

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

THE HONORABLE THOMAS S. ZILLY

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

**PLAINTIFF’S RESPONSE TO  
ZILLOW’S MOTION TO  
COMPEL**



**TABLE OF AUTHORITIES**

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

**Page(s)**

**Cases**

*Adidas America, Inc. v. TRB Acquisitions LLC*,  
2019 WL 7630793 (D. Or. Aug. 2, 2019)..... 6

*Apple, Inc. v. Samsung Elecs. Co., Ltd.*,  
881 F. Supp. 2d 1132 (N.D. Cal. 2012) ..... 5

*Ashcraft v. Experian Info Sols., Inc.*,  
2018 WL 6171772 (D. Nev. Nov. 26, 2018)..... 8

*Bliss v. CORECIVIC, Inc.*,  
2022 WL 2498997 (D. Nev. June 2, 2022) ..... 9

*Concord Boat Corp. v. Brunswick Corp*,  
1997 WL 33352759 (E.D. Ark. Aug. 29, 1997)..... 6

*Fish v. Air & Liquid Sys. Corp.*,  
2017 WL 697663 (D. Md. Feb. 21, 2017)..... 8

*Freedman v. Weatherford Int’l Ltd.*,  
2014 WL 4547039 (Sept. 12, 2014, S.D.N.Y.) ..... 8

*Hubbard v. Potter*,  
247 F.R.D. 27 (D.D.C. 2008) ..... 8

*Jensen v. BMW of North America*,  
328 F.R.D. 557 (S.D. Cal. 2019)..... 8

*Knickerbocker v. Corinthian Colleges*,  
298 F.R.D. 670 (W.D. Wash. 2014)..... 5

*Leyva v. Allstate fire & Casualty Ins. Co.*,  
2022 WL 2046220 (W.D. Wash. June 7, 2022) ..... 9

*Montoya v. Orange County Sheriff’s Dept.*,  
2013 WL 6705992 (C.D. Cal. Dec. 18, 2013) ..... 5

*Rivera v. NIBCO, Inc.*,  
364 F.3d 1057 (9th Cir. 2004)..... 6

*Roberts v. Clark Cty. Sch. Dist.*,  
312 F.R.D. 594 (D. Nev. 2016)..... 4

*Zubulake v. UBS Warburg LLC*,  
220 F.R.D. 212 (S.D.N.Y. 2003)..... 5

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

**Rules**

Fed. R. Civ. P. 26 ..... 4, 5

Fed. R. Civ. P. 26(b)(1)..... 1, 4

Fed. R. Civ. P. 30(a)(1)-(2) ..... 1, 9

Fed. R. Civ. P. 30(b)(6)..... 1, 9

Fed. R. Civ. P. 33 ..... 9

Fed. R. Civ. P. 37(a)(3)(B)..... 1

1 Zillow’s motion to compel should be denied. Rule 37 allows a party to move to  
2 compel a response to a discovery request – not to move to compel responses to *ad hoc*  
3 inquiries of counsel. *See* Fed. R. Civ. P. 37(a)(3)(B) (enumerating the four types of  
4 discovery responses that may be compelled). A motion to compel is part of the orderly  
5 procedure designed to ensure that litigants obtain the information necessary to prosecute  
6 or defend a case. *See* Fed. R. Civ. P. 26(b)(1). It is not a vehicle to engage in a fishing  
7 expedition untethered from discovery requests.

8 Yet, by means of the pending motion, Zillow wants to bootstrap what it erroneously  
9 claims is an insufficient response to a single interrogatory, Interrogatory Number 8, into a  
10 wide-ranging inquiry into REX’s document preservation efforts. Zillow has neither a legal  
11 nor factual basis to warrant this intrusive discovery. What it wants is to harass REX and  
12 tarnish it in the eyes of the Court. Its attempt should be rebuffed.

