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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

**REX’S MOTION TO COMPEL
ZILLOW TO PRODUCE
DOCUMENTS**

**NOTE ON MOTION CALENDAR:
October 14, 2022**

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24
25
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27
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

I. BACKGROUND.....1

II. ARGUMENT.....3

 A. Relevance3

 B. Proportionality and Burden.....7

III. CONCLUSION.....9

CERTIFICATE OF GOOD FAITH 10

CERTIFICATE OF SERVICE..... 10

TABLE OF AUTHORITIES

1
2
3
4
5
6
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8
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11
12
13
14
15
16
17
18
19
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22
23
24
25
26
27
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Page(s)

Cases

Ardent Mills, LLC v. Archer-Daniels-Midland Co.,
12-2171-EFM, 2014 WL 7236760 (D. Kan. Dec. 17, 2014) 3

CollegeNET, Inc. v. Com. Application, Inc.,
711 Fed. Appx. 405 (9th Cir. 2017)..... 5

Fed. Trade Commn. v. Cardinal Health, Inc.,
12 F. Supp. 2d 34 (D.D.C. 1998)..... 7

Hall v. Marriott International, Inc.,
2021 WL 1906464 (S.D. Cal., May 12, 2021) 6

In re B & J Inc.,
2021 WL 5622118 (W.D. La. Nov. 30, 2021)..... 6

Ivy Hotel San Diego, LLC v. Houston Cas. Co.,
2011 WL 13240367 (S.D. Cal. Oct. 20, 2011)..... 6

New Park Ent. L.L.C. v. Electric Factory Concerts, Inc.,
2000 WL 62315 (E.D. Pa. Jan. 13, 2000) 8

Oahu Gas Serv., Inc. v. Pac. Res., Inc.,
838 F.2d 360 (9th Cir. 1988)..... 6

Strickland Real Est. Holdings, LLC v. Texaco, Inc.,
C16-0653-JCC, 2016 WL 7243711 (W.D. Wash. Dec. 15, 2016)..... 8

Twin City Sportservice, Inc. v. Charles O'Finley & Co., Inc.,
676 F.2d 1291 (9th Cir. 1982)..... 6

U.S. v. Sungard Data Sys., Inc.,
172 F. Supp. 2d 172 (D.D.C. 2001)..... 7

Rules

Fed. R. Civ. P. 26..... 3

Fed R. Civ. P. 26(b)(1).....3, 7

1 REX moves this Court to enter an order requiring Zillow to produce listing data
2 respecting “For Sale By Owner” (“FSBO”) listings.

3 **I. Background**

4 Individually, NAR and Zillow wield extraordinary power and influence in the market
5 for residential real estate brokerage services. NAR is the largest trade association in the
6 United States. Zillow and Trulia, Zillow’s subsidiary, are the first and fourth most visited
7 residential real estate aggregator sites.¹ Because of who they are, they have the capacity to
8 control access to residential real estate listings and to dictate the terms and conditions under
9 which residential real estate is bought and sold, including by protecting the supra-competitive
10 commission structure that persists in the United States.

11 As this Court well knows, REX, an internet-based low-commission real estate broker,
12 alleges that these extraordinarily powerful actors have stifled competition in the market for
13 residential real estate brokerage services by segregating non-MLS listings, including REX’s
14 listings, in a tab labelled “Other,” “a recessed, obscured and deceptive tab that consumers do
15 not see and even professional real estate agents find deceiving.” Am. Compl. ¶ 8. Zillow made
16 the decision in January 2021 to create the “two tab” display to comply with NAR’s rules as
17 adopted by affiliated MLSs. *Id.* ¶ 197. Once this display change was implemented, REX
18 listings were no longer co-mingled and displayed with all other listings on Zillow’s site;
19 instead, REX’s listings resided separately in the “Other” tab together with “For Sale By
20 Owner” (“FSBO”) listings, foreclosures, new construction and other non-MLS listings that
21 were moved at the same time. *Id.* ¶ 95. The display change had the effect of suppressing
22 competition and depriving consumers of lower priced alternatives for buying and selling
23 homes. *Id.* at ¶¶94, 96-97. In REX’s case, its listings on the “Other” tab had significantly
24 reduced views and REX lost sales and revenues. *Id.* ¶¶ 90-91. Ultimately, REX’s losses were
25 so great that it was driven out of business.

