UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REX – REAL ESTATE EXCHANGE, INC., a Delaware corporation,

Plaintiff,

v.

ZILLOW, INC., a Washington corporation; ZILLOW GROUP, INC., a Washington corporation; ZILLOW HOMES, INC., a Delaware corporation; ZILLOW LISTING SERVICES, INC., a Washington corporation; ZILLOW GROUP MARKETPLACE, INC., a Washington corporation; TRULIA, LLC, a Delaware limited liability company; and THE NATIONAL ASSOCIATION OF REALTORS, an Illinois trade association,

Defendants.

No. 2:21-cv-00312-TSZ

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

NOTED: May 10, 2021

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

REX seeks a preliminary injunction under Section 1 of the Sherman Act and the Washington Consumer Protection Act to protect its innovative, technology-based real estate brokerage model from a group boycott involving the National Association of Realtors and Zillow. REX's innovative model threatens the 5-6% commission rates that have too-long prevailed among traditional brokers. But since mid-January, Zillow's ubiquitous websites have suppressed REX's listings by placing them in a hidden, deceptively-labeled tab. The source of suppression is NAR's segregation rule, which requires that NAR/MLS agent property listings be displayed separately from all others. When Zillow joined NAR and MLSs, it agreed to extend the rule to its websites.

Strikingly, Defendants do not assert any competitive justification for NAR's segregation rule. In fact, Zillow confesses that it knew segregating listings is worse for consumers. Yet Zillow joined the cartel and laboriously changed its websites while opening its own brokerage operations to compete with other brokers, including REX. But Zillow can gain the benefits of accessing MLS listing data without imposing the anticompetitive segregation rule.

Defendants do not contest key points of a Section 1 analysis including the well-defined residential brokerage services market, NAR/MLS dominance of it, and Zillow's role as the primary digital doorway into that market.[1] Zillow instead argues that its "pure" motives in knowingly joining NAR/MLSs and capitulating to the cartel's anticompetitive segregation rule frees Zillow from antitrust liability. That is not the law. Zillow has joined NAR and hundreds of MLSs, submitting to their rules, which alone constitutes sufficient combination under Section 1. Whether Zillow was compelled, coerced, or had separate motives is immaterial when the conspiracy restrains trade.

Realcomp II, Ltd. v. Federal Trade Commission, 635 F.3d 815 (6th Cir. 2011), provides

[1] In fact, Zillow acknowledges its prominence and the new "digital-first reality." Dkt. #61 ("Samuelson Dec.") ¶¶21, 72. Where Defendants filed both sealed and redacted pleadings, this Reply cites to the unredacted docket entries.

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important guideposts for the conduct at issue here. There, a local NAR-affiliated MLS engaged in similar, though arguably less-egregious conduct, when it used discriminatory internet policies to squelch the rise of discounters within its brokerage ranks. Both the FTC and the Sixth Circuit found the concerted behavior was anticompetitive and a Section 1 violation. NAR, its affiliated MLSs, and willing participant, Zillow, are using the same playbook here.

Zillow argues that consumers are not misled by including REX in the "Other listings" tab instead of the "Agent listings" tab because they can ultimately see REX is the listing agent under the demoted secondary tab. This misses the entire point. Consumers will not understand that licensed-agent listed properties are in the "other" tab to begin with, so consumers will see far fewer REX listings. REX has presented testimony and data to demonstrate this anticompetitive impact, which Zillow has not refuted with its own web traffic data.

To avoid a finding of irreparable harm, Defendants try to sidestep the obvious and severe impact of Zillow's new biased display. Their lead argument, instead, is that REX should have sued sooner—before REX had seen the new display and was able to properly assess its dramatic impact. Such a premature challenge would have been speculative and not countenanced by the Court. The Ninth Circuit is clear that prohibitory relief is not pegged to the status on the day when an injunction is sought, but instead to the last uncontested circumstance. Here, that was Zillow's unified display.

REX seeks an injunction *prohibiting* Zillow from continuing to deceptively segregate REX and MLS listings. The undisputed evidence shows segregating these listings deceives consumers, harms REX, and hurts competition. Zillow concedes it would prefer not to segregate listings.

Given that the indefensible, and undefended, segregation rule is now controlling what was the nation's largest independent real estate aggregator website, making it a servant of the NAR/MLS cartel, the Court should enjoin the behavior now. If Defendants are allowed to continue to bury REX's listings on the nation's most prominent portals during lengthy litigation,

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Defendants will win by default by blunting REX's disruptive model and, quite likely, discouraging any similar would-be entrants.

II. ARGUMENT

A. Defendants' Conduct Is A Classic Per Se Violation Of The Antitrust Laws.

1. Defendants Essentially Concede The Elements Of The Per Se Rule.

The elements of per se liability were set out in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*: (1) cutting off access to a necessary means of competition; (2) the boycotters' market dominance; and (3) that the action is not justified by efficiency gains or enhanced competition. 472 U.S. 284, 294 (1985). The first two elements—Zillow's critical role in the market and market dominance—are actually supported by Defendants' responses. Rather than address these criteria, Defendants attempt to divert the question to whether Zillow's overall combination with NAR/MLSs and resulting access to IDX feeds is pro-competitive. But *Northwest Stationers* itself pointed out that a proper analysis should focus on the specifically challenged anticompetitive behavior (in that case, expulsion, and here, segregation)—not the "existence of the cooperative arrangement," which could have lawful benefits. *Id.* at 295-96.

