

THE HONORABLE THOMAS S. ZILLY

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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

**THE NATIONAL ASSOCIATION OF  
REALTORS’® MOTION FOR SUMMARY  
JUDGMENT**

**PUBLIC VERSION – REDACTED**

NOTE ON MOTION CALENDAR: June 30,  
2023

ORAL ARGUMENT REQUESTED

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1 listings obtained from the multiple listing service more prominently than those obtained from other  
2 sources. Indeed, the undisputed evidence shows that Zillow independently decided to implement a  
3 nationwide two-tab design, independently decided to display MLS listings on the default tab, and  
4 independently decided how to label the two tabs. That evidence disproves REX’s allegation that  
5 “Zillow’s moving of REX listings to ‘Other Listings’ was done to comply with NAR’s co-mingling  
6 rules, including the segregation rule.”

7 ***The Changes to Zillow’s Website Did Not Harm Competition.*** At best, REX offers proof  
8 that REX was itself harmed by the changes to Zillow’s website. But that is not enough to prove  
9 harm to competition, which must take the form of higher prices, reduced output, or reduced quality,  
10 because REX had no meaningful impact on the market even when it was a going concern.

11 REX has mustered no evidence that it affected market-wide prices, output, or quality in any  
12 relevant antitrust market. According to REX’s own estimates, by 2021, after seven years in business  
13 and before Zillow changed its website, REX still accounted for ██████████ of home sales, and  
14 an even smaller percentage of listings, in each market where it competed. Moreover, while REX  
15 publicly boasted that it offered a revolutionary business model because it avoided multiple listing  
16 services and marketed properties directly to consumers—“totally eliminating” buyer agent  
17 commissions—those claims were false. According to REX’s own expert, even before Zillow’s  
18 website change, REX’s clients regularly paid compensation to buyer agents. And there is no reason  
19 to believe REX’s commissions were significantly lower than those that would otherwise prevail in  
20 the market. Testimony from REX’s CEO and its internal documents confirm that REX competed  
21 against all brokerage firms, including discount brokers that offered the same low fees as REX, and  
22 there is no evidence that discount brokers have not continued to offer the same low fees as REX  
23 since REX exited the market. The undisputed facts therefore show that REX was irrelevant to  
24 competition in the market: hundreds of thousands of other real estate brokerages, with varying  
25 business models and different commission structures (including discounted commissions), remain  
26 in the market today.

27 REX’s failure also has not reduced consumer choice or the quality of available brokerage  
28 services. Before Zillow changed its website, REX used multiple listing services to market property

1 listings. As REX’s CEO testified, as early as 2017, REX co-listed properties with MLS participants,  
2 for an average cost of \$100 to \$300 per listing, to market its listings through the local multiple listing  
3 service and give them greater exposure than they could receive when advertised by REX alone.  
4 Thus, the undisputed facts contradict REX’s allegation that the changes to Zillow’s website “forced  
5 [REX] to co-list clients with MLS members.” REX had been co-listing properties with multiple  
6 listing service participants for years prior to Zillow’s changes to its website, leveraging the benefits  
7 of MLS exposure at a trivial cost. Multiple listing service participants and the benefits of marketing  
8 properties through multiple listing services remain available to consumers today, giving them the  
9 same (or better) marketing exposure than was available through REX.

10 At bottom, REX had no impact on competition, and it would not have had impact on  
11 competition even absent the changes to Zillow’s website. Even before Zillow’s website change,  
12 REX had struggled to gain a toehold in the marketplace for years. According to REX’s CFO, Mike  
13 Drath, REX’s business was a “house of cards.” Ex. A (Drath Tr.) at 51:4. He testified that “REX  
14 built its business on “‘marketing technology,’ in air quotes,” which “never came close to  
15 compensating for the company not being on the MLS, so much so that the company was doing co-  
16 listings with people that were on the MLS while not saying so,” *id.* at 166:23–167:4, and it ran head-  
17 long into “very aggressive competitors, underpricing commissions and coming up with similar  
18 products and similar mechanics to lower the cost,” *id.* at 153:14–16. According to Mr. Drath, had  
19 the changes to Zillow’s website “not occurred, the company’s fortunes would still have ended up in  
20 the same place, maybe a little later, because everything else was still constraining the company, the  
21 overspend, the lack of experience in the space, the lack of experience in running startups, the  
22 competition, the pricing, the interest rates, the prices coming down, all of those are still happening,  
23 and the company was burning through cash like a drunken sailor.” *Id.* at 169:10–18.

24 ***REX Has Not Suffered Antitrust Injury and Lacks Antitrust Standing.*** REX has no  
25 evidence of antitrust injury because REX’s claimed injury—the failure of its business—was not  
26 caused by the changes to Zillow’s website. While REX now claims its business collapsed when its  
27 listings were moved to the “Other Listings” tab on Zillow, it is undisputed that REX could have  
28 retained its preferred position on Zillow’s website—commingled with MLS listings on the default,

1 “Agent Listings” tab—by continuing its practice of co-listing. In fact, after Zillow changed its  
 2 website, REX initially did just that. As REX’s CEO testified, when REX co-listed a property after  
 3 Zillow changed its website, the property was moved to the “Agent Listing” tab, where it was  
 4 commingled with MLS listings. Indeed, after the Court denied REX’s preliminary injunction  
 5 motion, REX’s co-founder, Lynley Sides, candidly told an investor that the only expected benefit  
 6 to REX from winning this lawsuit would be “to save about \$200/home on marketing,” *i.e.*, the cost  
 7 of a co-listing. That is a far cry from the injury REX now claims—more than \$400 million—based  
 8 on the purported lost enterprise value of its business. Because these flaws in REX’s case, standing  
 9 alone or considered together, dispose of REX’s remaining claims against NAR, NAR respectfully  
 10 asks the Court to enter summary judgment on Counts I and VI in REX’s Amended Complaint.<sup>1</sup>

