No. _____

IN THE
Supreme Court of the United States

REAL ESTATE EXCHANGE, INC.,
Petitioner,

v.

ZILLOW GROUP, INC. AND
NATIONAL ASSOCIATION OF REALTORS,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Around ten years ago this Court granted certiorari "to resolve 'whether allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in the association, without more, is sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act.'" *Visa Inc. v. Osborn*, 137 S. Ct. 289, 289 (2016) (citations omitted). "[H]owever, petitioner chose to rely on a different argument in their merits briefing" so the writ was dismissed as improvidently granted. *Id.* at 289–90 (citation omitted).

Since then, the circuit split has deepened on whether a business association's rules are a conspiracy subject to Section 1 of the Sherman Act. This appeal presents an effective vehicle for addressing a question that encompasses the granted question in *Visa Inc. v. Osborn*:

Whether a business association that publishes a rule for its members can immunize the rule, and members' adherence to it, from being considered a conspiracy subject to Sherman Act Section 1 by making the rule optional—as held by the Ninth Circuit below and the Tenth Circuit—or whether an association's rule can be a conspiracy even if optional—as held by the First, Third, and Fifth Circuits and supported by the Department of Justice and this Court's precedent.

PARTIES TO THE PROCEEDING

Petitioner is Real Estate Exchange, Inc., the plaintiff below.

Respondents are the National Association of Realtors and Zillow Group, Inc., the defendants below. Below Petitioner "also sued subsidiaries of Zillow Group, Inc. including Zillow, Inc., Zillow Homes, Inc., Zillow Listing Services, Inc., and Trulia, LLC." App. 2a n.1.

CORPORATE DISCLOSURE STATEMENT

Petitioner Real Estate Exchange, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to the case in this Court:

- *Real Estate Exchange, Inc. v. Zillow Inc. et al.*, No. 2:21-cv-0312 (W.D. Wash. Aug. 16, 2023) (granting summary judgment against Sherman Act Section 1 claim); and

- *Real Estate Exchange, Inc. v. Zillow Group, Inc. & Nat'l Ass'n of Realtors*, No. 24-685 (9th Cir. Mar. 3, 2025) (affirming summary judgment), rehearing en banc denied (9th Cir. Apr. 16, 2025).

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PETITION FOR A WRIT OF CERTIORARI

Real Estate Exchange, Inc. ("REX") respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 2025 WL 670967 and 2025 U.S. App. LEXIS 5117, and reprinted at App. 1a–7a. The Ninth Circuit's order denying the petition for rehearing en banc is unreported but reprinted at App. 8a. The District Court's decision granting summary judgment against REX's Section 1 claim is reported at 2021 WL 3930694 and 2021 U.S. Dist. LEXIS 167281 and reprinted at App. 9a–43a.

STATEMENT OF JURISDICTION

28 U.S.C. § 1254 confers jurisdiction on this Court. The Ninth Circuit entered its decision and judgment on March 3, 2025, App. 1a, and denied a timely petition for rehearing en banc on April 16, 2025, App. 8a. Petitioner received extensions of the deadline for filing this Petition until Saturday September 13, 2025, rendering the effective deadline Monday September 15, 2025. S. Ct. R. 30.1.

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

INTRODUCTION

The Court of Appeals' decision deepens a circuit split about antitrust liability for business associations, risks additional anticompetitive conduct by business associations under the guise of "optional" rules, and dismissed a Sherman Act claim that aimed to save Americans the $50 billion in excess commissions that they pay each year to buy and sell homes.

This case challenges the publication of a rule by the National Association of Realtors ("NAR") which recommended to its members that they segregate the display of their property listings from non-members' property listings (the "Segregation Rule").

Plaintiff REX, which competed with NAR members to represent home buyers and sellers, had been successfully listing its clients' properties on online platforms. Defendant Zillow had previously displayed the property listings from REX and NAR members on a single default webpage of search results. But then Zillow made agreements with associations of NAR members in order to obtain faster access to their

property listings. Most of these NAR-affiliated associations adhered to NAR's Segregation Rule.

Zillow then decided to change its display of property listings to start segregating. Zillow created a default display which showed property listings from NAR members only, and demoted REX's listings to a secondary tab which users clicked less than 10% of the time. Views of REX's listed properties dropped by 80%.

REX sued NAR and Zillow for claims including violation of Sherman Act Section 1. The District Court and Ninth Circuit held that there was no conspiracy in NAR's publication of the Segregation Rule, nor Zillow's adherence to it, because the rule was optional.

This troubling reasoning opens a large loophole in antitrust law, if allowed to stand. The Court should grant certiorari to close this loophole. It is not a one-off decision. The Tenth Circuit has held that there was no conspiracy in an association's policy to use the same price when soliciting laborers for each of its members to employ because the price was optional for those members to follow. *Llacua v. Western Range Ass'n*, 930 F.3d 1161, 1172–73, 1179 (10th Cir. 2019).

This Court considered conspiracies by business association rules worth addressing when it granted certiorari in *Visa Inc. v. Osborn*, 137 S. Ct. 289 (2016). This case is even more important. This case is an opportunity to close the antitrust loophole of "optional" rules, thus protecting the economic health of the country from thinly veiled conspiracies to restrain competition. The competition restrained here—which the lower courts did not consider or

remedy after mistakenly ruling there was no conspiracy—affects transactions totaling $2 trillion each year. Few antitrust cases have ever been more important.

The Court should grant this Petition and reverse the judgment of the Court of Appeals.

STATEMENT OF THE CASE

The Parties

Defendant National Association of Realtors ("NAR") is an association of "approximately 1.4 million members includ[ing] real estate brokers, agents, and others involved in the real estate industry." App. 13a. These NAR members compete to represent buyers and sellers of homes. 8-ER-1641–43. NAR is a bottom-up and top-down association: individual NAR members belong to local associations, representatives of those local associations populate NAR's leadership and make decisions on NAR's rules, and then NAR publishes rules for the local associations and individual members. 8-ER-1577–78. The local associations often operate their own multiple listing service ("MLS"). An MLS is an entity that shares property listings according to rules adopted by the MLS. App. 11a. There are more than 500 NAR-affiliated MLSs in the United States. 3-ER-522.

Defendant Zillow Group, Inc. and its affiliated companies operate the most-visited websites and mobile apps for residential property listings. 8-ER-2078. In 2019, Zillow started to join MLSs in order to obtain immediate access to their listings through their

"IDX feed" (Internet Data Exchange feed). App. 12a–13a. As the District Court explained, "By joining local MLSs, Zillow was required to adhere to various rules and policies enacted by the local MLSs regarding the display of IDX data. Many of these policies and rules had been promulgated by defendant [NAR]." App. 13a. (citations omitted).

Plaintiff REX was a promising real estate broker with a business model that sharply reduced the commissions charged to buy or sell a home. Founded with the knowledge that internet-enabled competition had dramatically reduced commissions in all other markets with intermediaries, such as stockbrokers and travel agents, REX sought to do the same for buying and selling homes. Central to REX's business was listing its clients' properties on internet platforms, the most popular being Zillow. App. 21a.

The Segregation Rule Published by NAR

NAR publishes a detailed Handbook on Multiple Listing Policy for MLSs. App. 13a–14a. The Handbook labels some rules as mandatory and others as recommended or optional. App. 14a.

During the relevant time period, NAR's Handbook contained an optional "Model Rule" that called for separating the display of property listings by NAR members from those of non-members. 3-ER-438, 465. NAR refers to this as the "no-commingling rule." In effect it was a Segregation Rule. Codified at Section 18.3.11, this rule stated:

> Listings obtained through IDX feeds from REALTOR® Association MLSs where the MLS Participant holds participatory rights must be displayed separately from listings obtained from 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)* O

3-ER-465; App. 15a. The text of the rule itself was compulsory: "Listings . . . must be displayed separately." But NAR's Handbook stated that the "O" icon meant this rule was "Optional." 3-ER-318.

As of 2022, 70% of NAR-affiliated MLSs had adopted the Segregation Rule—fully 373 of the 532 NAR-affiliated MLSs. 3-ER-522; *see also* App. 15a.

Zillow Segregates After Joining NAR MLSs

For years Zillow had displayed the listings from MLSs and from REX on a single webpage. There was no segregation. REX used Zillow and similar platforms to become a promising competitor to other real estate brokers, including NAR members. REX's business boomed for its first five years, reaching a valuation of around $1 billion in late 2020. 8-ER-1742.

But then Zillow implemented the Segregation Rule in January 2021. App. 18a. By this time, Zillow had signed agreements with more than 200 NAR-affiliated MLSs so that Zillow could obtain listings from their IDX feeds. App. 17a. Two-thirds of these

NAR-affiliated MLSs adhered to NAR's Segregation Rule. App. 17a.

When Zillow started displaying listings from these MLSs' IDX feeds, Zillow changed its website's display to start segregating. App. 17a–18a. As the District Court explained, Zillow "decided to implement a uniform, two-tab display, with the default tab labeled 'Agent listings' and the second tab labeled 'Other listings.'" App. 18a.

Catastrophic Effect on REX and Competition

After Zillow started segregating, Zillow displayed REX's listed homes only on the "Other listings" tab. App. 21a. Page views of listings on the "Other listings" tab dropped 80%. App. 19a, 21a. Less than 10% of sessions on Zillow even clicked on the "Other listings" tab. 4-ER-570. Segregation was the fatal blow to REX. There were no other blows, but REX could not survive. Approximately 18 months after Zillow started segregating, REX wound down its residential real estate brokerage. App. 21a. NAR's Segregation Rule, and Zillow's later adherence to it, had effectively insulated NAR members from competition from REX and other non-members.