Zillow acknowledges that its website is a critical input for brokers, noting that: Zillow "owns and operates the most-visited network of residential real estate websites and mobile apps"; Zillow "reaches hundreds of millions of consumers and participants in the real estate industry every month"; and that "consumers depend on Zillow, either directly or indirectly, to help them find the right home, or to market their home listing to the widest audience of potential buyers." Samuelson Dec. ¶7. NAR does not dispute its own studies showing that consumers rely heavily on online portals when searching for a home. *See* Dkt. #5 p. 14 of 30.

And neither Defendant contests that NAR/MLSs dominate the well-established product market for residential real estate brokerage services in local markets throughout the country. *See, e.g.*, *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1372 n.39 (5th Cir. 1980).

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Defendants' argument that a competitor must be "wholly excluded" for a Section 1 boycott was rejected by a unanimous Supreme Court in *Northwest Stationers*, stating that refusing to deal on "substantially equal terms" would qualify for per se analysis "if it placed a competing firm at a severe competitive disadvantage." *Nw. Stationers*, 472 U.S. at 295-96 n.6.[2]

As Dr. Majure's initial and rebuttal reports demonstrate, REX's competitiveness is dramatically diminished because of the NAR/MLS segregation rule. *See, e.g.*, Majure Rebuttal p. 21 ¶55. This is the same type of effect that the Sixth Circuit relied upon in finding that a NAR-affiliated MLS anticompetitively suppressed discounted brokerage listings, even though it did not entirely exclude them. *RealComp II*, 635 F.3d at 831. There, a resulting 10% decrease in the number of potential homebuyers reached constituted substantial harm. *See id*. at 830-31.

Finally, neither NAR, Zillow, nor Zillow's expert claim that Zillow's segregating of listings is pro-competitive or efficient. Zillow says the opposite: unifying listings would "improve the consumer experience"; and implementing the segregation rule was a "very large undertaking" and "challenging from a business and engineering perspective." Samuelson Dec. ¶¶53, 72. In other words, Zillow spent significant time and resources accommodating the segregation rule, which it admits *worsened* the consumer experience.

2. Zillow Competes With REX And NAR-Affiliated Brokers.

Zillow suggests that the rule of reason should apply because it is in a vertical, not a horizontal, relationship with NAR/MLSs. That is plainly incorrect. Zillow acknowledges that it has become a licensed broker, and hence a participant in the market for residential real estate brokerage services in markets throughout the country. Samuelson Dec. ¶¶17, 53. Adoption and acceptance of MLS rules by member brokers is a paradigmatic horizontal relationship. And as explained below, whether the relationship is horizontal or vertical does not matter because the segregation rule has no pro-consumer benefit.

[2] Other courts have recognized computer display bias as anticompetitive. *E.g.*, *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 62-63 (2d Cir. 2019); *Tichy v. Hyatt Hotels Corp.*, 376 F. Supp. 3d 821, 843 (N.D. Ill. 2019).

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Zillow entered the real estate brokerage services market with much fanfare—noting that it was joining local and state associations as well as the NAR. *See* Dkt. #5 p. 10 of 30. Zillow has now joined at least 218 local MLSs. Samuelson Dec. ¶69. Notably, prior to providing its own brokerage services, Zillow listed its own properties with outside brokers. *Id*. ¶16. Now Zillow charges a 6% "selling fee" in its home-buying program, explaining that "this includes the buyer's agent commission" and that "[i]n a "traditional sale, agent commissions are 6% on average." Zillow.com (https://www.zillow.com/z/offers/pricing). And Zillow tells investors that "[c]ompetitors for our real estate transaction services include real estate brokers . . . ." Zillow Group, Inc. Annual Report (Form 10-K), at 17.

Joining an MLS, and agreeing to be bound by its rules, clearly establishes an agreement under Section 1, a point repeatedly recognized by other courts. *Realty Multi-List, Inc.*, 629 F.2d at 1361 n.20 ("concerted action necessary to establish a Section 1 violation exists in the agreement of RML's members to adopt and apply these rules and membership criteria."); *see also RealComp II*, 635 F.3d at 824-25 (policy binding members of a NAR-affiliated MLS is a "contract, combination, or conspiracy"). Zillow entered into the conspiracy with NAR and MLS members by joining and accepting their rules, which is the sole reason behind Zillow changing its website display. Samuelson Dec. ¶¶62-64.

Zillow's entry into the NAR/MLS regime was considered, deliberate, and laborious. Zillow first became a broker in jurisdictions throughout the country, providing the necessary vehicle to join the NAR and MLSs. Samuelson Dec. ¶¶53, 58. Zillow then joined NAR (necessary for membership in many NAR-affiliated MLSs, Dkt. #62 ("Hendricks Dec.") ¶16) and negotiated membership in 218 MLSs (including 204 NAR affiliates), covering 90% of Zillow's listings, Samuelson Dec. ¶¶23, 69. Zillow agreed to abide by the MLS rules, *id.* ¶61, including the "critical question" of segregation rule compliance, *id.* ¶64, to which Zillow directed significant effort over sixteen months, Dkt. #55 ("Thomas Dec.") ¶¶14-15. Zillow then underwent website "compliance checks" performed by the various MLSs. Samuelson Dec. ¶¶60,

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63. These checks ensured Zillow followed locally implemented NAR model rules and other local MLS strictures, including the segregation rule, when displaying listings to Zillow's 200,000,000 monthly visitors.