## 11 STATEMENT OF UNDISPUTED MATERIAL FACTS

### 12 I. NAR Promulgates Optional MLS Model Rules, Like Section 18.3.11

13 1. NAR is trade association of real estate professionals, and it publishes the Handbook  
 14 on Multiple Listing Policy, which “is intended to guide member associations of REALTORS® in  
 15 the operation of multiple listing services consistent with the policies established by the National  
 16 Association’s Board of Directors.” Ex. B (NAR0001833) at -836.

17 2. The Handbook contains different tiers of model rules: Mandatory, Recommended,  
 18 Optional, and Informational. Ex. B. at -834; *see also* Ex. C (NAR0000177) at -259 (“All of the  
 19 following rules are optional.”).

20 3. To use the REALTOR® trademark, which is owned by NAR, and access  
 21 professional liability insurance procured by NAR, local REALTOR® associations must follow all  
 22 Mandatory NAR policies, including the Mandatory policies and rules in the Handbook. Ex. D  
 23 (Gansho 30(b)(6) (Oct. 28, 2022) Tr.) at 66:11–15.

24

25

26 <sup>1</sup> The Court should grant summary judgement on the antitrust claim REX alleged against NAR under  
 27 state law (Count VI) for the same reasons summary judgment is warranted as to the REX’s federal  
 28 claim (Count I). *See PBTM LLC v. Football Nw., LLC*, 511 F. Supp. 3d 1158, 1178 (W.D. Wash.  
 2021) (“The Court’s analysis of [plaintiff’s] federal antitrust claims extends to its state law claims  
 under the WCPA . . . .”); ECF 98 at 9 n.2 (“The Court recognizes that the state and federal standards  
 are essentially the same and thus analyzes both claims under the federal standards.”).





1 4. NAR does not own or operate any multiple listing services, and state and local  
 2 associations of REALTORS®, which operate multiple listing services, are independently  
 3 incorporated entities (with separate by-laws). *See* Ex. D at 15:5–19, 47:7–48:2.






4 5. Multiple listing services operated by local associations of REALTORS® are not  
 5 required to adopt the Recommended, Optional, or Informational model rules. Ex. B at -834, -836.

6 6. In the regular course of business, NAR does not monitor or enforce Optional model  
 7 rules. Ex. D at 78:8–15, 123:21–24.

8 7. Since its inception, Section 18.3.11 of NAR’s IDX Policy has been an Optional  
 9 model rule for local MLSs—neither Mandatory nor Recommended for adoption by NAR.

10 **Section 18.3.11** Listings obtained through IDX feeds from REALTOR® Association MLSs where the MLS  
 11 participant holds participatory rights must be displayed separately from listings obtained from  
 12 other sources. Listings obtained from other sources (e.g., from other MLSs, from  
 non-participating brokers, etc.) must display the source from which each such listing was  
 obtained.\* (Amended 05/17)  

The compliance classification category of each item is denoted by the following symbol:

-  Mandatory\*
-  Recommended
-  **Optional** 
-  Informational

13  
 14  
 15  
 16  
 17 Ex. B at -936–37 (annotations added); *id.* at -834 (annotations added); *see also* Ex. C at -259  
 18 (originally numbered Section 18.3.13); Ex. E (Gansho 30(b)(6) (Dec. 8, 2022) Tr.) at 27:7–18.

19 8. Approximately 29% of multiple listing services affiliated with NAR have *not*  
 20 adopted Section 18.3.11. Ex. F (NAR Suppl. Resp. to REX Interrogatory No. 4); Ex. G (Evans  
 21 Report) ¶ 35 (REX’s economic expert acknowledging that Section 18.3.11 is optional and has been  
 22 adopted by only [REDACTED]); Ex. H (Ryan Tr.) at 43:23–44:7 (REX’s CEO has  
 23 agreed that [REDACTED]  
 24 [REDACTED]); Ex. I (Hendricks Decl. (ECF 54)) ¶ 41; Ex. J (Zillow Resp. to REX First Set  
 25 of Interrogatories) at 12–19 (No. 3) (showing that at least 75 multiple listing services did not adopt  
 26 the Optional Section 18.3.11).  
 27

28 9. A local NAR-affiliated MLS is not required to certify to NAR that it has adopted

1 Section 18.3.11, Ex. D at 27:10–29:2, and it will not lose access to errors and omissions insurance  
2 coverage if it has not adopted Section 18.3.11. *See id.* at 49:13–23, 66:11–15.

3 10. Multiple listing services operated by local REALTOR® associations are free to adopt  
4 any rule that does not conflict with a Mandatory NAR policy and there is no Mandatory policy that  
5 requires separate displays of non-MLS and MLS listings. *Id.* at 47:7–48:20; Ex. B at -834, -836, -  
6 936.

7 11. For example, the largest NAR-affiliated multiple listing service in the country—  
8 California Regional MLS (“CRMLS”)—has not adopted Section 18.3.11. Ex. F at 34; *see* Ex. K  
9 (NAR0023121) at -153–56.

10 12. Multiple listing services that have adopted Section 18.3.11 are free to repeal the rule  
11 at any time without violating NAR policies. Ex. E at 212:24–213:12.