REX's Section 1 Claim

Among other claims not at issue here, REX sued NAR and Zillow for their concerted action related to the Segregation Rule, which unlawfully restrained trade in violation of Sherman Act Section 1.

The Decisions Below

After discovery, both REX and the Defendants moved for summary judgment as to whether there was concerted action by NAR and Zillow. App. 9a–10a.

The District Court granted summary judgment against REX on the element of concerted action, and therefore dismissed REX's Section 1 claim. The District Court reasoned that "NAR's promulgation of an optional model rule . . . does not, standing alone, constitute evidence of 'a common scheme' or concerted effort" because, "[u]nlike the mandatory rules discussed above, roughly 29% of NAR-affiliated MLSs have not adopted the no-commingling rule." App. 26a, 32a. The District Court also held that, although Zillow implemented its two-tab design to comply with the Segregation Rule, and after executing agreements with NAR-affiliated MLSs that had adopted the Segregation Rule, Zillow was not a conspirator with NAR. App. 27a–28a.

The Ninth Circuit affirmed summary judgment against REX's Section 1 claim by holding that "there was no Sherman Act agreement between NAR and Zillow based on the no-commingling rule." App. 2a. The Ninth Circuit's reasoning consisted of two short paragraphs:

> First, as the district court found, the no-commingling rule itself is not direct evidence of concerted action that "joins together separate decisionmakers." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010). Each NAR-affiliated

> multiple listing service ("MLS") independently chose whether to adopt the rule, and indeed twenty-nine percent of them did not. The rule was in fact optional and does not establish a Section 1 agreement by itself.
>
> Second, Zillow independently re-designed its website to comply with the rule. . . . REX has not provided either direct or circumstantial evidence demonstrating that NAR agreed to this website design, or that Zillow did anything more than "merely accept" and comply with the optional no-commingling rule promulgated by NAR and adopted by some MLSs. . . . Nor did the no-commingling rule itself direct how Zillow or others should separately display listings from MLS and non-MLS sources. Thus, REX cannot prove that Zillow and NAR committed to a common, anti-competitive scheme and the district court correctly granted summary judgment.

App. 3a–4a (citations omitted). The Court of Appeals denied the petition for rehearing en banc on April 16, 2025, despite former Chief Judge Sidney Thomas recommending en banc review. App. 8a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because there is a circuit split, the Court of Appeals erred in this case, and this case is exceedingly important to the country: both to foster competition in the multi-trillion-dollar

residential real estate market, and to dissuade anticompetitive conduct by the innumerable other business associations covering the entire economy.

I. There Is a Circuit Split on the Important Question Whether an Association of Competitors Conspires When It Publishes an Optional Rule for Its Members.

The Ninth Circuit below held that NAR's Segregation Rule "does not establish a Section 1 agreement by itself" because it "was in fact optional." App. 3a. NAR's members "independently chose whether to adopt the rule, and indeed twenty-nine percent of [the NAR-affiliated MLSs] did not." App. 3a. This mistaken reasoning deepens a circuit split and deserves review to reverse.

A. The Tenth Circuit Supports the Ninth Circuit's Flawed Reasoning About Optional Rules.

The Tenth Circuit recently made a similar mistake. In *Llacua v. Western Range Ass'n*, employees had sued two associations that handled hiring for their member–employers because each association listed the same wage for every employer when soliciting employees. 930 F.3d 1161, 1172–73 (10th Cir. 2019). The Tenth Circuit did not consider this practice of listing the same wage for every member of the association to be a conspiracy because "[t]here is no allegation of fact showing the Association Defendants controlled member ranches' decision-making processes to further a collective scheme," "nor do [plaintiffs] allege facts supporting a plausible

inference individual members of either association could not offer a salary above the minimum wage if they so desired." *Id.* at 1177–79.

Like the Ninth Circuit below, the Tenth Circuit rested its decision on whether the association's members had the option to deviate from the association's policy, rather than whether the policy was a conspiracy in the first place.

B. The Ninth and Tenth Circuits' Decisions Split With At Least Three Other Circuits.

Decisions from the First, Third, and Fifth Circuits conflict with the view of the Ninth and Tenth Circuits on whether an association's optional rule is concerted action subject to Sherman Act Section 1.

The First Circuit held that an advertising association's communications about "maintenance of resale prices and elimination of price cutting" were concerted action despite evidence that "[t]he Association's resolutions and discussions [we]re represented as recommendations . . . which involved 'absolutely no obligation' and which w[ere] not binding on anyone." *Advert. Specialty Nat'l Ass'n v. FTC*, 238 F.2d 108, 116–17 (1st Cir. 1956). The First Circuit explained, in conflict with the Ninth and Tenth Circuits, that "it is settled that no provision to compel adherence to an unlawful agreement is necessary to invalidate it." *Id.*

The Third Circuit similarly held that an optional policy could support a finding of concerted action. In

LifeWatch Services v. Highmark Inc., the Third Circuit held that there were sufficient allegations of a conspiracy between Highmark and competing insurance providers to deny coverage for a particular treatment even though the policy Highmark followed was a "model policy . . . recommend[ing] denying coverage" and "members . . . [we]re not bound to follow the model policy." 902 F.3d 323, 334 (3d Cir. 2018).

Consistent with the First and Third Circuits, the Fifth Circuit held that an organization of physicians conspired by negotiating prices on behalf of its member physicians even though "its physicians remained free to reject an offer messengered by [the organization]," "each physician decided whether to accept a payor's offer, and physicians rejected offers messengered through [the organization] more than two-thirds of the time." *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 357–58 (5th Cir. 2008). This Fifth Circuit decision correctly focused on the association's conduct on behalf of its members—which was concerted action in itself—even though members did not adhere two-thirds of the time. In contrast, the Ninth Circuit erred by considering NAR's rule not to be concerted action because one-third of members did not adhere to it. App. 3a.

In truth, the percentage of members who adhere to an association's rule is not relevant to whether publication of the rule in the first place was concerted action. Although adherence to a rule is relevant to determining the identity of all the conspirators, the rule's effect on competition, and the damages caused by the rule, "[t]he question whether an arrangement

is a contract, combination, or conspiracy is different from and antecedent to" such considerations. *Am. Needle*, 560 U.S. at 186.

Further deepening the circuit split are decisions by three additional circuits which held that publication of a rule by an association of competitors was concerted action in itself. The following opinions addressed mandatory rules, but their reasoning does not indicate the result would have been any different if the rules were optional.

The Fourth Circuit, in another case regarding real estate professionals, held that there was concerted action based on "allegations that the MLS board members conspired in the form of the MLS rules, *the very passage of which establishes that the defendants convened and came to an agreement*. Circumstantial evidence sufficient to suggest a preceding agreement is thus superfluous in light of the direct evidence in the by-laws of the agreement itself." *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 289 (4th Cir. 2012) (cleaned up; emphasis added).

The D.C. Circuit similarly held that an association's publication of rules is itself concerted action: "The allegations here — that a group of retail banks fixed an element of access fee pricing through bankcard association rules — describe the sort of concerted action necessary to make out a Section 1 claim." *Osborn v. Visa Inc.*, 797 F.3d 1057, 1066–67 (D.C. Cir. 2015).

Recently the Second Circuit joined this rationale, explaining, "[T]he adoption of a binding association

rule designed to prevent competition is *direct evidence* of concerted action. No further proof is necessary. . . . [T]here is no need for [plaintiff] to allege a prior 'agreement to agree' or conspiracy to adopt the policy[.]" *Relevent Sports, LLC v. United States Soccer Fed'n, Inc.*, 61 F.4th 299, 307 (2d Cir. 2023) (citations omitted). "If . . . the plaintiff adequately alleges that the policy or rule is the agreement itself, then it need not allege any further agreement." *Id.* at 308. The Ninth Circuit below did not address this case, nor any of the others cited in this section.

* * *

In sum, there is stark inconsistency among the circuits as to whether a business association's publication of an optional rule is a conspiracy. This circuit split is ripe for resolution.

This circuit split deserves resolution more than usual because it concerns organizations that span the country. That means the outcome of a case like this depends on where a plaintiff happens to bring suit, and inconsistent rulings are possible. This risks unequal protection under antitrust law, a law so important this Court has called it "the Magna Carta of free enterprise" and "as important to the preservation of economic freedom . . . as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972). Granting certiorari is needed to correct the Ninth Circuit's error.

II. The Court of Appeals Erred.

REX appeals the granting of summary judgment against its Section 1 claim. Although "Section 1 applies only to concerted action that restrains trade," a single association's conduct can be concerted action. *Am. Needle*, 560 U.S. at 190. This Court "ha[s] repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *Id.* at 191. "The question is whether the agreement joins together independent centers of decisionmaking." *Id.* at 196 (citation omitted). The Ninth Circuit stated this principle, but then added an unsupported exception for action by an association that is optional for its members to follow.

Two errors arose from the Ninth Circuit's false premise that an association of competitors does not conspire when it publishes an optional rule for its members: (A) the error that NAR's publication of the rule was not a conspiracy in itself, and (B) the error that Zillow's change in conduct to adhere to the rule was not a conspiracy.