Zillow does not hide that it carefully considered the segregation rule itself when joining ranks with the NAR/MLS cartel. Zillow even lobbied against the rule because mandatory segregation runs counter to consumer interests. Samuelson Dec. ¶72. Nevertheless, Zillow voluntarily agreed to segregate MLS listings from other competitive listings to reap the benefits of NAR/MLS membership. Given Zillow's admissions, there is no question that it was a "knowing participant . . . and facilitated the scheme." *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 690-91 (S.D.N.Y. 2013); *see also United States v. Singer Mfg. Co.*, 374 U.S. 174, 193-94 (1963) ("Whether the conspiracy was achieved by agreement, by tacit understanding, or by 'acquiescence . . . coupled with assistance in effectuating its purpose is immaterial.'").

The fact that Zillow *also* operates its websites does not change this analysis. Certainly it is unusual that a combination of more than a million competitors, cooperating through local MLSs, state associations, and NAR, are able to add to their ranks a competitor that controls the most important, formerly independent entry point into their marketplace.[3] But that additional aspect is damning, not exonerating. Even if Zillow were solely in a vertical relationship with NAR, MLSs, and their members, the analysis would be unchanged. When boycotters "either directly deny[] or persuad[e] or coerc[e] suppliers or customers to deny relationships the competitors need in the competitive struggle," it is a paradigmatic per se case. *Nw. Stationers*, 472 U.S. at 294; *see also Fashion Originators' Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457, 461-62 (1941).[4]

[3] National Association of Realtors (https://www.nar.realtor/about-nar/history).

[4] This conclusion is buttressed by other cases that impose per se liability upon vertical actors who participate in and facilitate an unlawful horizontal agreement. For example, in *United States v. Apple*, Apple orchestrated an unlawful horizontal conspiracy of publishers. As the district court explained, "[w]here a vertical actor is alleged to have participated in an unlawful horizontal agreement, plaintiffs must demonstrate both that a horizontal conspiracy existed, and that the vertical player was a knowing participant in that agreement and facilitated the scheme." 952 F.

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In any event, the result is the same if the restraint is evaluated under the rule of reason or its ancillary quick look analysis.[5] The segregation rule is inherently suspect because it significantly denigrates listings from brokers who compete with those who control MLSs. Dkt. #15 pp. 26-32 of 59; Dkt. #38 pp. 18-31 of 31. Defendants concede NAR/MLS market power. And they fail to either substantively defend the segregation rule or explain why the rule is necessary to the delivery of IDX feeds. *Federal Trade Commission v. Indiana Federation of Dentists* made clear that "a naked restriction on price or output," as a matter of law, "requires some competitive justification even in the absence of a detailed market analysis." 476 U.S. 447, 460 (1986) (applying rule of reason). Enforcing an indefensible rule to dramatically suppress the visibility of NAR/MLS-competitive listings for over two billion annual website visits is most certainly an output restriction. Thus, the complete lack of procompetitive justification for the segregation rule, laid alongside the easily ascertained anticompetitive effect, justifies its condemnation as "unreasonable and anticompetitive." Dkt. #60 p. 19 of 31 (quoting *Texaco, Inc. v. Dagher*, 541 U.S. 1, 5 (2006)).

3. Zillow's Role Falls Squarely Within The Confines Of Section 1.

Zillow's "pure motive" and "innocent victim" arguments are contrary to the law. "[A]cquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." *United States v. Paramount Pictures*, 334 U.S. 131, 161 (1948). "'Antitrust law has never required identical *motives* among conspirators' when their independent reasons for joining together lead to collusive action." *United States v. Apple, Inc.*, 791 F.3d 290,

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Supp. 2d 638, 690 (S.D.N.Y. 2013). Here, Zillow is a knowing participant in the MLS/NAR cartel and facilitates the scheme by implementing its segregation rule.

[5] "Full rule of reason treatment is unnecessary where the anticompetitive effects are clear even in the absence of a detailed market analysis." *Cal. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1134 (9th Cir. 2011). "Once it is established that the restraint is inherently suspect and the anticompetitive effects are easily ascertained, then the burden shifts [to the defendants] to produce evidence of procompetitive justification or effects and thus demonstrate the need for more extensive market inquiry." *Id.* at 1138 (internal quotation marks omitted); *see also Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 781 (1999) (applying quick look when "a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.").

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317 (2d Cir. 2015) (quoting *Spectators' Commc'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 220 (5th Cir. 2001)); *see also United States v. Gen. Motors Corp.*, 384 U.S. 127, 142 (1966). "Where, as here, [Zillow was a] knowing participant[] in a scheme whose effect was to restrain trade, the fact that [its] motives were different from or even in conflict with those of the other conspirators is immaterial." *Duplan Corp. v. Deering Milliken Inc.*, 594 F.2d 979, 982 (4th Cir. 1979) (replacing named parties with "Zillow").