26
27
28 ¹ See <https://www.similarweb.com/top-websites/united-states/category/business-and-consumer-services/real-estate/>

1 Based on these allegations, REX served Zillow with Requests for Production that
 2 sought data regarding the segregation of all listings that were moved to the “Other” tab,
 3 especially the number of views of those listings, including the following:

4 **REQUEST FOR PRODUCTION NO. 7:** For each MLS coverage area,
 5 produce all Documents sufficient to show the number of listings received
 6 by Zillow from the MLS for one year before and for the period one year
 after Zillow began receiving IDX feeds from the MLS . . .

7 **REQUEST FOR PRODUCTION NO. 10:** Produce all data on
 8 consumer and real estate broker usage of Zillow sites . . .

9 **REQUEST FOR PRODUCTION NO. 12:** Produce Documents
 10 sufficient to show how many daily Zillow searches are performed in REX
 markets . . .

11 **REQUEST FOR PRODUCTION NO. 13:** Produce all Documents
 12 sufficient to show daily views and showing requests through Zillow for
 13 each listing (REX and all other listings as well) in REX markets from
 December 2015 through the present, indicating whether the listing was
 displayed in the “Agent listings” tab or “Other listings” tab . . .

14 **REQUEST FOR PRODUCTION NO. 19:** Produce all Documents
 15 relating to performance (including but not limited to number of views,
 16 days on market, selling price, commissions paid and any other metrics
 Zillow uses to gauge listing performance) of listings displayed under the
 17 “Other listings” tab . . .

18 **REQUEST FOR PRODUCTION NO. 22:** Produce all Documents
 19 evidencing any analysis, review or information concerning the impact of
 the two-tab display system upon Zillow’s consumer-users. *Id.* at 17 . . .

20 **REQUEST FOR PRODUCTION NO. 58:** Produce all Documents
 21 sufficient to show number of listings in the “Agent listings” tab and
 22 “Other listings” tab on a daily basis in REX markets from January 2021
 through the present.

23 Ex. A at 12, 14-17, 21-22, 48-49. Zillow objected to these requests, *see id.* and also served a
 24 letter regarding its approach to these requests.²

25 Apart from General Objections, Zillow objected mainly on the grounds that they
 26 sought voluminous documents, required burdensome searches and duplicated other discovery
 27

28 ² Zillow, in its June 29, 2022 Letter to REX, agreed to treat REX’s request for FSBO
 data as a single request for production. *See* Ex. B.

1 requests. *See Id.* Zillow further objected that the documents sought are not proportionate to
 2 the needs of the case and, in some instances, encompassed irrelevant documents. *Id.* However,
 3 Zillow agreed to meet and confer respecting “what may constitute a reasonable search for and
 4 production of responsive documents.” *Id.* at 15-17, 22.

5 The parties met and conferred repeatedly on the scope of these requests since early
 6 June, 2022, and by early September, REX understood that Zillow would produce listing data
 7 from late-2017 onward for all listings – MLS and “other” – where REX did business.
 8 However, on September 14, 2022, Zillow advised REX that it would produce data for REX
 9 listings placed in the “Other tab,” but not FSBO or other listings that were moved to that tab.
 10 Ex. C. In its September 14, 2022 letter, Zillow asserted that FSBO and other listings are
 11 irrelevant to REX’s claims. *Id.* Then, in response to REX’s September 18, 2022 letter
 12 explaining the relevance, Zillow asserted that REX’s request that Zillow produce the FSBO
 13 listing data is not proportional to the needs of the case and would be unduly burdensome. Ex.
 14 D. On September 20, 2022 Zillow and REX held a final meet and confer on the issue and
 15 were still unable to come to an agreement. The parties are now at an impasse regarding the
 16 FSBO listings.

17 **II. ARGUMENT**

18 **A. Relevance**

19 Pursuant to Rule 26, REX is entitled to discovery “regarding any nonprivileged matter
 20 that is relevant to any party’s claim or defense and proportional to the needs of the case....”
 21 Fed. R. Civ. P. 26. FSBO listing data is facially ³ and directly relevant to allegations made in
 22 the Amended Complaint, including the following:

23
 24
 25 ³ *See Ardent Mills, LLC v. Archer-Daniels-Midland Co.*, 12-2171-EFM, 2014 WL
 26 7236760, at *3 (D. Kan. Dec. 17, 2014) (“When a discovery request seeks facially relevant
 27 information or when the proponent of the discovery has demonstrated relevance, the objecting
 28 party bears the burden to show that the requested discovery does not come within the scope
 of relevance as defined by Rule 26(b)(1) or is of such marginal relevance that the potential
 harm occasioned by discovery would outweigh the presumption in favor of broad
 disclosure.”).

