

1 Kevin K. Forrester (SBN 129023)
2 Attorney at Law
3 4403 Manchester Ave Ste 205
4 Encinitas CA 92024-7903
5 Telephone: (760) 944-1918
6 Facsimile: (760) 944-3517

7 Attorney for Plaintiff

FILED
SAN DIEGO COUNTY, CALIFORNIA
2010 SEP 21 PM 12:40
CLERK OF SUPERIOR COURT
SAN DIEGO COUNTY, CA

8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

10) Case No.: 37-2010-00056531-CU-MC-NC
11 CHUCK SMAR,)
12) Plaintiff,) FIRST AMENDED COMPLAINT FOR
13) vs.) DAMAGES
14) (BREACH OF FIDUCIARY DUTY)
15) [Corporations Code § 7231]
16 NORTH SAN DIEGO COUNTY ASSOCIATION)
17 OF REALTORS, Incorporated, and JIM)
18 ALDREDGE, GINNI FIELD, KURT)
19 KINSEY, MARIA WEISS, and DOES 1)
20 through 20,)
21 Defendants.)

22 Plaintiff alleges:

23 Nominal Defendant

24 1. Defendant NORTH SAN DIEGO COUNTY ASSOCIATION OF REALTORS,
25 Incorporated, hereinafter referred to as "NSDCAR", is, and at all
26 times herein mentioned was, a corporation duly organized and existing
27 under the laws of the State of California and has its principal place
28 of business in San Diego County, California.

///

///

1 There was no announcement at this time, or ever, that either the
2 Merger Task Force or the Board of Directors had undertaken or
3 considered any sort of cost-benefit analysis, or had prepared or
4 considered any business plan of any sort from which any conclusions
5 could be drawn about the advisability of merging NSDCAR and SDAR.

6 11. Before February 11, 2010, Plaintiff made the following
7 efforts to secure action by the Directors: Plaintiff asked for, and
8 received, permission from the Board of Directors to address the
9 Directors on the subject of this complaint (which permission,
10 however, was limited to a period of no more than five minutes); and,
11 on February 11, 2010, by and through plaintiff's counsel, Kevin
12 Forrester, did address the Directors and specifically requested that
13 they comply with their fiduciary duties of good faith, care, and
14 loyalty to NSDCAR, and cease and desist from all efforts to merge
15 NSDCAR with SDAR. The Directors were informed verbally and in
16 writing, during the allotted five minutes, of their fiduciary
17 obligations under the NSDCAR Bylaws and California Corporations Code
18 section 7231.

19 12. On or about February 25, 2010, Board Chairman JIM ALDREDGE
20 announced to the NSDCAR members, by way of video presentation and in
21 writing, that NSDCAR and SDAR had signed a "confidentiality and non-
22 disclosure agreement", and a "non-binding memorandum of
23 understanding", pursuant to which NSDCAR had agreed to share its
24 confidential asset, contract and membership information with SDAR.
25 This announcement, which came 23 weeks after the "exploratory" Merger
26 Task Force described in Paragraph 9, above, had been formed, did not
27 contain any suggestion that either the Merger Task Force or the Board
28

1 of Directors had ever undertaken or considered any sort of cost-
2 benefit analysis, or had prepared or considered any business plan of
3 any sort from which any conclusions could be drawn about the
4 advisability of merging NSDCAR and SDAR. Nevertheless, after 23
5 weeks of "exploration" by the Merger Task Force, confidential due
6 diligence had begun, pursuant to a "non-binding memorandum of
7 understanding".

8
9 13. The above-described announcement by Chairman of the Board
10 JIM ALDREDGE was the Board of Directors' only response to plaintiff's
11 February 11, 2010, efforts to secure action by the Directors in the
12 form of ceasing and desisting from any attempt to merge NSDCAR with
13 SDAR.

14 14. On March 18, 2010, plaintiff delivered to the Board of
15 Directors a true copy of a member-derivative complaint which
16 plaintiff then proposed to file for breach of fiduciary duties and
17 rescission of the agreements announced by JIM ALDREDGE on February
18 25, 2010, and demanded that the Board of Directors either cease and
19 desist from any and all merger discussions, negotiations, and/or
20 information sharing with SDAR, or take such action as was necessary
21 for the corporation to prosecute the causes of action therein set
22 forth against the Director Defendants and all other members of the
23 NSDCAR Board of Directors. Included with this proposed complaint were
24 petitions signed by 264 NSDCAR members demanding that the Board of
25 Directors "immediately cease and desist from any and all merger
26 discussions, negotiations, and/or information sharing with SDAR."