13 For the same improper purposes, Zillow asks for a Court order compelling REX to  
14 designate one or more individuals to testify as a Rule 30(b)(6) representative regarding  
15 REX’s efforts to preserve relevant documents. Zillow never met and conferred with REX  
16 concerning this deposition and for that reason alone the motion to compel to the extent it  
17 requests an order regarding a Rule 30(b)(6) deposition should be denied. *See* LCR 37 (“If  
18 the movant fails to include such a certification, the court may deny the motion without  
19 addressing the merits of the dispute”). It also should be denied because Zillow simply does  
20 not need a court order to take a Rule 30(b)(6) deposition. *See* Fed. R. Civ. P. 30(a)(1)-(2).  
21 Instead, Zillow should be directed to comply with the Rule by serving its notice for the  
22 Rule 30(b)(6) deposition; the parties then can meet and confer about the matters to be  
23 covered in the examination. *See* Fed. R. Civ. P. 30(b)(6).

### 24 **BACKGROUND**

25 REX was founded in 2015 to disrupt the traditional real estate sales model by  
26 putting customers’ interests first. Its founders wanted to use digital technology to enhance  
27 efficiency in real estate transactions, but more importantly to drastically reduce brokerage  
28 commissions while delivering a range of personalized services to its clients.

1           Until January of 2021, REX was accomplishing its objectives and expanding  
2 rapidly. It employed nearly 400 individuals in several states, including salaried real estate  
3 agents. These agents/employees were successfully competing with members of Defendant  
4 National Association of Realtors (“NAR”) to provide residential real estate brokerage  
5 services to consumers wishing to buy and sell homes at significantly reduced commission  
6 rates. *See* Compl. ¶¶ 40-42 (ECF No. 99). As alleged by REX in its Amended Complaint,  
7 before being forced by Defendants to shutter its business, REX’s clients were paying on  
8 average only 3.3% total commissions upon the sale of a house as opposed to the national  
9 rate of 5%. *Id.* ¶ 41. And it had every expectation of ultimately achieving its goal of  
10 transacting real estate transactions on a zero-commission basis. *Id.* ¶ 45.

11           But, no matter how good REX and its salaried agents were for the consumer, REX’s  
12 business model required a large aggregator, of which Zillow was by far the largest, to  
13 market its clients’ homes. *Id.* ¶ 46. Zillow essentially functioned as a digital hub, providing  
14 REX and its clients with the ability to list homes on its national website where they could  
15 compete alongside homes listed by competing NAR-member brokers. *Id.*

16           In the end, REX’s need for a large aggregator was REX’s undoing. In 2020, Zillow  
17 announced that it would forego its independence and stand “shoulder to shoulder” with  
18 NAR. *Id.* ¶ 58. This meant it would commit to selling homes owned by Zillow in  
19 compliance with NAR’s rules that require mandatory offers of commission to buyer agents  
20 and to using NAR-controlled MLS feeds to populate its website. *Id.* ¶ 99. Then, in January  
21 2021, Zillow went so far as to adopt NAR’s Segregation Rule which requires that listings  
22 obtained through NAR-member IDX feeds must be displayed separately from listings from  
23 other sources. *Id.* ¶ 106. As a result, Zillow segregated REX’s listings from NAR-member  
24 listings by relegating them to an obscure tab that it disparagingly labeled “Other.” *Id.* ¶¶ 68-  
25 70.

26           Nearly immediately, REX experienced dramatic declines in consumer views of its  
27 listings on Zillow’s websites which, in turn, led to decreased showing activity. *Id.* ¶ 90-91.  
28 Because of the decreased activity, REX’s existing clients cancelled their contracts. *Id.*

¶¶ 92, 128. Also, as potential customers learned their homes would not be displayed on Zillow if they listed their homes with REX, it became increasingly difficult for REX to attract new listings. *Id.* Nonetheless, REX’s senior management sought to mitigate the effects of the display change. Among other measures, they increased REX’s advertising spend and redirected its internet promotional activities to Facebook and similar social networking websites. *Id.* ¶ 117.