1 “The second tab, labeled ‘Other listings,’ presents all non-MLS homes,
2 including homes listed by licensed agents that are not part of the MLS.”
Am. Compl. ¶ 64.

3 “Interested buyers are likely to continue avoiding or missing ‘Other
4 listings’ altogether.” *Id.* ¶ 94.

5 “Consumers—buyers and sellers—now experience reduced choice in
6 transacting real estate. Sellers, as noted above, may feel forced to do
7 business with the NAR/MLS cartel to have superior placement on
8 Zillow’s dominant website, while buyers may never see their best options
9 because REX’s listings (and all others in the ‘Other listings’ category)
10 are demoted. Defendants’ coordinated conduct drives consumers to
11 homes listed on the high-commission MLS network. Competition from
12 REX, which allows buyers and sellers to lower commissions to get more
13 home for their money, is suppressed, and REX loses customers. The
14 result stifles competition from independent brokers such as REX, which
15 save consumers thousands of dollars in reduced commissions on every
16 home transaction.” *Id.* ¶ 96.

17 “The effect of these anticompetitive practices harm REX in each of the
18 twenty states and jurisdictions where it currently operates, and it harms
19 consumers REX wishes to serve within those markets as well as
20 consumers moving into those markets from outside the state. Because
21 Zillow’s universal display change concealing non-MLS listings is
22 implemented nationally, consumers’ and competitors’ participation in
23 interstate commerce is broadly impacted.” *Id.* ¶ 97.

24 Additionally, the FSBO listings data is highly relevant for the following
25 reasons:

26 **First**, these listings will show the impact on REX’s listings of being moved to the
27 “Other listings” tab. To be sure, REX can show the impact of Zillow’s display change on
28 REX’s listings through a before and after analysis of the average number of views REX’s
listings received by comparing, for example, the views of its listings across markets before
and after Zillow’s display change. However, showing an analogous decline in the number of
views of FSBO homes as a result of Zillow’s display change would be powerful
corroboration of REX’s position that the two-tab display proximately caused REX economic
harm. Zillow argues in its September 20, 2022 letter that REX does not need data on FSBO
homes to show the impact on REX. But the issue is not whether such data is essential for
REX’s claims, the issue is simply whether it is relevant, which it clearly is. Importantly, the

1 relevance of the FSBO data for this purpose does not depend on whether an owner who acts
2 as his or her own selling agent is in the market “for the provision of real estate brokerage
3 services to sellers and buyers of residential real estate in local markets throughout the country
4 where REX operates.” *Id.* ¶ 119. Nor does it depend on whether a buyer who uses a broker
5 to purchase a FSBO home is in that market. It just depends on the fact that FSBO listings
6 were moved into a secondary tab at the same time as REX listings were moved to that tab
7 and in both cases, the move changed the consumer experience in the same manner.

8 **Second**, FSBO data is relevant for showing the adverse impact of Zillow’s display
9 change on competition, including competition for the sale of FSBO homes. If, following
10 Zillow's display change, there has been a decline in the number of consumer views of FSBO
11 homes, or a decline in the number of homes offered for sale by owner on Zillow, such a
12 decline would represent a significant impact on competition from NAR’s and Zillow’s
13 collusive activity. In fact, according to a news report, Zillow’s display change has had an
14 adverse impact on the marketing of FSBO homes. *See Ex. E.* Thus, the data that Zillow seeks
15 to exclude from discovery is data that is likely to show an adverse effect on the marketing of
16 FSBO homes.

17 Zillow tries to sidestep this issue by contending that FSBO homes are not in the same
18 market as that defined in the Amended Complaint and so are irrelevant and beyond the reach
19 of discovery. But NAR took the opposite position in its motion to dismiss when it argued
20 that a market that “exclude[s] consumers who provide real estate brokerage services to
21 themselves” is “implausible”. Dkt. No. 84 at 13. Thus, there is a *bona fide* dispute between
22 the two defendants as to whether consumers who sell their own homes are – or are not – in
23 the relevant market for brokerage services.

