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8	SUPERIOR COURT	C OF CALIFORNIA
9	COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION	
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11	CHUCK SMIAR,	Case No.: 37-2010-00056531-CU-MC-NC
12	Plaintiff,	COMPLAINT FOR: (1) BREACH OF FIDUCIARY DUTIES, (2) RESCISSION,
13	vs.	(3) TEMPORARY RESTRAINING ORDER, and (4) PRELIMINARY AND PERMANENT
14	NORTH SAN DIEGO COUNTY ASSOCIATION	INJUNCTIONS
15	OF REALTORS, Incorporated, and JIM ALDREDGE, GINNI FIELD, KURT KINSEY, MARIA WEISS, and DOES 1	
16	Defendants.	
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19	Dlaintiff allogog.	
20	Plaintiff alleges:	
21	Nominal Defendant	
22	1. Defendant NORTH SAN DIEGO COUNTY ASSOCIATION OF REALTORS,	
23	Incorporated, hereinafter referred to as "NSDCAR", is, and at all	
24	times herein mentioned was, a corporation duly organized and existing	
25	under the laws of the State of California and has its principal place	
26	of business in San Diego County, California.	
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# Director Defendants

2. At all times herein mentioned defendants JIM ALDREDGE, GINNI FIELD, KURT KINSEY, and MARIA WEISS were directors of NSDCAR (the "Director Defendants").

3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through 20, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.

4. At all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the scope of such agency.

5. Plaintiff is, and at all times mentioned herein was, a REALTOR member of NSDCAR.

## Duties of the Director Defendants

6. The activities and affairs of NSDCAR are managed and all corporate powers are exercised under the direction of the Board of Directors. The Directors have common law fiduciary and statutory obligations of care and loyalty that require them to perform their duties as directors, and as members of any committee of the board upon which the Directors may serve, in good faith, in a manner such directors believe to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

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7. The Directors who are also REALTOR members of NSDCAR have the additional primary responsibility under the NSDCAR Bylaws to safeguard and promote the standards, interests and welfare of NSDCAR.

# Factual Allegations

8. In or about 2005, NSDCAR, together with the San Diego Association of REALTORS, the Pacific Southwest Association of REALTORS, the East County Association of REALTORS, and the Coronado Association of REALTORS (all of the REALTOR Associations located in San Diego County), concluded years of antitrust litigation with the payment of a class action settlement to certain multiple listing service (MLS) members. This antitrust litigation arose out of the common ownership of the San Diego County regional MLS service by the above-named five (5) real estate Associations.

9. On or about September 17, 2009, the NSDCAR Directors named a task force comprised of JIM ALDREGE, GINNI FIELD, KURT KINSEY, and MARIA WEISS putatively to explore possible benefits to a merger of NSDCAR with the San Diego Association of REALTORS (hereinafter "SDAR"), in which SDAR would be the surviving corporation.

10. On or about February 25, 2010, Board Chairman JIM ALDREDGE announced to the NSDCAR members, by way of video presentation and in writing, that NSDCAR and SDAR had signed a "Confidentiality and Non-Disclosure Agreement", and a "non-binding Memorandum of Understanding", pursuant to which NSDCAR had agreed to share its confidential asset, contract and membership information with SDAR.

11. All of the above-described actions in pursuance of a merger between NSDCAR and SDAR, in which SDAR would be the surviving entity, were taken under Confidentiality and Non-Disclosure Agreements, in executive session, and without the knowledge or approval of the NSDCAR members.

12. Said actions of the Director Defendants are in furtherance of the interests of SDAR in becoming the sole surviving REALTOR Association in San Diego County at the cost of eliminating the Director Defendants' own REALTOR Association, and violate the Director Defendants' fiduciary duties of care and loyalty to NSDCAR and its members.

