

THE HONORABLE THOMAS S. ZILLY

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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; TRULIA, LLC, a Delaware  
limited liability company; and THE  
NATIONAL ASSOCIATION OF  
REALTORS, an Illinois trade association,

Defendants.

CASE NO. 2:21-cv-00312-TSZ

**PLAINTIFF’S RESPONSE TO U.S.  
DEPARTMENT OF JUSTICE’S  
STATEMENT OF INTEREST**

In its response to the United States Department of Justice’s Statement of Interest, NAR asks this court to infer that the segregation rule REX challenges is “competition neutral (and legal),” Dkt. 96 at 3 of 6, because it says “the rule was required by a consent decree the United States approved and told a federal court was ‘in the public interest,’” *id.* at 2 of 6.<sup>1</sup> NAR makes

<sup>1</sup> NAR did not make this assertion in its opening motion to dismiss brief, but wrote in its reply:

Faced with the devastating fact that the rule it has challenged was required by the Department of Justice and a court in a filed Consent Decree, REX incorrectly states that “the 2008 Consent Decree concluding a case between NAR and the Department of

1 this assertion the centerpiece of its motion to dismiss, saying the 2008 Consent Decree “required  
 2 NAR to adopt the rule at issue here,” Dkt. 96 at 2 of 6, “the United States approved the consent  
 3 decree that required the policy at issue,” *id.*, and the United States “expressly approved of and  
 4 required NAR to adopt the rule at issue,” *id.* at 4 of 6.

5 There is no support for NAR’s argument, either within the “four corners” of the consent  
 6 decree or the context in which it was entered,<sup>2</sup> or anywhere else. DOJ accurately characterizes  
 7 the 2008 Consent Decree, saying it “did *not* permit—much less ‘approve’—NAR to use the  
 8 consent decree to shield from future investigation or challenge ‘any Rule or practice adopted or  
 9 enforced by NAR or any of its Member Boards,’” including the segregation (or co-mingling) rule  
 10 challenged here. Dkt. 95 at 6 (quoting Dkt. 85-4 at 11).

11 The 2008 Consent Decree addressed NAR’s Virtual Office Website (VOW) rules. This  
 12 lawsuit challenges a NAR Internet Data Exchange (IDX) rule.<sup>3</sup> The “IDX Policy was NOT the  
 13 subject of” the lawsuit that resulted in the 2008 Consent Decree, and DOJ took “no position as to  
 14 the permissibility under the antitrust laws of NAR’s IDX Policy.” Dkt. 96-5 at 39 of 42.<sup>4</sup> NAR

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15 Justice in no way ‘approved’ the segregation rule as the DOJ itself recently made clear.”  
 16 Opp. 7 n.1. That is simply wrong. *Not only was the 2008 Consent Decree approved by*  
 17 *the Department of Justice and the presiding court, the decree required NAR to adopt the*  
*rule at issue here.*

18 Dkt. 93 at 11 of 14 (emphasis added).

19 <sup>2</sup> A “consent decree . . . is to be construed for enforcement purposes basically as a contract.”  
 20 including by using “aids to construction” like “circumstances surrounding the formation of the  
 21 consent order, any technical meaning words used may have had to the parties, and any other  
 22 documents expressly incorporated in the decree.” *United States v. ITT Continental Baking Co.*  
 420 U.S. 223, 238 (1975).

22 <sup>3</sup> *See, e.g.,* Dkt. 1 at ¶¶83–90 (discussing NAR’s IDX rules and Zillow’s implementation of  
 23 them).

24 <sup>4</sup> In its Response to Public Comment to the 2008 Consent Decree that NAR provided to the  
 25 Court, DOJ said “‘the IDX Policy was NOT the subject of the DOJ’s pre-complaint  
 26 investigation, complaint, amended complaint or discovery’ . . . The United States takes no  
 position as to the permissibility under the antitrust laws of NAR’s IDX Policy; paragraph three  
 of the preamble to the proposed Final Judgment reflects that this case involved only VOWs and  
 not the IDX websites about which [one commentator] is concerned.” Dkt. 96-5 at 39 of 42.

1 thus asks the Court to infer facts favorable to its motion to dismiss from a judicial document that  
2 has no bearing on this case—something it cannot do. *Cf. Lee v. City of Los Angeles*, 250 F.3d  
3 688, 690 (9th Cir. 2001) (on a “motion to dismiss, when a court takes judicial notice of another  
4 court’s opinion, it may do so ‘not for the truth of the facts recited therein . . .’”).

5 NAR acknowledges that the “Consent Decree . . . required NAR to adopt a *Modified*  
6 *Virtual Office Website policy* that included a rule” providing an MLS may require the separate  
7 searching of listings from some sources. Dkt. 93 at 11–12 of 14 (emphasis added). NAR’s rules  
8 define a VOW as the provision of real estate brokerage services to clients who have entered a  
9 relationship with a virtual broker.<sup>5</sup> Before a client may search listings, the broker must “establish  
10 with that consumer a lawful broker-consumer relationship (as defined by state law).” Dkt. 85-2 at  
11 104 of 184 (Section 19.3 a.i). The Complaint does not allege that Zillow provides brokerage  
12 services through a VOW, *see* Dkt. 1 at ¶12, and neither defendant asserts that Zillow provides  
13 brokerage services through a VOW.