24 Relatedly, Zillow’s argument depends on a merits decision about the proper product
25 (service) market definition, which is premature at this stage because market definition is
26 often fact dependent and discovery in this case is continuing. *See CollegeNET, Inc. v. Com.*
27 *Application, Inc.*, 711 Fed. Appx. 405, 407 (9th Cir. 2017) (unpublished) (“The question of
28 whether, and if so in what market, TCA has monopoly power is complex, nuanced, and fact

1 dependent.”); *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 363 (9th Cir. 1988) (“Our
2 ... decisions establish that both market definition and market power are essentially questions
3 of fact.”); *Twin City Sportservice, Inc. v. Charles O'Finley & Co., Inc.*, 676 F.2d 1291, 1299
4 (9th Cir. 1982) (“The definition of the relevant market is basically a fact question”).

5 At this juncture, the test is whether the requested information is relevant based on the
6 pleadings, not on the basis of ultimate rulings that the Court has not even made yet. “[REX]
7 is entitled to explore through discovery facts relevant to its own theories regarding the
8 [defining] of [market]. *Ivy Hotel San Diego, LLC v. Houston Cas. Co.*, 2011 WL 13240367,
9 at *3 (S.D. Cal. Oct. 20, 2011) (granting discovery request for documents that would be
10 relevant in contract case as parole evidence and rejecting argument that depended on
11 excluding parole evidence, stating: “There has been no ruling on, nor should this Court
12 determine, whether the terms are ambiguous . . . Indeed, that issue is for the district court
13 (presumably at summary judgment), not this Court at the discovery stage.”); *see also Hall v.*
14 *Marriott International, Inc.*, 2021 WL 1906464, at *8 (S.D. Cal., May 12, 2021) (“to the
15 extent that the parties seek a ruling by the Magistrate Judge on the merits of the statute of
16 limitations issue as a predicate to ruling on this discovery matter, the Court declines to make
17 such a ruling”). *In re B & J Inc.*, 2021 WL 5622118, at *1 (W.D. La. Nov. 30, 2021) (allowing
18 discovery into the value of a barge over respondent’s objection that value of the barge was
19 not included in the cap on liability because the determination of the cap “[wa]s an outstanding
20 issue of fact which cannot be determined at this stage of the proceedings absent further
21 factual development” and stating “claimant is entitled to obtain information would could
22 conceivably support her position.”);

23 In any event, REX maintains, and this Court ultimately should find, that the services
24 provided by homeowners who list their homes for sale without a seller-agent are in the
25 relevant market. FSBO sellers, by acting as their own listing broker, are self-supplying seller
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1 services and often consummating sales through buyer agents affiliated with MLSs.⁴ Not only
2 does NAR claim that FSBO homes are in the same market, Zillow itself treats FSBO homes
3 just like homes for sale by an agent for purposes of selling advertising opportunities to buyer
4 agents. Zillow sells buyer agents the same opportunity through paid advertisements to entice
5 buyers and earn commissions for FSBO listings (as well as other listings in the secondary
6 tab) as it provides for MLS listings and formerly provided for REX listings. The fact that
7 REX believes its listings offered a superior value proposition to FSBO listings does not mean
8 that they are not in the same market. REX also believed that its listings offered a superior
9 value position to MLS listings, for which there is agreement that they are in the same market
10 as REX's listings were. But even if FSBOs are not in the same market, it is well understood
11 that when prices are elevated, consumers may turn to products that would otherwise be
12 outside the relevant market in a competitive environment, and eliminating such products
13 would give a monopolist even more power over price as consumers have even fewer
14 substitutes.

15 In sum, the FSBO data is highly relevant to show that consumer choice has been
16 frustrated by the two-tab display and the extent to which consumer choice has been adversely
17 affected. It is also relevant to corroborate REX's claim it has suffered existential harm and
18 damage as a result of the Defendants' collusive conduct.

19 **B. Proportionality and Burden**

20 Because the FSBO data is highly relevant to show the nature and extent of REX's
21 damage and the impact of the display change on competition and because the data can be
22 obtained only from Zillow, REX's requests for the FSBO data are entirely proportional to the
23 needs of the case. Fed. R. Civ. P. 26(b)(1) ("When addressing proportionality, a court should
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26 ⁴ *U.S. v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 186 (D.D.C. 2001) ("As a matter
27 of law, [c]ourts have generally recognized that when a customer can replace the services of
28 [an external product] with an internally-created [] system, this 'captive output' (i.e. the self-
production of all or part of the relevant product) should be included in the same market.")
(quoting *Fed. Trade Commn. v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 48 (D.D.C. 1998)
(internal quotation marks omitted).