A. NAR's Publication of the Segregation Rule Was a Conspiracy Even if the Rule Was Optional.

The Ninth Circuit erroneously held that the Segregation Rule published by NAR was not concerted action because "[t]he rule was in fact optional and does not establish a Section 1 agreement by itself." App. 3a. The decision by an association of competitors to

publish a rule is still a conspiracy even if the rule is optional for members to follow.

NAR is a business association comprised of and controlled by NAR members who generally compete with one another, and non-members, to represent home buyers and sellers. NAR members are "separate economic actors pursuing separate economic interests," and therefore are "independent centers of decisionmaking." *Am. Needle*, 560 U.S. at 195. This means that NAR's decision to publish the Segregation Rule and label it as an optional rule was not the action of a single entity for antitrust purposes, but rather concerted action. *See id.* at 195–96. This publication of the Segregation Rule is the concerted action on which REX bases its Section 1 claim against NAR.

The Ninth Circuit believed that the Segregation Rule's publication was not concerted action that "joins together separate decisionmakers" because the rule was optional. App. 3a. But that optionality is irrelevant to whether independent decisionmakers conspired to publish the rule. There is no reason to treat the conspiracy to publish a rule as not a conspiracy because the rule is optional. The Ninth Circuit did not cite any support, nor did the Tenth Circuit in its similar ruling.

There is no support for the Ninth Circuit's position. On the contrary, this Court has held repeatedly that a rule or other action by an association of competitors is concerted action even if adherence by the association's members is not obligatory.

Most relevant, this Court found concerted action in another lawsuit against NAR when it "adopted standard rates of commissions for its members," even though the rates were "'non-mandatory'" and "departure from the prescribed rates has not caused the [local association] to invoke any sanctions." *United States v. Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485, 488 (1950).[1] This Court keenly reasoned, "[T]he fact that no penalties are imposed for deviations from the price schedules is not material. Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line." *Id.* at 489.

The parallels with REX's case are more than doctrinal. At issue again is the same anticompetitive defendant—NAR. At issue again is the same species of anticompetitive conduct by NAR—nominally optional rules that direct the market behavior of competitors. And at issue again is same effect—exclusion of low-cost rivals. The only thing that has changed in seventy-five years is NAR's evolving sophistication in cloaking its restraints. NAR's repeated questionable conduct makes scrutiny under Section 1 particularly appropriate for NAR's Segregation Rule.

Another instance in which this Court held there was concerted action in an association's policy despite members' adherence being optional was an "optional" plan for members to share price information, even though "no specific agreement to restrict trade or fix

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[1] NAR's name at the time was the National Association of Real Estate Boards. *About NAR—History*, NAR, www.nar.realtor/about-nar/history (last visited Sept. 4, 2025).

prices [wa]s proved." *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 391, 411 (1921). Similarly, in *Eastern States Retail Lumber Dealers' Ass'n v. United States*, this Court found concerted action from members of an association of retailers circulating "blacklists" of wholesalers who competed with retailers, even though "there [wa]s no agreement among the retailers to refrain from dealing with listed wholesalers, nor [wa]s there any penalty annexed for the failure so to do." 234 U.S. 600, 608–09 (1914).

Inconsistent with this precedent, the Ninth Circuit overlooked the conspiracy to publish the Segregation Rule and instead focused on whether NAR's members followed the Segregation Rule. But the action of an association can be a conspiracy even if there is not an additional agreement by the association's members to take further action. As this Court further explained in *FTC v. Pacific States Paper Trade Ass'n*, which challenged an association's publication of price lists, "The fact that there is no established rule that the lists shall be followed . . . or that the quoting of lower prices is an infraction . . . is not controlling in favor of [the association]." 273 U.S. 52, 62–63 (1927).

The Ninth Circuit's decision below is also contrary to the position of the Department of Justice's Antitrust Division in this case. The Antitrust Division's amicus brief to the Ninth Circuit explained:

> Under Supreme Court precedent, there are at least three ways that optional rules can involve concerted action: (1) a purportedly optional rule could be mandatory in

> practice; (2) an association's adoption of an optional rule can itself be concerted action; and (3) an optional rule can invite others to participate in a common plan.

App. 53a. Setting aside the first way—an optional rule that is not truly optional—the Antitrust Division's second and third ways are valid examples of concerted action with optional rules. The second way is NAR's concerted action: "an association's adoption of an optional rule can itself be concerted action." *Id.*

In sum, the Ninth Circuit's holding is troublingly inconsistent with the positions of this Court, the First, Third, and Fifth Circuits, and the Antitrust Division. Treating "optional" rules as immune from antitrust scrutiny "rest[s] on formalistic distinctions rather than actual market realities," which is "generally disfavored in antitrust law." *Ohio v. Am. Express Co.*, 585 U.S. 529, 542–43 (2018) (Thomas, J., opinion of the Court) (citation omitted). This Court should grant certiorari and reverse.

B. Zillow's Adherence to the Segregation Rule Was a Conspiracy Even if the Rule Was Optional.

The Ninth Circuit erroneously held that Zillow did not participate in the conspiracy of the Segregation Rule. Zillow, after becoming a member of NAR-affiliated MLSs and making agreements with NAR-affiliated MLSs, redesigned its website to start segregating listings from non-members. App. 12a–13a, 17a–18a. Zillow demoted non-members' listings from the default search-results page to a separate tab

that the user had to manually click, and which showed only non-member's listings such as REX's.

Generally when a member of an association complies with the association's policy, that is sufficient proof of an agreement without needing evidence of any communication from the particular member to confirm agreement. For example, in *Anderson v. Shipowners Ass'n of Pacific Coast*, this Court found that the members of the association "agreed to abide by the will of the associations" without mentioning that they communicated acceptance beyond complying with the restriction at issue. 272 U.S. 359, 361–62, 364–65 (1926). Similarly, regarding the member schools of the NCAA, this Court held that "*[b]y participating in an association* which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, *the NCAA member institutions have created a horizontal restraint -- an agreement among competitors*[.]" *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 99 (1984) (emphases added). In the Court's recent NCAA case, it unanimously applied Section 1 to "NCAA-issued-and-enforced limits on what compensation [members of the association] can offer" without mentioning a need for evidence that members communicated assent to the association. *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 86 (2021) (Gorsuch, J., opinion of unanimous Court); *see also id.* at 109 (Kavanaugh, J. concurring) (opining that Section 1 also applies to "the NCAA's remaining compensation rules").

Zillow did more than comply with NAR's Segregation Rule, it changed its conduct to do so. This change in conduct is at least circumstantial evidence that Zillow agreed to the Segregation Rule. Circumstantial evidence is sufficient to establish a conspiracy. *E.g.*, *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). Changes in conduct are significant proof. *See, e.g.*, *LifeWatch Servs.*, 902 F.3d at 334 (finding sufficient an allegation of a conspiracy when Highmark changed its conduct from covering the treatment to not covering it, based on pressure from Highmark's alleged co-conspirators); *United States v. Foley*, 598 F.2d 1323, 1332 (4th Cir. 1979) (affirming criminal antitrust conviction against realtors who increased commission rates after one realtor announced he would do so, even though that realtor also said "he did not care what the others did").

The Ninth Circuit relied on its misconception about optional rules to hold that Zillow did not conspire when it "*merely* accept[ed] and compl[ied] with the optional no-commingling rule promulgated by NAR[.]" App. 4a (citation omitted; emphasis added). This fails to credit the evidence of Zillow's changed conduct. It is also inconsistent with the Antitrust Division's opinion of this case: "REX's arguments appear to have the most support under the third theory"—an optional rule inviting participation in a common plan—because "Zillow later acquiesced by complying with the no-commingling rule[.]" App. 53a. Zillow's changed conduct was an acceptance of NAR's offer to participate in an agreement to segregate out the listings of non-members from the display of members' listings.

There is no evidence cited by the Ninth Circuit or the District Court to indicate that Zillow's changed conduct was independent of the Segregation Rule. The evidence shows the opposite: Zillow adopted its two-tab display in order to comply with the Segregation Rule. App. 17a–18a. Indeed, Zillow had an incentive to maintain NAR members' high commissions because NAR members pay Zillow to advertise. 8-ER-1699. If NAR members received less in commissions, they would have less to pay Zillow.

There is no requirement that NAR and Zillow communicate about the Segregation Rule, as the Ninth Circuit appeared to impose. That would be direct evidence of a conspiracy, which is not required. *See, e.g.*, *Monsanto*, 465 U.S. at 768; *Relevent*, 61 F.4th at 307 ("[T]here is no need for [plaintiff] to allege a prior 'agreement to agree[.]'").

To the extent the Ninth Circuit relied on the MLSs' decisions whether to adopt the "optional" Segregation Rule as a break in the concerted action between NAR and Zillow, as the District Court appeared to do, that would be further error. NAR's promulgation of the Segregation Rule was a conspiracy which also invited others to participate in it. *See* App. 53a (Antitrust Division's brief explaining "an optional rule can invite others to participate in a common plan"). Zillow participated in the conspiracy by adhering to the rule, as did the NAR-affiliated MLSs which adhered to it. Zillow did not need to expressly communicate its acceptance to NAR. *See, e.g.*, *Monsanto*, 465 U.S. at 768; *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (Sotomayor, J.) ("[E]ven in the absence of direct

'smoking gun' evidence, a horizontal . . . agreement may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors[.]" (citing *Interstate Circuit v. United States*, 306 U.S. 208, 221–22 (1939))).

