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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

MICHAEL BOATMAN, Plaintiff, vs. PEORIA AREA ASSOCIATION OF REALTORS, Defendant.	)	Civil Action No. 1:20-cv-01248-JES-JEH Honorable Judge James E. Shadid

PEORIA AREA ASSOCIATION OF REALTORS' MOTION FOR LEAVE TO FILE BRIEF IN EXCESS OF 15 PAGES PURSUANT TO LOCAL RULE 7.1

Defendant Peoria Area Association of Realtors ("PAAR"), by and through its attorneys, respectfully moves this Court for leave to file a brief in excess of fifteen pages pursuant to Rule 7.1 of the Local Rules of the Central District of Illinois. In support of its motion, Defendant PAAR states as follows:

1. PAAR seeks leave to file its Motion to Dismiss Plaintiff's First Amended Complaint, which is in excess of fifteen pages. Local Rule 7.1(B)(4)(a) provides that no brief may exceed fifteen pages, unless it complies with the type volume limitation.

2. Defendants PAAR's responsive pleading to Plaintiff's First Amended Complaint is due on Tuesday, October 13, 2020 (rolling over from the Court holiday on October 12, 2020).

3. In its Motion to Dismiss, Defendant PAAR argues five separate grounds for dismissal of Plaintiff's First Amended Complaint, which is over 380 pages in length and contains 91 paragraphs of allegations against PAAR.

4. The Motion to Dismiss is just over 22 pages, exceeding the 15 page limit by approximately 7 pages. A copy of the Motion, without its Exhibits, is attached hereto as Exhibit 1. Further, the Motion complies with the Local Rule 7.1(B)(4)(b) type volume limitation because it

contains 6396 words or 33,060 characters, which is well under the permitted 7000 words or 45,000 characters.

5. Defendant PAAR's request for leave to file its Motion to Dismiss in excess of 15 pages is both reasonable and warranted given the circumstances and relief requested. Plaintiff will not be prejudiced by Court's grant of PAAR's Motion for Leave to File Brief in Excess of 15 pages.

WHEREFORE, Defendant Peoria Area Association of Realtors respectfully requests that the Court enter an order granting it leave instanter to file its Motion attached hereto as Exhibit 1 in excess of 15 pages, and that the Court grant them such other relief as is just and appropriate in the circumstances.

Dated: October 12, 2020

Respectfully submitted,

By: /s/ Thomas G. Griffin
One of the Attorneys for Peoria Area Association of Realtors

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
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MICHAEL BOATMAN, Plaintiff, vs. PEORIA AREA ASSOCIATION OF REALTORS, Defendant.	)	Civil Action No. 1:20-cv-01248-JES-JEH Honorable Judge James E. Shadid

DEFENDANT'S MOTION AND SUPPORTING MEMORANDUM
TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant, Peoria Area Association of Realtors ("PAAR"), by and through its attorneys, respectfully moves pursuant to Fed. R. Civ. P. 12(b)(6) and 19(a) for dismissal of the First Amended Complaint (the "FAC") filed by Plaintiff, Michael Boatman ("Plaintiff" or "Boatman"), or, in the alternative, the mandatory joinder of third party Move, Inc., and in support, states as follows:

INTRODUCTION

The Court should dismiss Boatman's FAC for five reasons.

First, Boatman's claim is barred by the applicable three-year statute of limitations. 17 U.S.C. § 507(b). Boatman's claim against PAAR is premised entirely upon PAAR's agreement granting Realtors Information Network ("RIN") access to IDX feeds to data in PAAR's real estate multiple listing service ("MLS"), because that agreement purportedly grants rights in PAAR's MLS data that exceeds the scope of licenses that Boatman later granted to his real estate agent clients that uploaded his copyrighted photographs to the PAAR MLS. However, PAAR entered into that agreement with RIN (the "RIN Agreement") way back in June of 1996. Boatman does not allege any other conduct by PAAR that might constitute an act of infringement of Boatman's

copyrights. Boatman also alleges that the last date on which any of his real estate agent clients uploaded any of his copyrighted photos to the PAAR MLS, and in turn were fed to Realtor.com through an IDX feed pursuant to the RIN Agreement, was no later than 2016. These dates are all more than three years before Boatman filed his claims against PAAR, so Boatman's claims against PAAR are barred by the applicable statute of limitations.

Second, Boatman's FAC fails to state a claim against PAAR upon which relief can be granted. To state a claim for copyright infringement, the owner of copyrighted photographs must demonstrate that an operator of an automated website like PAAR's MLS engaged in some volitional conduct that infringed the owner's copyrights. Here, Boatman is not alleging that anyone is actively infringing his copyrights. Although Boatman alleged in his original complaint that Move, Inc. was infringing his copyrights in reliance upon the RIN Agreement, Boatman removed those allegations of infringement by Move, Inc. from his FAC. Boatman now alleges only that the RIN Agreement purports to grant Move, Inc. the right to use the Boatman photos in a manner that might infringe on Boatman's copyrights, without alleging that Move, Inc. or any other party or third-party is actually displaying or copying the photographs in a manner that infringes on Boatman's copyrights. Boatman does not allege that PAAR engaged in any conduct directed to the Boatman photographs at issue here. The only conduct alleged against PAAR is that PAAR entered into a contract with RIN in 1996 that granted RIN certain rights in the PAAR MLS. The mere fact that, 20 years later, Boatman granted only limited rights to use his photos to his real estate agent clients, and that those clients nonetheless chose to upload those copyrighted photos to the PAAR MLS, does not make PAAR liable to Boatman for copyright infringement. Thus, Boatman's FAC fails to state a claim for direct copyright infringement against PAAR.