Zillow misinterprets, and misapplies, *Toscano v. Prof'l Golfers Ass'n*, 258 F.3d 978 (9th Cir. 2001). *Toscano*, quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), states that Section 1 requires "a *conscious commitment to a common scheme* designed to achieve an unlawful objective." *Toscano*, 258 F.3d at 984 (emphasis added). This statement is entirely consistent with the authority quoted above.[6] Zillow prefers that specific anticompetitive intent be read as a required element of an agreement in a Section 1 civil conspiracy. But subsequent Ninth Circuit opinions make it clear that Zillow's interpretation of *Toscano* is erroneous:

> [T]he district court reached this erroneous conclusion by improperly grafting an additional requirement—specific intent to destroy competition—onto the element of [the plaintiff's] prima facie case requiring that the defendants acted in concert. Our antitrust law is clear that [a plaintiff] need not prove intent to control prices or destroy competition to demonstrate the element of an agreement among two or more entities.

Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1153-54 (9th Cir. 2003) (internal quotation marks omitted).

Both *Toscano* and *Monsanto* were concerned with whether the alleged conspiratorial acts were independently undertaken or whether there was a "meeting of the minds." *Monsanto*, 465 U.S. at 764 (internal quotations omitted). In *Monsanto*, the question was whether communications between a manufacturer and distributors concerning product pricing were merely lawful and expected business interactions or were evidence of an agreement. *See id*. at

[6] This statement in *Monsanto* did not silently overrule *General Motors* or *Paramount*, much less do so without the overruling being recognized by later decisions.

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763. In *Toscano*, the court concluded that a PGA tournament's local sponsors merely ceded tournament operations to the PGA in "agree[ing] to purchase a product" and "acted independently of the PGA Tour and of one another." *Toscano*, 258 F.3d at 984.

Zillow's participation, by contrast, is horizontal and far more substantial. Unlike in *Toscano*, Zillow joined co-defendant NAR, its local associations, and hundreds of co-conspirator MLSs. Zillow agreed to abide by all their rules, further their objectives, and even submit itself to compliance audits. Zillow did so knowingly: it considered and participated in industry discussions concerning the segregation rule; and it determined that the mandatory segregation rule did not serve consumer interests; yet Zillow spent almost a year and half changing its website to implement it. Zillow has enforced the rule since January. As such, Zillow became a member of a horizontal conspiracy to enforce NAR's much-adopted model segregation rule, which suppresses competitive internet listings to the plain detriment of consumers and competitors such as REX. In so doing, Zillow became liable under Section 1 for its participation in an anti-competitive rule.[7]

It is no answer that Zillow extended the reach of the segregation rule beyond specific MLS requirements. The genesis of the segregation unquestionably and admittedly lies within the anticompetitive segregation rule brought about by the Section 1 combination. Samuelson Dec. ¶62. Zillow's particular application and then extension of the rule into other geographic locales for its own business reasons increases the harm, but does not lessen the liability.

B. Zillow And NAR Are Co-Conspirators With Non-Defendant MLSs.

NAR and Zillow each argue they are not co-conspirators. NAR says its model segregation rule is "optional" and predates Zillow's joining the organization. Dkt. #64 p. 21 of 31. Defendants also argue that Zillow's decision on how to implement the rule was

[7] Because Zillow admits it agreed to follow the segregation rule promulgated by NAR and adopted by many of its affiliated MLSs, Zillow and NAR are "jointly liable for the acts of their co-conspirators," and it is unnecessary for REX to prove "[p]articipation by each conspirator in every detail in the execution of the conspiracy . . . to establish liability, for each conspirator may be performing different tasks to bring about the desired result." *Beltz v. Travel Serv., Inc. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980).

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"independent" and thereby no conspiracy. Dkt. #60 p. 17 of 31; Dkt. #64 p. 21 of 31. Neither fact alters the analysis.

1. NAR Facilitates An Ongoing Conspiracy.

Professional associations like NAR are "'routinely treated as continuing conspiracies of their members.'" *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 128 F.3d 720, 728 (9th Cir. 1997), *rev'd on other grounds,* 526 U.S. 756 (1999) (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988)). When association members like those in NAR, "independent, profit-seeking [persons] in competition with each other[,] . . . join[] the [association], they effectively agree to abide by [its] Code of Ethics." *Id*. at 729. "This brings association rules having a competitive impact within the reach of §1 of the Sherman Act." Phillip E. Areeda (late) & Herbert Hovenkamp, *Antitrust Law* ¶1477 (4th & 5th Ed. 2013-2020).

In *Realcomp II*, the Sixth Circuit found a Multiple Listing Service to be a "contract, combination, or conspiracy" and that its "website policy constitutes an agreement," because the MLS was owned by several associations of competing real estate brokers and was governed by their members. 635 F.3d at 824-825; *see also, e.g.*, *Denny's Marina v. Renfro Prods*., 8 F.3d 1217, 1221 (7th Cir. 1993) (actions of dealers and trade association to prevent competitor "from participating in the Boat Shows constitutes a horizontal price-fixing conspiracy notwithstanding the apparent lack of an explicit agreement to set prices"); *United States v. Nat'l Ass'n of Broadcasters*, 536 F. Supp. 149, 160-62 (D.D.C. 1982).