13. Before February 11, 2010, Plaintiff made the following efforts to secure action by the Directors: Plaintiff asked for, and received, permission from the Board of Directors to address the Directors on the subject of this complaint and, on February 11, 2010, by and through plaintiff's counsel, Kevin Forrester, did address the Directors and specifically request that they comply with their fiduciary duties of good faith, care, and loyalty to NSDCAR, and cease and desist from all efforts to merge NSDCAR with SDAR. The above-described actions of Chairman of the Board JIM ALDREDGE were in direct response to plaintiff's efforts to secure action by the Directors. On March 18, 2010, plaintiff delivered to the Board of Directors a true copy of the complaint which plaintiff then proposed to file (a complaint which included the first two causes of action of this complaint), and demanded that the Board of Directors either cease and desist from any and all merger discussions, negotiations, and/or information sharing with SDAR or take such action as is necessary for the corporation to prosecute the causes of action therein set forth against the aforementioned defendants. 111

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COMPLAINT FOR BREACH OF FIDUCIARY DUTIES, RESCISSION, TRO, INJUNCTION

### Count 1, Breach of Fiduciary Duty

14. Plaintiff incorporates by reference and realleges each and every allegation set forth above, as though fully set forth herein.

15. As alleged above herein, the Defendants had a fiduciary duty to, among other things, act in good faith, in the best interests of NSDCAR and in promotion of the welfare of NSDCAR.

16. In breach of their fiduciary duties of loyalty and good faith the Defendants, and each of them, participated in and/or aided and abetted each other in a deliberate course of action designed to terminate the existence of the REALTOR Association that they serve: NSDCAR.

17. The actions alleged herein were not, and could not have been, in exercise of good faith business judgment, as it unduly befitted the interests of a competing REALTOR Association, SDAR, at the expense of NSDCAR.

18. As a direct and proximate result of these breaches of Defendants' fiduciary duties, NSDCAR faces dissolution and termination as a result of merging with SDAR, and NSDCAR and SDAR both face the risk of additional millions of dollars in antitrust litigation expenses.

# Count 2, Rescission

19. Plaintiff incorporates by reference and realleges each and every allegation set forth above, as though fully set forth herein.

20. The "Confidentiality and Non-Disclosure Agreement" and the "non-binding Memorandum of Understanding" referred to above herein were entered into and obtained as a result of Defendants breaches of their fiduciary duties and are, therefore, invalid, unenforceable,

and void. Said agreements and understandings should, therefore, be rescinded, and any and all confidential information provided or received by NSDCAR and/or SDAR pursuant to such agreements should be returned to their providing parties forthwith.

# <u>Count 3, Temporary Restraining Order,</u> Preliminary and Permanent Injunctions, and Damages

21. Plaintiff incorporates by reference and realleges each and every allegation set forth above, as though fully set forth herein.

22. Defendants' wrongful conduct, unless and until enjoined and restrained by order of this court will cause great and irreparable injury to NSDCAR in that NSDCAR will be dissolved, terminate and cease to exist as a result of merging with SDAR.

23. NSDCAR has no adequate remedy at law for the injuries that are threatened, as all of NSDCAR's assets and goodwill will, together with NSDCAR, cease to exist as a result of merging with SDAR, and NSDCAR will thereafter have no means to pursue damages on behalf of itself or its members.

24. If plaintiff is successful in this action, a substantial benefit will result to NSDCAR, on whose behalf this action is prosecuted, and plaintiff is entitled to his costs, disbursements and reasonable attorney's fees incurred herein from and against NSDCAR.

WHEREFORE, plaintiff prays judgment against defendants NSDCAR, JIM ALDREDGE, GINNI FIELD, KURT KINSEY, and MARIA WEISS:

 For an order requiring defendants to show cause, if any they have, why they should not be enjoined as set forth in this complaint, during the pendency of this action;

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2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendants, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them:

a. From doing, commencing, or continuing any actions of any kind in furtherance of any plan of merger between NSDCAR and SDAR as described in the "Confidentiality and Non-Disclosure Agreement" and "non-binding Memorandum of Understanding" referenced in the complaint, or as described in any related merger agreement, proposed corporate document or other document, or otherwise.

3. Granting appropriate equitable relief, including the rescission prayed for herein, to remedy Director defendants' breaches of fiduciary duties;

4. Against NSDCAR, for the costs and disbursements of this action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses; and,

5. Granting such other and further relief as the Court deems just and proper.

June 14 , 2010 Dated:

Kevin K. Forrester,

Attorney for Plaintiff

#### VERIFICATION

I, Chuck Smiar, am the plaintiff in the above-entitled action. I have read the foregoing complaint and know its contents. The same is true of my own knowledge, except as to those matters that are alleged in the complaint on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

June 14, 2010

Ruch Fineau

Dated: