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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

REX - REAL ESTATE EXCHANGE,  
INC.,

Plaintiff,

v.

ZILLOW, INC.; ZILLOW GROUP,  
INC.; ZILLOW HOMES, INC.;  
ZILLOW LISTING SERVICES,  
INC.; TRULIA, LLC; and THE  
NATIONAL ASSOCIATION OF  
REALTORS,

Defendants.

C21-312 TSZ

ORDER

THIS MATTER comes before the Court on a motion to dismiss, docket no. 101, Plaintiff's amended complaint filed by defendant the National Association of REALTORS® ("NAR"). Having reviewed all papers filed in support of, and in opposition to, the motion, the Court enters the following Order.

## 1 Background

2 On September 2, 2021, the Court entered an Order,<sup>1</sup> docket no. 98, denying in part  
3 and granting in part NAR’s motion under Federal Rule of Civil Procedure 12(b)(6) to  
4 dismiss Plaintiff’s claims, docket no. 84. The Court denied NAR’s motion as to  
5 Plaintiff’s antitrust claims brought under Section 1 of the Sherman Act, 15 U.S.C. § 1,  
6 and the Washington Consumer Protection Act (“CPA”), RCW 19.86.030. The Court  
7 granted NAR’s motion as to Plaintiff’s claims for false advertising or deceptive acts  
8 under the Lanham Act, 15 U.S.C. § 1125, and the CPA, RCW 19.86.020, and dismissed  
9 the claims without prejudice and with leave to amend.<sup>2</sup>

10 On September 30, 2021, Plaintiff filed an amended complaint, docket no. 99. In  
11 its amended complaint, Plaintiff maintains its claims against NAR for alleged violations  
12 of Section 1 of the Sherman Act and the CPA, RCW 19.86.030 (Counts I & VI), and  
13 Section 1125 of the Lanham Act and the CPA, RCW 19.86.020 (Counts III & V).  
14 Am. Compl. at ¶¶ 131–41, 153–62, 179–88 & 189–201 (docket no. 99). Plaintiff also  
15 brings a new claim against NAR, alleging defamation in violation of Washington law  
16 (Count VII). *Id.* at ¶¶ 202–216. Plaintiff relies on an agency theory to establish NAR’s  
17 liability, and alleges that Zillow acted as NAR’s agent when Zillow designed its website  
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20 <sup>1</sup> The relevant background of this action is set forth in the Court’s Order, docket no. 98.

21 <sup>2</sup> The Court concluded that Plaintiff failed to state a Lanham Act or CPA claim against NAR for false  
22 advertising or deceptive acts because Plaintiff’s initial complaint relied on conclusory allegations that did  
not plausibly allege that NAR had any involvement in designing or encouraging Zillow’s allegedly  
misleading website displays.

1 displays. *Id.* at ¶¶ 156, 184 & 207. NAR requests that the Court dismiss all of Plaintiff’s  
2 claims.

### 3 **Discussion**

#### 4 **1. Article III Standing**

5 The Court previously concluded that Plaintiff has standing to bring its claims  
6 against NAR. Order at 7–8 (docket no. 98). NAR takes a second bite at the apple, and  
7 argues that Plaintiff’s amended complaint confirms that NAR’s actions did not cause  
8 Plaintiff’s alleged injuries. NAR argues that it did not cause Plaintiff’s injuries because  
9 Plaintiff alleges that some, but not all, NAR-affiliated multiple listing services (“MLSs”)  
10 reviewed, approved of, or required Zillow to implement its new displays. *See Am.*  
11 *Compl.* at ¶¶ 83–85. Because Plaintiff’s amended complaint suggests that some NAR-  
12 affiliated MLSs did not require Zillow to change its websites, NAR contends that its rules  
13 cannot have caused Plaintiff’s injuries. As before, NAR ignores Plaintiff’s allegations  
14 that NAR is a direct participant in the challenged conduct. Plaintiff challenges the “rules  
15 written by NAR and enforced by its member MLSs.” *Id.* at ¶ 7. Plaintiff’s amended  
16 complaint continues to allege that Zillow changed its websites as “a result of [Zillow]  
17 joining the MLS.” *Id.* at ¶ 105. Plaintiff also alleges that a Zillow representative stated  
18 that, “[i]n general these changes are for us to comply with MLS rules.” *Id.* The Court  
19 concludes that Plaintiff’s alleged injuries are fairly traceable to NAR’s conduct. The  
20 amended complaint plausibly alleges that Zillow changed its websites because of NAR’s  
21 rules.