2. NAR Is A Co-Conspirator Because It Issued The Segregation Rule.

NAR promulgated the segregation rule as an "optional" policy, and many of its affiliated MLS organizations, also controlled by NAR members, adopted it. In addressing a similar claim that a broadcasting association rule was "voluntary," the D.C. district court said "it is well established that the parties to an agreement which per se violates the antitrust laws may not defend it on the basis that they have applied no coercion to bring about adherence to the combination or to compel obedience to its terms." *Nat'l Ass'n of Broadcasters*, 536 F. Supp. at

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163; *see also United States v. Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485, 488-89 (1950) ("non-mandatory" rule adopted by real estate board was basis for Section 1 liability because even "[s]ubtle influences may be just as effective as the threat or use of formal sanctions to hold people in line.").

Zillow admits that the majority of its local agreements involve MLSs that have adopted the segregation rule. "[T]he very passage of [MLS rules] establishes that the defendants convened and came to an agreement." *Robertson v. Sea Pines Real Estate Cos., Inc.*, 679 F.3d 278, 289 (4th Cir. 2012) (Section 1 may apply to anticompetitive MLS Rules and membership criteria); *see also Moehrl v. Nat'l Ass'n of Realtors*, 492 F.Supp. 3d 768, 778 (N.D. Ill. 2020) ("the purported anticompetitive restraints . . . are a product of written rules issued by the NAR").

NAR has been the sole defendant in two suits brought by the U.S. Department of Justice challenging some NAR rules that limited real estate agents' ability to provide lower-commission services. *See United States v. Nat'l Ass'n of Realtors*, Case No. 1:20-cv-3356 (D.D.C. Nov. 19, 2020); *United States v. Nat'l Ass'n of Realtors*, Case No. 1:05-cv-5140 (N.D. Ill. Nov. 18, 2008). In each, NAR entered a consent decree agreeing to alter its rules.[8] And in *Moehrl*, the court noted "NAR does not contest that Plaintiffs have sufficiently pleaded the conspiracy element with respect to it. Thus, for present purposes, the Court accepts the existence of a conspiracy—at least among the NAR and the non-Defendant coconspirators." 492 F.Supp. 3d at 777. NAR was a proper defendant in those actions, as here, because its members are competitors who jointly set and enforce rules to regulate competition among themselves. *See id*. at 778.

3. Zillow Joined An Ongoing Conspiracy.

NAR argues that it did not conspire with Zillow because some version of the segregation rule predates Zillow's decision to follow it. But "acquiescence in an illegal scheme is as much a

[8] Final Judgment, Case No. 1:05-cv-5140 (N.D. Ill. Nov. 18, 2008) available at https://www.justice.gov/atr/case-document/final-judgment-142. Proposed Final Judgment, Case No. 1:20-cv-3356 (D.D.C. Nov. 19, 2020) available at https://www.justice.gov/atr/case-document/file/1338671/download.

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violation of the Sherman Act as the creation and promotion of one." *Paramount Pictures*, 334 U.S. at 161. "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939) (internal citations omitted).

C. Zillow Must Remedy Its Deceptive Display Under Washington Law.

Zillow and NAR do not contest this Court's authority to grant preliminary injunctive relief under the Washington Consumer Protection Act (WCPA) if it finds a deceptive act with potential impact on the general public.[9] *See* Dkt. #5 pp. 18 of 30; *see also* RCW 19.86.090; *Zango, Inc. v. PC Tools Pty Ltd.*, 494 F. Supp. 2d 1189, 1194 (W.D. Wash. 2007).

Zillow's new display conceals "Other listings" by placing its own listings (and those of fellow MLS members) in the highly-visible, default "Agent" tab, resulting in an inherently deceptive display. REX has shown that many consumers now never see REX's listings—much less the details that Zillow says will clear everything up. Zillow has not refuted this evidence with its own data. REX clients have struggled to find their own listings now concealed on Zillow. And by labeling these listings as "Other," and grouping them with FSBO and foreclosures, competing brokers have been misled into believing that REX's clients are not represented by agents.

1. Zillow's Deceptive Description Is Amplified By Misleading "Pop-Ups."

The "net impression" created by Zillow's new display is that *all* agent listings are in the first tab and that the "Other" group does not contain *any* agent listings. A deceptive net impression cannot be cured by words that a consumer may not see on a secondary web page.

[9] Nor does Zillow contest that this Court is empowered to enjoin conduct extending beyond the geographic boundaries of Washington. *See Thornell v. Seattle Serv. Bureau, Inc.*, 363 P.3d 587, 592 (Wash. 2015) (permitting out-of-state claims under the WCPA so long as the claim has a sufficient Washington nexus).

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See, e.g., *Keithly v. Intelius Inc.*, 764 F. Supp. 2d 1257, 1267 (W.D. Wash. 2011) (disclosure of true price several web-pages deep into internet sales transaction was deceptive); *see also Fed. Trade Comm'n v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006).