Due to the lapse of time from when REX obtained a new listing until a sale closed, REX’s mitigation efforts, and other factors, the full impact of the display change on REX was not apparent for several months. However, as revenue flattened, costs increased and REX’s efforts to respond to the display change undermined REX’s business model, REX management made the difficult decision to reduce its workforce, including by layoffs and attrition. Its layoffs began in August of 2021 with 69 employees, followed by another 30 layoffs and the closure of its New York and Chicago Offices in October 2021. Ex. A at ¶¶ 6-8. Then in May of this year, REX laid off 143 people or almost all of its remaining employees and closed its remaining offices. *Id.* at ¶¶ 9-10.<sup>1</sup>

In its motion, Zillow seeks to exploit these sad events by suggesting that REX had an obligation, no matter how expensive or impractical, to preserve all documents and materials on the laptops of all of the employees who were terminated. As explained below, the law requires no such extraordinary – and expensive – efforts.

#### **I. REX’s Objections to Interrogatory Number 8 Should Be Sustained**

Zillow’s motion is 12 pages in length but only beginning at page 10 does it devote two pages to the actual discovery request – Zillow’s Interrogatory Number 8. Interrogatory 8 asked that REX:

Identify all employees (by name, last position/job title held while employed by REX, and the last day of employment at REX) who have left REX, including any employees whose employment was involuntarily terminated, since January 2021 and state whether such employees were permitted to retain any REX-issued laptops.

---

<sup>1</sup> Angela Cook, who is discussed below, is a good example of an employee who was not laid off -- she left REX voluntarily. Ex. B at ¶¶ 2, 9; Ex. A at ¶ 12.

1 REX responded as follows:

2 REX objects to this interrogatory as being vague, overly broad and unduly  
3 burdensome insofar as it seeks information on “all employees ... who  
4 have left REX.” REX further objects insofar as this interrogatory is not  
5 relevant to any party’s claim or defense nor is it proportionate to the needs  
6 of the case. REX has let **about 250 employees** go since January 2021 due  
7 to Zillow’s and NAR’s anticompetitive conduct. The overwhelming  
8 majority of those employees were salaried agents and non-managerial  
9 employees, whose employment at REX had no or at most de minimus  
10 relevance to the issues involved in this case. Accordingly, this  
11 interrogatory is seeking information not relevant to any party’s claim or  
12 defense and is not proportionate to the needs of this case. The employees  
13 whose laptops are potentially relevant are the employees listed on REX’s  
14 Amended Rule 26 disclosures, and REX has already provided information  
15 regarding those employees laptops.

16 ECF No. 144-2 at 18-19.

17 REX’s objections should be sustained: there is simply no legal or factual basis  
18 justifying a requirement that REX disclose to Zillow the identities of hundreds of REX  
19 employees who were laid off or left through attrition and whether they were allowed to  
20 keep their laptops. Tellingly, Zillow does not cite any case law supporting its position that  
21 it is entitled to this information. The fact is that Interrogatory Number 8 is completely  
22 lacking in proportionality and irrelevant to any material issue in the case.

23 **A. Interrogatory Number 8 is Not Proportional to the Needs of the Case**

24 Zillow’s right to compel a better response to Interrogatory Number 8 is governed  
25 by Federal Rule of Civil Procedure 26. Rule 26 permits discovery of “any nonprivileged  
26 matter that is relevant to any party’s claim or defense and *proportional* to the needs of the  
27 case.” Fed. R. Civ. P. 26(b)(1) (emphasis added). Importantly, the 2015 amendments to  
28 Rule 26(b)(1) expanded on the concept of proportionality. “The 2015 amendments  
emphasize the need to impose reasonable limits on discovery through increased reliance  
on the common-sense concept of proportionality.” *Roberts v. Clark Cty. Sch. Dist.*, 312  
F.R.D. 594, 603 (D. Nev. 2016) (internal quotation marks and citations omitted). “The  
fundamental principle of amended Rule 26(b)(1) is that lawyers must size and shape their  
discovery requests to the requisites of a case.” *Id.* Rule 26 and the related rules are intended

