in fact pay to be listed, and that HomeLight's

commission structure is disclosed and explained throughout its advertising. CC ¶¶ 26, 35, 41, and Dkts. 17-4 and 17-6.

California Unfair Competition. Mr. Shkipin premises his Unfair Competition Law (UCL) claim on the same flawed antitrust and false advertising theories, and thus this claim fails for the same reasons.

The Court should therefore grant the motion and dismiss the counterclaims.

II. STATEMENT OF THE ISSUES TO BE DECIDED

Whether the Court should dismiss the entire complaint for failure to state a claim, where plaintiff failed to plausibly allege violations of (i) Sherman Act § 1, (ii) Sherman Act § 2; (iii) the Lanham Act; and (iv) California Unfair Competition Law.

III. LEGAL STANDARD

To survive a Rule 12(b)(6) motion, Mr. Shkipin's factual allegations must be sufficient "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558, 570 (2007). "However, as the Supreme Court has noted precisely in the context of private antitrust litigation, 'it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.'" *Feitelson v. Google Inc.*, 80 F. Supp. 3d 1019, 1025 (N.D. Cal. 2015) (quoting *Twombly*, 550 U.S. at 558-59). "As such, 'a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" *Id.* at 1025–26 (quoting *Assoc.'d Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983), quoted with approval in *Twombly*, 550 U.S. at 559). Thus, "[a]llegations of facts that could just as easily suggest rational, legal business behavior" are insufficient to plead an antitrust case. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1049 (9th Cir. 2008). Indeed, allegations of wrongdoing must be "plausible in light of basic economic principles." *William O. Gilley Enters., Inc. v. Atl. Richfield Co.,* 588 F.3d 659, 662 (9th Cir. 2009). And, "[w]hen considering plausibility, courts must also consider an 'obvious alternative explanation[]' for

defendant's behavior." *Eclectic Props. E., LLC v. Marcus & Millichap Co*., 751 F.3d 990, 996 (9th Cir. 2014) *(*quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 682 (2008)).

IV. ARGUMENT

A. Mr. Shkipin pled that he and HomeOpenly were harmed by competition, and thus failed to allege an antitrust injury (Counts 1 and 2).

As an initial matter, Shkipin cannot state any valid claim for violation of the Sherman Act because he failed to plead an antitrust injury. "It is well established that the antitrust laws are only intended to preserve competition for the benefit of consumers." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal*., 190 F.3d 1051, 1055 (9th Cir. 1999). "[P]rivate plaintiffs can be compensated only for injuries that the antitrust laws were intended to prevent," so they must prove "antitrust injury"—which is an injury caused by "acts that harm allocative efficiency *and* raise the price of goods above their competitive level or diminish their quality." *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034, 1036 (9th Cir. 2001) (cleaned up). When a plaintiff's "allegations do not identify how [it] suffered any antitrust injury," it has not stated an antitrust claim and its complaint should be dismissed. *Korea Kumho Petrochemical v. Flexsys Am. LP*, No. 07-1057, 2007 WL 2318906, at *4 (N.D. Cal. Aug. 13, 2007).[2]

Mr. Shkipin's theory of antitrust injury is that the benefits of using HomeLight and the more than 15 businesses that he lumps together under the term "Referral Fee Networks" make agents less likely to want to work with his HomeOpenly platform. CC ¶¶ 57-69. He does not explain why agents continue to choose to work with these competitors and pay referral fees for completed transactions rather than use his free platform. He does allege that there are "suppressed network effects," by which he appears to mean that he has not been able accumulate enough buyers, sellers, and agents on his platform to make the service useful and reasonably attractive to those groups. CC ¶ 61-62. Critically, Mr. Shkipin also does not allege that HomeLight requires

[2] *See also Hip Hop Beverage Corp. v. Monster Energy Co.*, 733 F. App'x 380, 381 (9th Cir. 2018) (unpublished) (affirming dismissal of a complaint in which plaintiff "failed to adequately plead injury to competition"); *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 557 (9th Cir. 2008) (unpublished) (holding that plaintiff's "failure to allege causal antitrust injury, which is an element of all antitrust suits, serves as an independent basis for dismissal" (cleaned up)).