Third, contrary to Boatman's conclusory allegations, the 1996 RIN Agreement upon which

Boatman bases his claim against PAAR did not grant Move, Inc. the right to use Boatman's photos for purposes other than advertising the photographed properties for sale. The purpose of the RIN Agreement is clearly articulated and confined to the display of information obtained from the PAAR MLS to advertise the photographed properties for sale. On its face, the RIN Agreement does not purport to give RIN (much less Move, Inc., which is not a party or alleged assignee of the agreement) any right to re-display any photographs obtained from the PAAR MLS for purposes other than advertising the properties for sale. Thus, the actual terms of the RIN Agreement, which control over Boatman's conclusory allegations to the contrary, require that Boatman's claims against PAAR be dismissed for failure to state a claim.

Fourth, Rule 19 provides for the joinder of all materially interested parties to protect interested parties and avoid waste of judicial resources. If a party is necessary, it must be joined, if feasible. If it is not feasible, and the claim cannot proceed without them, then the complaint must be dismissed. Boatman's claim against PAAR depends entirely on an alleged contractual relationship between PAAR and Move, Inc., and in turn, Move, Inc.'s purported rights under the contract to wrongfully re-display the photographs in a manner that infringes on Boatman's copyrights. Move, Inc. is necessary to completely adjudicate the claims regarding the construction and interpretation of the 1996 RIN Agreement, and/or whether Move, Inc. has any rights under the 1996 RIN Agreement, and/or whether Move, Inc. has relied upon the 1996 RIN Agreement to re-display Boatman's photographs for purposes that exceed the scope of the licenses granted by Boatman therefore infringe on Boatman's copyrights. Yet Boatman failed to name Move, Inc. as a defendant party. Because Move, Inc. is a necessary party, Boatman must either add Move, Inc. as a defendant, or his claim must be dismissed.

Finally, a party may not bring a claim against another if that claim had previously reached

finality on the merits and was litigated under an identity of cause of action and parties or their privies. In such cases, the party's claim is barred by *res judicata*. Further, even if the prior litigation of those claims did not reach finality, they must be brought in one action against all culpable parties to avoid dismissal for improper claim splitting. Here, the allegations against PAAR have been alleged and adjudicated by Boatman in at least one prior action (and possibly more) which was dismissed with prejudice pursuant to a settlement in 2018. Before that action was dismissed, the district court in that action held that the licenses Boatman granted to his Peoria area real estate agent clients expressly permitted the real estate agents to upload the copyrighted photographs to the Realtor.com website. Thus, Boatman's attempt to re-assert those claims against PAAR in this subsequent action is barred by *res judicata* and because of Boatman's improper claim splitting.

SUMMARY OF RELEVANT FACTS

Boatman is a professional photographer who contracts with real estate agents to photograph the interior and exterior of homes to market their sale. (FAC ¶¶ 7, 17, 18.) PAAR is a professional association of Peoria-area real estate agents that maintains an MLS database for its members. (*Id.* at ¶¶ 2, 3.)

Boatman alleges that, during the period from 2012 to 2015, Boatman delivered 1,216 copyrighted photographs to his real estate agent clients in the Peoria area pursuant to limited licenses granting them the rights to use the photographs to advertise and market the properties depicted in the photos during the term of the real estate agents' listing agreements for those properties. (*Id.* at ¶¶ 9-11, 17-24.) Boatman's real estate agent clients in turn uploaded the photos to the MLS operated by PAAR. (*Id.* at ¶ 40.) "[T]hose real estate agent clients selected and organized the Photographs" that they uploaded to the MLS. (*Id.*) As set forth in the PAAR MLS Rules and Regulations attached as Exhibit 3 to Boatman's FAC, PAAR does not verify or edit any

of the listing information uploaded to the MLS by Boatman's real estate agent clients. "The information published and disseminated by the Service [the PAAR MLS] is communicated verbatim, without change by the Service, as filed with the Service by the Participant [real estate agent]. The Service does not verify such information and disclaims any responsibility for its accuracy." (FAC Ex. 3 at Page 14, Section 12.2.) The listing information on the PAAR MLS is "fed" by internet data exchange feeds ("IDX") to real estate websites, like Realtor.com, that display MLS listings on the internet. (FAC ¶¶ 42, 64.) Boatman concedes in his FAC that PAAR's grant of IDX feed access to MLS listings to promote the sale of the listed properties was "[i]ncluded in the scope of the license granted by Boatman to his real estate agent clients" and "was consistent with Boatman's license to his real estate agent clients." (*Id.* at ¶¶ 43, 55).

The Boatman photographs at issue were "taken in the years 2012, 2013, 2014, or 2015" and his real estate agent clients "uploaded the Photographs to the MLS operated by PAAR in 2012, 2013, 2014, 2015 or 2016." (*Id.* at ¶¶ 39, 40.) Thus, 2016 was the last date that any Boatman photograph at issue was uploaded to the PAAR MLS and then fed by IDX to the Realtor.com website pursuant to the RIN Agreement.