12 13. REColorado, which is a multiple listing service affiliated with NAR in Colorado,  
13 repealed Section 18.3.11 in August 2022. Ex. L (REColorado Press Release); *see also* Ex. F at 3.

14 14. For those multiple listing services that have decided to adopt Section 18.3.11, their  
15 local rule simply states that MLS listings and non-MLS listings should be displayed separately.  
16 Ex. B at -936–37.

17 15. Section 18.3.11 does not mandate how MLS participants should label MLS or non-  
18 MLS listings searches or whether either should appear as the default search, and nothing in the rule  
19 requires that MLS listings be prioritized or preferred. *Id.*

## 20 **II. Zillow Independently Decided How to Design its Website**

21 16. In 2020, without consulting NAR, Zillow decided which multiple listing services it  
22 would join. *See* Ex. M (Samuelson (Nov. 29, 2022) Tr.) at 13:19–20 (“[T]here were no  
23 communications with NAR prior to September 23, 2020.”); Ex. N (Zillow Suppl. Resp. to REX  
24 Fourth Set of Interrogatories) at 6–7 (No. 21) (describing “Zillow’s unilateral business decision to  
25 switch to IDX feeds,” when Zillow announced its plan to switch to IDX feeds).

26 17. Instead of creating a website design that only separately displayed MLS and non-  
27 MLS listings in parts of the country where separate displays are required by the local multiple listing  
28 service, Zillow unilaterally decided, without consulting NAR, to implement a uniform, nationwide

1 website design, which separately displayed MLS and non-MLS listings everywhere. Ex. O (Zillow  
 2 Resp. to REX Second Set of Interrogatories) at 12–15 (No. 15); Ex. P (Samuelson Decl. (ECF 53))  
 3 ¶¶ 66–67.

4 18. Without consulting NAR, Zillow changed its website on January 12, 2021 to reflect  
 5 a display with two separate “tabs”—one that displayed MLS listings and another that displayed  
 6 listings obtained from other sources. Ex. O at 12–15 (No. 15); *see also* Ex. D at 179:17–181:20;  
 7 Ex. M at 14:3–21.

8 19. Without consulting NAR, Zillow decided how the tabs would be labeled and which  
 9 tab would be displayed by default. Ex. Q (NAR0031149); Ex. O at 12–15 (No. 15) (“Zillow alone  
 10 decided how best to display listings in a manner that would comply with MLS rules.”); Ex. P ¶ 62  
 11 (“[M]any of the changes that Zillow has made to its online platforms in order to comply with these  
 12 rules, including the specific way listings are displayed in a two-tab format, how those tabs are  
 13 labeled, and how that two-tab format has been implemented across all geographies, are business  
 14 decisions made by Zillow alone and not explicitly stated in or required by any MLS rules.”).

### 15 **III. REX Was Not a Unique Competitor**

16 20. From 2017 through 2021 (including after Zillow’s website change), REX co-listed  
 17 properties with multiple listing service participants for an average fee between \$100 and \$300.  
 18 Ex. H at 159:13–15; *id.* at 150:1–151:15, 152:8–21, 152:22–153:2, 154:5–9, 160:5–161:11; Ex. R  
 19 (REX Resp. to NAR Third Set of Interrogatories) at 8–10 (No. 10); Ex. S (REX\_0035617).

20 21. When REX co-listed a property, its listings were distributed both on the local  
 21 multiple listing service and wherever listings were syndicated by the local multiple listing service,  
 22 including Zillow, Redfin, and realtor.com. Ex. H at 153:3–24.

23 22. REX advertised that it “totally eliminat[es] the buy side agent commission.” Ex. T  
 24 (Ryan Depo. Ex. 5); *see also* Ex. U (Sides 30(b)(6) Tr.) at 234:20–235:4; Ex. V (REX\_0003399)  
 25 (“With REX, you pay 2%. All in! No hidden fees, no fine print.”).

26 23. REX’s clients paid buyer agent commissions. Ex. G ¶ 454 & tbl. VII-1 (showing  
 27 that by March 2020, REX’s seller clients paid a buyer agent commission in approximately █████ of  
 28 its transactions).



1 the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit  
2 or express.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (cleaned up); *see also Fisher v.*  
3 *City of Berkeley*, 475 U.S. 260, 266 (1986) (“[T]here can be no liability under § 1 in the absence of  
4 agreement.”). And not just *any* agreement is enough—there must be “a conscious commitment to .  
5 . . . achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764  
6 (1984) (quotation marks and citation omitted). The existence of an unlawful agreement can be  
7 established with direct evidence or circumstantial evidence. *In re Citric Acid Litig.*, 191 F.3d 1090,  
8 1093 (9th Cir. 1999). This case has neither.

9 In its Amended Complaint, REX alleged that Zillow entered an agreement with NAR and  
10 multiple listing services to “segregate, conceal, and demote non-MLS listings” when it became a  
11 member of NAR and certain local multiple listing services. ECF 99 ¶ 60. REX further alleges that  
12 Zillow acted in furtherance of that alleged conspiracy when it changed its website to display non-  
13 MLS listings on a different tab than MLS listings, and to display MLS listings on the default tab of  
14 its website. *Id.* ¶¶ 64–65; *see also id.* ¶¶ 102–104 (“Zillow’s website redesign, which demotes non-  
15 MLS listings, is driven by its voluntary membership in the NAR and MLSs and the agreed adherence  
16 to their rules.”); *id.* ¶ 123 (“The NAR, MLSs, and Zillow have implemented their rules and  
17 agreement to exclude and impair non-MLS, non-NAR member competitors’ access to online display  
18 in local markets nationwide.”).