agents to work exclusively with it, or otherwise prohibits them from working with HomeOpenly. Nor could he: Mr. Shkipin has attached HomeLight's form agreement to the counterclaims that contains no such requirement. Dkt. 17-9. Moreover, Mr. Shkipin admits that *he* is the one who has attempted to exclude competitors by prohibiting agents that have worked with HomeLight and others from listing their services on *his* platform. CC ¶¶ 15 ("HomeOpenly specifically does not allow certain real estate agents to use Open Marketplace™ . . . if we know that an agent is part of . . . HomeLight . . . ."); *id.* ¶¶ 14, 57.

This case is thus like *Top Agent Network, Inc.*, 554 F. Supp. 3d 1024, in which this Court dismissed antitrust claims with prejudice due to failure to allege an antitrust injury. In *Top Agent*, the plaintiff offered a real estate listing service to "top agents," and wanted to require its members to list exclusively on its service. It sued the National Association of Realtors, with whom it had overlapping membership, over NAR's policy that a member agent marketing a property in any way must also list that property on NAR's MLS listing services. *Id.* at 1029-30. This Court rejected the plaintiff's claim that NAR's policy unlawfully interfered with its ability to create exclusive listings, holding that the plaintiff had failed to allege an antitrust injury. The plaintiff, unlike here, had plausibly alleged several bases indicating that NAR's policy had an overall anticompetitive effect, including that NAR's control of the real estate market coerced most agents into giving up their off-MLS activities. *Id.* at 1032. But plaintiff's alleged *harm*—"the loss of agent members—does not flow from effects of the Policy that are harmful to competition," and instead flowed from the plaintiff's own anticompetitive exclusive listing policy, which NAR's policy in fact remedied in a procompetitive fashion by ensuring greater availability to consumers of information about real estate listings. *Id.*

So too here. That Mr. Shkipin has failed to build his more exclusive referral service because HomeLight and more than a dozen other competitors are more successful at matching agents and consumers is an injury stemming from competition itself, not from any anticompetitive practice. HomeLight is not alleged to restrict agents from partnering with HomeOpenly or generating leads in any other way they see fit; and it is not accused of restricting agents from

continuing to compete for a given listing or buyer even in the event HomeLight has made a contrary referral recommendation. *See also* Dkt. 17-9. The only accusation is that HomeLight and other businesses throughout the industry collect a fee for successful transactions that they originated. CC ¶¶ 20-23, 66. There are no facts alleged that plausibly indicate that practice is anticompetitive, as discussed below. But even if it were, Mr. Shkipin's alleged harm stems from the allegation that those businesses have out-competed him by drawing more agents and consumers to their services, not because he has had to pay that fee or that it affected a real estate transaction to which he was a party. This failure is fatal to both antitrust claims.

B. Mr. Shkipin failed to plead a plausible claim for an unreasonable restraint of trade under Section 1 of the Sherman Act (Count 1).

Mr. Shkipin did not allege any unreasonable restraint of trade, and therefore his first claim for violation of the Sherman Act fails. Only an "unreasonable restraint" on trade can constitute a violation of the Sherman Act section 1, 15 U.S.C. § 1. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Restraints on trade are unreasonable for antitrust purposes in one of two ways: they are either *per se* unreasonable because they are a naked restraint of trade (such as price fixing, bid rigging, or market allocation, without any pro-competitive justification), or they are found unreasonable under the Rule of Reason. *The PLS.com, LLC v. The National Association of Realtors*, 516 F.Supp.3d 1047, 1056 (C.D. Cal. 2021). Mr. Shkipin does not allege any *per se* violation specific to HomeLight,[3] nor could he on these facts. *See Texaco*, 547 U.S. at 5 ("*Per se* liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality. Accordingly, we have expressed reluctance to adopt *per se* rules where the economic impact of certain practices is not immediately obvious.") (cleaned up).