In his original complaint, Boatman alleged that non-party Move, Inc. re-displayed his copyrighted photographs after the properties were sold and the listings terminated, thereby infringing Boatman's copyrights, and that PAAR was directly liable for such infringement because PAAR purportedly granted RIN, Move, Inc.'s alleged predecessor, rights to re-display information in the PAAR MLS after the properties were sold. However, Boatman removed all those allegations from his FAC. Boatman no longer alleges that Move, Inc. or anyone else is re-displaying his copyrighted photographs in any manner that infringes on Boatman's copyrights.[1] However,

[1] The only allegations in Boatman's original complaint that anyone was displaying his copyrighted photographs in any manner that infringed on his copyrights are as follows:

Boatman still seeks to hold PAAR directly liable for copyright infringement (which is no longer alleged to be occurring) merely for entering into a contract with RIN in 1996 that purportedly granted RIN a right to re-display photographs in the PAAR MLS after the properties depicted were sold and the listings terminated. The crux of Boatman's direct infringement claim against PAAR in the FAC consists of the following allegations:

> 57. The license to the Photographs granted by Boatman to his real estate agent clients excluded rights to copy, display or distribute Boatman's Photographs after the applicable real estate listing was expired, withdrawn or sold.
>
> * * * *
>
> 72. PAAR entered into an Agreement with non-party REALTORS Information Network, at that time the owner and operator of the Realtor.com website, on June 3, 1996, relating to the display of PAAR's MLS database on the Realtor.com website (the "RIN Agreement").
>
> 73. At some point after the RIN Agreement was executed, The RIN Agreement with PAAR transferred from non-party REALTORS Information Network to non-party Move, Inc., and has not been terminated or materially changed by any of the parties to date.
>
> 74. The RIN Agreement did not require the owner or operator of the Realtor.com website to refresh all MLS downloads and IDX displays automatically fed by those downloads over any time frames.
>
> 75. The RIN Agreement permitted the owner or operator of the Realtor.com website to copy, display or distribute real estate listing information and associated photographs for real estate listings that had expired, been withdrawn or been sold.
>
> 76. PAAR distributed the MLS database compilations including the preexisting component works protectible by copyright, which preexisting component works included Boatman's Photographs, to Realtor.com pursuant to the RIN Agreement.

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34. At some point, Realtor.com's practice changed.

35. Realtor.com stopped removing photographs for sold listings after the properties sold.

36. Realtor.com began re-displaying photographs from prior listings after the properties sold.

37. Realtor.com displayed and used Boatman's Photographs after the properties depicted in the Photographs sold and after the listings closed.

38. Realtor.com obtained Boatman's Photographs from PAAR.

39. Realtor.com's display of Boatman's Photographs after the listings closed and the properties sold violated Boatman's license agreements with Boatman's real estate agent clients and infringed his rights under the Copyright Act.

Boatman removed all of the foregoing allegations in his FAC, and no longer alleges that Move, Inc., Realtor.com or anyone else is displaying any of his copyrighted photographs after the listings closed or the properties sold in violation of the licenses Boatman granted to his real estate agent clients.

(FAC at ¶¶ 57 and 72-76.)

Although Boatman's FAC abandons his prior allegations that Move, Inc. violated his copyrights, the claim against PAAR in the FAC is still entirely premised and dependent upon the construction and interpretation of the 1996 RIN Agreement and Boatman's conclusory allegation that the RIN Agreement somehow transferred from RIN to Move, Inc. But Boatman did not name Move, Inc. as a defendant in this action. And despite the fact that Boatman no longer alleges that any third party is violating Boatman's copyrights based on the 1996 RIN Agreement, the crux of Boatman's claim against PAAR remains that "PAAR unilaterally granted rights to third parties that exceeded the scope of Boatman's licenses." (*Id.* at ¶ 82.)

Although the 1996 RIN Agreement is central to the FAC and incorporated into the FAC by reference, Boatman and his counsel conspicuously neglected to attach this document to the FAC. A copy of the contract is attached to this Motion as Exhibit A. Contrary to Boatman's conclusory allegations, the actual terms of the RIN Agreement make it clear that PAAR licensed MLS data to RIN solely for the purpose of advertising properties listed for sale on the MLS. As set forth in the agreement's opening recital, the parties were entering into the agreement "to advertise certain properties offered for sale by various REALTORS®." (Ex. A. at 1, opening recital.) The Realtor.com website (the "RPA") is defined in the agreement as a website operated by RIN "to support property advertising." (Ex. A. at 1, ¶1 definition of RPA.) The data licensed by PAAR to RIN (the "Licensed Data") was "textual data and information *related to a Property*." (Ex. A. at 1, ¶1 definition of Licensed Data (emphasis added).) The Property to which the Licensed Data was so limited is defined as "residential property: house, condominium, townhouse or mobile home, *offered for sale through a REALTOR® and for which Data Provider maintains listing information relating to same*." (Ex. A. at 1, ¶1 definition of Property (emphasis added).) Thus, the

Licensed Data was to encompass properties offered for sale and for which a real estate agent maintains a listing. Indeed, the RIN Agreement contains an express representation and warranty that "***Licensed Data only contains properties that are offered for sale through REALTORS®.***" (Ex. A. at ¶8(b) (emphasis added).)

Boatman also incorrectly alleges that the RIN Agreement did not provide for the IDX feeds to Realtor.com to be refreshed. (FAC ¶ 74.) In fact, the RIN Agreement expressly provided for "updates of the Licensed Data to RIN in an electronic format acceptable to RIN no less frequently than weekly…" (Ex. A at ¶2(b).) Boatman further alleges that Move, Inc. somehow succeeded to RIN's rights under the RIN Agreement without any express assignment authorized by PAAR. (FAC at ¶73.) However, the RIN Agreement specified that "[n]either this Agreement nor any right or obligation arising hereunder may be assigned (voluntarily, by operation of law or otherwise), in whole or in part, by either party without the prior written consent of the other party…" (*Id*. at ¶ 14.)