19 There is no evidence of such a conspiracy, which means summary judgment should be  
20 entered on Counts I and VI in REX’s Amended Complaint. *See 49er Chevrolet, Inc. v. Gen. Motors*  
21 *Corp.*, 803 F.2d 1463, 1467 (9th Cir. 1986) (affirming summary judgment where there was no  
22 evidence of an unlawful agreement).

23 **A. There Is No Direct Evidence of an Agreement Involving NAR**

24 “Direct evidence is smoking-gun evidence that establishes, without requiring any inferences  
25 the existence of a conspiracy.” *Honey Bum, LLC v. Fashion Nova, Inc.*, 2023 WL 2592287, at \*5  
26 (9th Cir. Mar. 22, 2023) (cleaned up); *see also Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d  
27 1148, 1155 (9th Cir. 2001) (“We have noted that direct evidence in a Section 1 conspiracy must be  
28 evidence that is explicit and requires no inferences to establish the proposition or conclusion being

1 asserted.” (cleaned up)). It includes, for example, written agreements or eyewitness testimony that  
2 establishes an express agreement between the defendants. *See, e.g., PharmacyChecker.com LLC v.*  
3 *LegitScript LLC*, 614 F. Supp. 3d 796, 809 n.13 (D. Or. 2022) (“Direct evidence may consist of  
4 written documents, audio or video recordings, or eyewitness testimony about what was said.”);  
5 *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 2013 WL 595122, at \*8 (E.D. Cal. Feb. 15,  
6 2013) (“[T]estimony from percipient witnesses that defendants agreed at a certain meeting to fix  
7 prices or not to compete constitutes direct evidence of an agreement to restrain trade . . . .”), *aff’d*,  
8 803 F.3d 1084 (9th Cir. 2015).

9       There is no direct evidence of an agreement involving NAR to “segregate, conceal, and  
10 demote non-MLS listings.” There is no written evidence NAR, multiple listing services, and Zillow  
11 agreed to “segregate, conceal, and demote non-MLS listings.” And there also is no eyewitness  
12 testimony establishing that NAR, multiple listing services, and Zillow entered an agreement to  
13 “segregate, conceal, and demote non-MLS listings.” Indeed, every NAR and Zillow witness has  
14 testified that Zillow never even discussed its two-tab display with anyone at NAR before Zillow  
15 changed its website in January 2021. SUMF ¶¶ 16–19.

16           **B. Optional Section 18.3.11 and a Handful of Communications Unrelated to**  
17           **Display of Non-MLS Listings Are Not Evidence of an Agreement**

18       In the absence of direct evidence, “[t]o survive a motion for summary judgment . . . a plaintiff  
19 seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility  
20 that the alleged conspirators acted independently.” *Matsushita Elec. Indus. Co. v. Zenith Radio*  
21 *Corp.*, 475 U.S. 574, 588 (1986) (cleaned up); *In re Citric Acid Litig.*, 191 F.3d at 1096 (“The  
22 requirement that a plaintiff who relies solely on circumstantial evidence of conspiracy . . . must  
23 produce evidence tending to exclude the possibility that defendants acted independently follows  
24 directly from the Supreme Court’s opinion in *Matsushita* and is, as we have explained, well-  
25 established . . . .”). Under this standard, the Court may not infer the existence of an unlawful  
26 agreement from evidence that is equally consistent with lawful, independent conduct. *See In re*  
27 *Citric Acid Litig.*, 191 F.3d at 1094.

1 REX claims the existence of an optional model rule, Section 18.3.11, is circumstantial  
 2 evidence of the alleged agreement involving NAR, but that rule truly is optional and there is  
 3 undisputed evidence that NAR, multiple listing services, and Zillow all acted independently.

4 **1. Optional Section 18.3.11 of NAR’s Handbook on MLS Policy Is Not**  
 5 **Evidence of an Agreement**

6 In ruling on NAR’s motion to dismiss at the outset of the case, the Court recognized a line  
 7 of cases in which some courts have found that rules labeled “optional” were actually mandatory in  
 8 practice, *see* ECF 98 at 12–13, but the undisputed evidence shows that Section 18.3.11 is not such  
 9 a rule. Section 18.3.11 is not optional in name only. It is undisputed that hundreds of multiple  
 10 listing services owned by local REALTOR® associations (amounting to nearly 30% of all multiple  
 11 listing services) have independently decided *not* to adopt Section 18.3.11. SUMF ¶ 8. Those  
 12 multiple listing services do not require their participants to separately display MLS listings and non-  
 13 MLS listings. *Id.* And it is undisputed that the local multiple listing services that have adopted  
 14 Section 18.3.11 are free to repeal it at any time without notifying NAR and without adverse  
 15 consequence. SUMF ¶ 12. Indeed, one major multiple listing service repealed its rule in 2022—  
 16 after REX filed suit in this case. SUMF ¶ 13. Section 18.3.11 therefore does not require any  
 17 member of NAR—including individual multiple listing services—to do anything at all.

18 These undisputed facts contradict REX’s allegation that “brokerages, agents, and even  
 19 customers allegedly have *no choice* but to comply with NAR’s so-called optional rules.” ECF 98  
 20 at 12. The record instead shows multiple listing services have a choice, *and in fact choose*, not to  
 21 adopt or follow Section 18.3.11. SUMF ¶¶ 7–8. That means REX’s allegations that multiple listing  
 22 services must segregate non-MLS listings because of Section 18.3.11 are false and, after two years  
 23 of discovery, completely unsupported. *Compare* ECF 99 ¶ 47 (“Notably, the NAR rules provide  
 24 that listings from MLSs *must* be segregated from any non-MLS listings”) (emphasis added); *id.* ¶ 73  
 25 (“NAR requires its affiliated Multiple Listing Services to comply with NAR Rules, including . . .  
 26 the mandatory co-mingling rules.”). That alone is enough for summary judgment.