27 ///
28

1 15. On or about April 2, 2010, plaintiff and plaintiff's
2 counsel, together with a group of other NSDCAR members opposed to
3 merging NSDCAR with SDAR, delivered to the NSDCAR Board of Directors
4 a letter seeking answers to 25 specific questions about the
5 anticipated costs and benefits and impacts upon NSDCAR members of a
6 merger between NSDCAR and SDAR. This was an "open" letter, in that
7 it was posted publicly on the authors' website, entitled
8 SaveNSDCAR.com, with the offer to publicly post the question
9 responses from the Board of Directors (when and if received) for
10 consideration by the entire NSDCAR membership. The Directors have
11 never responded to these 25 member questions.
12

13 16. On April 8, 2010, the NSDCAR Board of Director approved a
14 letter of intent to merge NSDCAR with SDAR. This action came 29
15 weeks after the "exploratory" Merger Task Force described in
16 Paragraph 9, above, had been formed, and 6 weeks after the
17 "confidential due diligence" pursuant to a "memorandum of
18 understanding" described in Paragraph 11 had started. Yet this
19 decision to merge NSDCAE with SDAR came without any indication,
20 again, that either the Merger Task Force or the Board of Directors
21 had ever undertaken or considered any sort of cost-benefit analysis,
22 or had prepared or considered any business plan of any sort from
23 which any conclusions could be drawn about the advisability of
24 merging NSDCAR and SDAR.
25

26 17. On or about April 26, 2010, having received no response to
27 the above-mentioned April 2, 2010 letter, which included a request
28 for the e-mail addresses of each NSDCAR member for use in opposing
the merger of NSDCAR and SDAR, plaintiff's counsel made a formal

1 written demand, pursuant to Corporations Code section 8330, to
2 inspect and copy the record of all of the NSDCAR members' names,
3 addresses and voting rights to facilitate communication with and
4 polling of all other NSDCAR members on the subject of the proposed
5 NSDCAR and SDAR merger.

6 18. On May 5, 2010, having received no response to the above-
7 mentioned April 26, 2010, letter demanding to inspect and copy member
8 information, plaintiff's counsel requested that the NSDCAR Board of
9 Directors appoint inspectors of election pursuant to California
10 Corporations Code section 7614(a) to oversee the member voting to
11 either approve or disapprove the merger of NSDCAR and SDAR, and
12 demanded that the election be conducted in accordance with the
13 following minimum standards: First, that the inspectors of election
14 chosen by the Board of Directors not be either currently-seated
15 NSDCAR Board of Directors members, or candidates for election to the
16 NSDCAR Board of Directors, or SDAR members; and Second, that a secure
17 third-party election vendor be used by NSDCAR, and that this vendor
18 be different than the vendor used for SDAR's separate vote (NSDCAR
19 had previously successfully used votenet.com to conduct electronic
20 web-based elections, and the demand indicated that votenet.com would
21 be an appropriate third-party election vendor); and Third, that any
22 third-party election vendor used by NSDCAR conduct the election in
23 such a fashion and with such safeguards in place so as to insure the
24 availability of independently-auditable post-election results; and
25 Fourth, that the Board of Directors publish and distribute to the
26 entire membership the following information in advance of the
27 election: the number of SDAR primary members, if any, who also held a
28

1 secondary NSDCAR membership and were entitled to vote in NSDCAR's
2 elections (specifically the merger election), and, conversely, the
3 number of NSDCAR primary members, if any, who also held a secondary
4 SDAR membership and were entitled to vote in SDAR's elections
5 (specifically, the merger election).

6 19. On May 6, 2010, the NSDCAR Board of Directors adopted a
7 resolution approving the proposed Bylaws and Agreement of Merger
8 between NSDCAR and SDAR. There was, again, no announcement at this
9 time, or ever, that either the Merger Task Force or the Board of
10 Directors had undertaken or considered any sort of cost-benefit
11 analysis, or had prepared or considered any business plan of any sort
12 from which any conclusions could be drawn about the advisability of
13 merging NSDCAR with SDAR. As a substitute for a genuine business
14 plan, the Board of Directors attached an Exhibit "A" to the Agreement
15 of Merger, entitled "Operational Efficiencies and Economies of Scale
16 to be Achieved Through the Unified Association." (This two-page
17 Exhibit "A" is attached hereto and incorporated herein as Exhibit "A"
18 to this First Amended Complaint.)