1 to provide parties with “efficient access to what is needed to prove a claim or defense, but  
2 eliminate unnecessary or wasteful discovery.” *Id.*

3 Proportionality is an essential consideration in the context of ESI, which can be  
4 prohibitively expensive and otherwise intrusive and burdensome. As the Court stated in  
5 *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003), it is clear that the  
6 scope of ESI discovery does not require a party to “preserve every shred of paper, every  
7 email or electronic document.” Nor is there a duty to preserve ESI that is duplicative or is  
8 available by less burdensome means. See *Id.* at 217-218. (“As a general rule, then, a party  
9 need not preserve all backup tapes even when it reasonably anticipates litigation. At the  
10 same time, anyone who anticipates being a party or is a party to a lawsuit must not destroy  
11 *unique*, relevant evidence that might be useful to an adversary.”) (emphasis added)  
12 (footnote omitted).

13 Nor does the duty to preserve relevant information extend to all employees. Rather,  
14 “the duty to preserve extends to those employees likely to have relevant information – the  
15 ‘key players’ in the case.” *Id.* at 218. The “key players” standard has been repeatedly used  
16 by courts in the Ninth Circuit, including this court when considering the contours of a  
17 party’s ESI obligations. See *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 881 F. Supp. 2d 1132,  
18 1137 (N.D. Cal. 2012) (“Thus, the duty to preserve extends to those employees likely to  
19 have relevant information –the ‘key players’ in the case.”); *Montoya v. Orange County*  
20 *Sheriff’s Dept.*, 2013 WL 6705992, at \*5 (C.D. Cal. Dec. 18, 2013) (same); *Knickerbocker*  
21 *v. Corinthian Colleges*, 298 F.R.D. 670, 678 (W.D. Wash. 2014) (same).

22 As applied to this case, the individuals named in REX’s Amended Rule 26  
23 Disclosures are the REX employees with knowledge of the facts and circumstances of this  
24 case and who are in possession custody or control of relevant documents. See ECF 139.  
25 Recently this Court required REX to designate as custodians an additional 4 individuals  
26 named in its Amended Rule 26 Disclosures but not originally identified as custodians,  
27 bringing REX’s list of custodians or “key employees” to 10 persons. Even as expanded,  
28 this represents less than 3% of REX’s total workforce before it was impacted by the display

1 change. The chasm between the number of custodians (10) and the number of laid off  
2 employees (more than 240) illustrates the extent to which Zillow’s request is completely  
3 disproportionate to its discovery needs and, actually, is a gross overreach.

4 Moreover, almost all of the individuals who were laid off beginning in January  
5 2021 were non-managerial employees involved in marketing, human resources, technical  
6 support, and the like. Zillow offers no reason to believe that these individuals can  
7 contribute relevant information or documents beyond what is in the possession custody or  
8 control of REX’s senior management and the other custodians, or that the marginal  
9 relevance, if any, of any documents they have is proportional to the needs of the case. What  
10 is most likely is that granting Zillow’s Motion to Compel will lead to an intrusive,  
11 unproductive and expensive investigative foray into REX’s preservation efforts. *See*  
12 *Concord Boat Corp. v. Brunswick Corp.*, 1997 WL 33352759, at \*4 (E.D. Ark. Aug. 29,  
13 1997) (“With corporations spending enormous amounts of money to preserve business-  
14 related and financial data (the information that is really of the most value in determining  
15 the issues in this case), they should not be required to preserve every e-mail message at  
16 significant additional expense.”).

17 **B. The Court Should Not Allow Zillow’s Fishing Expedition**

18 The Court also should reject Zillow’s “justification” for the interrogatory. Zillow  
19 asserts that the interrogatory is relevant due to “REX’s significant layoffs and apparent  
20 policy of allowing former employees to retain their laptops as severance” because “it would  
21 allow Zillow to determine if there were any preservation issues regarding those  
22 employees.” Mot. 10. In other words, the interrogatory does not relate to a material fact or  
23 issue in the case – rather, it relates to a collateral issue – based solely on Zillow’s  
24 speculation that there may be document preservation issues.