This is not the first time that Boatman has claimed that someone other than Move, Inc. is liable for Move, Inc.'s display of his photographs beyond the scope permitted by the licenses he granted to his real estate agent customers. In *Boatman v. Honig Realty, Inc.*, Civil Action No. 16-cv-08397 (N.D. Ill. August 26, 2016) (the "*Honig* Action"), an action he filed in the Northern District of Illinois more than four years ago, Boatman made the exact same claim he makes in the present action, but against Defendant Honig, which was a real estate agency that employed some of Boatman's real estate agent customers. In the *Honig* Action, Boatman claimed that it was the real estate agency, Defendant Honig, rather than PAAR, that "uploaded the Registered Photographs to Realtor.com knowing that it unlawfully granted rights in the Registered Photographs to Realtor.com under the Move Terms of Use that far exceeded the scope of Limited

License" that Boatman granted to his real estate agent customers. *See* Boatman Second Amended Complaint in the *Honig* Action at ¶ 38. A copy of Boatman's Second Amended Complaint in the *Honig* Action (without the voluminous exhibits) is attached to this motion as Exhibit B (the "*Boatman v Honig* SAC").

Boatman acknowledged in the *Honig* Action that in order to feed a photograph through the MLS to Realtor.com, a Peoria-area real estate agent "must first agree to the terms and conditions of the Peoria Area Association of Realtors' ('PAAR') Multiple Listing Service ('MLS') Rules and Regulations (the 'PAAR MLS Rules and Regulations') before uploading the photographs to PAAR's online 'portal,' which photographs are then published on Realtor.com." (Ex. B at ¶39.) Boatman attached the PAAR MLS Rules and Regulations as an exhibit to his *Boatman v. Honig* SAC, and further alleged that:

> Defendant Honig-Bell agreed to the PAAR MLS Rules and Regulations, which PAAR MLS Rules and Regulations provide:
>
> > By the act of submitting any property listing content to the MLS, **the participant represents that he has been authorized to grant and also thereby does grant authority for the MLS to include the property listing content in its copyrighted MLS compilation and also in any statistical report on comparables**. Listing content includes, but is not limited to, photographs, images, graphics, audio and video recordings, virtual tours, drawings, descriptions, remarks, narratives, pricing information, and other details or information related to the listed property. (PAAR MLS Rules and Regulations, Section 13 (emphasis added); see also id. at Section 13.1 ("All right, title, and interest in each copy of every multiple listing compilation created and copyrighted by the Peoria Area Association of REALTORS® (PAAR) and in the copyrights therein, shall at all times remain vested in the Peoria Area Association of REALTORS®.").)

(Ex. B, *Boatman v. Honig* SAC ¶ 40 (emphasis in original).) Boatman attached the very same PAAR Rules and Regulations to his FAC in this action. (FAC Ex. 3.)

Moreover, Boatman understood as early as September 2015 that PAAR required real

estate agents to transfer copyrights to PAAR of the photographs uploaded to the PAAR MLS, even if the agents did not have the authority to do so. In an action Boatman filed in this district in January 2017, captioned *Boatman v. Kepple Premier Real Estate, LLC, et al.*, Civil Action No. 17-cv-01009-MMM-JEH (the "*Kepple* Action"), Boatman alleged that he understood and was concerned as early as September of 2015 that PAAR required "that realtors transfer copyrights of uploaded photographs to PAAR even though the agents do not have authority to do so." *See* January 9, 2017 Complaint in the *Kepple* Action, a copy of which (without voluminous exhibits) is attached hereto as Exhibit C, at ¶20. Boatman further complained in the *Kepple* Action that infringing copies of his photographs with the PAAR watermark were being distributed on the PAAR MLS and through the PAAR MLS to Realtor.com and other real estate websites. (Ex. E at ¶¶ 25-26.)

Thus, Boatman acknowledged in both the August 2016 *Honig* Action and the January 2017 *Kepple* Action that PAAR was acting in the same middle-man role he alleges that PAAR occupies in the present action. Boatman alleges in all three actions that Boatman's real estate agent customers upload his copyrighted photographs to the PAAR MLS, and from there they get uploaded to Realtor.com. The photographs that Boatman displayed in both the *Boatman v. Honig* SAC and the *Kepple* Action complaint contained the PAAR watermark. (*See, e.g.,* Ex. B at ¶ 25 and Ex. C at ¶ 25.) Both the *Honig* Action and the *Kepple* Action also involved may of the same properties and copyright registrations at issue in this action. In the present action, Boatman essentially alleges that all his photographs uploaded by his real estate agent clients to the PAAR MLS automatically were infringed, without any intent or directed action by PAAR, by operation of the RIN Agreement because PAAR back in 1996 had granted RIN rights in the PAAR MLS data that exceed the scope of the licenses that Boatman would later grant to his real estate agent

clients.