19 20. The NSDCAR Board of Directors also voted on May 6, 2010, in
20 response to the above-mentioned April 26, 2010, letter demanding to
21 inspect and copy member information, to offer to "contract with an
22 outside vendor, at NSDCAR's expense, to distribute [merger
23 opponents'] proposed communication and polling ('Material') to all
24 NSDCAR members" as a "reasonable alternative" to inspecting and
25 copying member information. The reasonableness of this alternative,
26 however, was eliminated when Merger Task Force member and Board
27 Chairman JIM ALDREDGE installed Merger Task Force member MARIA WEISS
28

1 as a gatekeeper between the merger opponents and the outside vendor
2 to monitor, revise and control information received by NSDCAR
3 members.

4 21. The NSDCAR Board of Directors also voted on May 6, 2010, to
5 limit merger related expenses to no more than \$100,000.

6 22. On May 27, 2010, having received no response to either the
7 above-mentioned March 18, 2010 proposed member-derivative complaint
8 for breach of fiduciary duties and rescission, or the above-mentioned
9 May 5, 2010, demand for inspectors of election, plaintiff's counsel
10 demanded said responses by May 28, 2010, upon threat of filing the
11 within or similar action.

12 23. On May 28, 2010, Board Chairman JIM ALDREDGE responded to
13 counsel's May 27, 2010 letter by appointing three inspectors of
14 election, one of which was also a candidate for election to the
15 NSDCAR Board of Directors, and selecting a never-before-used by
16 NSDCAR web-based electronic election vendor known as SBS – Survey and
17 Ballot Systems. (The NSDCAR Board of Directors election, which would
18 take place only if the NSDCAR members rejected the proposed merger,
19 would be and was conducted by NSDCAR staff and votenet.com, in
20 accordance with NSDCAR's customary web-based electronic election
21 vendor procedures.)

22 24. On or about June 2, 2010, the President of the California
23 Association of REALTORS, Steve Goddard, became so concerned about
24 multiple reports of what he termed "deceptive, misleading and
25 coercive behavior inappropriate to a REALTOR organization", that he
26 took the remarkable action of addressing a letter of that same date
27
28

1 to the Presidents and Directors of all four local San Diego REALTOR
2 associations reminding them of their legal and ethical obligations.

3 His letter reads in part:

4 "Further, lest silence be deemed acquiescence, C.A.R. needs
5 to remind the leadership of the involved associations of
6 their fiduciary duties to their members. Both NAR Policy
7 and California law require directors to disclose any
8 conflict of interest they may have to their fellow
9 directors and to their membership. To be absolutely clear:
10 if a director receives promises for teaching assignments,
11 promises for special appointments, monetary gifts or any
12 other compensation from an association that is proposing a
13 merger or in anticipation of a merger, it could give rise
14 to or be perceived as a conflict of interest that must be
15 disclosed to their fellow directors and to their members
16 voting on the merger. Failure to adhere to the director's
17 promise to engage in no self-dealing may be a violation of
18 the California Corporations Code and opens the Directors to
19 personal monetary liability. In addition, such actions are
20 inconsistent with the high standards of integrity and
21 transparency that NAR requires of local association
22 Directors. Let me be clear, there is no transaction worth
23 compromising the integrity of the Association and the
24 members it serves. We need to trust that the members will
25 make a decision of self determination that is predicated
26 only on their best interests and not of any individual
27 director or officer and certainly not on any promises made
28 of special favors."

19 Plaintiff is informed and believes and thereon alleges that no
20 disclosures of conflicts of interest such as those mentioned in the
21 above paragraph were ever made by anyone with respect to the proposed
22 NSDCAR and SDAR merger.

23 25. On June 3, 2010, plaintiff's counsel asked the NSDCAR Board
24 of Directors for an invitation to participate in the NSDCAR "Proposed
25 Merger – Town Hall Forums" that were scheduled by the Board of
26 Directors to take place on June 14, 15 and 16, 2010, for the purpose
27 of representing the opposing viewpoint to merger and giving the
28 NSDCAR members a full and fair opportunity to hear from and question

1 representatives of both the "yes" and "no" on merger points of view
2 before voting on the merger issue. The request for "equal time" was
3 refused on June 4, 2010, with the statement that the Town Hall
4 Meetings were structured to be "educational in nature" and were not
5 going to be presented in a debate format.