Admitting that many consumers might miss the "Other" tab, Zillow states that it developed a "pop-up" calling attention to the "Other listings" tab. Thomas Dec. ¶23. This "pop-up" only appears when Zillow is initially accessed by a "new" consumer. *Id.* Worse, if a user notices the "pop-up" *and* clicks to the FAQ page, the consumer sees more misleading information. In two places, Zillow's FAQs state that "'Other Listings' are for sale by owner, non-MLS auctions, foreclosures and other properties." *Id*. ¶¶24-25. Nothing suggests that "Other listings" include listings by licensed agents who have not submitted to cartel membership.

2. Zillow's "Motives" Do Not Bear On Deceptiveness.

Finally, Zillow argues that its "conduct is motivated by legitimate business concerns." Dkt. #60 p. 26 of 31. But motives are irrelevant to the question of whether a practice is *deceptive* under the WCPA. "[A] claimant need not show intent to deceive or defraud . . . , [but] only that the practice had the *capacity* to deceive a substantial portion of the public." *Robinson v. Avis Rent A Car Sys., Inc.*, 22 P.3d 818, 824 (Wash. App. 2001) (emphasis added); *see also Keithly*, 764 F. Supp. 2d at 1266. The proof that some have actually been deceived in this case is sufficient to show a capacity to deceive. *Keithly*, 764 F. Supp.2d at 1269.

D. REX Has Alleged An Irreparable Injury, And Harm Grows Every Day.

1. Zillow Admits That Consumers Are Ill-Served By The Segregation Rule.

"A lessening of competition constitutes an irreparable injury." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016) (citing *United States v. BNS Inc.*, 858 F.2d 456, 464–66 (9th Cir. 1988)). Federal courts have found that MLS policies which limit the exposure of online listings "reduce[] the competition among brokers and could result in less competition for brokerage fees" thereby "resulting in inefficient sales prices." *Realcomp II*, 635 F.3d at 831 (quoting *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1580 (11th Cir. 1991)).

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Like the anticompetitive policies in *Realcomp II*, NAR's segregation rule lessens competition by concealing discount brokerage listings—which provide lower costs to consumers—and preventing innovators like REX from effectively challenging cartel-member listings and their outdated commission standards. Zillow admits that "a change to the Model IDX Rules permitting Zillow and other data aggregators to combine listings data *would improve the consumer experience* on Zillow's online platforms." Dkt. #60 p. 15 of 31 (emphasis added). This alone establishes ongoing irreparable injury to competition justifying an injunction.

2. REX Presented Additional Concrete Evidence That It Is Losing Goodwill.

REX has provided "concrete evidence" of harm to its business goodwill. *See adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 756 (9th Cir. 2018) (finding that "concrete evidence" of loss of control over business reputation and damage to goodwill can constitute irreparable harm). Once Zillow began segregating REX's listings, REX received an increase in customer complaints. Dkt. #10 ("Van Ham Dec.") ¶11. REX continues to hear from frustrated clients who do not like MLS co-listing because of Zillow's demotion. Dkt. #38 p. 8 of 31 ("Maggio Supp. Dec.") ¶7. And REX continues to lose clients because sellers' property listings are segregated to the second tab and receive decreased visibility. Dkt. #38 p. 23 of 31 ("Van Ham Supp. Dec.") ¶3; Dkt. #12 ("Reina Dec.") ¶7–8; Dkt. #9 ("Maggio Dec.") ¶7.

Co-listing is a band-aid that only increases harm to REX's goodwill. When co-listing, Zillow lists *the MLS agent* as the primary agent. At times, REX is omitted from the listing entirely. Dkt. #38 p. 13 of 31 ("Rosenbaum Supp. Dec.") ¶4; Van Ham Supp. Dec. ¶5. A co-listing agent must redirect a potential buyer to REX, negatively affecting consumer experience. Rosenbaum Supp. Dec. ¶4. By reducing the total listings attributed to REX, co-listing also falsely depreciates REX's sales and listing metrics on Zillow, which "not only misinforms the consumer, but also reduces REX's ability to effectively market itself to new clients." Rosenbaum Supp. Dec. ¶5.

These examples of harm from the segregation rule go well beyond "speculation."

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Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush and Co., Inc., 240 F.3d 832, 841 (9th Cir. 2001), *overruled on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008) ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm."). And such harm is acutely felt by REX as it establishes itself as a legitimate competitor to the NAR/MLS cartels. *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 931 (Fed. Cir. 2012) ("During the growth stage of a product, it is particularly crucial to be able to distinguish oneself from competitors. This includes building the brand, expanding the customer base, and establishing one's reputation and leadership in the market.").

3. Co-Listing Requires REX To Become An Ad-Hoc Member Of The MLS.

When REX co-lists, its clients must offer a buyer's agent commission up front just like all cartel members—interfering with a main feature of REX's competitive model.[10] Dkt. #7 ("Barret Dec.") ¶10. The answer to Zillow's segregation—which has no consumer benefit—is not to force REX into de facto cartel membership. As the Sixth Circuit found in the face of an MLS segregating certain listings, the "policy in fact limited access to internet marketing and imposed financial and administrative costs on brokers seeking to dual-list with other MLSs." *Realcomp II*, 635 F.3d at 831. The evidence there supported the district court's finding that segregating certain listings "adversely affected competition." *Id.* So too here.