Yet, despite Boatman's knowledge of all this by at least August 2016, Boatman did not name either PAAR or Move, Inc. as defendants in the *Honig* Action that Boatman filed in August 2016. Instead, Boatman attempted to split his claims against the various parties involved in the process of uploading Boatman's photos to the Realtor.com website. Boatman first sued Honig in August 2016. In November 2018, Boatman settled with Honig and dismissed his claims in the *Honig* Action with prejudice. A copy of the November 18, 2018 Stipulation of Dismissal with Prejudice in the *Honig* Action is attached as Exhibit D. Before Boatman settled and dismissed the *Honig* Action, the district court in that case found as a matter of law that the licenses Boatman granted to his Peoria area real estate agent clients expressly permitted the real estate agents to upload the copyrighted photographs to the Realtor.com website, and that "Honig acted within the scope of its license when it uploaded the photographs and did not directly infringe Boatman's copyright." *See* September 5, 2017 Memorandum Opinion at Order in the *Honig* Action, a copy of which is attached hereto as Exhibit E, at 4-5.

ARGUMENT

Under Rule 12(b)(6), a court should dismiss a plaintiff's complaint when the factual allegations fail to state a plausible claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560-61 (2007). A complaint that contains no more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," or that fails to allege "more than the mere possibility of misconduct," fails to meet the liberal pleading standard of Rule 8. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). "The complaint must actually suggest that the plaintiff has a right to relief, by providing allegations that raise a right to relief above the speculative level." *Frazier v. U.S. Bank Nat. Assn.,* 2013 WL 1337263, at *2 (N.D. Ill. Mar. 9, 2013) (quotations and citations

omitted). "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." *Martin v. Direct Wines, Inc*., 2015 WL 4148704, at *1 (N.D. Ill. Jul. 9, 2015) (quoting *Twombly*, 550 U.S. at 556). "In reviewing the sufficiency of a complaint under the plausibility standard…[courts] need not accept as true legal conclusions, or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Martin,* 2015 WL 4148704, at *1 (quotations omitted). Conclusions of fact and law may be disregarded because "they are…not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679.

I. Boatman's claims against PAAR are barred by the applicable statute of limitations.

The Copyright Act, 17 U.S.C. § 507(b) provides that "[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." The Supreme Court noted that a copyright claim arises or accrues when an infringing act occurs. *Petrella v. Metro-Goldwyn-Mayer, Inc.,* 572 U.S. 663, 670 (2014). Here, based on Boatman's FAC, the infringing act he attributes to PAAR was it entering into an agreement with RIN for display of the information related to real estate listings offered for sale. The RIN Agreement was executed in June of 1996, more than 24 years before this action was filed.

Boatman alleges that his real estate agent clients uploaded his copyrighted photographs to the PAAR MLS and that such upload was a permissible use of the photos within the scope of the licenses he granted to his clients. Boatman contends, however, that PAAR's distribution of its MLS database compilation, which at various points in 2012 through 2016 included the Boatman copyrighted photographs, by IDX feed to Realtor.com pursuant to the RIN Agreement infringed on his copyrights merely because the RIN Agreement could be construed to permit RIN or Move, Inc. as its alleged successor to use his photographs in a manner that exceeded the scope of his

licenses to the real estate agent clients. However, Boatman no longer alleges that Move, Inc. is infringing his copyrights by re-displaying his photos. Boatman alleges that the last IDX feed of Boatman's photos occurred by no later than 2016, which is more than three years prior to Boatman's filing of the present action. (FAC ¶ 40.) Thus, Boatman's claim against PAAR accrued no later than 2016 and are barred by the applicable three year statute of limitations.

Boatman cannot be heard to argue that he did not know or have cause to know sufficient facts in 2016 to bring his claim against PAAR. Boatman had sufficient knowledge and facts in August of 2016 to assert his identical claims against Honig. Boatman also understood as early as September 2015 that PAAR required its real estate agent members to assign to PAAR copyrights in the photos they uploaded to the PAAR MLS even if the agents did not have the power to do so, and that his copyrighted photos were being distributed from and through the PAAR MLS in a manner that Boatman believed to exceed the scope of the licenses he granted to his real estate agent customers. But in an effort to separately recover against first Honig and Kepple, and then against Move, Inc. and now against PAAR, Boatman made the calculated decision to delay bringing any claim against either Move, Inc. or PAAR. After settling and dismissing with prejudice his 2016 action against Honig in November 2018, Boatman went after Move, Inc. in 2019. After resolving the claim against Move, Inc., Boatman then came after PAAR in 2020. However, because Boatman waited more than three years after the last of his copyrighted photographs were fed through the PAAR MLS to the Realtor.com website to bring this action, any claim Boatman may have against PAAR is barred by the applicable statute of limitations.

II. Boatman's FAC fails to state a claim for copyright infringement because he does not allege any infringement, or that PAAR was the cause of any infringement.

To state a claim for copyright infringement against PAAR, Boatman must plausibly allege that: (1) Boatman owns a valid copyright in the photos at issue, and (2) that PAAR violated at least

one exclusive right granted to Boatman under 17 U.S.C. § 106. *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 731 (9th Cir.), *cert. denied*, 140 S. Ct. 122, 205 L. Ed. 2d 41 (2019). Boatman contends that PAAR, by distributing the PAAR MLS data that contains Boatman's copyrighted photos pursuant to the 1996 RIN Agreement, infringed on Boatman's exclusive right to distribute his copyrighted photos under 17 U.S.C. § 106(3).

