

The Honorable Thomas S. Zilly

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REX - REAL ESTATE EXCHANGE, INC.,

Plaintiff,

v.

ZILLOW, INC., et al.,

Defendants.

Case No. 2:21-CV-00312-TSZ

**ZILLOW DEFENDANTS’
OPPOSITION TO PLAINTIFF’S
MOTION TO COMPEL ZILLOW TO
PRODUCE DOCUMENTS**

NOTE ON MOTION CALENDAR:
October 14, 2022

ZILLOW DEFENDANTS’ OPPOSITION TO

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Table of Contents

- I. FACTUAL BACKGROUND 2
- II. ARGUMENT 3
 - A. REX’s Complaint Excludes FSBO Homes from the Relevant Market for Brokerage Services, Rendering FSBO Data Irrelevant to the Issue of Harm to Competition..... 3
 - B. FSBO Data Is Not Necessary for REX to Prove Its Own Harm. 8
 - C. Producing FSBO Data is Not Proportional to the Case. 8
- III. CONCLUSION 11

ZILLOW DEFENDANTS’ OPPOSITION TO



TABLE OF AUTHORITIES**Page(s)****Cases**

| | | |
|----|--|------------|
| 1 | | |
| 2 | | |
| 3 | Cases | |
| 4 | <i>Anderson v. Aset Corp.</i> , | |
| 5 | 329 F. Supp. 2d 380 (W.D.N.Y. 2004) | 6 |
| 6 | <i>Avila v. Bank of Am.</i> , | |
| 7 | No. 17-cv-00222-HSG, 2017 WL 4168534 (N.D. Cal. Sep. 20, 2017) | 6 |
| 8 | <i>In re B & J Inc.</i> , | |
| 9 | No. 6:19-CV-01440, 2021 WL 5622118 (W.D. La. Nov. 30, 2021) | 7 |
| 10 | <i>Bolding v. Banner Bank</i> , | |
| 11 | No. C17-0601RSL, 2020 WL 3605593 (W.D. Wash. July 2, 2020) | 3 |
| 12 | <i>CollegeNET, Inc. v. Common Application, Inc.</i> , | |
| 13 | 711 Fed. Appx. 405 (9th Cir. 2017) | 7 |
| 14 | <i>In re eBay Seller Antitrust Litig.</i> , | |
| 15 | No. C09-0735RAJ, 2009 WL 10677051 (W.D. Wash. Aug. 17, 2009) | 4 |
| 16 | <i>FTC v. Qualcomm Inc.</i> , | |
| 17 | 969 F.3d 974 (9th Cir. 2020)..... | 3, 4, 7, 8 |
| 18 | <i>Gilmour v. Gates, McDonald & Co.</i> , | |
| 19 | 382 F.3d 1312 (11th Cir. 2004)..... | 6 |
| 20 | <i>Hall v. Marriott Int'l, Inc.</i> , | |
| 21 | No. 3:19-cv-01715-JLS-AHG, 2021 WL 1906464 (S.D. Cal. May 12, 2021)..... | 7 |
| 22 | <i>Ivy Hotel San Diego, LLC v. Houston Cas. Co.</i> , | |
| 23 | No. 10cv2183-L (BGS), 2011 WL 13240367 (S.D. Cal. Oct. 20, 2011)..... | 7 |
| 24 | <i>New Park Entm't LLC v. Elec. Factory Concerts, Inc.</i> , | |
| 25 | No. Civ.A. 98-775, 2000 WL 62315 (E.D. Pa. Jan. 13, 2000)..... | 4, 8, 9 |
| 26 | <i>Oahu Gas Serv., Inc. v. Pac. Res., Inc.</i> , | |
| 27 | 838 F.2d 360 (9th Cir. 1988)..... | 7 |
| 28 | <i>Philips N. Am., LLC v. Summit Imaging Inc.</i> , | |
| | No. C19-1745JLR, 2020 WL 1515624 (W.D. Wash. Mar. 30, 2020) | 6 |
| | <i>Radio Music License Comm., Inc. v. Glob. Music Rights, LLC</i> , | |
| | No. CV 19-3957 TJH (ASx), 2020 WL 7636281 (C.D. Cal. Jan. 2, 2020) | 4, 8 |
| | <i>Strickland Real Estate Holdings, LLC v. Texaco, Inc.</i> , | |
| | No. C16-0653-JCC, 2016 WL 7243711 (W.D. Wash. Dec. 15, 2016)..... | 9 |
| | <i>T-Mobile USA, Inc. v. Huawei Device USA, Inc.</i> , | |
| | No. C14-013151 RAJ, 2016 WL 1597102 (W.D. Wash. Apr. 20, 2016)..... | 3 |

ZILLOW DEFENDANTS' OPPOSITION TO

1 *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*,
676 F.2d 1291 (9th Cir. 1982).....7

2
3 *Vident v. Dentsply Int’l, Inc.*,
No. SA CV 06-1141 PSG (ANx), 2008 WL 4384124
4 (C.D. Cal. Aug. 29, 2008)4

5 **Statutes**

6 15 U.S.C. § 158

7 **Other Authorities**

8 Fed. R. Civ. P. 26(b).....3, 8, 9

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ZILLOW DEFENDANTS’ OPPOSITION TO

1 REX's numerous discovery requests for listings-related data are massively overbroad
2 and immensely burdensome. Nonetheless, after extensive meeting and conferring regarding
3 those requests, Zillow agreed that it would produce data regarding MLS and REX property
4 listings in hundreds of Metropolitan Statistical Areas ("MSAs"), from 2017 to present, as well
5 as data regarding visitor views related to those listings. That comprises millions of records. And
6 from those records, REX can assess consumer viewings of its listings, as well as multiple
7 millions of MLS listings, both before Zillow's change to the two-tab display, and after. REX
8 does not object to Zillow's production of those records. Instead, it wants more; this time, REX
9 seeks data relating to for-sale-by-owner ("FSBO") listings on Zillow's websites.

10 REX claims that it is entitled to all of the listings and engagement data for FSBO homes
11 in all the same geographies for which Zillow has produced REX and MLS data. Yet, FSBO data
12 is clearly irrelevant to REX's affirmative claims because the antitrust market REX defined in its
13 Complaint is limited to "brokered" transactions which, by definition, exclude FSBO sales. And
14 REX does not need FSBO data to show harm to REX, a point that REX admits in its Motion.
15 Instead, REX wants these additional data records because they *may* show "an analogous" decline
16 in the number of views of FSBO listings. *See* Mot. to Compel at 4, ECF No. 162. That, however,
17 is far from the relevancy showing required for production, particularly given the significant
18 burden it would impose on Zillow. Accordingly, REX's Motion should be denied.

19 **First**, FSBOs are outside the relevant market REX defined for purposes of its antitrust
20 claim, and thus any impact on FSBOs is irrelevant to assessing harm to competition in this
21 litigation. In its Complaint, REX defined a market for "brokerage services" that on its face
22 *excludes* FSBOs. There are no allegations in the Complaint that FSBOs compete with REX or
23 other participants in REX's alleged market for brokerage services. Because harm to competition
24 must occur in the same relevant market as the alleged anticompetitive conduct, and because
25 REX has alleged a market that excludes FSBOs, FSBO data is irrelevant.

26 **Second**, data regarding FSBO listings is not needed to show alleged harm to REX. REX
27 alleges that Zillow's two-tab display has impacted **REX's** listings. Zillow has agreed to
28

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.