25 Zillow’s speculation, however, is unwarranted and should not suffice to support its  
26 proposed fishing expedition. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir.  
27 2004) (“[C]ourts need not condone the use of discovery to engage in fishing expeditions.”);  
28 *see also Adidas America, Inc. v. TRB Acquisitions LLC*, 2019 WL 7630793 (D. Or. Aug.

1 2, 2019) (finding in a trademark infringement actions that further discovery into store visits  
2 would be an unreasonably burdensome fishing expedition). Before Zillow and NAR  
3 combined to destroy REX’s business, REX had nearly 400 employees. As REX’s business  
4 model became more and more untenable due to Zillow and NAR’s anti-competitive  
5 conduct, REX engaged in more than one round of layoffs. Only after REX ceased operation  
6 as a real estate broker did REX’s counsel discover that one employee –Angela Cook–  
7 “wiped” the hard drive on her laptop by restoring it to its factory settings. REX has not  
8 hidden this fact: REX voluntarily and promptly disclosed this fact in its response to NAR’s  
9 motion to compel the designation of additional custodians on June 17, 2022.

10 Zillow attempts to make much of Angela Cook’s decision to “wipe” her hard drive  
11 – an entirely innocent decision motivated by her intention to gift her laptop to a relative.  
12 See Ex. B at ¶ 10. But Angela Cook has attested that all of her REX work product was done  
13 through or ultimately uploaded to one of REX’s databases (such as Salesforce and  
14 Dotloop), shared folders (such as REX’s Google drive) and her email account/server, and  
15 that her practice was to delete nothing. Ex. B at ¶¶ 4-7. Counsel for Zillow knew all this  
16 before Zillow filed it’s motion because counsel for REX told Zillow that Cook would so  
17 attest and now she has. According to the declaration of Tyler MacDonald, REX’s former  
18 Director of Engineering, all of these documents and data have been archived and thereby  
19 preserved since on or about the date of Angela Cook’s resignation. Ex. C at ¶¶ 6-9. Indeed,  
20 Zillow has offered nothing to this Court that suggests that any relevant documents or data  
21 that were in the possession of Angela Cook while employed by REX are no longer  
22 accessible. But that has not deterred Zillow from seeking to embark on this fishing  
23 expedition.

24 Zillow also attempts to exploit Angela Cook’s status as a custodian to justify its  
25 far-ranging request. But Angela Cook was not designated as a custodian by REX until  
26 compelled to do so pursuant to this Court’s order granting NAR’s motion to compel to add  
27 custodians on June 27, 2022. By that time, Angela Cook, who voluntarily left REX in  
28 March 2022 had been long gone from the company and her hard drive had already been

1 restored to its factory settings. Nonetheless, as stated above, and as attested to by Cook and  
 2 Tyler McDonald, Cook’s practice before she left REX was not to delete anything, and soon  
 3 after she left, REX preserved all of the documents on the Google accounts to which she  
 4 had access.

5 Finally, the Court should reject Zillow’s motion because “[d]iscovery into another  
 6 party’s discovery process is disfavored.” *Ashcraft v. Experian Info Sols., Inc.*, 2018 WL  
 7 6171772 at \*2 n.2 (D. Nev. Nov. 26, 2018); *Fish v. Air & Liquid Sys. Corp.*, 2017 WL  
 8 697663 at \*17 (D. Md. Feb. 21, 2017) (collecting cases and holding same); *see also, Jensen*  
 9 *v. BMW of North America*, 328 F.R.D. 557, 566 (S.D. Cal. 2019) (“Plaintiff provides no  
 10 particularized reason whatsoever for why such discovery should be ordered here, besides  
 11 that this is ‘litigation.’ This superficial reason is far from sufficient.”). As stated by the  
 12 district court in *Freedman v. Weatherford Int’l Ltd.*, 2014 WL 4547039, at \*2 (Sept. 12,  
 13 2014, S.D.N.Y.), “Requests for such ‘meta-discovery’ should be closely scrutinized in light  
 14 of the danger of extending already costly and time-consuming discovery process ad  
 15 infinitum.” *See also Hubbard v. Potter*, 247 F.R.D. 27, 29 (D.D.C. 2008) (“Speculation  
 16 that there is more will not suffice; if the theoretical possibility that more documents exist  
 17 sufficed to justify additional discovery, discovery would never end.”)