A copyright plaintiff must also establish causation by the defendant, which is commonly referred to as the "volitional-conduct requirement." *Id.* (*citing Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017)). Direct liability must be premised on conduct that can reasonably be described as the direct cause of the infringement. *Id.* "This prerequisite takes on greater importance in cases involving automated systems," like the PAAR MLS. *Id.* This issue "comes right to the fore when a direct-infringement claim is lodged against a defendant who does nothing more than operate an automated, user-controlled system. . .Most of the time that issue will come down to who selects the copyrighted content: the defendant or its customers." *Id.* (*quoting Am. Broad Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431, 453 (2014) (Scalia, J., dissenting)).

As stated by the Ninth Circuit in *Giganews*,[2] direct copyright liability for website owners arises when they are actively involved in the infringement, and the distinction between active and passive involvement in the alleged infringement is central to the legal analysis. *Giganews*, 847 F.3d at 667; *see also, CoStar Grp, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004). Indirect activities, such as automatic copying, storage, and transmission of copyrighted materials, when instigated by others, do not render a website service strictly liable for copyright infringement.

[2] The Seventh Circuit and the Northern District of Illinois have relied on the Ninth Circuit's analysis in several copyright infringement cases that involved plaintiff Perfect 10, Inc. and its claims against defendants related to the display of Perfect 10's copyrightable material on various websites. *See e.g. Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012); *Bell v. Chi. Cubs Baseball Club, LLC*, 2020 WL 550605 (N.D. Ill. Feb. 4, 2020); *GC2 Inc. v. Intl. Game Tech. PLC*, 255 F. Supp. 3d 812 (N.D. Ill. 2017).

Giganews, 847 F.3d at 670. To demonstrate volitional conduct, a plaintiff must provide some evidence showing the defendant exercised control (other than by general operation of its website); selected material for upload, download, transmission, or storage; or instigated any copying, storage or distribution of its photos. *VHT, Inc.*, 918 F.3d at 732 (citing *Giganews*, 847 F.3d at 666, 670).

In his FAC, Boatman attempted to remedy the volitional conduct deficiencies in his claim against PAAR by repeatedly using the word "volition" in his description of the manner in which PAAR operated its MLS. However, to satisfy the volition requirement, Boatman must allege more than PAAR's conduct in the overall operation of the PAAR MLS in which other parties selected and uploaded Boatman's photos. Boatman would have to allege, for example, that PAAR was somehow involved in the selection of the Boatman photos that allegedly were distributed in violation of Boatman's copyrights. *See VHT, Inc.*, 918 F.3d at 732. Boatman does not do so.

Here, Boatman does not allege that PAAR exercised any control over the selection of any Boatman photographs distributed to or displayed by by Realtor.com. As Boatman concedes in his FAC, the PAAR MLS is populated with photographs that real estate agents selected and upload to the MLS, and thus Boatman admits the photographs are not selected by PAAR. The only action Boatman alleges PAAR took was entering into the RIN Agreement in 1996 and then acting as an operator of the MLS that automatically fed photographs to the Realtor.com website. (FAC ¶ 42.)

Thus, Boatman does not sufficiently allege a direct infringement claim against PAAR. The FAC alleges that PAAR did nothing more than operate a largely automated, user-controlled MLS. There can no direct copyright infringement when PAAR was simply acting as a passive resource through which photographs were uploaded onto a third-party's website.

III. Move, Inc. has no rights under the RIN Agreement, and the RIN Agreement did not purport to grant RIN any rights in the MLS data other than rights to advertise the listed properties for sale.

Move, Inc. is not a party to the 1996 RIN Agreement. The RIN Agreement specifically prohibited assignment of any rights without PAAR's prior written consent, and no assignment or consent is alleged by Boatman in the FAC. Boatman accordingly fails to allege sufficient facts to show that Move, Inc. is a successor to RIN's rights under the RIN Agreement. Conclusory allegations provided in the FAC fail to meet the rigorous federal court requirements for a well-pleaded complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

Even if Boatman sufficiently alleged that Move, Inc. has some interest in the RIN Agreement, the claim against PAAR is barred by the language of the RIN Agreement itself. Boatman's claim is entirely dependent upon his conclusory allegation that the RIN Agreement grants Move, Inc. rights to use photos in the PAAR MLS for purposes other than advertising the sale of properties listed for sale in the PAAR MLS. Contrary to this conclusory allegation, however, the RIN Agreement clearly and unambiguously provides that the purpose of the agreement is to advertise the PAAR MLS properties for sale. On its face, the RIN Agreement does not purport to give RIN (much less Move, Inc.) any right to re-display any photographs obtained from the PAAR MLS for purposes other than advertising the properties for sale. Thus, the actual terms of the RIN Agreement, which control over Boatman's conclusory allegations to the contrary, require that Boatman's claims against PAAR be dismissed for failure to state a claim.

Boatman also incorrectly alleges that the RIN Agreement did not provide for the IDX feeds to Realtor.com to be refreshed. Boatman's theory is that the PAAR MLS Rules and Regulations required PAAR's members to periodically refresh their IDX data feeds, thereby removing data for properties that are sold or delisted. Boatman alleges that the RIN Agreement failed to require RIN to refresh its IDX data feeds. In other words, Boatman contends that PAAR somehow infringed on his copyrights by failing to ensure back in 1996 that the RIN Agreement required RIN to

periodically refresh its IDX fees to ensure that properties that were sold or delisted were identified and removed from the properties displayed on the Realtor.com website. Notably, however, Boatman does not allege anywhere that his copyrights are being infringed and that his photos are being displayed on Realtor.com after the sale or delisting of a property as a consequence of this alleged oversight. On the contrary, Boatman removed from his FAC any allegation that any of his photos are being displayed on the Realtor.com website in violation of his copyrights. Further, Boatman's conclusory allegation again misrepresents the actual terms of the RIN Agreement. Boatman claims that the Agreement did not "require the owner or operator of the Realtor.com website to refresh all MLS downloads and IDX displays automatically fed by those downloads over any time frames." (FAC ¶ 74.) Contrary to this statement, the Agreement provides that data provider was to "provide updates of the Licensed Data to RIN in an electronic format acceptable to RIN no less frequently than weekly for inclusion on the RPA." (Ex. B, ¶ 7(b).)