The Rule of Reason exists to "distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's

[3] Addressing Referral Fee Networks in the abstract, Mr. Shkipin at one point references "'per se' unlawful collusion," but does not specify that HomeLight has perpetrated it. CC ¶ 80. Even if he did allege that HomeLight perpetrated a *per se* antitrust violation, he would be unable to plead facts sufficient to show HomeLight operated as a naked restraint of trade. And his claims would also fail for the additional reasons addressed in this motion.

best interest." *The PLS.com, LLC* at 1056 (quoting *State Oil v. Khan*, 522 U.S. 3, 10 (1997)) (cleaned up). To state a claim, a plaintiff must plead facts sufficient to show the plausible existence of "'(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition;'" and (4) said anti-competitive restraint harmed the plaintiff and such harm flowed from an anti-competitive aspect of the practice at issue. *Id.* (quoting *Kendall*, 518 F.3d at 1047).

Mr. Shkipin does not identify any restraint of trade. Although he alleges a "hub-and-spoke conspiracy" among HomeLight and its participating agents, he does not identify any anticompetitive agreement—the only agreement he identifies is the commitment of the agents to pay a fee if a referral results in a sale. CC ¶ 86; Dkt. 17-9 (Exh. I). A hub-and-spoke conspiracy has three elements: "(1) a hub, such as a dominant purchaser; (2) spokes, such as competing manufacturers or distributors that enter into vertical agreements with the hub; and (3) the rim of the wheel, which consists of horizontal agreements among the spokes." *In re Musical Instruments and Equipment Antitrust Litig.*, 798 F.3d 1186, 1192 (9th Cir. 2015). Hub-and-spoke conspiracy allegations are dismissed where there is no evidence of a "rim" (horizontal agreements among the alleged participants), such as where the alleged participants are free to compete with one another or with others in the market. *See Clear Connection Corp. v. Comcast Cable Communications Management, LLC*, No. 2:12-cv-02910-TLN-DB, 2020 WL 6742889 at *5 (E.D. Cal. Nov. 17, 2020) (dismissing claim for hub-and-spoke conspiracy where "each contractor's employee was free to apply for employment with other contractors, and . . . retained independent authority to hire anyone applying").

Here, Mr. Shkipin recognizes that any participating real estate agent or broker may use HomeLight along with other referral services and traditional means of generating sales leads, and may market their listings in any way he or she chooses, so long as when a house is sold based on a HomeLight referral, the agent pays a referral fee. *See, e.g.*, CC ¶¶ 14, 15, 57 (actively prohibiting agents who use HomeLight from using HomeOpenly); *see also* Dkt. 17-9 (attaching referral

agreement to Counterclaims). The fee does not divide the market or exclude any agent or service from the market. Indeed, there is no "rim" alleged at all: even if HomeLight refers a buyer or seller to a particular agent, any agent (including a different HomeLight participating agent) could still compete and win the sale. And finally, while Mr. Shkipin alleges that an agent might be inclined to spend more to promote a sale if he or she chose to use a free referral service instead of a fee-based one like HomeLight or the 15+ other services with a similar model, the same thing could be said of *any* cost incurred by agents. The counterclaim does not allege that any agent is required to use HomeLight, nor that any agent is required to limit marketing efforts for HomeLight referrals. Because there are no facts alleged that make plausible the conclusion that the HomeLight agreement on balance injures competition or has an overall anticompetitive effect, Mr. Shkipin has failed to allege a Sherman Act § 1 violation.

C. Mr. Shkipin failed to plead a plausible claim for monopolization or attempted monopolization under Section 2 of the Sherman Act (Count 2).