This Court should clarify that when a new member to an association changes its conduct upon joining to adhere to the association's optional rule, that is sufficient evidence for a reasonable jury to find that the new member agreed to the rule. REX of course presented other circumstantial evidence that Zillow conspired with NAR to participate in the Segregation Rule conspiracy, but the Ninth Circuit relied on the lack of express communications and the optionality of the rule to find there was not a conspiracy. That was mistaken.

III. This Case Is Extraordinarily Important to Homeowners and the Future of Business Associations.

Transactions in residential real estate are one of the largest economic activities in the United States, totaling $2 trillion each year. 8-ER-1739, 1797. NAR's 1.4 million members handle the large majority of these home transactions, making it one of the nation's most economically significant business associations.

The Segregation Rule covered most home transactions during the relevant time period. As of 2022, there were 532 NAR-affiliated MLSs spread throughout the country, and more than two-thirds had adopted the Segregation Rule. 3-ER-522. That was a

significant swath of the American real estate market. And then the effect went nationwide when Zillow adhered to the Segregation Rule by implementing its two-tab design to all listings across the country.

REX's innovative low-cost model had represented a competitive threat to NAR members' traditional commission rate. But by relegating REX's listings to the secondary, non-default tab on Zillow, NAR's "optional" rule effectively foreclosed competition from REX and other non-members of NAR. This anticompetitive effect deserves scrutiny under Section 1. REX went from being valued around $1 billion to being out of business less than two years later. This outcome demonstrates how even "optional" rules can eliminate competition as effectively as a formal agreement. The Ninth Circuit's approach immunizes "optional" rules, despite the coordinated behavior that flows naturally from them, which here has enabled members of a business association to maintain inflated rates that cost individuals billions each year.

A. Real Estate Commissions in the United States Are Suspiciously Inflated.

For decades NAR has succeeded in maintaining commission percentages for real estate agents that are 5–6% total for the buyer's and seller's agents, which is *double or triple* the rate in other developed countries.[2] This disparity means that buyers and

[2] The average total is 3% in Australia, 2.4% in Sweden, 2.2% in the United Kingdom, and 1.8% in Ireland. 8-ER-1615-17.

sellers in the United States pay scores of billions more each year to buy and sell homes than they would in other countries.

There is no reason such a dramatic pricing disparity exists unless there is a restraint on competition. In virtually all other markets that historically used intermediaries paid on commission, such as travel agents, stockbrokers, and sellers of used goods, the internet enabled competition that drove down commission rates dramatically. But in the residential real estate market over the past few decades, the commission paid to agents has levitated at a consistent 5–6% rate, and the average amount of commission per transaction has increased faster than inflation.[3] This is remarkable because the advent of widespread online listings has made the realtor's work much easier. Gone are the days when a buyer's agent needed to show each buyer each potential house in person before it could be checked off the list. Now buyers themselves do much more of the work to sift through the options, saving realtors significant time.

Recent scholarship shines further light. A 2025 empirical analysis did not find any legitimate market

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[3] *See, e.g.*, 8-ER-1654; N. Delcoure & N. Miller, *International Residential Real Estate Brokerage Fees and Implications for the US Brokerage Industry*, 5 Int'l Real Estate Rev. 12, 29 (2002) (reporting a "common 6% or 7% fee" in 2002), available at www.gssinst.org/irer/wp-content/uploads/2020/10/2002-Vol-5-No-1-International.pdf; P. Barwick & M. Wong, *Competition in the real estate brokerage industry: A critical review* at 8, Brookings Institution (Dec. 2019), available at www.brookings.edu/wp-content/uploads/2019/12/ES-12.12.19-Barwick-Wong.pdf.

factors to justify the decades-long maintenance of commission rates in the United States, especially when other developed economies have much lower rates, and rates in other industries have declined. *See* J. Barry, et al., *Et Tu, Agent? Commission-Based Steering in Residential Real Estate*, 110 Iowa L. Rev. 1473, 1476–77, 1528, 1570 (May 2025).[4] The authors concluded that the reason commission rates remain high is that realtors steer their clients away from low-commission listings. *Id.* NAR's Segregation Rule facilitates steering by excluding non-members' listings from the display of properties listed by NAR members.

B. Immunity for Optional Rules Risks Anticompetitive Conduct Across the Economy.

The Question Presented in this appeal affects every industry where business associations could coordinate through "optional" rules. Healthcare associations could direct treatment protocols and reimbursement practices affecting patient care and medical costs. Banking associations could direct lending standards and fee structures that determine credit availability and pricing. Manufacturing associations could direct marketing and operational practices that affect product availability and pricing.

The Ninth Circuit's holding that "optional" rules escape Sherman Act scrutiny would fundamentally

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[4] Available at ilr.law.uiowa.edu/volume-110-issue-4-1. A data scientist who assisted with the article previously worked for REX, as the article discloses.

weaken antitrust enforcement by providing an easy and large loophole for competitors in other industries to follow. "The antitrust laws are not so rigid as to permit such easy evasion." *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment).

If NAR's conduct is allowed to stand immune from any scrutiny under Section 1, that tempts other business associations to coordinate through optional rules. Such coordination would be enough to harm competition, as it did here.

IV. This Case Is an Optimal Vehicle to Resolve an Issue on Which the Court Granted Certiorari But Dismissed Without a Substantive Ruling.

This Court considered the issue of conspiracies by business associations worth addressing when it granted certiorari in *Visa Inc. v. Osborn*, 137 S. Ct. 289 (2016). But the Court did not issue an opinion on the question presented in that case.

The circuit split at issue here—whether business association's optional rules are concerted action—shows no sign of resolving itself through further percolation in the Courts of Appeals. The Ninth and Tenth Circuits have staked their ground, unsupported though it is.

This case provides an ideal vehicle to resolve the question whether an association's publication of an optional rule, and members' adherence to it, is a

conspiracy. Here the relevant evidence is undisputed. Each side moved for summary judgment on whether Defendants conspired for purposes of Section 1. Moreover, the residential real estate market is well-known, closely followed, and exceedingly important to virtually everyone in the United States.

The unpublished status of the decision below is no barrier to review. "[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987). Indeed, the Court regularly grants certiorari from unpublished decisions to resolve circuit splits. *See, e.g.*, *Martin v. United States*, 145 S. Ct. 1689, 1695 (2025) (reversing unpublished Eleventh Circuit opinion); *Chiaverini v. City of Napoleon, Ohio*, 602 U.S. 556, 561 (2024) (reversing unpublished Sixth Circuit opinion); *Dupree v. Younger*, 598 U.S. 729, 733 (2023) (reversing unpublished Fourth Circuit opinion).

If anything, the unpublished status of the Ninth Circuit's decision is "yet another reason to grant review." *Plumley v. Austin*, 574 U.S. 1127, 1131–32 (2015) (Thomas, J., dissenting from denial of certiorari); *see also Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., dissenting from denial of certiorari) ("Nonpublication must not be a convenient means to prevent review."). The Ninth Circuit's opinion, although short and unpublished, still signals to business associations that there is a loophole for "optional" rules, and still has a real-world effect on competition in the multi-trillion-dollar residential real estate market. *See id.* ("An

unpublished opinion may have a lingering effect in the circuit and surely is as important to the parties concerned as is a published opinion."). Review should not be avoided because the Ninth Circuit panel did not designate it for publication.

V. The Court Should Invite the Views of the Solicitor General.

This Court routinely invites the Solicitor General to file a brief in cases that involve significant questions of federal law enforcement, particularly where the government has demonstrated sustained interest.

The federal government has demonstrated sustained interest in antitrust law's application to business associations.

In 2009, in *American Needle v. NFL*, Solicitor General Elena Kagan, the Assistant Attorney General, and the FTC General Counsel jointly submitted an amicus brief to explain their views on when an association's conduct constitutes concerted action subject to Section 1, and to oppose the association's "request for a broad judicially created exemption from Section 1." No. 08-661 (Sept. 25, 2009). In *American Needle* this Court also invited the Solicitor General's views on the petition for a writ of certiorari. No. 08-661 (Feb. 23, 2009).

In 2016, in *Visa Inc. v. Osborn*, the Acting Solicitor General, Acting Assistant Attorney General, and Acting FTC General Counsel jointly submitted an amicus brief to argue that a rule published by an

association of competitors is a conspiracy subject to Section 1. *See* No. 15-961 (Oct. 24, 2016).

In 2024, in response to this Court's invitation, the Solicitor General filed a brief regarding the petition for certiorari in *United States Soccer Federation v. Relevent Sports, LLC*, No. 23-120 (Mar. 13, 2024), the case in which the Second Circuit held that an association's publication of a binding rule was concerted action. 61 F.4th at 307. This Court agreed with the Solicitor General's recommendation not to grant certiorari. In contrast here, the Ninth Circuit found no concerted action in an association's rule.

This case has already interested the Department of Justice's Antitrust Division, which filed a Statement of Interest in the District Court (App. 71a), and in the Ninth Circuit filed an amicus brief (App. 44a) and presented oral argument.

The federal government's repeated advocacy on antitrust law's application to business associations indicates this issue has longstanding importance to federal antitrust enforcement. The Solicitor General's views could provide this Court with crucial insight on topics such as how the circuit split on optional association rules affects nationwide antitrust enforcement, the economic significance of business association rules and how they coordinate competitors' behavior, the relationship between the Question Presented and broader Department of Justice enforcement priorities, and the practical implications of allowing a loophole in antitrust law for optional rules.

CONCLUSION

The Ninth and Tenth Circuits are in conflict with three other circuits and the positions of this Court and the Department of Justice's Antitrust Division. To correct the error, this Court should call for the views of the Solicitor General, grant the Petition, and reverse the Ninth Circuit's decision.