In considering a motion to dismiss under Rule 12(b)(6), district courts are free to consider any facts set forth in the complaint that undermine the plaintiff's claim, including exhibits attached to the complaint or documents referenced in the pleading if they are central to the claim. *Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013) (citations omitted). "When an exhibit incontrovertibly contradicts the allegations in the complaint, the exhibit ordinarily controls, even when considering a motion to dismiss." *Id*. Thus, in the present case, the actual terms of the RIN Agreement control over Boatman's contrary conclusory allegations in the FAC, and dictate that Boatman's claims against PAAR be dismissed for failure to state a claim.

IV. Move, Inc. is a necessary party to this action, and Boatman must name Move, Inc. as a defendant or the Court should dismiss Boatman's FAC.

Under Rule 19, a necessary party includes any person who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence

may ... as a practical matter impair or impede the person's ability to protect that interest...." Fed. R. Civ. P. 19(a). Move, Inc. satisfies these criteria. In an action to construe or enforce a contract, a missing contracting party is often viewed to be the paradigm of an indispensable party. A judicial declaration as to the validity and the enforceability and construction of a contract necessarily affects, as a practical matter, the interests of both parties to the contract. *U.S. ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 479 (7th Cir. 1996). Further, when ruling on a dismissal for lack of joinder or an indispensable party, a court may go outside the pleadings and look to extrinsic evidence. *Davis Companies v. Emerald Casino, Inc.*, 268 F.3d 477, 481 (7th Cir. 2001). Documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim. Fed. R. Civ. Pro. 12(b)(6); *Ochs v. Hamilton*, 984 F. Supp. 2d 903, 907 (N.D. Ill. 2013).

Boatman's claim against PAAR in this lawsuit is rooted in an alleged contractual relationship between PAAR and Move, Inc., and in turn, Move, Inc.'s purported rights under the contract to re-display the photographs on the Realtor.com website in a manner that infringes on Boatman's copyrights. The adjudication of Boatman's claims in this action requires this Court to find that: (1) Move, Inc. is a successor or otherwise has standing to assert rights under the 1996 RIN Agreement between PAAR and RIN, and (2) that the 1996 RIN Agreement actually grants rights to Move, Inc. to continue to use photographs obtained from PAAR's feed to the Realtor.com website after the sale of the subject properties and/or termination of the listings. Either of these determinations would impact Move, Inc.'s interests in the subject matter of this action. Yet Boatman did not name Move, Inc. as a defendant.

As the purported successor in interest to the 1996 contract at issue here, Move, Inc. has a commercial stake in the outcome of this litigation. It therefore would appear beyond dispute that

Move, Inc. is a necessary party under Rule 19(a). Furthermore, PAAR's interests and Move, Inc.'s are not identical and do not align, and PAAR could not and would not adequately represent Move, Inc.'s interest. *See Lufkin v. Ill. Dept. of Employment Sec.*, 1997 159546, at *2 (N.D. Ill. March 28, 1997) (unreported in F.Supp.); *but cf. N. Shore Gas Co.*, 896 F. Supp. at 790 (an identity of interests between a named defendant and a third party does not favor adding the third party as a necessary one).

The Court need not reach the question of whether a party is indispensable under Rule 19(b) if joinder of that party would not destroy federal jurisdiction. *Promatek Indus., Ltd. v. Equitrac Corp.*, 185 F.R.D. 520, 523 (N.D. Ill. 1999). Because Boatman's copyright claim arises under federal law, the court's jurisdiction does not depend on the diversity of the parties, and therefore, the Court need only analyze joinder under Rule 19(a). Move, Inc. is a necessary party and must be added as an additional defendant as in this action, but if it is not feasible, then Boatman's FAC must be dismissed.

V. Boatman's claim is barred by *res judicata* because there was a final decision on the facts, transactions, and those in privity with the litigants that are at issue in this case. Also, Boatman has and continues to engage in improper claim splitting by naming the parties to these events in separate successive actions.

The doctrine of claim preclusion or *res judicata* precludes parties from relitigating issues that were or could have been raised in a previous action. *Johnson v. Cypress Hill*, 641 F.3d 867, 874 (7th Cir. 2011). Claim preclusion under federal law has three elements: (1) a final decision in the first suit; (2) a dispute arising from the same transaction (identified by its operative facts); and the same litigants (directly or through privity of interest). *US ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 851 (7th Cir. 2009). *Res judicata* bars not only those issues which were decided in a prior suit, but also all issues that could have been raised in that action. *Highway J Citizens Group v. U.S. Dept. of Transp.*, 456 F.3d 734, 741 (7th Cir. 2006) (citations omitted). Once a transaction

has caused injury, all claims arising from that transaction must be brought in one suit or lost. *Roboserve*, 121 F. 3d 1027, 1035 (7th Cir. 1997). The doctrine of *res judicata* may properly be raised as a basis to dismiss a complaint pursuant to Rule 12(b)(6). *Anderson v. Guaranteed Rate, Inc.*, 2013 WL 2319138, at *3 (N.D. Ill. May 28, 2013).