18 In sum, Zillow’s motion to require REX to identify hundreds of employees and to  
 19 state whether each was allowed to retain his or her laptop is based entirely on speculation  
 20 and cannot be justified on the basis of the need to ascertain what happened to the data and  
 21 documents stored on their laptops. Instead, it is a cynical exercise designed to harass REX  
 22 and embarrass it in the eyes of the Court. The Motion should be denied.

## 23 **II. The Court Should Not Require REX to Respond to the So - Called “Discovery** 24 **Inquiries”**

25 At pages 6 and 7 of its Motion, Zillow claims that in its meet and confers with REX,  
 26 REX unjustifiably refused to respond to Zillow’s numerous inquiries regarding its  
 27 document preservation efforts in this case. But what Zillow fails to acknowledge is that the  
 28 information it sought was not – and is not now – the subject of a Request to Produce or an

1 Interrogatory. For the reasons explained above, this Court should not allow Zillow to  
2 bootstrap its dissatisfaction with REX's response to Interrogatory 8 into an inquisition into  
3 its document preservation efforts. Rather, this Court should require Zillow to comply with  
4 the Federal Rules of Civil Procedure and allow REX the opportunity to evaluate any proper  
5 discovery request and respond accordingly.

6 **III. The Court Should Not Order a Rule 30(b)(6) Deposition**

7 Zillow is at its most transparent in asking for an order – which it does not need –  
8 for a Rule 30(b)(6) deposition, which it has not sought to take. Zillow can issue a notice to  
9 take a Rule 30(b)(6) deposition without court intervention. *See* Fed. R. Civ. P. 30(a)(1)-  
10 (2). This Court should see this request for what it is—an attempt to embarrass REX and  
11 diminish it in the eyes of the Court.

12 Additionally, the Court should deny the request because it was not the subject of a  
13 meet and confer. *See Leyva v. Allstate fire & Casualty Ins. Co.*, 2022 WL 2046220 at \*2  
14 (W.D. Wash. June 7, 2022) (one telephonic conference was not sufficient to satisfy meet  
15 and confer requirement); *Bliss v. CORECIVIC, Inc.*, 2022 WL 2498997 at \*2 (D. Nev. June  
16 2, 2022) (failure to meet and confer before filing motion to which requirement applies may  
17 result in denial). If Zillow would just follow the proper procedures, REX would have the  
18 opportunity to decide whether to object to the topics in accordance with Fed. R. Civ. P. 33  
19 and negotiate in good faith for a solution.

20 **CONCLUSION**

21 For all the reasons stated above and the authority stated therein, Plaintiff requests  
22 that the Court deny Zillow's Motion and provide Plaintiff such further relief it deems just  
23 and proper.