1. Mr. Shkipin failed to plead a relevant market.

Market definition is an essential predicate to an antitrust claim, *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2285 (2018), and "[a]ccordingly, an antitrust plaintiff must plead a plausible relevant market— including 'both a geographic market and a product market'— to state a claim." *Reilly v. Apple Inc.,* 2022 WL 74162, *4 (N.D. Cal. Jan. 7, 2022) (citing *Hicks v. PGA Tour, Inc*., 897 F.3d 1109, 1120 (9th Cir. 2018)). The failure to do so requires dismissal. *See Tanaka v. Univ. of S. California*, 252 F.3d 1059, 1063 (9th Cir. 2001); *Pistacchio v. Apple, Inc*., No. 4:20-cv-07034-YGR, 2021 WL 949422, at *2 (N.D. Cal. Mar. 11, 2021); *Coronavirus Reporter v. Apple, Inc.*, No. 21-CV-05567-EMC, 2021 WL 5936910, at *7 (N.D. Cal. Nov. 30, 2021).

A "plausible market requires alleged facts explaining why the products included in the market are substitutes for one another as well as alleged facts explaining why seemingly similar products excluded from the market are not substitutes for those in the market." *Reilly*, 2022 WL 74162, *6. Here, Mr. Shkipin alleges no such facts, beginning with the problem that he failed to state what products and services are at issue. He alleges a "two-sided online real estate agent

marketplace," which includes the ability to connect real estate agents to home buyers and sellers, but that also potentially includes a litany of other real estate services. CC ¶¶ 72, 77. There is also no explanation of why consumers (i.e., the home buyers or sellers) do not have reasonably interchangeable alternatives for any of these services, including for finding real estate agents (such as through their own online searches or by traditional means). Moreover, Mr. Shkipin expressly alleges that HomeLight and the 15 or so other companies that he refers to as "Referral Fee Networks" are in fact *not* "genuine" economic substitutes for his company HomeOpenly, because they allegedly cannot offer all of the same services. CC ¶¶ 78-79. They therefore operate in an undefined market broader than the "two-sided online real estate marketplace" that Mr. Shkipin refers to as the real estate representation "sector." CC ¶¶ 63, 64, 70, 78. As to the geographic market, the counterclaims refer at first to this national "United States real estate representation sector," CC ¶¶ 2-3, but elsewhere allege that there are in fact multiple such "United States *markets*" in which "*local* real estate representation professionals" compete. CC ¶¶ 11, 57 (emphases added).

When, as here, a plaintiff fails to define its proposed relevant market with reference to the underlying economic facts (i.e., reasonable interchangeability and cross-elasticity of demand) or alleges a market that does not encompass all substitute products or services, the relevant market is "legally insufficient," and the proper remedy is to dismiss. *Colonial Med. Group, Inc. v. Catholic Healthcare West*, No. C-09-2192 MMC, 2010 WL 2108123, at *3. The Court should do so here, as Mr. Shkipin made no serious attempt to allege a relevant antitrust market.

2. Mr. Shkipin failed to plead market power.

To plead a violation of Section 2, the plaintiff must also plead either that the defendant has monopoly power or that there exists a dangerous probability that the defendant will acquire such power. *See Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997); *Rebel Oil Co., Inc. v. Atlantic Richfield, Co.,* 51 F.3d 1421, 1434 (9th Cir.). "Courts generally require a 65% market share to establish a prima facie case of market power," *Image Tech*

Servs., 125 F.3d at 1206,[4] although the Ninth Circuit is clear that even high market share does not demonstrate market power when defendants cannot "control prices or exclude competitors." *See W. Parcel Exp. v. UPS*, 190 F.3d 974, 977 (9th Cir. 1999).[5]