## 2. Rule 12(b)(6) Standard

Although a complaint challenged by a Rule 12(b)(6) motion to dismiss need not provide detailed factual allegations, it must offer “more than labels and conclusions” and contain more than a “formulaic recitation of the elements of a cause of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint must indicate more than mere speculation of a right to relief. *Id.* When a complaint fails to adequately state a claim, such deficiency should be “exposed at the point of minimum expenditure of time and money by the parties and the court.” *Id.* at 558. A complaint may be lacking for one of two reasons: (i) absence of a cognizable legal theory, or (ii) insufficient facts under a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). In ruling on a motion to dismiss, the Court must assume the truth of the plaintiff’s allegations and draw all reasonable inferences in the plaintiff’s favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). The question for the Court is whether the facts in the complaint sufficiently state a “plausible” ground for relief. *Twombly*, 550 U.S. at 570. If the Court considers matters outside the complaint, it must convert the motion into one for summary judgment. Fed. R. Civ. P. 12(d). If the Court dismisses the complaint or portions thereof, it must consider whether to grant leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

## 3. Antitrust Violations

NAR moves to dismiss Plaintiff’s antitrust claims. The Court previously denied NAR’s motion to dismiss Plaintiff’s antitrust claims under Section 1 of the Sherman Act and the CPA, RCW 19.86.030. In its amended complaint, Plaintiff does not substantively

1 amend its antitrust claims against NAR. *Compare* Compl. (docket no. 1) with Am.  
2 Compl. (docket no. 99). NAR argues that Plaintiff’s “new factual allegations,”  
3 concerning the conduct of “some” NAR-affiliated MLSs defeats Plaintiff’s antitrust  
4 standing. However, Plaintiff’s allegation that only some NAR-affiliated MLSs engaged  
5 in the anticompetitive application of NAR’s rules is not new. *See* Compl. at ¶ 161; Am.  
6 Compl. at ¶ 198. Despite NAR’s contention, the amended complaint does not contain  
7 new allegations that support dismissing Plaintiff’s antitrust claims.

8 Accordingly, the Court DENIES NAR’s motion to dismiss, docket no. 101, the  
9 antitrust claims brought under Section 1 of the Sherman Act and the CPA,  
10 RCW 19.86.030 (Counts I & VI).

#### 11 **4. False Advertising or Other Deceptive Acts**

12 The Court previously dismissed Plaintiff’s claims for false advertising or  
13 deceptive acts brought under the Lanham Act and the CPA, RCW 19.86.020. The Court  
14 concluded that Plaintiff’s initial complaint, docket no. 1, did not contain allegations  
15 explaining what NAR did to design or encourage the labeling system on Zillow’s  
16 websites, let alone when, where, and how NAR did it. These allegations remain absent  
17 from Plaintiff’s amended complaint. To cure the identified deficiencies, Plaintiff now  
18 embraces an agency theory, claiming that Zillow acted as NAR’s agent when changing its  
19 websites. Am. Compl. at ¶¶ 156 & 184.

20 “In Washington, ‘[t]he two elements of an agency are mutual consent, and control  
21 by the principal of the agent.’” *Env’t Transp. of Nev., LLC v. Mod. Mach. Co.*, No. C18-  
22 5445, 2020 WL 1847747, at \*4 (W.D. Wash. Apr. 13, 2020) (citing *Uni-Com Nw., Ltd. v.*

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