4. REX Was Not Obligated To Seek Relief While Harm Was Still Speculative.

The undisputed timeline proves that REX did not sleep on its rights. Zillow unveiled its final redesigned display on January 12, 2021. Dkt. #60 p. 15 of 31. REX sued 56 days later and sought a preliminary injunction that same day. This short delay was entirely justifiable.

A "[s]peculative injury does not constitute irreparable injury sufficient to warrant

[10] NAR repeats an assertion in this case that it made in *Moehrl*—that a broker like REX could offer a very small commission to avoid the consequence of NAR's rules. Dkt. #64 p. 25 of 31. The district court rejected NAR's argument, saying, "[c]ommon sense suggests that a buyer-broker is highly unlikely to show their client a home when the seller is offering a penny in commission" and that "[t]aken together, the NAR's rules allow for the hypothetical possibility of negotiation but it is difficult to imagine how such negotiation could occur." *Moehrl*, 492 F. Supp.3d at 784-85.

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granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Boardman*, 822 F.3d at 1022 (quoting *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir.1988)).

Zillow considered numerous different displays such as using "tabs, radio buttons, filters, or other visual means" as well as various nuances of those features. Thomas Dec. ¶6; Dkt. #60 p. 13 of 31. REX did not, and could not, know how the final design would appear until Zillow finally unveiled it. Even as late as December 2020, Zillow continued to communicate to REX that the details of the display change were not finalized. In a December 21, 2020 email exchange, a REX employee wrote Zillow that he wanted "to understand what the second tab would look like for the Non-MLS sourced listings." Barrett Dec., Ex. A. Zillow's December 23, 2020 response did not clarify any details, but offered to discuss it in early January after the holidays. *Id*. All this time, REX did not know whether its listings would be in the default tab or banished to a separate tab that few consumers would even know to click.

Once Zillow implemented its new, segregated display, REX began assessing its impact on its business and observed tangible harm. REX received testimonials from its employees about clients becoming frustrated and cancelling listings because of a lack of visibility. Reina Dec. ¶8. REX also assessed data metrics which showed a dramatic decline in views of REX's listings. *See*, *e.g.*, Maggio Dec. ¶8. As soon as REX assessed and gathered evidence of irreparable harm, it sought relief from the Court.

This is different from the intellectual property cases that Zillow cites, in which the harm from an infringement seems to decrease the longer the plaintiff waits. *See Garcia v. Google, Inc.*, 786 F.3d 733, 738 (9th Cir. 2015). In *Gilder v. PGA Tour, Inc.*, the Ninth Circuit did not disturb a holding that plaintiffs acted "with reasonable diligence" in asking for a preliminary injunction *more than six months* after a potentially anticompetitive rule took effect. 936 F.2d 417, 423 (9th Cir. 1991). There, the court found no delay when those plaintiffs waited four

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months to request a meeting with the defendants and took "a couple months to review the data" provided by the defendants before seeking a preliminary injunction. *Id.* Here, REX took fewer than two months to collect and analyze the data generated by Zillow's segregation of its listings.

E. REX Seeks A Prohibitory Injunction.

REX's relief is tailored to preserve the status quo before Zillow's January 2021 change to its website—its last uncontested status. REX seeks an injunction prohibiting Zillow from mislabeling and segregating REX's listings from MLS-agent listings, including a prohibition against enforcement of the offending cartel rules and contractual provisions.

Zillow's argument that REX seeks a mandatory injunction misconceives both the relief REX requests and the law of injunctions. A prohibitory injunction bars a party from taking action and "preserve[s] the *status quo* pending a determination of the action on the merits." *Chalk v. U.S. Dist. Court*, 840 F.2d 701, 704 (9th Cir. 1988). In contrast, a mandatory injunction "orders a responsible party to 'take action.'" *Garcia*, 786 F.3d at 740 (quoting *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009)). The applicable status quo referenced in *Chalk* refers not simply to the last pre-lawsuit circumstance, but instead to "the last, *uncontested status* which preceded the pending controversy." *Regents of the Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 514 (9th Cir. 1984) (emphasis added) (internal quotation marks omitted). Zillow essentially asserts that once it launched a segregated site, a prohibitory injunction became unavailable. Rejected by the Ninth Circuit, such a standard would "lead to absurd situations, in which plaintiffs could never bring suit once infringing conduct had begun." *Goto.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000), *overruled on other grounds by Winter*, 555 U.S. 7. Here, REX contests the implementation of the deceptive two-tab display. The unified display was the last uncontested status.

The cases cited by Defendants arguing that the heightened mandatory injunction standard should apply involve substantially different relief. For example, in *Garcia*, the plaintiff sought an injunction requiring Google to continually remove a video from its websites "whenever and

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by whomever the film was uploaded." 786 F.3d at 740. Similarly, in *Marlyn Nutraceuticals*, the Ninth Circuit addressed an injunction which not only (1) enjoined a company from manufacturing and distributing a certain product, but also (2) required the company to undertake a recall for its already-distributed products. 571 F.3d at 878-79 (holding that requiring a recall invoked mandatory action). Here, Zillow controls its website content and maintains possession over the listing data it receives. Zillow merely needs to stop its new filtering of REX's listings out of the default "Agent" display and into the misleading "Other listings" tab.