24 Dated: September 6, 2022.

25 **BOIES SCHILLER FLEXNER LLP**

26 By: /s/ Carl E. Goldfarb  
27 Carl E. Goldfarb (Admitted *Pro Hac Vice*)  
28 BOIES, SCHILLER & FLEXNER LLP  
401 East Las Olas Blvd., Suite 1200  
Fort Lauderdale, FL 33301

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

Telephone: (954) 356-0011  
Facsimile: (954) 356-0022  
[cgoldfarb@bsfllp.com](mailto:cgoldfarb@bsfllp.com)

Ursula Ungaro (Admitted *Pro Hac Vice*)  
Stephen N. Zack (Admitted *Pro Hac Vice*)  
BOIES, SCHILLER & FLEXNER LLP  
100 SE 2<sup>nd</sup> Street, Suite 2800  
Miami, FL 33131  
Telephone: (305) 539-8400  
Facsimile: (305) 539-1307  
[uungaro@bsfllp.com](mailto:uungaro@bsfllp.com)  
[szack@bsfllp.com](mailto:szack@bsfllp.com)

David Boies (Admitted *Pro Hac Vice*)  
BOIES, SCHILLER & FLEXNER LLP  
333 Main Street  
Armonk, NY 10504  
Telephone: (914) 749-8200  
Facsimile: (914) 749-8300  
[dboies@bsfllp.com](mailto:dboies@bsfllp.com)

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

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on September 6, 2022, I served foregoing document to be filed in this Court’s CM/ECF system, which will send notification of such filing to the counsel of record.

By: /s/ Carl E. Goldfarb  
Carl E. Goldfarb

# **Exhibit A**

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., 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.

No. 2:21-cv-00312-TSZ

**DECLARATION OF MICHAEL  
TOTH**

I, Michael Toth, declare as follows:

1. I am a former employee of REX-Real Estate Exchange. I am over the age of 18 and have personal knowledge of all of the facts set forth herein.

2. I was REX’s General Counsel from March 2020 to May 2022.

3. I was serving as REX’s General Counsel in January 2021 when Zillow changed its web display and segregated non-MLS listings, including REX’s listings, into the “other tab.”

4. As General Counsel, I was involved with two Reduction in Forces (“RIFs”) that REX implemented as a result of the slowdown in business resulting from Zillow’s display change.

5. REX laid off 242 employees in the two RIFs.

6. In 2021, REX implemented a RIF, which occurred in two waves.

7. The first wave of the RIF occurred on August 26, 2021, when REX laid off 69 employees. At the time, REX had 394 employees.

8. On October 7, 2021, REX laid off an additional 30 employees in the second wave of the RIF. At the time REX had 290 employees. That same month REX closed its brokerage operations in the New York City and Chicago metropolitan areas.

**DECLARATION OF MICHAEL TOTH**

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

BOIES SCHILLER FLEXNER LLP  
401 E. Las Olas Blvd, Ste 1200  
Fort Lauderdale, FL 33301  
Phone (954) 356-0011

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

9. In May 2022, REX underwent another RIF with several waves of layoffs.

10. On May 6, REX laid off 94 employees; on May 11, REX laid off 18 employees; on May 13, it laid off 24 employees; on May 20, it laid off 4 employees; and on May 31, it laid off 3 employees.

11. REX currently has 4 employees.

12. Angela Cook was not laid off. She resigned and ceased being a REX employee on March 28, 2022.

I declare under the penalty of perjury that the foregoing is true and correct.

EXECUTED this 3rd day of September 2022, in Driftwood, Texas.

/s/ Michael Toth  
Michael Toth

# **Exhibit B**

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.

No. 2:21-cv-00312-TSZ

**DECLARATION OF ANGELA  
COOK**

I, Angela Cook, declare as follows:

1. I am a former employee of REX. I am over the age of 18 and have personal knowledge of all of the facts set forth herein.

2. I worked for REX between September 2, 2019, and March 28, 2022. I worked in REX’s sales department and at the time of my departure, I worked as a regional sales manager.

3. Lynley Sides and Phil Felice were my supervisors while I worked at REX. I communicated with them on a weekly basis regarding my work. I would also have “one-on-ones” with my supervisors via Zoom, which were memorialized in meeting minutes and/or agendas. All these communications and related documentation are accessible via my archived Gmail account, Slack, and Google Drive folders.

4. While at REX, all my work product would either be done through or ultimately uploaded to one of REX’s databases (such as Salesforce and Dotloop), shared folders (such as REX’s Google Drive), or my work Gmail account or my work Google Drive.