September 15, 2025 Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 3, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-685
D.C. No. 2:21-cv-00312-TSZ

REAL ESTATE EXCHANGE INC,
A DELAWARE CORPORATION,

Plaintiff-Appellant,

v.

ZILLOW GROUP, INC.,
A WASHINGTON CORPORATION;
NATIONAL ASSOCIATION OF REALTORS,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted February 13, 2025
Honolulu, Hawaii

Before: S.R. THOMAS, BRESS, and DE ALBA, Circuit Judges.

Filed March 3, 2025

Appendix A

MEMORANDUM*

Real Estate Exchange ("REX") appeals the district court's grant of summary judgment to the National Association of Realtors ("NAR") and Zillow Group, Inc.[1] ("Zillow") on antitrust claims under Section 1 of the Sherman Act, 15 U.S.C. § 1, and a parallel provision of the Washington Consumer Protection Act, Wash Rev. Code § 19.86.030. REX also appeals the district court's denial of REX's motion for a new trial on REX's deceptive act or practice claim under Wash. Rev. Code § 19.86.020. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm. Because the parties are familiar with the factual and procedural history of the case, we need not recount it here.

I

The district court correctly concluded that there was no Sherman Act agreement between NAR and Zillow based on the no-commingling rule.[2] The existence of an

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3..

1. REX also sued subsidiaries of Zillow Group, Inc. including Zillow, Inc., Zillow Homes, Inc., Zillow Listing Services, Inc., and Trulia, LLC. These entities are collectively referred to as "Zillow" here.

2. We analyze REX's antitrust claim under Washington state law under the federal standard because the relevant section of the Washington Consumer Protection Act mirrors the Sherman

agreement, or "concerted action," is an essential element of a claim under Section 1 of the Sherman Act. *Fisher v. City of Berkeley*, 475 U.S. 260, 266-67, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986) (stating "there can be no liability under § 1 in the absence of agreement"). Concerted action consists of "a conscious commitment to a common scheme designed to achieve an unlawful objective." *PLS.Com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 842 (9th Cir. 2022) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)). To survive summary judgment, a plaintiff must provide direct or circumstantial evidence of concerted action. *See Toscano v. Pro. Golfers Ass'n*, 258 F.3d 978, 983 (9th Cir. 2001). REX did not do so here.

First, as the district court found, the no-commingling rule itself is not direct evidence of concerted action that "joins together separate decisionmakers." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010). Each NAR-affiliated multiple listing service ("MLS") independently chose whether to adopt the rule, and indeed twenty-nine percent of them did not. The rule was in fact optional and does not establish a Section 1 agreement by itself.

Act. *See State v. Black*, 100 Wn.2d 793, 676 P.2d 963, 967 (Wash. 1984) (en banc) (stating that Wash. Rev. Code § 19.86.030 "is our State's equivalent of section 1 of the Sherman Antitrust Act" and that "[w]hen the Legislature enacted the Consumer Protection Act, it anticipated that [Washington] courts would be guided by the interpretation given by federal courts to their corresponding federal statutes").

Second, Zillow independently re-designed its website to comply with the rule. Zillow's choice to change its website to display listings on two separate tabs—with REX's listings on the non-default tab—is the source of REX's alleged anti-competitive harm. REX has not provided either direct or circumstantial evidence demonstrating that NAR agreed to this website design, or that Zillow did anything more than "merely accept[]" and comply with the optional no-commingling rule promulgated by NAR and adopted by some MLSs. *Toscano*, 258 F.3d at 983-84 (finding no agreement where local sponsors of golf tournaments "merely accepted" rules that were "independently set" by the PGA Tour). Nor did the no-commingling rule itself direct how Zillow or others should separately display listings from MLS and non-MLS sources. Thus, REX cannot prove that Zillow and NAR committed to a common, anti-competitive scheme and the district court correctly granted summary judgment. *See Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1155 (9th Cir. 2001) (finding "[p]laintiffs [could not] survive summary judgment because they [had] presented neither direct nor circumstantial evidence" of concerted action).

II

The district court also correctly found that REX forfeited any claim of conspiracy between Zillow and non-party MLSs that did not include NAR. REX never made a concrete allegation of a separate conspiracy involving Zillow and individual MLSs. In its Amended Complaint,

REX referred repeatedly to the "NAR/MLS regime" or "NAR/MLS cartel." REX also alleged a nationwide conspiracy "[b]ecause Zillow's universal display change concealing non-MLS listings is implemented nationally" and did not limit its allegations to only those jurisdictions where an MLS had adopted the no-commingling rule. Any conspiracy between Zillow and MLSs alone was not clearly raised before the district court and accordingly need not be considered on appeal. *In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 780 (9th Cir. 2014) ("Generally, arguments not raised in the district court will not be considered for the first time on appeal.").

III

Finally, the district court did not err in instructing the jury on Zillow's reasonable business practice defense to REX's deceptive act or practice claim under the Washington Consumer Protection Act. "Jury instructions must be supported by the evidence, fairly and adequately cover the issues presented, correctly state the law, and not be misleading." *Peralta v. Dillard*, 744 F.3d 1076, 1082 (9th Cir. 2014).

Here, Zillow presented sufficient evidence to warrant the instruction. As the district court noted in its denial of REX's motion for a new trial, Zillow provided evidence at trial that it designed its two-tab display thinking REX's listings would not be included on either tab after

Zillow switched to IDX feeds. Later, at REX's request, Zillow accommodated REX by including its listings on the "Other listings" tab. *Id.* The district court correctly noted that "[t]he jury could have viewed this last-minute decision as being in the best interests of both REX and Zillow and therefore reasonable." Zillow was thus entitled to receive a jury instruction on its reasonable business practice defense. *See Travis v. Wash. Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 759 P.2d 418, 423-24 (Wash. 1988) (en banc) (defendant was entitled to an instruction on the reasonable business practice defense, where the defendant presented evidence that its deceptive practice was customary in the trade).

The given instruction also correctly stated the law. The language was derived from the Washington Consumer Protection Act, Wash. Rev. Code § 19.86.920, and mirrored the language of Washington Pattern Jury Instruction 310.02. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 310.02 (7th ed. 2022). Additionally, in *Travis*, the Washington Supreme Court held that an instruction substantially similar to the one given by the district court "correctly states the law." 759 P.2d at 424. REX asserts the instruction was nonetheless misleading because the jury might conclude that Zillow's switch to receiving listings data through IDX feeds was reasonable, not its website re-design. But the language of the instruction makes clear that Zillow's deceptive "act or practice" is

what must be reasonable, and accordingly the court did not err in refusing to clarify the instruction any further.[3]

AFFIRMED.

3. REX also asserts the instruction should not have been given because the public interest outweighed any potential business justification. REX did not preserve this objection below, so it is reviewed only for plain error. Fed. R. Civ. P. 51(d)(2). None of the cases REX cites support its contention that the trial court must weigh the public interest before instructing a jury on the reasonableness defense. Instead, "[t]he 'reasonableness defense' is appropriately submitted as a jury question if there are material issues of fact about its application." *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 159 P.3d 10, 20-21 (Wash. Ct. App. 2007). The district court committed no error, let alone plain error, in giving the instruction.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED APRIL 16, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-685
D.C. No. 2:21-cv-00312-TSZ
Western District of Washington, Seattle

REAL ESTATE EXCHANGE INC,
A DELAWARE CORPORATION,

Plaintiff-Appellant,

v.

ZILLOW GROUP, INC., A WASHINGTON
CORPORATION AND NATIONAL
ASSOCIATION OF REALTORS,

Defendants-Appellees.

ORDER

Before: S.R. THOMAS, BRESS, and DE ALBA, Circuit Judges.

Judge Bress and Judge de Alba have voted to deny Real Estate Exchange's petition for rehearing en banc and Judge S.R. Thomas has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40. Real Estate Exchange's petition for rehearing en banc, Dkt. No. 107, is **DENIED**.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED AUGUST 16, 2023

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

C21-0312 TSZ

REX–REAL ESTATE EXCHANGE, INC.,

Plaintiff,

v.

ZILLOW, INC., *et al.*,

Defendants.

Filed August 16, 2023

ORDER

THIS MATTER comes before the Court on (i) the motion for summary judgment, docket no. 331, brought by defendant the National Association of REALTORS® ("NAR") relating to antitrust claims under federal and state law asserted by plaintiff REX–Real Estate Exchange, Inc. ("REX"), (ii) the deferred portion of the motion for summary judgment, docket no. 339, brought by defendants Zillow, Inc., Zillow Group, Inc., Zillow Homes, Inc., Zillow Listing Services, Inc., and Trulia, LLC (collectively, "Zillow") relating to REX's antitrust claims, and (iii) the portion of REX's motion for partial

summary judgment, docket no. 332, seeking to establish the existence of an "agreement" for purposes of its antitrust claims. Having reviewed all papers filed in support of, and in opposition to, the motions, and having considered the oral arguments of counsel, the Court enters the following Order, and dismisses REX's antitrust claims against all defendants.

BACKGROUND

A. Zillow

This action arises from Zillow's implementation of a two-tab display on its websites and mobile platforms ("apps"). Founded in 2004 in Seattle, Washington, Zillow operates "the most-visited network of residential real estate websites and mobile apps in the United States." Samuelson Decl. at ¶ 7 (docket no. 61)[1]; *see also* Ex. J to Goldfarb Decl. (docket no. 405-9 at 5) (showing that the total number of Zillow's daily active app users is three times higher than its nearest competitor).