27 Moreover, the undisputed evidence shows that Zillow acted independently when deciding  
 28 how to design its website, including how it would comply with the rules of local multiple listing

1 services. Zillow independently decided, for its own reasons, to become a participant in certain  
 2 multiple listing services to obtain access to their IDX feeds. SUMF ¶ 16. Zillow then independently  
 3 decided which multiple listing services it would join, without consulting NAR. *Id.* Some of the  
 4 multiple listing services that Zillow decided to join allow commingling of MLS listings and non-  
 5 MLS listings, and some do not. *Id.* ¶ 17; Ex. G ¶ 235 n.226 (REX’s expert reporting that [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]). Zillow independently decided to implement a  
 8 nationwide, two-tab design to comply with the rules of the individual multiple listing services it  
 9 joined. SUMF ¶ 17. It could have pursued other options, including a website design that varied  
 10 between localities, a design with more tabs and labels, or a different default tab, but it chose not to,  
 11 for its own reasons. *Id.* ¶¶ 17–18. In other words, yet again, REX’s allegations are not supported  
 12 by the undisputed facts. *See* ECF 99 ¶ 88 (“Zillow’s moving of REX listings to ‘Other Listings’  
 13 was done to comply with NAR’s co-mingling rules, including the segregation rule.”).

14 The undisputed evidence also contradict REX’s allegation that “absent NAR’s actions in  
 15 drafting the rules *and effectively forcing* Zillow and other MLS participants to comply with them,  
 16 Zillow would not have changed its websites.” ECF 98, at 8 (emphasis added). NAR did not force  
 17 Zillow to change its website design. Nor did NAR dictate how many separate “tabs” Zillow would  
 18 have on its website, how they would be labeled, or which tab would be the default tab. *See* ECF 99  
 19 ¶ 89 (“Because the default option is the ‘Agent listing’ tab, many consumers will never click on the  
 20 tab that includes REX homes.”). In fact, there is nothing in the text of Section 18.3.11 that dictates  
 21 to MLS participants how to display non-MLS listings, including what labels to use or which listings  
 22 to display as the default. SUMF ¶¶ 7, 15. And there is no record evidence that suggests otherwise.

23 The reality is that Section 18.3.11 does not compel multiple listing services—or anyone  
 24 else—to do anything. To illustrate the point: If NAR repealed Section 18.3.11 today, the rules of  
 25 local multiple listing services would not change. Multiple listing services operated by local  
 26 REALTOR® associations are free to adopt any rule that does not conflict with a mandatory NAR  
 27 policy and there is no mandatory policy that requires separate displays of non-MLS and MLS  
 28 listings. SUMF ¶ 10. That means multiple listing services that currently allow commingling non-



1 MLS and MLS listings would be free to continue with that practice after Section 18.3.11 was  
 2 repealed. And those that prohibit commingling would continue to prohibit commingling without  
 3 Section 18.3.11.

4 Section 18.3.11 does nothing to compel multiple listing services, brokers, agents, or Zillow  
 5 to do anything, which means it cannot be evidence of an unlawful agreement. *See, e.g., Cnty. of*  
 6 *Tuolumne*, 236 F.3d at 1156 (recommendation of medical staff regarding a credentialing decision,  
 7 even if followed, does not establish a conspiracy between the hospital and staff); *Evergreen*  
 8 *Partnering Grp., Inc. v. Pactiv Corp.*, 832 F.3d 1, 9 (1st Cir. 2016) (“We note that the antitrust laws  
 9 allow trade associations to make nonbinding recommendations about businesses and products.”);  
 10 *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1459 n.34 (11th Cir. 1991) (a decision-  
 11 maker’s acting consistently with a recommendation does not result in conspiracy between the  
 12 decision-maker and those providing the recommendation); *cf. Relevent Sports, LLC v. United States*  
 13 *Soccer Fed’n, Inc.*, 61 F.4th 299, 307–09 (2d Cir. 2023) (finding concerted action only where “a  
 14 **binding** association rule designed to prevent competition” is promulgated “in conjunction with the  
 15 members’ **surrender to the control of the association**” (emphasis added)); *O.M. by & through*  
 16 *Moultrie v. Nat’l Women’s Soccer League, LLC*, 541 F. Supp. 3d 1171, 1180 (D. Or. 2021) (finding  
 17 plaintiff alleged concerted action only where a soccer league created a **mandatory** rule and required  
 18 member teams to comply).