14 None of the claims in the Complaint are based on VOW rules. As NAR acknowledges,  
15 Dkt. 84 at 7 of 21, the rule challenged in this lawsuit is found in the IDX or internet data  
16 exchange rules, *see* IDX Rules, Dkt. 85-2 at 99–103 of 184. The IDX rules “afford[] MLS  
17 participants the ability to authorize limited electronic display and delivery of their listings by  
18 other participants via the following authorized mediums under the participant’s control: websites,  
19 mobile apps, and audio devices.” Section 18, IDX Defined, Dkt. 85-2 at 99 of 184. The  
20 Complaint challenges IDX Rule 18.3.10, Dkt. 1 at ¶85, which says:

21 Listings obtained through IDX feeds from Realtor® Association MLSs where the MLS  
22 participant holds participatory rights must be *displayed separately* from listings obtained

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23 <sup>5</sup> “A ‘Virtual Office Website’ (VOW) is a participant’s Internet website, . . . through which the  
24 participant is capable of providing real estate brokerage services to consumers with whom the  
25 participant has first established a broker-consumer relationship (as defined by state law) where  
26 the consumer has the opportunity to search MLS listing information, subject to the participant’s  
oversight, supervision, and accountability.” NAR Rules Section 19.1, VOW Defined, Dkt. 85-2  
at 103 of 184.

1 from other sources. Listings obtained from other sources (e.g., from other MLSs, from  
2 non-participating brokers, etc.) must display the source from which each such listing was  
3 obtained.\* (*Amended 05/17*)

Dkt. 85-2 at 102 of 184 (emphasis added).

4 The VOW rules are found under the heading “Virtual Office Websites (VOWs).” Dkt.  
5 85-2 at 103–109 of 184. The VOW search rule allowed by the 2008 Consent Decree is found at  
6 Section 19.23 and says:

7 A participant shall cause any listing displayed on his or her VOW obtained from other  
8 sources, including from another MLS or from a broker not participating in the MLS, to be  
9 *searched separately* from listings in the MLS.

Dkt. 85-2 at 109 of 184 (emphasis added).

10 The 2008 Consent Decree stated clearly that an “MLS may . . . impose [this rule] on the  
11 operation of VOWs.” Dkt. 96-4 at 23 of 27. It does not mention or in any way authorize NAR to  
12 adopt any IDX rules, including the segregation rule challenged by the Complaint.

13 Finally, NAR argues the VOW search rule is “substantively the same as the comingling  
14 rule” at issue in this lawsuit. Dkt. 93 at 12 of 14. But the VOW “search” rule and the IDX  
15 “segregation” rule have no resemblance either in their purpose, language or their impact on  
16 competition.

17 The VOW rule that was the subject of the 2008 Consent Decree requires the broker  
18 operating the website to provide consumers a separate search of listings from any source other  
19 than the Multiple Listing Service in which it is a participant, whether it be another MLS or non-  
20 MLS broker. It does not discriminate against non-MLS listings.

21 The IDX rule at issue in this lawsuit does not discuss the search function at all. Instead,  
22 the IDX rule requires “Listings obtained through IDX feeds from Realtor® Association MLSs”  
23 to be “displayed separately from listings obtained from other sources.” And unlike the VOW rule  
24 referenced by the 2008 Consent Decree, the IDX rule affirmatively discriminates against listings  
25 from a source other than a NAR-affiliated MLS.  
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1 On their face it is apparent these rules are not “substantively the same” as NAR says: one  
2 rule (VOW) requires a separate search of listings from different sources; the other rule (IDX)  
3 doesn’t mention a search function at all. One rule (IDX) discriminates against non-MLS listings  
4 like REX’s, and the other (VOW) does not.

5 The 2008 Consent Decree demonstrates that NAR’s “exclusionary policies targeting  
6 brokers using innovative online platforms,” Dkt. 95 at 4, have the capacity to limit competition  
7 for real estate brokerage services. As DOJ points out in its Statement of Interest, the real estate  
8 brokerage industry has seen significant changes since 2008, such as the “massive growth of  
9 Zillow into an allegedly critical platform for marketing homes directly to consumers (as opposed  
10 to through a multiple listing service).” Dkt. 95 at 6. When the 2008 Consent Decree was entered,  
11 neither Zillow nor any other company was the dominant site for online residential real estate  
12 searches. *See* Dkt. 1 at ¶48 (before Zillow, “information about homes for sale was controlled  
13 entirely by” NAR brokers); ¶54 (today “Zillow is undoubtedly a dominant doorway into the  
14 residential real estate market”). NAR’s exclusionary rules that escaped scrutiny in the 2008  
15 Consent Decree are being used to maintain high real estate commissions for NAR members  
16 despite the growing use of technology allowing consumers to bypass the services of a broker in  
17 searching for their new home. Dkt. 1 at ¶¶34, 71.

18 The Complaint in this lawsuit alleges that Zillow’s decision to apply NAR’s IDX rules to  
19 discriminate against listing sources harms REX by depriving it access to the most important tool  
20 needed to reach potential homebuyers (the primary display on Zillow’s search results), and  
21 harms consumers by making it unlikely they will find home listings by innovative brokers  
22 seeking to reduce commissions they pay to buy a home. These were not issues addressed in any  
23 way by the 2008 Consent Decree.

24 RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of August, 2021.

25 *(signatures on following page)*

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**CERTIFICATE OF SERVICE**

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I certify that on August 16, 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 16<sup>th</sup> day of August, 2021.

s/ Shbien Cross  
Shbien Cross, Legal Practice Assistant