Here, there is no allegation that supports the conclusion that HomeLight is either a monopolist or dangerously likely to become one. Mr. Shkipin does not even attempt to assign a market share to HomeLight or allege a factual basis for one. Instead, the counterclaims allege a competitive market that includes *at least* HomeOpenly and the 15 businesses that Shkipin has dubbed "Referral Fee Networks," including well-known companies like Zillow, Movoto, and Redfin, as well as "several others" that are unnamed. CC ¶ 64. Mr. Shkipin does not even allege that HomeLight is the largest of these "Referral Fee Networks" that he alleges has harmed his business—nor that HomeLight has caused greater harm than any of the other competitors. Moreover, Mr. Shkipin has alleged no specific facts that show that HomeLight has the power to control prices, exclude consumers from dealing with competitors, or the like. Instead, the core allegation is that real estate agents have chosen to work with HomeLight and other businesses that collect a referral fee rather than use HomeOpenly's ad-supported service. CC ¶¶ 13, 18-23, 47, 52, 58-62. And further, although Mr. Shkipin alleges that there are more than 1.5 million real estate professionals nationwide, he alleges that a small minority of these, "only +/-28,000," use HomeLight (i.e. less than 2% of the market). CC ¶ 37. There is therefore no direct allegation of market power nor is that conclusion "plausible in light of basic economic principles." *Atl. Richfield Co.*, 588 F.3d at 662.

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[4] *See Distance Learning Co. v. Maynard*, No. 19-cv-03801-KAW, 2020 WL 2995529 at *7-8 (N.D. Cal. June 4, 2020) (granting motion to dismiss where plaintiff alleged a 53.8% market share); *Redbox Automated Retail, LLC v. Buena Vista Home Ent., Inc.*, 399 F. Supp. 3d 1018, 1029 (C.D. Cal. 2019) (allegation of "something 'greater' than fifty percent," when supported only by "conclusory assertions," does not create an inference of market power).

[5] Plausibly alleging market power requires the plaintiff to define a market; accordingly, Shkipin's failure to allege a relevant antitrust market is also fatal to any allegations concerning market power. *See Kinderstart.com LLC v. Google, Inc.,* No. C 06-2057 JF (RS), 2007 WL 831806, at *10 (N.D. Cal. Mar. 16, 2007).

3. Mr. Shkipin failed to plead anticompetitive conduct.

Because market power—even a monopoly—is not unlawful in and of itself, the plaintiff must also plead an "element of anticompetitive conduct"—i.e., that the defendant achieved or threatens to achieve a monopoly through anticompetitive means. *Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *see also Aerotec Intern., Inc. v. Honeywell Intern., Inc.*, 4 F. Supp. 3d 1123, 1136-37 (D. Ariz. 2014). Mr. Shkipin failed to allege this element for the same reasons discussed above, and it is an independent basis on which the Court should dismiss the Section 2 claim.

D. Mr. Shkipin failed to plead a Lanham Act violation (Count 3).

The Court should also dismiss the Lanham Act false advertising claim as Mr. Shkipin either fails to allege a factual basis from which one could plausibly conclude that the challenged advertising statements are false or undermines his own allegations through admissions in his pleading. A claim alleging knowing and intentional false advertising under 15 U.S.C. § 1125 sounds in fraud and therefore must meet the heightened pleading standard of Rule 9(b). *Clorox Co. v. Reckitt Benckiser Group PLC, et al.*, 398 F.Supp.3d 623, 634 (N.D. Cal. 2019); *see also Julian Bakery, Inc. v. Healthsource International, Inc.*, Case No. 16cv2594-JAH(KSC), 2018 WL 1524499 at *4 (S.D. Cal. March 28, 2018) (collecting cases showing "an abundance of relevant and persuasive case law standing for the proposition that Rule 9(b) should be applied to [§ 1125] claims when they are 'grounded in fraud'"). To satisfy this heightened standard, a plaintiff must plead "'the who, what, when, where, and how' of the misconduct charged," *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009), specifically including the circumstances showing why an alleged misrepresentation is false, *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1005-06 (N.D. Cal. 2014).[6]

[6] Even if the more liberal standard of Fed. R. Civ. P. 8(a) applied here, the result would be the same, as Mr. Shkipin's Counterclaims must have more than mere "unadorned accusation": a claim has sufficient facial plausibility only when the claimant pleads factual information sufficient to allow the Court to draw an inference that the defendant could be liable for the alleged misconduct. *Bell Atlantic Corp.*, 550 U.S. at 555-557.

