

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

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 the motion to dismiss filed by Defendants Zillow Inc., Zillow Group Inc., Zillow Homes Inc., Zillow Listing Services Inc., and Trulia LLC (“Zillow”), docket no. 83, and the motion to dismiss filed by the National Association of REALTORS® (“NAR”), docket no. 84. Having reviewed all papers filed in support of, and in opposition to, the motions, the Court enters the following Order.

Background

NAR is the nation’s largest trade association for real estate professionals, consisting of multiple listings services (“MLSs”), more than a thousand local

1 associations, and around 1.45 million real estate agents. Compl. at ¶ 24 (docket no. 1).
2 NAR promulgates rules governing how its members operate their businesses, which have
3 allegedly become ubiquitous within the marketplace. *Id.* at ¶ 29. For example, NAR has
4 adopted an optional rule, known as the Segregation Rule,¹ which requires members’
5 listings that are obtained through MLSs’ internet data exchange (“IDX”) feeds to be
6 “displayed separately from listings obtained from other sources.” *Id.* at ¶¶ 83 & 85.
7 NAR has also adopted a mandatory rule, known as the Buyer Agent Commission Rule,
8 which requires a seller’s agent to include in any MLS listing a predetermined offer of
9 commission to a buyer’s agent, thereby prohibiting any party from later modifying that
10 commission. *Id.* at ¶¶ 31 & 33. NAR’s members allegedly encourage their customers to
11 offer high commissions for buyers’ agents, resulting in historically high, static
12 commissions throughout the United States, with total commissions averaging about 5.5
13 percent of a home’s sale price. *See id.* at ¶¶ 34 & 42.

14 Established in 2015, Plaintiff REX – Real Estate Exchange Inc. is a licensed
15 broker that employs licensed real estate agents across the nation, including in
16 Washington. Compl. at ¶¶ 40, 44, & 47. Plaintiff is not a member of NAR or any MLS
17 and thus has not agreed to comply with any of NAR’s rules. *Id.* at ¶ 35. Home sellers
18 who choose Plaintiff’s services are able to avoid paying a predetermined buyer agent
19 commission and can instead negotiate that fee—as a result, Plaintiff’s clients pay a total
20 average commission of 3.3 percent of a home’s sale price. *Id.* at ¶ 42.

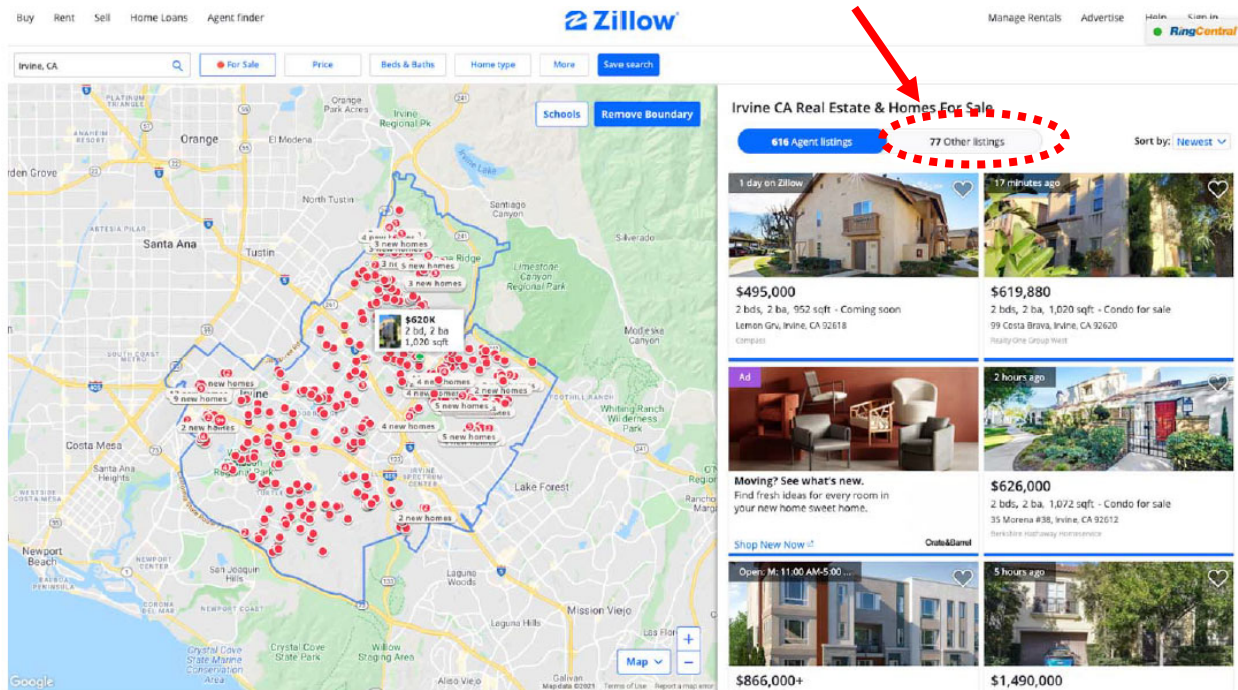
22 ¹ The complaint refers to the “segregation rule” or “IDX segregation rule,” e.g., Compl. at ¶¶ 85 & 93, but
the parties and the Court’s prior order (docket no. 80) have also referred to this rule as the No-