Before January 2021, Zillow obtained access to the millions of property "listings"[2] that it displayed on its websites and mobile platforms through individually

1. All parties rely on the Declaration of Errol Samuelson, Zillow's Chief Industry Development Officer, docket no. 61, in support of their respective motions and briefs.

2. A listing is a "compilation of data" about a specific property, including its size, price, and sale status, as well as any photos, videos, or virtual tours of the property. Samuelson Decl. at ¶ 19.

negotiated, third-party "syndication agreements" with hundreds of multiple listing services across the United States and many of their participants.[3] Samuelson Decl. at ¶¶ 32, 34. A multiple listing service ("MLS") is an "organization and a system" through which real estate professionals "agree on the basic terms of their cooperation and compensation to help one another sell homes and contribute to a common database of listings." *Id.* at ¶ 24. Prince Report at ¶¶ 19-20, Ex. 10 to Goldfarb Decl. (docket no. 344-2). Approximately 585 MLSs exist within the United States, "each of which generally covers a discrete geographic region and facilitates broad access to all listings within that area." *Id.*

Although Zillow's syndication agreements with MLSs allowed it to "compile a vast quantity" of listings nationwide, Zillow observed that its coverage was not complete. Samuelson Decl. at ¶¶ 35, 40. Although Zillow was, on average, displaying approximately 98% of listings in the United States, its coverage in certain markets was substantially lower. *Id.* at ¶¶ 40-41. For example, Zillow found that it was missing approximately 30-35% of MLS listings in the Seattle real estate market despite its syndication agreement with the local MLS. *See id.* These gaps in coverage caused Zillow to consider whether

3. The parties repeatedly refer to various types of real estate professionals throughout their motions and briefs. According to NAR's antitrust rebuttal expert, Jeffrey Prince, Ph.D., a real estate "agent" has a professional license to assist in the buying, selling, or rental of real estate, while a "broker" typically has more experience than an agent, as well as an additional license, and might oversee one or more agents.

to use a different method of obtaining listings data. *Id.* at ¶ 30. Additionally, Zillow was concerned about losing access to listings because most MLSs could terminate the syndication agreements "without cause and with very limited notice." *Id.* at ¶ 49.

In 2019, Zillow began to shift away from syndication agreements to contracts permitting it to obtain "more reliable, comprehensive, and higher-quality" Internet Data Exchange ("IDX") feeds directly from the MLSs. Samuelson Decl. at ¶ 31. To gain access to an MLS's IDX feed, Zillow was required to become a participant of the MLS.[4] *Id.* at ¶¶ 18, 31; *see also* Samuelson Dep. (Nov. 29, 2022) at 13:9-13, Ex. M to Bonanno Decl. (docket no. 329-13) ("[T]hat meant that [Zillow] would be joining MLSs in order to qualify for those [IDX] feeds."). Unlike Zillow's

4. Zillow's decision to join local MLSs coincided with the expansion of its iBuying business, Zillow Offers. Since 2018, Zillow had been purchasing homes directly from consumers in 25 major markets across the United States. *See* Samuelson Decl. at ¶ 16. Zillow would buy a home, flip it, and then place the property in a local MLS and on Zillow's websites for resale. *Id.* Zillow typically worked with local brokers to represent it when buying and selling properties through its Zillow Offers service. *Id.* In January 2021, Zillow launched Zillow Homes. *See id.* at ¶ 17. Through its Zillow Homes business, Zillow became a licensed brokerage in certain markets and represented itself when buying and selling homes in those areas. *Id.* Zillow hoped to expand Zillow Homes to all of the markets in which Zillow Offers operated. *Id.* Becoming a licensed broker, however, required Zillow "to change the way it obtained listings data [from the MLSs] to conform to the typical way brokers receive listing data" (i.e., through IDX feeds licensed to an MLS's participants). *Id.* at ¶ 52.

third-party syndication agreements, which sometimes "imposed restrictions on how often Zillow would obtain updated listings information," access to IDX feeds would provide Zillow with complete listings delivered directly from the MLSs without delay. Samuelson Decl. at ¶¶ 5, 47.

The record reflects that Zillow's transition to IDX feeds was not a simple task. Zillow first "had to become a licensed brokerage and hire and/or license designated brokers" in all 50 states and the District of Columbia. *Id.* at ¶ 53. These brokers "then applied for membership with hundreds of local MLSs" and requested access to their IDX feeds. *Id.* By joining local MLSs, Zillow was required to "adhere to various rules and policies enacted by the local MLSs regarding the display of IDX data[.]" *Id.* Many of these policies and rules had been promulgated by defendant the National Association of REALTORS®.

B. NAR

NAR is a trade association of real estate professionals. Samuelson Decl. at ¶ 26. Its approximately 1.4 million members include real estate brokers, agents, and others involved in the real estate industry. *Id.* The term "REALTOR®" refers to a broker or agent who is member of NAR. Galicia Decl. at ¶ 2 (docket no. 65). A broker or agent can become a REALTOR® by joining a local association of REALTORS®, which "automatically extends" the broker's or agent's membership to the state association and to NAR. Prince Report at ¶ 21, Ex. 10 to Goldfarb Decl. (docket no. 344-2). As a trade association, NAR publishes the Handbook on Multiple Listing Policy

(the "Handbook"), which "is intended to guide member associations of REALTORS® in the operation of [their MLSs] consistent with the policies established by [NAR's] Board of Directors." *See* Ex. B to Bonanno Decl. (docket no. 329-2 at 5). Pursuant to the Handbook, NARaffiliated MLSs[5] "must conform their governing documents to the mandatory MLS policies established by [NAR's] Board of Directors to ensure continued status as member boards and to ensure coverage under [NAR's] master professional liability insurance program." *Id.*

C. The No-Commingling Rule

In addition to providing mandatory provisions, the Handbook contains a number of NAR's "recommended," "optional," or "informational" model rules. *See* Handbook (docket no. 329-2 at 3). At issue in this action is "Section 18.3.11," which the Handbook labels as an optional model rule. *Id.* (docket no. 329-2 at 105). Section 18.3.11 (hereafter referred to as the "no-commingling rule")[6]

5. NAR-affiliated MLSs are "independent entities owned by or operated by [REALTOR(R)] associations." Gansho Dep. (Oct. 28, 2022) at 47:16-20, Ex. D to Bonanno Decl. (docket no. 335). Some MLSs in the United States are not affiliated with NAR. For example, the Northwest Multiple Listing Service (which covers the Seattle housing market) is not affiliated with NAR. *See* Samuelson Decl. at ¶ 27. Only MLSs owned by one or more associations of REALTORS® are considered NAR-affiliated. *Id.* If affiliated with NAR, an MLS must "enact and follow" NAR's mandatory policies and rules. *See id.* at ¶ 29.

6. REX refers to Section 18.3.11 as the "segregation rule," Zillow refers to Section 18.3.11 as the "no-commingling rule," and NAR refers to the provision as "Section 18.3.11." The Court will refer to Section 18.3.11 as the "no-commingling rule."

provides that:

> Listings obtained through IDX feeds from REALTOR(R) Association MLSs where the MLS participant holds participatory rights must be displayed separately from listings obtained from 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.

Id. The parties do not dispute that approximately 29% of NAR-affiliated MLSs have not adopted the no-commingling rule. NAR Suppl. Resp. to REX Interrog. No. 4, Ex. F to Bonanno Decl. (docket no. 335-2 at 4); Gansho Dep. (Dec. 8, 2022) at 27:10-18, Ex. E to Bonanno Decl. (docket no. 335-1). For example, the California Regional Multiple Listing Service, the largest NAR-affiliated MLS in the United States, has not adopted the rule. *See* NAR Suppl. Resp. to REX Interrog. No. 4 (docket no. 335-2 at 35).[7]

The no-commingling rule originated in 2001 when Triangle MLS (which operates in North Carolina) adopted

7. Some unaffiliated MLSs, such as the Northwest Multiple Listing Service, have also "enacted or otherwise agreed to abide by many of" NAR's policies and rules. *See* Samuelson Decl. at ¶ 65. Although the Northwest Multiple Listing Service is not affiliated with NAR, it has adopted a rule that prohibits the commingling of MLS and non-MLS listings. Zillow Resp. to REX Interrog. No. 3, Ex. J to Bonanno Decl. (docket no. 329-10 at 9).

a no-commingling provision due to concern regarding the quality and reliability of listings data obtained from sources outside the MLS. Gansho Dep. (Dec. 8, 2022) at 127:1-129:17, Ex. C to Bonanno Decl. (docket no. 386-3). NAR promulgated the optional no-commingling rule sometime thereafter and most recently amended the rule in May 2017. *See id.*; Handbook (docket no. 329-2 at 105). Zillow was not involved in NAR's promulgation or amendment of the model rule.

Unlike with mandatory rules, NAR does not require its affiliated MLSs to certify to NAR that they have adopted optional rules, such as the no-commingling rule, *see* Gansho Dep. (Oct. 28, 2022) at 27:10-29:2 (docket no. 335), and MLSs that choose not to adopt the no-commingling rule will not lose access to NAR's errors and omissions insurance policy, *see id.* at 49:13-23, 66:11-15. In other words, NAR does not mandate compliance with its optional rules, *see id.* at 78:8-19, and an MLS that decides to adopt an optional model rule, such as the no-commingling rule, can repeal the rule at any time, *see* Gansho Dep. (Dec. 8, 2022) at 212:24-213:12 (docket no. 335-1). For example, in August 2022, REColorado, a NAR-affiliated MLS, decided to repeal the no-commingling rule, with no negative consequences from NAR. Ex. L to Bonanno Decl. (docket no. 329-12).