19 **2. Communications Between NAR and Zillow or the Multiple Listing**  
 20 **Services Are Not Circumstantial Evidence of an Agreement**

21 Beyond contending that an Optional model rule that is not followed by 30% of multiple  
 22 listing services is actually mandatory, REX cites a handful of communications between NAR,  
 23 MLSs, and Zillow as purported circumstantial evidence of the alleged agreement to demote non-  
 24 MLS listings on Zillow’s website. *See* Ex. Y (REX Resp. to Zillow Fourth Set of Interrogatories)  
 25 at 8–10 (No. 11) (citing NAR0003757, NAR0003784, NAR0150760, NAR0003861, NAR0090947,  
 26 NAR0103417, ZG\_00352026). But mere communications between members of an alleged  
 27 conspiracy do not permit an inference of an unlawful agreement “unless those communications rise  
 28 to the level of an agreement, tacit or otherwise.” *In re Packaged Seafood Prods. Antitrust Litig.*,

1 2023 WL 3046073, at \*12 (S.D. Cal. Apr. 21, 2023) (quoting *In re Baby Food Antitrust Litig.*, 166  
2 F.3d 112, 126 (3d Cir. 1999)); *see also Fashion Nova, Inc.*, 63 F.4th at 823–24 (observing that “to  
3 qualify as a plus factor, . . . communications must go beyond the ‘standard fare’ of business and  
4 trade-association practice,” otherwise, courts “would have to allow an inference of conspiracy  
5 whenever a trade association exists in a given industry.” (cleaned up)). And here, the  
6 communications cited by REX show only that (1) NAR employees addressed questions about issues  
7 that were wholly unrelated to the alleged agreement to separate MLS and non-MLS listings; and (2)  
8 communications relating to Zillow’s decisions about how to display of MLS and non-MLS listings  
9 occurred *after* Zillow had already unilaterally changed its website.

10 For a conspiracy to implement a two-tab display on Zillow’s website to be plausible, REX  
11 must come forward with evidence that *before* Zillow changed its website design on January 12,  
12 2021, NAR, multiple listing services, and Zillow agreed to demote non-MLS listings on Zillow’s  
13 website. *See In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1257  
14 (W.D. Wash. 2009) (finding that allegations about purportedly conspiratorial communications,  
15 temporally untethered from the conduct complained of, are plainly inadequate for inferring  
16 agreement). The communications REX cites, however, fail even to establish that NAR knew about  
17 the contemplated changes to Zillow’s website before they were implemented.

18 Only two communications cited by REX pre-date the website change. *See Ex. Z*  
19 (NAR0090947) (Dec. 18-29, 2020 emails between Zillow and NAR); *Ex. AA* (ZG\_00352026) (Jan.  
20 5-11, 2021 emails between Metro MLS and Zillow). One [REDACTED]  
21 [REDACTED]). *Ex. AA*. The  
22 other shows that NAR responded to a question about Zillow’s ability to display information  
23 concerning sold properties (such as the sales price) that it acquired from outside the MLS in  
24 locations where home sale prices are not publicly disclosed. *Ex. Z*. Neither shows that NAR knew  
25 about Zillow’s two-tab display, that NAR and Zillow agreed to demote non-MLS listings, or that  
26 NAR forced Zillow to demote non-MLS listings. As confirmed in later communications, “Zillow  
27 came up with the current display format,” and did not “seek[] [NAR’s] approval or feedback [on the  
28 two-tab display] . . . prior to rolling out [its] new IDX site.” *Ex. Q*. That is the opposite of NAR

1 directing or recommending to Zillow that it “segregate” non-MLS listings. *Compare Freeman v.*  
 2 *San Diego Ass’n of Realtors*, 322 F.3d 1133, 1156 (9th Cir. 2003) (noting that the California  
 3 Association of Realtors did not commit any antitrust violation by opining on the legality of a certain  
 4 fee arrangement, as CAR did not “encourage[]” or “recommend[]” the particular arrangement).

5 Nor do the communications that post-date Zillow’s website change constitute evidence that  
 6 Zillow and NAR reached any agreement regarding Zillow’s two-tab display. For example, three  
 7 communications—Ex. BB (NAR0003757), Ex. CC (NAR0003784), and Ex. DD (NAR0150760)—  
 8 are from the same email chain between Zillow, NAR, and MLS of Greater Cincinnati (“Cincy  
 9 MLS”). They show that NAR and Cincy MLS discussed whether Zillow’s two-tab display complies  
 10 with IDX rules *after* the website change had already occurred. NAR concluded that “this display  
 11 does not appear to violate IDX policy . . . .” Ex. DD at -767. But the fact that NAR felt that the  
 12 already-implemented website change did not violate national IDX rules—which allow local  
 13 multiple listing services to decide on their own whether to prohibit or allow commingling of MLS  
 14 and non-MLS listings—is meaningless. At best, it shows that NAR did not consider whether  
 15 Zillow’s two-tab display complied with IDX rules *until* after it was implemented, further  
 16 confirming Zillow neither sought nor obtained NAR’s approval prior to its implementation. The  
 17 same reasoning applies to the remaining communications cited by REX. *See* Ex. EE (NAR0003861)  
 18 (emails from Apr. 2-7, 2021, months after Zillow changed its display, asking a question that related  
 19 to [REDACTED]  
 20 [REDACTED]); Ex. FF (NAR0103417) (emails from Apr. 26–July 23,  
 21 2021, months after Zillow changed its display, [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED] (emphasis added)).

25 Put simply, REX has failed to identify a single communication—or communications in  
 26 combination—that could be properly construed as circumstantial evidence of agreement.  
 27  
 28

1           **C.       The Undisputed Evidence Shows that NAR, Multiple Listing Services, and**  
 2           **Zillow Acted Independently**

3           Multiple listing services independently decide whether to prohibit or allow commingling of  
 4 non-MLS listings and MLS listings in a single display, SUMF ¶¶ 7–9, and they do so based on local  
 5 market conditions. *See* Ex. D at 104:13–106:12 (prior to promulgation of Section 18.3.11, MLSs  
 6 had expressed concern that the reputation of MLS data and listings would be tarnished if lower-  
 7 quality non-MLS listings were commingled in searches alongside MLS listings); Ex. GG (Niersbach  
 8 Tr.) at 64:19–65:3 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]). Some  
 12 allow commingling, some do not, and others, after initially deciding to prohibit commingling, later  
 13 changed their minds. SUMF ¶¶ 8, 13.