F. The Balance Of Harms And Public Interest Favor A Preliminary Injunction.

This is the exceptionally rare case where no Defendant alleges a benefit from the practice plaintiff seeks to enjoin: the segregation and exclusion of REX's listings from Zillow's primary "Agent listings" search results. Because "Defendants . . . have not established how maintaining the status quo while the district court decides the case on the merits will injure them," *Boardman*, 822 F.3d at 1023, the balance of harm supports granting the preliminary injunction motion.

While opposing the form of relief, Zillow welcomes the result, saying "it believes a change to the Model IDX Rules permitting Zillow and other data aggregators to combine listings data would improve the consumer experience on Zillow's online platforms." Dkt. #60 p. 15 of 31; *see also* Samuelson Dec. ¶¶64 & 72. The preliminary injunction REX seeks would minimize harm to REX during the pendency of this lawsuit and *improve* Zillow's website.

Zillow expresses concern that if this Court prohibits Zillow from segregating REX's listings from the default "Agent" tab, Zillow might be subject to "administrative proceedings" for breach of its contracts and could lose access to data feeds from many MLSs. Samuelson Dec. ¶74. First, "no court will lend its assistance in any way towards carrying out the terms of an illegal contract." *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899). Because NAR's segregation rule violates antitrust laws, enforcing that contract clause would command unlawful conduct. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 79 (1982). But no other aspect of Zillow's contractual obligations to these MLSs would be disturbed. *See, e.g.*, *id.* at 82, n 7.

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Second, general principles of contract law confirm that Zillow's compliance is excused as not only illegal, but also impracticable. 30 Williston on Contracts §77:53 (4th ed.). An injunction that prohibits a party from taking certain action excuses the party from performance even when the injunction indirectly affects a third party. *Id*. §77:61. As a result, Zillow's failure to segregate listings in order to comply with both antitrust law and a court order, would not place it in breach of its contracts with those MLS's that required this clause.[11] Finally, in entering consent decrees containing injunctive relief with the United States, NAR has twice represented that it has the power to bind its affiliated MLS organizations.[12] A preliminary injunction that includes relief against NAR will shield Zillow from administrative or other enforcement actions by NAR-affiliated associations.

REX brings a competitive model to disrupt the high-commission structure protected by the NAR/MLS regime.[13] The Sixth Circuit's observations in striking down a similar attempt to hobble discounted brokerage services are instructive:

> Restricting the online dissemination of home listings is especially pernicious because of the emerging competitive impact of the internet and of discounted brokerage services on the residential real-estate market. . . . Substantial evidence shows . . . that 'the exclusion of nascent threats' such as discount brokerage services and consumer access to online listings 'is reasonably capable of contributing significantly' to anticompetitive effects.

[11] If Zillow refuses to accept any administrative sanction or discipline, the circumstances and proposed discipline would be appealed to the board of directors to the association of Realtors®, which is affiliated with NAR. *See* https://cdn.nar.realtor/sites/default/files/documents/2021_NAR_HMLP_210112.pdf.

[12] *See* Final Judgment, *United States v. Nat'l Ass'n of Realtors*, Case. No. 1:05-C-5140 (Nov. 11, 2008 N.D. Ill): "Covered Entity" means each Member Board that . . . operates a multiple listing service and each multiple listing service that . . . is exclusively owned by one or more Member Boards . . . ."

[13] Just last year, NAR again entered a consent decree to settle a lawsuit brought by DOJ alleging that its rules prevented competition from brokers offering discounts. *See* Competitive Impact Statement, *United States v. Nat'l Ass'n of Realtors*, Case. No. 1:20-cv-03356-TJK (D.D.C. Dec. 10, 2020) (available at https://www.justice.gov/atr/case-document/file/1344346/download) (some rules were "anticompetitive because they . . . help[] buyer brokers conceal from potential home buyers any property listings offering lower buyer broker commissions").

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Realcomp II, 635 F.3d at 830. The preliminary injunction requested in this case will further the effort to protect the public's great interest in competition from new business models like REX's that promise to lower the costs of buying and selling a home.

III. CONCLUSION

For the reasons set forth here, and in its Motion, Dkt. #5, REX asks this Court to issue an injunction prohibiting Zillow from (1) continuing to categorize, characterize, or display REX listings in any manner other than as agent listings on Zillow's websites; (2) continuing to segregate Rex's listings from MLS listings on Zillow's websites; and (3) enforcing, honoring, or implementing any agreement or contractual provision that requires Zillow to segregate Rex's listings from MLS listings on Zillow's websites.

RESPECTFULLY SUBMITTED this 10th day of May, 2021.

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CERTIFICATE OF SERVICE

I certify that on May 10, 2021, I electronically filed the foregoing document with the Clerk of the Court via CM/ECF which will notify all parties in this matter who are registered with the Court's CM/ECF filing system of such filing. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 10th day of May, 2021.

s/Jan Howell
Jan Howell

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