D. Zillow's "Two-Tab Display"

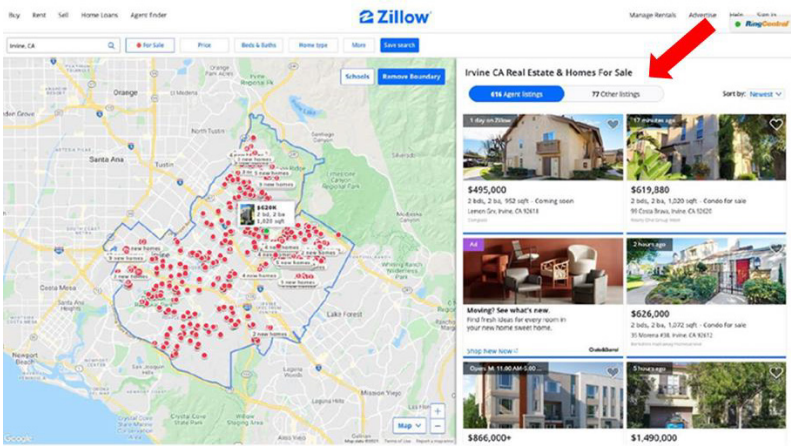
Zillow's syndication agreements did not impose restrictions on the commingling of search results, meaning that "listings from all sources could be, and

were, displayed together on Zillow's online platforms," and prior to January 2021, Zillow's search results contained a mix of listings from various sources, including MLS feeds and for-sale-byowner listings. Samuelson Decl. at ¶ 38. On September 23, 2020, Zillow made a public announcement that it would obtain listings data from IDX feeds beginning in January 2021. *Id.* at ¶ 68. Because Zillow was joining many MLSs that had adopted the no-commingling rule, Zillow was required to change the way it displayed its search results in certain geographic areas. *Id.* at ¶ 68. For example, as of April 2021, Zillow had executed approximately 218 agreements with local MLSs to obtain access to their IDX feeds. Hendricks Decl. at ¶ 25 (docket no. 62)[8]; Hendricks Dep. at 125:16-126:17, Ex. 8 to Najemy Decl. (docket no. 352-8). Of those 218 IDX agreements, 204 were with NAR-affiliated MLSs, Hendricks Decl. at ¶ 26, and approximately two-thirds of the MLSs Zillow joined had adopted a no-commingling rule, Samuelson Decl. at ¶ 66. Before obtaining access to the MLSs' IDX feeds, Zillow was required to execute IDX agreements with each MLS and submit to a "mandatory review process" with the MLSs to ensure compliance with their local rules. *See* Samuelson Decl. at ¶ 69.

How Zillow chose to comply with the no-commingling rule was decided solely by Zillow. Samuelson Decl. at ¶ 67 ("The no-commingling rule is not prescriptive and Zillow alone decided how it would display its search results to comply, including for MLSs that did not

8. The parties also rely on the Declaration of Matt Hendricks, docket no. 62, a Senior Director of Brokerage Operations at Zillow.

prohibit comingling at all."). Although Zillow could have implemented a different website display in regions where local MLSs had adopted the no-commingling rule, it decided to implement a uniform, two-tab display, with the default tab labeled "Agent listings" and the second tab labeled "Other listings." *See id.* at ¶ 68. Because Zillow set the "Agent listings" tab as the default tab, listings associated with that tab would be seen by Zillow's users immediately (without clicking the tab). A user who clicked on the "Other listings" tab would see only non-MLS listings. Thus, the Court and the parties refer to the "Agent listings" tab as the "default" tab. *See* Am. Compl. at ¶ 63 (arrow added, showing Zillow's two-tab display).



On January 12, 2021, Zillow implemented its new two-tab display. Zillow Resp. to REX Interrog. No. 15, Ex. O to Bonanno Decl. (docket no. 329-15 at 15). Many Zillow users disliked the change and Zillow recorded "a 32% increase in inbound complaints to Customer Care in the

weeks following [its] transition to IDX [feeds]." Ex. NNN to Goldfarb Decl. (docket no. 405-61 at 2); *see also* Ex. 38 to Goldfarb Decl. (docket no. 332-37 at 8) (explaining that Zillow received "overwhelmingly negative feedback [regarding] the 'two-tab experience.'"). Some users expressed their belief that the two-tab display favored agent listings over listings obtained from other sources. *See* Ex. NNN to Goldfarb Decl. (docket no. 405-61 at 2).

Additionally, Zillow observed that pageviews of for-sale-by-owner listings dropped approximately 80-85% after Zillow moved those listings to the "Other listings" tab. *See id.* By February 2021, Zillow found that usage of the "Other listings" tab was low (used in only four to seven percent of sessions) despite "minimal change in overall onsite customer engagement." Ex. 38 to Goldfarb Decl. (docket no. 332-37 at 8); *see also* Ex. YYY to Goldfarb Decl. (docket no. 405-72) (characterizing the "Other listings" tab's performance as "terrible"). Zillow also recognized that various listing types such as agent, new construction, and coming soon could appear in either tab depending on the source of the data. *See* Ex. 38 to Goldfarb Decl. (docket no. 332-37 at 10). Zillow described the categorization of listings by data source (i.e., MLS v. non-MLS listings) as "arbitrary." *Id.* (docket no. 332-37 at 9).

The record reflects that Zillow disliked the no-commingling rule, and some of its employees even referred to the requirement as "anti-competitive." Samuelson Dep. (Apr. 27, 2023) at 44:4-21, 53:18-23, Ex. 4 to Najemy Decl. (docket no. 345-2). From Zillow's perspective, the commingling of all listings greatly benefits consumers,

Samuelson Decl. at ¶ 72, and, beginning in October 2021, Zillow advanced multiple proposals to NAR to adopt a mandatory rule that would require all MLSs to permit the commingling of listings regardless of source, *id.*; Samuelson Dep. (Apr. 27, 2023) at 264:15-266:15 (docket no. 345-2); Ex. 34 to Goldfarb Decl. (docket no. 332-34).

E. REX

Founded in 2014, REX was a licensed real estate broker that adopted a business model aimed at reducing commissions in the real estate industry. Sides Dep. at 31:16-17, 33:8-34:12, Ex. 14 to Najemy Decl. (docket no. 345-9). As a broker, REX employed licensed real estate agents to handle its clients' listings. *See* Hendricks Dep. at 157:19-158:5, Ex. 14 to Goldfarb Decl. (docket no. 332-14). Unlike some other discount brokers, such as Redfin, REX attempted to bypass MLSs entirely, *see* Ryan Dep. at 33:7-11, 385:5-11, Ex. 1 to Najemy Decl. (docket no. 345), and advertised to consumers that it charged "a low fee" for its services by "totally eliminating" certain commissions customary in the real estate industry, Ex. T to Bonanno Decl. (docket no. 329-20 at 4). Specifically, by operating outside of the MLSs, REX sought to eliminate mandatory, predetermined buyer broker or agent commissions.[9]

9. Mandatory offers of buyer broker or agent compensation are required under NAR's "Buyer Broker Commission Rule," which provides that an MLS participant, when listing a property with an MLS, must disclose the compensation offered to a buyer broker or agent whose client purchases the listed home. *See* Handbook (docket no. 329-2 at 55). REX contends that the Buyer Broker Commission Rule preserves "sky-high" real estate commissions in the United States. Am. Compl. at ¶ 33.

Appendix C

To promote its clients' properties, REX relied on websites such as Zillow, Google, Facebook, Instagram, and Bing. Sides Dep. at 57:17-21, 74:3-20, 79:20-80:12 (docket no. 345-9); *see also* Ex. T to Bonanno Decl. (docket no. 329-20). Prior to January 12, 2021, REX's listings were displayed alongside all other listings on Zillow's platforms. Following implementation of its two-tab display, Zillow moved REX's listings to the non-default "Other listings" tab. Ryan Dep. at 159:17-24 (docket no. 345). As a result of this transition, a number of REX's clients were unable to find their listings on Zillow. *See, e.g.*, Ex. 39 to Goldfarb Decl. (docket no. 332-38) ("Seller reported that they can't find listing on Zillow. . . . Seller is upset and considering cancelling."). REX also observed that some prospective clients were hesitant to use its services in light of Zillow's two-tab display. *See, e.g.*, *id.* ("Seller is hesitant to sign listing agreement due to the change in the [Z]illow platform."). REX estimates that, like for-sale-by-owner listings, pageviews of its listings on Zillow's platforms dropped by as much as 80% following Zillow's implementation of the two-tab display. *See* Ex. 38 to Goldfarb Decl. (docket no. 332-37 at 9). Approximately 18 months after Zillow adopted the two-tab display, REX wound down its residential real estate brokerage business. REX Resp. to Zillow Interrog. No. 12., Ex. Y to Bonanno Decl. (docket no. 335-6 at 9).