1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that on September 1, 2022, I served foregoing document upon  
3 counsel of record listed below via e-mail:

4 Aravind Swaminathan  
5 Nicole Tadano  
6 ORRICK, HERRINGTON & SUTCLIFFE LLP  
7 701 Fifth Avenue, Suite 5600  
8 Seattle, WA 98104-7097  
9 [aswaminathan@orrick.com](mailto:aswaminathan@orrick.com)  
10 [ntadano@orrick.com](mailto:ntadano@orrick.com)

11 Russell P. Cohen, *Pro Hac Vice*  
12 ORRICK, HERRINGTON & SUTCLIFFE LLP  
13 The Orrick Building  
14 405 Howard Street, 7th Floor  
15 San Francisco, CA 94105  
16 [rcohen@orrick.com](mailto:rcohen@orrick.com)

17 Naomi J. Scotten, *Pro Hac Vice*  
18 ORRICK, HERRINGTON & SUTCLIFFE LLP  
19 51 West 52nd Street  
20 New York, NY 10019  
21 [nscotten@orrick.com](mailto:nscotten@orrick.com)

22 John "Jay" Jurata, Jr., *Pro Hac Vice*  
23 ORRICK, HERRINGTON & SUTCLIFFE LLP  
24 1152 15th Street, N.W.  
25 Washington, DC 20005  
26 [jjurata@orrick.com](mailto:jjurata@orrick.com)

27 ***Attorneys for Defendants Zillow, Inc., Zillow Group, Inc., Zillow Homes, Inc., Zillow Listing  
28 Services, Inc., and Trulia, LLC***

29 Thomas C. Rubin  
30 QUINN EMANUEL URQUHART &  
31 SULLIVAN, LLP  
32 1109 First Avenue, Suite 210  
33 Seattle, Washington 98101  
34 [tomrubin@quinnemanuel.com](mailto:tomrubin@quinnemanuel.com)

35 Gabrielle H. Hanna  
36 COOLEY LLP  
37 1700 Seventh Avenue, Suite 1900  
38 Seattle, WA 98101  
39 [ghanna@cooley.com](mailto:ghanna@cooley.com)

40 DECLARATION OF ANGELA COOK

BOIES SCHILLER FLEXNER LLP

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

Samantha A. Strauss, *Pro Hac Vice*  
COOLEY LLP  
1299 Pennsylvania Avenue, NW, Suite 700  
Washington, D.C. 20004  
[sastrauss@cooley.com](mailto:sastrauss@cooley.com)

*Attorneys for Defendant The National Association of Realtors*

By: /s/ Carl Goldfarb  
Carl Goldfarb

# **Exhibit C**

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.

No. 2:21-cv-00312-TSZ

**DECLARATION OF TYLER  
MACDONALD**

I, Tyler MacDonald, declare as follows:

1. I am an employee of REX-Real Estate Exchange. I am over the age of 18 and have personal knowledge of all of the facts set forth herein.

2. I have worked at REX from September 2019 to May 2022.

3. I was the Director of Engineering at REX from October 2021 to May 2022. I am currently a part-time consultant charged with maintaining the IT infrastructure of the company. As the Director of Engineering, I oversaw the company’s data and IT infrastructure.

4. Email and Slack are the primary means by which REX employees communicated regarding work-related matters.

5. Salesforce, Shared Google Drives, and Dotloop are the main repositories used to store and carry out real estate transactions at REX.

6. All of these systems are not stored locally on employees’ laptops, rather they are cloud-based systems that are stored on a server online.

7. The potential loss of data on the hard drive of a laptop should not have any effect on any communications, transactions, or documents stored on REX’s cloud-based systems.

**DECLARATION OF TYLER MACDONALD**

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

**BOIES SCHILLER FLEXNER LLP**

401 E. Las Olas Blvd, Ste 1200  
Fort Lauderdale, FL 33301  
Phone (954) 356-0011