14           It also is undisputed that Zillow acted independently when it chose to access listings through  
 15 IDX feeds rather than syndication and to redesign its website. Zillow independently chose which  
 16 multiple listing services to join and how to design its website to comply with their rules. SUMF  
 17 ¶ 16. Zillow could have decided to join only multiple listing services that allow commingling, or it  
 18 could have designed its website to commingle non-MLS and MLS listings for the regions served by  
 19 the approximately 75 multiple listing services it joined that allow commingling. *Id.* ¶¶ 8, 17. Zillow  
 20 instead chose, for its own reasons and without any input from NAR, to join some multiple listing  
 21 services that prohibited commingling and to implement a single, nationwide website design.  
 22 *Id.* ¶ 17.

23           All of this evidence is precisely the sort of unilateral conduct that does not give rise to  
 24 liability under the Sherman Act and from which a plaintiff cannot infer the existence of an unlawful  
 25 agreement as a matter of law. *See 49er Chevrolet*, 803 F.2d at 1467 (affirming summary judgment  
 26 for defendants because the plaintiff failed to present evidence to prove there was an agreement  
 27 between the dealers); *Gorlick Distribution Centers, LLC v. Car Sound Exhaust Sys., Inc.*, 2010 WL  
 28 4365807 at \*5 (W.D. Wash. 2010) (holding that a Sherman Act claim failed as a matter of law

1 because the plaintiff failed to present evidence that the defendants agreed not to ship automotive  
2 parts to certain regions of the country rather than unilaterally deciding not to do so).

## 3 **II. The Unilateral Changes to Zillow’s Website Have Not Harmed Competition**

4 As the Court recognized in its motion to dismiss decision, REX’s antitrust claims must be  
5 evaluated under the rule of reason. ECF 98 at 9–10. To prevail in a rule of reason case, the plaintiff  
6 must prove that the defendants’ actions harmed competition. *Kaplan v. Burroughs Corp.*, 611 F.2d  
7 286, 291 (9th Cir. 1979) (a rule of reason plaintiff must prove “significant anticompetitive effects”).

8 To meet this burden, REX alleges the changes to Zillow’s website harmed competition  
9 because sellers “may feel forced to do business” with NAR and multiple listing services “to have  
10 superior placement on Zillow’s dominant website, while buyers may never see their best options  
11 because REX’s listings (and all others in the ‘Other listings’ category) are demoted.” ECF 99 ¶ 96.  
12 According to REX, this harms competition because “[c]ompetition from REX, which allows buyers  
13 and sellers to lower commissions to get more home for their money, is suppressed, and REX loses  
14 customers.” *Id.* REX further alleges that the changes to Zillow’s website have anticompetitive  
15 effects because REX “has lost clients, has been forced to co-list clients with MLS members, and has  
16 been repeatedly questioned about the lack of visibility of REX listings on Zillow’s websites.”  
17 *Id.* ¶ 140.

18 None of these claims, however, amount to harm to competition, even if the effects of the  
19 website change ultimately drove REX out of business. “The elimination of a single competitor,  
20 without more, does not prove anticompetitive effect.” *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802,  
21 812 (9th Cir. 1988). That means to show harm to competition, REX must do more than simply  
22 prove that it exited the market as a result of the changes to Zillow’s website. *See Hilton v. Children’s*  
23 *Hosp. San Diego*, 315 F. App’x 607, 609 (9th Cir. 2008) (“Any loss of Hilton’s services is  
24 insufficient by itself to raise a genuine issue of material fact regarding a decline in marketwide  
25 quality.”); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995). REX must prove  
26 that its presence in the market had a meaningful impact on competition before it failed, which it  
27 cannot do. Indeed, REX’s own expert implicitly concedes that REX had no impact on competition  
28 prior to Zillow’s website change by opining [REDACTED]

1 [REDACTED] Ex. G  
2 ¶ 438 (emphasis added). In other words, at the time of its failure—after seven years in business—  
3 REX still was not “a competitive constraint” in the marketplace, which is confirmed by the  
4 discovery record.

5 The undisputed facts show that REX had no impact on the prices consumers pay for  
6 brokerage services. REX admits that it competed with all licensed real estate agents in the parts of  
7 the country where it had operations, Ex. X at 3 (No. 1), which amounts to [REDACTED]  
8 [REDACTED], Ex. H at 172:6–8, 172:18–21. REX admits that [REDACTED]  
9 [REDACTED]. *Id.* at 172:24–173:17. And REX never  
10 attained a market share of more than 0.6% in any individual market. Ex. W. That means there is  
11 no reason to believe REX’s exit from the market had any impact on prices whatsoever. *See Gorlick*  
12 *Distrib. Centers, LLC v. Car Sound Exhaust Sys., Inc.*, 723 F.3d 1019, 1024–25 (9th Cir. 2013)  
13 (“[T]he antitrust laws ‘were enacted for the protection of competition, not competitors.’ [Plaintiff]  
14 must demonstrate injury to competition in the market as a whole, not merely injury to itself as a  
15 competitor.” (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977));  
16 *GSI Tech. v. United Memories, Inc.*, 2014 WL 1572358, \*3 (N.D. Cal. Apr. 18, 2014) (“While  
17 eliminating one player from a market will certainly cause injury to the eliminated party, that injury  
18 is not ‘of the type the antitrust laws were intended to prevent,’ so long as other participants are not  
19 harmed and competition remains in the market.” (quoting *Gorlick*, 723 F.3d at 1025)).