Here, Mr. Shkipin fails to plead facts sufficient to make plausible any of his claims that HomeLight's advertising is intentionally or knowingly false or misleading. For example:

- Mr. Shkipin alleges that HomeLight falsely claims that it is a "referral service." CC ¶ 14. But the counterclaims themselves state that HomeLight refers home buyers and sellers to agents, and call HomeLight a "Referral Fee Network." CC ¶¶ 3-4.
- Mr. Shkipin alleges that HomeLight falsely states that its services are free to homebuyers and sellers, and that agents do not pay any fees to be listed. CC ¶¶ 20, 32, 35. But he does not allege any direct fee charged to consumers, and he expressly concedes that that the statement that agents do not pay *to be listed* is literally true. CC ¶ 35. Nor does he allege any basis to conclude that a consumer would be confused or misled by these statements due to the referral fee for completed transactions. To the contrary, Mr. Shkipin attaches HomeLight advertising and agreements disclosing and explaining its referral structure and means of income. *See* Dkt. 17-3 at 6 ("Suppose you and one of our in-network agents complete a successful home sale or purchase. Then, HomeLight receives a portion of the agent's commission as a referral fee."); Dkt. 17-9 at 2 (HomeLight agreement, which states that the referral fee is "25% of the Agent's side of the gross commission" and is "triggered when a transaction closes within two years of the date of the Referral.").
- Mr. Shkipin alleges that HomeLight falsely states that it "is operated in compliance with all state and federal housing laws" (CC ¶ 20), but again his admissions undermine his claim. The only accusation of illegality he makes is that that by charging a referral fee, HomeLight and other similar businesses violate two federal anti-kickback regulations (RESPA Section 8 (12 U.S.C. § 2607) and CFPB Regulation X (12 C.F.R. § 1024.14). But RESPA provides a long list of circumstances for which referral fees are permissible, including for "payments pursuant to cooperative brokerage and referral arrangements or

agreements between real estate agents and brokers." 12 U.S.C. § 2607(a) and (c).[7] Here, Mr. Shkipin undermines his own claim by expressly alleging that "HomeLight is a licensed real estate broker" that works with other real estate agents and brokers. CC ¶¶ 3-4. Mr. Shkipin does not allege that any agent that has worked with HomeLight was unlicensed or identify any transaction that otherwise violated RESPA. The counterclaim therefore pleads facts showing the lawfulness of HomeLight's operation, not its unlawfulness. Mr. Shkipin's bare allegations that HomeLight is a "sham" and somehow not a true real estate broker is controverted by his concessions and is not sufficient to show that any of the challenged statements are false or misleading.

The Court should therefore dismiss the Lanham Act claim.

E. Mr. Shkipin failed to plead a violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq*. (Count 4).

Finally, the UCL requires that the alleged unfair conduct by a competitor be "tethered" to some other violation of law. *Gregory v. Albertson's, Inc*., 104 Cal. App. 4th 845, 854 (2002) (UCL "unfair" claims must be tethered to specific constitutional, statutory, or regulatory provisions). Here Mr. Shkipin's UCL claim is premised on his antitrust and Lanham Act theories. The UCL count incorporates by reference the other allegations of the counterclaims (CC ¶ 127) and refers generically to HomeLight's "scheme" and "unlawful conduct" without adding any new facts (CC ¶¶ 129-131). Because those other legal claims are deficient, Mr. Shkipin has therefore likewise failed to plead a valid UCL claim.

V. CONCLUSION

For the reasons stated above, HomeLight respectfully requests that the Court dismiss the Counterclaims with prejudice.

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[7] Likewise, CFPB Regulation X refers back to 12 U.S.C. § 2607, and restates the exception for "A payment pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and real estate brokers." 12 C.F.R. § 1024.14(g)(v).

Dated: August 1, 2022

FENWICK & WEST LLP

By: */s/ Todd R. Gregorian*
Todd R. Gregorian

Attorneys for Plaintiff HomeLight, Inc.