1 consider “the importance of the issues at stake in the action, the amount in controversy, the
 2 parties' relative access to relevant information, the parties' resources, the importance of the
 3 discovery in resolving the issues, and whether the burden or expense of the proposed
 4 discovery outweighs its likely benefit.”).

5 Additionally, the incremental burden on Zillow of producing the FSBO data is not
 6 significant.⁵ According to Zillow’s subsidiary, Trulia, FSBO listings account for 6.2% of all
 7 listings nationwide.⁶ Therefore, REX is asking that Zillow be required to produce what is
 8 likely no more than 6.2% of additional data. Moreover, by agreeing to produce MLS listing
 9 data and REX listing data for all geographic areas in which REX operated its real estate
 10 brokerage business, Zillow has thus acknowledged that all of its listing data is accessible and
 11 can be culled based on the geographic parameters. Zillow has already produced some data for
 12 MLS and REX listings further showing it has the expertise and experience to produce such
 13 data.⁷

14 Finally, Zillow should be directed to produce the FSBO data by October 28, 2022 at
 15 the latest, so that REX’s experts have time to analyze the data in connection with their initial
 16 expert reports.⁸ REX worked diligently, patiently and tenaciously to resolve the issues
 17 surrounding the production of the data. But now time is short and any further delay will
 18 severely disadvantage REX.

21 ⁵ *New Park Ent. L.L.C. v. Electric Factory Concerts, Inc.*, 2000 WL 62315, at *9 (E.D.
 22 Pa. Jan. 13, 2000) (“Also, the parties are reminded that discovery in an antitrust action is
 23 “most broadly permitted” and the cost or burden of providing the requested information is
 less weighty a consideration than in other cases.”).

24 ⁶ See <https://www.trulia.com/guides/for-sale-by-owner/>

25 ⁷ *Strickland Real Est. Holdings, LLC v. Texaco, Inc.*, C16-0653-JCC, 2016 WL 7243711,
 26 at *2 (W.D. Wash. Dec. 15, 2016) (“The requested discovery goes to the heart of this dispute,
 27 albeit in a circumstantial manner. Moreover, Texaco is the type of litigant that can respond
 to such a request. The Court thus finds the request proportional.”).

28 ⁸ Initial expert reports are currently due on October 19, 2022. The parties submitted earlier
 today for the Court’s review a joint motion proposing an extension of the current deadlines.
 Dkt. No. 161. The new proposed deadline for initial expert reports is December 5, 2022.

1 **III. CONCLUSION**

2 For all the reasons stated above, REX asks that this Court enter an order requiring
3 Zillow to produce the FSBO data on the same terms and with the same limitations as all other
4 listing data that it has agreed to produce by no later than October 28, 2022.

5
6 Dated: September 22, 2022

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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

**PROPOSED ORDER GRANTING
REX’S MOTION TO COMPEL
ZILLOW TO PRODUCE
DOCUMENTS**

**NOTE ON MOTION CALENDAR:
October 14, 2022**

THIS MATTER comes before the Court on Plaintiff REX Real Estate Exchange Inc.’s (“REX”) Motion to Compel Documents.

The Court has considered REX’s Motion to Compel, the Declaration of Counsel in Support of REX’s Motion to Compel, the response by the Zillow Defendants (“Zillow”), and REX’s reply, along with the pleadings filed in this action. Based on the foregoing, the Court hereby ORDERS that REX’s Motion to Compel Documents is GRANTED.

Zillow shall produce to REX the For Sale By Owner Data requested in REX’s First Set of Requests for Production by October 28, 2022.

IT IS SO ORDERED. Dated this ___ day of _____, 2022.

HONORABLE THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

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CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that I have in good faith conferred with counsel for the Zillow Defendants regarding the discovery requests at issue in this motion, in an attempt to obtain that discovery without court action.

By: /s/ Carl Goldfarb
Carl Goldfarb

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 22, 2022, I served foregoing document upon counsel of record listed below via e-mail:

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