6 26. At or about the time of the June California Association of
7 REALTORS business and Board of Directors meetings, June 8 through
8 June 12, 2010, it became known to plaintiff that Merger Task Force
9 Member Chairman JIM ALDREDGE had appointed himself the sole
10 administrator of the merger election then scheduled to commence June
11 16, 2010 and end June 24, 2010. Plaintiff's counsel notified Ms.
12 Dianne McMillan, as the CEO and agent for service of process of
13 NSDCAR, verbally and in writing on Saturday, June 12, 2010, that an
14 action seeking an injunction against the pending merger election
15 would be filed in the San Diego Superior Court on Monday, June 14,
16 2010, seeking an ex parte appearance on Tuesday or Thursday, unless
17 JIM ALDREDGE was replaced as the sole administrator of the pending
18 merger election by an agreed substitute in the person of REALTOR
19 Almon "Bud" Smith.

20 27. The within action was filed on June 14, 2010, an Ex Parte
21 Application for Temporary Restraining Order and Order to Show cause
22 and related documents were filed on June 15, 2010, in anticipation of
23 a June 17, 2010 ex parte appearance in front of the Honorable Thomas
24 P. Nugent, Superior Court Judge. Minutes before the ex parte
25 hearing, the parties agreed to a resolution of the injunctive relief
26 causes of action only, in relevant part, as follows: First, the
27 merger election then scheduled to commence June 23, 2010, and end
28 June 30, 2010, would go forward; and, Second JIM ALDREGE would

1 immediately withdraw as the then co-administrator of the merger
2 election, leaving Almon "Bud" Smith as the sole administrator of the
3 merger election.

4 28. In the June 23 - June 30, 2010, merger election, with 59.54%
5 of eligible voters voting, the NSDCAR members rejected the proposed
6 NSDCAR-SDAR merger by a vote of 1,626 "No" to 1,270 "Yes".

7 29. The merger-related expenses incurred by NSDCAR Chairman JIM
8 ALDREDGE and the Merger Task Force, on behalf of the NSDCAR Board of
9 Directors, on behalf of NSDCAR, have been reported to be \$431,313.86.
10 This amount is equal to approximately 94% of all membership dues
11 received by NSDCAR from active NSDCAR members for one year, and more
12 than four times the maximum merger related expenses approved by the
13 NSDCAR Board of Directors on May 6, 2010.

14 30. All of the above-described actions in pursuance of a merger
15 between NSDCAR and SDAR, in which SDAR would be the surviving entity,
16 were taken under confidentiality and non-disclosure agreements, in
17 executive session, and without the knowledge or approval of the
18 NSDCAR members. Plaintiff is informed and believes and thereon
19 alleges that due to the dominance of the NSDCAR Board of Directors by
20 the Merger Task Force members, many, if not most, of the above-
21 described actions were taken by Chairman JIM ALDREDGE and the Merger
22 Task Force members, acting alone, without the informed approval of
23 the NSDCAR Board of Directors.

24 31. Said actions of the Merger Task Force members were in
25 furtherance of the interests of SDAR in becoming the sole surviving
26 REALTOR Association in San Diego County, at the cost of eliminating
27 the Merger Task Force Members' own REALTOR Association, and violate
28

1 the Merger Task Force members' fiduciary duties of care and loyalty
2 to NSDCAR.

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

8 33. The actions alleged herein were not, and could not have
9 been, in exercise of good faith business judgment, as they unduly
10 befitted the interests of a competing REALTOR Association, SDAR, at
11 the expense of NSDCAR; and neither the Merger Task Force nor the
12 NSDCAR Board of Directors ever undertook or considered any sort of
13 cost-benefit analysis, or had prepared or considered any business
14 plan of any sort from which any conclusions could be drawn about the
15 advisability of merging NSDCAR with SDAR; and neither the Merger Task
16 Force nor the NSDCAR Board of Directors ever seriously considered the
17 risk of inviting antitrust litigation, as had been experienced by
18 NSDCAR previously, by merging the two largest real estate
19 associations in San Diego County into one association.

20 34. As a direct and proximate result of these intentional and
21 deliberate breaches of Defendants' fiduciary duties, NSDCAR has
22 suffered a so-far-disclosed loss in the sum of \$431,313.86, plus an
23 undisclosed loss to be established according to proof at time of
24 trial.