In *Bell v. Taylor*, the Seventh Circuit found that there was an identity of the causes of action in two copyright infringement cases of the holder of a copyright for photographs depicting a city skyline, as required for *res judicata* to bar the second action. 827 F.3d 699, 706-07 (7th Cir. 2016). The court found that the plaintiff's two lawsuits arose out of a common core of operative facts, even though the plaintiff mistakenly had referenced the wrong photograph is his first action. *Id.*

Boatman has been litigating his copyright claims with respect to the photographs at issue in this action since at least August 2016 when he filed the *Honig* Action. Honig is a real estate sales agency located in Joliet, Illinois that commissioned Boatman to photograph certain homes for sale in 2015. (*Honig* Action at Dkt. #45, ¶¶ 3, 6.) Boatman alleged that the Honig agents distributed Boatman's photos through PAAR for publication on Realtor.com. (*Id.* at Dkt. #45, ¶ 39.) Some of the photos in the *Honig* Action are part of the 1,216 photos at issue in this case. Despite his knowledge throughout the *Honig* Action of PAAR's role in feeding Boatman's photographs to Realtor.com, Boatman did not name PAAR as a defendant in the *Honig* Action. Boatman elected instead to settle the *Honig* Action, and that action was dismissed with prejudice on November 7, 2018. Moreover, Boatman did so after the district court in the *Honig* Action already had ruled as a matter of law that that the licenses Boatman granted to his Peoria area real estate agent clients expressly permitted the copyrighted photographs to be uploaded to the Realtor.com website.

PAAR was in privity with Honig with respect to the matters at issue in the *Honig* Action. Boatman expressly alleged that the photos at issue in the *Honig* Action were uploaded to Realtor.com using the PAAR MLS pursuant to an agreement between Honig and PAAR that required Honig to follow the "PAAR MLS Rules and Regulations." (Ex. B at ¶39.) Thus, Boatman's claim against PAAR arising out of the same operative facts therefore is barred by *res judicata*. The district court in the *Honig* Action already found that uploading Boatman's photos to Realtor.com was permitted under the licenses Boatman granted his Peoria area real estate agent clients. Boatman settled and dismissed his claims in the *Honig* Action without appealing that ruling. Boatman is not permitted to continue seeking repeated pay-days for the same infringing conduct in successive actions against the various different parties involved in that common operative conduct.

This action also cannot proceed because Boatman has engaged in improper claim-splitting. The doctrine prohibits a party from maintaining a suit that arises from the transaction or events underlying a previous suit simply by changing his legal theory. *Anderson*, 2013 WL 2319138, at *4. The federal definition of a cause of action, when combined with the rule against claim splitting, requires that a plaintiff allege in one proceeding all claims for relief arising out of a single core of operative facts, or be precluded from pursuing those claims in the future. *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361, 1365 (7th Cir. 1988). Claim splitting is a litigation tactic that the *res judicata* doctrine is meant to prevent. *Palka v. City of Chi.*, 662 F.3d 428, 437 (7th Cir. 2011).

Courts take a pragmatic approach when determining whether a set of facts constitutes a series of connected transactions and consider the relation of the facts in time, space, origin, and motivation. *Huon v. Johnson & Bell, Ltd.*, 757 F.3d 556, 558 (7th Cir. 2014) (citation omitted). They look to whether the facts form a convenient trial unit that conforms to the parties'

expectations or business usage. *Id.* The fact that some events occurred at different times did not matter when the facts in the two complaints described a series of connected transactions that formed a convenient trial unit. *Id.* at 559.

Boatman is seeking to recover for the same alleged infringement from multiple parties in multiple actions under multiple theories. The doctrine of claim splitting prevents Boatman from testing out new legal theories against multiple parties in separate actions. With his latest suit against PAAR, Boatman seeks to relitigate the same events and claims that already were decided or could have been litigated in his prior *Honig* Action, which involved the same operative facts. If Boatman had a good faith basis for suing PAAR for copyright infringement, he should have brought those claims in the *Honig* Action, which involved the same operative facts. Because he failed to bring the instant claim in the *Honig* Action, Boatman is barred from seeking relief against PAAR in the present action, and this Court should dismiss Boatman's claims against PAAR with prejudice.

CONCLUSION

PAAR respectfully requests that this Court address the *res judicata* and claim splitting arguments first. Boatman's claim should be barred and dismissed with prejudice. His claim should be barred because he knew of PAAR and its alleged role in the redisplay of Boatman's photographs since at least 2016, yet never named it as a defendant in the *Honig* Action. He is not permitted to do so now because the doctrines of *res judicata* and claim splitting bar the claims. Should the claims not be barred and dismissed with prejudice on those grounds, the Court should dismiss the FAC for failure to state a claim. PAAR operates and automated MLS website, and Boatman does not allege that PAAR engage in any volitional conduct to infringe his copyrighted photographs. Moreover, the actual terms of the RIN Agreement should be found to bar Boatman's claims against

PAAR as a matter of law. Nor should Boatman be allowed to proceed with his claims against PAAR without naming Move, Inc. as a necessary party. Under Rule 19, Move, Inc. must be named as a party or the case dismissed.

Dated: October 12, 2020

Respectfully submitted,

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Certificate of Service

I hereby certify that on October 12, 2020, a copy of the foregoing document was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Thomas G. Griffin