1 Plaintiff has developed proprietary digital technology to market its customers'
2 homes, allegedly saving customers more than \$29 million in commissions over the past
3 five years. Compl. at ¶¶ 40–43. Plaintiff lists its customers' homes on various real estate
4 aggregator websites, including two of Zillow's websites, Zillow.com and Trulia.com,
5 which are the first and fourth most visited real estate aggregator sites in the United States.
6 *Id.* at ¶ 54. Zillow's websites are alleged to be a "dominant doorway into the residential
7 real estate market." *Id.* Plaintiff's listings were historically displayed on Zillow's
8 primary search page alongside the listings of MLS participants. *Id.* at ¶ 63.

9 In 2018, Zillow launched its "Zillow Offers" business, allowing Zillow to
10 "transact[] thousands of homes annually" as an "ibuyer" of homes. Compl. at ¶ 58.
11 Based on Plaintiff's information and belief, "the growth and substantial inventory of
12 Zillow-owned homes placed Zillow in a new position: Instead of focusing on being an
13 open access point for consumers to display and access residential real estate listings,
14 Zillow's interests turned to its own substantial home inventory." *Id.* In late 2020, Zillow
15 announced that it would join forces with NAR and several MLSs, publicly committing
16 that "all Zillow-owned homes will be listed on the MLSs with commissions paid to
17 agents representing buyers." *Id.* at ¶ 59. Plaintiff alleges that NAR's Buyer Agent
18 Commission Rule, which is "now adopted by Zillow, is the paramount reason that real
19 estate commissions are two to three times higher in the United States than in comparable
20 international markets." *Id.* Zillow also announced that it would begin to use MLS data
21 feeds to populate its websites. *Id.* at ¶ 60.

22 In January 2021, Zillow unveiled its newly designed website display to be
implemented nationwide on its websites to comply with the NAR and MLS "guidelines"

1 or “rules.” Compl. at ¶¶ 64 & 70–71. The new display created a separate page or tab,
 2 called “Other listings,” that is concealed behind the primary results page or tab, called
 3 “Agent listings,” as depicted below:



13 *Id.* at ¶ 64. As a result of this new display, consumers see only a portion of the homes at
 14 one time, based on whether they are viewing the primary “Agents listings” tab or the
 15 secondary “Other listings” tab; and they must now move back and forth between these
 16 two tabs. *Id.* at ¶ 66. Although Plaintiff’s customers’ homes are all listed by licensed
 17 real estate agents, its listings are now being displayed in the “Other listings” category to
 18 comply with NAR and MLS rules, rather than in the “Agent listings” category. *Id.* at
 19 ¶¶ 67–68 & 71. Zillow allegedly knows that Plaintiff is a licensed broker with licensed
 20 agents, as Plaintiff pays Zillow to be a part of Zillow’s Premier Agent Program. *Id.* at
 21 ¶ 69. Plaintiff alleges that this new display and labeling system “is not only inaccurate
 22 and nonsensical, it is misleading and deceptive,” as it “degrades non-MLS listings” by

1 After Zillow redesigned its websites, views of Plaintiff's listings "plummeted" on
 2 Zillow's websites, causing "a corresponding drop in sales and . . . lost brokerage service
 3 revenues to" Plaintiff. Compl. at ¶¶ 73–74 & 88. For example, views of one of
 4 Plaintiff's listings on Zillow.com dropped dramatically after January 2021, when Zillow
 5 added the "Other listings" tab to the website, as depicted below:



16 *Id.* at ¶ 74. Zillow's and NAR's actions are also allegedly harming other non-MLS
 17 agents, *see id.* at ¶ 71, as well as the sellers of the homes that are listed on Zillow's
 18 "Other listings" tab, "causing them to list the home for more days on market and accept
 19 lower sales prices." *Id.* at ¶ 73.

20 In March 2021, Plaintiff brought this action against Zillow and NAR, asserting
 21 four claims: (1) an unreasonable restraint of trade in violation of Section 1 of the
 22 Sherman Act, 15 U.S.C. § 1; (2) false advertising in violation of the Lanham Act, 15

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.