20 The undisputed evidence also shows that REX had no impact on quality or consumer choice.  
21 While REX publicly claimed that it offered a unique service that leveraged technology to market  
22 homes directly to buyers, “totally eliminating” buyer agent commissions, Ex. T at 2, buyer agents  
23 were actually involved in many of REX’s transactions, and REX’s clients often paid buyer agent  
24 commissions. SUMF ¶ 23. Moreover, it also is undisputed that REX, like MLS participants, used  
25 multiple listing services to market its listings before Zillow changed its website. SUMF ¶ 20 (Ex. H  
26 at 152:8–21). It did so through co-listing, which refers to practice in which two real estate  
27 brokerages or agents jointly list a property for sale. SUMF ¶ 20 (Ex. H at 150:2–151:18). It is  
28 undisputed that REX co-listed properties with MLS participants *before* Zillow changed its

1 website—as early as 2017—for a nominal fee that was typically between \$100–300 per listing.  
2 SUMF ¶ 20. Indeed, REX’s use of co-listings had already been *increasing* in the year prior to the  
3 changes to Zillow’s website. *See* SUMF ¶ 20. REX used co-listings for the same reason that any  
4 agent chooses to use a multiple listing service—to expose their clients’ homes to the broadest  
5 possible audience. SUMF ¶ 20 (Ex. H at 152:22–153:2).

6 In sum, there was nothing particularly unique or novel of REX’s approach, or its impact on  
7 the market, that would suggest REX’s exit from the market caused an increase in prices or a market-  
8 wide reduction in the quality of brokerage services or consumer choice. And REX has not identified  
9 any other competitively significant firm that was impacted by Zillow’s website changes in any way.  
10 That means it has not mustered any evidence of harm to competition.

### 11 **III. REX Has Not Suffered an Antitrust Injury Caused by Changes to Zillow’s Website 12 and Therefore Lacks Antitrust Standing**

13 Antitrust injury is a required element for a plaintiff to establish antitrust standing and  
14 maintain a private antitrust case. *See Brunswick*, 429 U.S. at 489; *City of Oakland v. Oakland*  
15 *Raiders*, 20 F.4th 441, 456 (9th Cir. 2021) (antitrust injury is “mandatory”). Specifically, to create  
16 a triable issue on antitrust injury, the plaintiff must produce evidence that (1) the defendants’ actions  
17 harmed competition; *and* (2) that the plaintiff’s injury was caused by the reduction in competition.  
18 *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990) (“Antitrust injury does not arise  
19 . . . until a private party is adversely affected by an *anticompetitive* aspect of the defendant’s conduct  
20 . . . .”); *Hilton*, 315 F. App’x at 609 (granting defendants’ motion for summary judgment where  
21 plaintiff failed to show there was a genuine issue of material fact on the question of antitrust injury).  
22 The undisputed evidence shows that REX’s claimed injury was not caused by a reduction in  
23 competition arising from the changes to Zillow’s website—instead, its injury was caused by its own  
24 stubborn refusal to continue its preexisting business practice of co-listing.

25 REX insists that “Zillow’s decision to adopt a two-tab display and label the default tab as  
26 ‘Agent Listings’ and place REX’s listings . . . under ‘Other Listings’ had a devastating impact on  
27 REX’s listings and its business as a whole.” Ex. Y (REX Resp. to Zillow Fourth Set of  
28 Interrogatories) at 14 (No. 12). But it is undisputed that the changes to Zillow’s website prevented





1 DATED: June 8, 2023

2 /s/ Ethan Glass

3 Christopher B. Durbin (WSBA No. 41159)  
4 COOLEY LLP  
5 1700 Seventh Avenue  
6 Suite 1900  
7 Seattle, WA 98101-1355  
8 Phone: (206) 452-8700  
9 Fax: (206) 452-8800  
10 Email: cdurbin@cooley.com

11 Ethan Glass (pro hac vice)  
12 Samantha A. Strauss (pro hac vice)  
13 COOLEY LLP  
14 1299 Pennsylvania Avenue, NW  
15 Suite 700  
16 Washington, DC 20004-2400  
17 Phone: (202) 776-2244  
18 Fax: (202) 842-7899  
19 eglass@cooley.com  
20 sastrauss@cooley.com

21 Sarah M. Topol (pro hac vice)  
22 COOLEY LLP  
23 55 Hudson Yards  
24 New York, NY 10001  
25 Tel: (212) 479-6000  
26 stopol@cooley.com

27 Michael D. Bonanno (pro hac vice)  
28 Kathleen Lanigan (pro hac vice)  
Peter Benson (pro hac vice)  
Michael Sebring (pro hac vice)  
QUINN EMANUEL URQUHART & SULLIVAN,  
LLP  
1300 I Street, Suite 900  
Washington, D.C. 20005  
Phone: (202)538-8000  
Fax: (202) 538-8100  
mikebonanno@quinnemanuel.com  
katlanigan@quinnemanuel.com  
peterbenson@quinnemanuel.com  
michaelsebring@quinnemanuel.com

*Attorneys for Defendant National  
Association of REALTORS®*

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**CERTIFICATION OF WORD COUNT**

I certify that this memorandum contains 7,851 words, in compliance with the Local Civil Rules.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 8, 2023, I caused a true and correct copy of the foregoing to be filed in this Court's CM/ECF system, which will send notification of such filing to counsel of record.

DATED: June 8, 2023

*/s/ Ethan Glass*

\_\_\_\_\_  
Ethan Glass