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

1 WHEREFORE, plaintiff prays judgment:

2 1. Against defendants JIM ALDREDGE, GINNI FIELD, KURT KINSEY,
3 and MARIA WEISS, for damages in an amount no less than \$431,313.86,
4 plus an amount to be established according to proof at time of trial;

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

8 3. Any other and further relief as the Court deems just and
9 proper.

10 Dated: September 21, 2010

11
12 

13 _____
14 Kevin K. Forrester,
15 Attorney for Plaintiff

EXHIBIT "A"

AGREEMENT OF MERGER

OPERATIONAL EFFICIENCIES AND ECONOMIES OF SCALE TO BE ACHIEVED THROUGH THE UNIFIED ASSOCIATION

The following are examples of some the Operational efficiencies and economies of scale which it is anticipated will be achieved pursuant to the Merger.

A. Economies of Scale.

1. **Financially.** The Unified Association will combine both existing association resources for the benefit of its membership. It is expected that this will position the association to offer more benefits, services and dues at lower prices/dues/fees. For example, membership will enjoy local reduced dues for 2011, 2012, 2013 and likely beyond.

2. **Stronger Negotiating.** As a 15,000 plus member association, it is anticipated that the Unified Association will be able to offer more member products and services at better prices, including free.

a. **New Products.** A Local Forms Library on zipForm®, Mongo Fax, AgentPro247, My Neighborhood Agent, Property Minder, Top Producer, LS-Office, TransUnion, T-Rex Global, vFlyer, DataQuick and PC Repair to be provided to membership, with the possibility of DocuSign.

b. **Existing Products.** relay®, zipForm®

B. Enhanced Membership Benefits and Services

1. **Volunteer Opportunities.** Membership opportunities to volunteer will increase dramatically with more than 17 committees and district councils created.

2. **"Full Service" Service Centers.** Each service center will have available to members a conference room, business center, two classrooms, and storefront to better address the members needs.

3. **Education.** Over 100 Live Instruction, Webinars, Brown Bag sessions, and Educational Tracks will be offered per year.

4. **High Common Standard of Practice and Risk Management.** All members will enjoy an expanded suite of risk management tools and services including Local Forms Library on zipForm®, communication and information concerning current practices which help REALTORS® avoid litigation, a Mediation Center and informative Risk Management Brown Bag sessions.

5. **Technology.** – PC Repair, Smart phone applications.
6. **Effective Marketing and Branding Strategies within Region.** Increase and enhance the unified association's events, membership benefits and communication, and corporate sponsorships and partnerships, as well as to more strategically brand the association with consumers and the business communities.
7. **Networking and Informative Events.** An expansion of events to include Issue and Real Estate Summits (economic?), Expo, Membership Appreciation Day, Golf Tournament, Casino Night, Walk-a-Thon and Installation of the Board of Directors and Officers.
8. **Communications.** Enhanced membership communication and various forums for membership to exchange information such as the Caravan Connection, Radio, Monthly Publication, Open House Hotline and Rentals.
9. **Equal and Proportional Membership Representation.** All members of the Unified Association will be represented at the board level through the creation of regions comprised of districts of equal size.
10. **Larger and Stronger Voice**
 - a. **Government Affairs.** The unified association can increase the PAC balance significantly within 18 months and leverage political muscle throughout the county to protect Realtors livelihoods and businesses. The PACs would include equal representation from each region of the new Unified Association as well as the Government Affairs Committee.
 - b. **CAR / NAR.** The existing CAR and NAR Directors of SDAR and NSDCAR would remain as CAR and NAR directors therefore providing, greater involvement on state and national committees; as well as leadership positions within each to ensure all local REALTORS®' interests in all Districts are represented.
 - c. **Consumers and Public.** Opportunity to become a community leader via outreach efforts to enhance the communities REALTORS® live, work in, and sell.
11. **Consumer Focus.** The Unified Association will better serve the consumers and place the REALTOR® at the center of the transaction by utilizing an experienced marketing department and professionals to cultivate a public awareness campaigns; a consumer based website; and effective marketing, branding, and communication.
12. **Philanthropic.** The unified association will continue its charitable efforts and in particular enhance its own charities or 501 (c)(3) entities such as the Ambassadors Foundation and FAR, as well as support other charitable organizations and efforts.
13. **Customer Service.** Enhanced to provide better membership satisfaction through strategies such as Concierge Teams, On-Call After Hours, a Call Center and extended and weekend hours.