REX attributes its total business failure to Zillow's two-tab display, and brings antitrust claims against Zillow and NAR under the Sherman Act, 15 U.S.C. § 1, and an antitrust provision of the Washington Consumer Protection Act ("CPA"), RCW 19.86.030. Am. Compl. at

¶¶ 131-41, 189-201. REX alleges that NAR and Zillow, along with non-party MLSs, "entered into a horizontal combination, agreement, and/or conspiracy" to enforce the no-commingling rule, thereby denying non-MLS members like REX "effective access to prominent Zillow residential real estate aggregator websites[.]" Am. Compl. at ¶¶ 110, 135. NAR and Zillow now move for summary judgment on REX's antitrust claims, and REX moves for partial summary judgment on two discrete issues: (i) the existence of an agreement for purposes of its antitrust claims; and (ii) the falsity of Zillow's tab labels for purposes of its false advertising claim against Zillow under Section 43 of the Lanham Act.[10] For the reasons discussed below, the Court concludes that REX has failed to present evidence of the conspiracy alleged in its Amended Complaint, namely, a purported agreement between NAR, Zillow, and non-party MLSs to segregate, conceal, and demote non-MLS listings on Zillow's websites and mobile platforms.

DISCUSSION

A. Summary Judgment Standard

The Court shall grant summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material

10. The Court will address the portion of REX's motion regarding its false advertising claim in a separate order.

fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A fact is material if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). To survive a motion for summary judgment, the adverse party must present affirmative evidence, which "is to be believed" and from which all "justifiable inferences" are to be favorably drawn. *Id.* at 255, 257. When the record, however, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, summary judgment is warranted. *See Beard v. Banks*, 548 U.S. 521, 529, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006) ("Rule 56 'mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" (quoting *Celotex*, 477 U.S. at 322)).

B. Contract, Combination, or Conspiracy

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade[.]" 15 U.S.C. § 1. Like Section 1 of the Sherman Act, RCW 19.86.030 provides that "[e]very contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful." Because the federal and state standards are practically the same, the Court will analyze both of REX's antitrust claims using the federal

standards.[11] *See State v. LG Elecs., Inc.*, 186 Wn.2d 169, 186 n.3, 375 P.3d 1035 (2016) (McCloud, J., concurring) (explaining that Washington courts are guided by the interpretation of corresponding federal statutes).

To prevail on a Section 1 claim, a plaintiff must establish: (i) a "contract, combination or conspiracy among two or more persons or distinct business entities"; (ii) "which is intended to restrain trade"; (iii) "which actually injures competition"; and (iv) "harm to the plaintiff from the anticompetitive conduct." *Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1129 (9th Cir. 2015) (citation omitted). The contract, combination, or conspiracy element of a Section 1 claim is not particularly demanding; a formal agreement is not required, *see Interstate Cir., Inc. v. United States*, 306 U.S. 208, 227, 59 S. Ct. 467, 83 L. Ed. 610 (1939), and a "knowing wink" among competitors might be sufficient to create a triable issue of fact, *see Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965). The existence of a contract, combination, or conspiracy, however, is a "threshold component" of every Section 1 claim, *see Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 981 (9th Cir. 2023), and must reflect a "conscious commitment to a common scheme designed to achieve an unlawful objective," *Toscano v. Pro. Golfers Ass'n*, 258 F.3d 978, 984 (9th Cir. 2001) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)). "Mere independent action is insufficient to

11. The Court notes that the parties rely only on the federal standards in their respective motions and briefs.

trigger" a violation of Section 1 of the Sherman Act. *Gold Medal LLC v. USA Track & Field*, 187 F. Supp. 3d 1219, 1224 (D. Or. 2016).

The existence of a contract, combination, or conspiracy may be established by either direct or circumstantial evidence. "Direct evidence is smoking-gun evidence that 'establishes, without requiring any inferences' the existence of" such an agreement. *Honey Bum, LLC v. Fashion Nova, Inc.*, 63 F.4th 813, 822 (9th Cir. 2023) (quoting *In re Citric Acid Litig.*, 191 F.3d 1090, 1093 (9th Cir. 1999)). Direct evidence "may consist of written documents, audio or video recordings, or eyewitness testimony about what was said." *PharmacyChecker.com LLC v. LegitScript LLC*, 614 F. Supp. 3d 796, 809 n.13 (D. Or. 2022). In contrast, to survive a motion for summary judgment, a plaintiff who relies on circumstantial evidence "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting *Monsanto*, 465 U.S. at 764).

In its Amended Complaint, REX alleges that NAR and Zillow, with non-party MLSs, "entered into a horizontal combination, agreement, and/or conspiracy" to "segregate, conceal, and demote non-MLS listings" on Zillow's websites and mobile platforms.[12] Am. Compl.

12. REX alleges that the defendants entered into a horizontal agreement. Horizontal agreements are those between actual or potential competitors. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988). In contrast,

at ¶¶ 60, 135. The gist of REX's antitrust claims is that NAR, Zillow, and certain non-party MLSs conspired to organize Zillow's websites and mobile platforms in a manner that disadvantages non-MLS listings. *See id.* at ¶ 125 ("In particular, [NAR, Zillow, and affiliated MLSs] are using their commonly agreed [nocommingling rule] to implement a change in Zillow.com's and Trulia.com's display of home inventory to demote and obscure listings by non-member competitors."). NAR and Zillow contend that REX has failed to present any evidence of a common scheme between them to redesign Zillow's platforms and relegate REX's listings to a secondary, non-default tab. On the other hand, REX argues that the undisputed facts establish the existence of an agreement for antitrust purposes, and asserts that it has presented direct evidence of the challenged conspiracy or, at the very least, "overwhelming circumstantial evidence of an agreement." Tr. (July 27, 2023) at 37:3-7 (docket no. 456). Specifically, REX contends that (1) Zillow's enforcement of the no-commingling rule and (2) certain communications between Zillow, NAR, and the MLSs support the existence of an agreement between the defendants.

1. The No-Commingling Rule

The no-commingling rule, standing alone, does not constitute direct or circumstantial evidence of an anticompetitive agreement between NAR and

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vertical agreements are defined as agreements between firms at different levels in a chain of production or distribution. *Id.*; *see also In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015).

Zillow to segregate, demote, and conceal non-MLS listings on Zillow's websites and mobile platforms. Although "arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose," *Associated Press v. United States*, 326 U.S. 1, 19, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945), "every action by a trade association is not concerted action by the association's members," *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (internal citation omitted). To establish the existence of an agreement for antitrust purposes, a plaintiff must present evidence tending to show a "conscious commitment to a common scheme designed to achieve an unlawful objective." *See Toscano*, 258 F.3d at 984 (quoting *Monsanto*, 465 U.S. at 764).

The undisputed evidence in this action shows that neither NAR nor its affiliated MLSs were involved in Zillow's decision to implement the challenged two-tab display that allegedly drove REX out of business. *See* Samuelson Decl. at ¶ 67 ("Zillow alone decided how it would display its search results to comply [with the no-commingling rule]."). When deciding how to comply with the no-commingling rule, Zillow "experimented with a number of different options," including "displaying MLS and non-MLS listings on separate search results pages," "adding a filter option to switch between MLS and non-MLS listings," and "displaying search results differently based on [a user's] specific location and whether the local MLS had enacted the no-commingling rule." *Id.* Zillow ultimately chose, without input from NAR or any MLS, to implement the two-tab display on its platforms.

Although REX has presented no evidence to refute that Zillow acted independently when it decided how to design its platforms to comply with the no-commingling rule, REX argues that Zillow's enforcement of the no-commingling rule alone is evidence of an anticompetitive agreement between the defendants to segregate, demote, and conceal non-MLS listings. This argument, however, ignores the optional nature of the no-commingling rule and does not support the existence of an alleged agreement between NAR and Zillow.

The authorities cited by REX deal with mandatory, not optional, rules or policies. For example, in *Gold Medal*, a case on which REX relies, a manufacturer of chewing gum brought suit against the United States Olympic Committee ("USOC") and USA Track & Field ("USATF") to challenge USOC's mandatory policy prohibiting athletes from competing at the 2016 Olympic Trials in apparel bearing individual sponsorship. 187 F. Supp. 3d at 1221-23. Athletes who violated the policy were subject to disqualification from the trials. *Id.* at 1223. When ruling on USOC's and USATF's motions to dismiss, the district court concluded that plaintiff had plausibly alleged the existence of an agreement between the defendants to enforce the advertising policy. *Id.* at 1224-25. Although USATF did not conspire to craft the challenged policy, plaintiff alleged that the organization would play a significant role in enforcing the mandatory policy by identifying and potentially disqualifying athletes whose apparel violated its terms.[13] *Id.*

13. REX also relies on *O.M. by and through Moultrie v. National Women's Soccer League, LLC*, 541 F. Supp. 3d 1171 (D. Or. 2021), to support its argument that Zillow's enforcement

Similarly, in *Associated Press*, another case on which REX relies, the United States Supreme Court explained that an association's mandatory by-laws constituted an actionable restraint of trade in the newspaper publishing field. 326 U.S. at 12. There, the Associated Press ("AP"), a cooperative association of more than 1200 newspaper publishers, required all of its members to "consent" to the organization's bylaws, which it enforced through "severe disciplinary action," including monetary fines, suspension, or expulsion from the organization. *Id.* at 3, 8. Among other restrictions, the bylaws "tied the hands" of all members by prohibiting them "from selling or furnishing their spontaneous news to any agency or publisher except to AP," which made "it difficult, if not impossible" for non-members "to buy news from AP or any of its publisher members." *Id.* at 9, 13.

Unlike the mandatory advertising policy at issue in *Gold Medal* or the mandatory bylaws challenged in *Associated Press*, the undisputed evidence in this action shows that the no-commingling rule is entirely optional and has not been adopted by approximately 29% of NAR-affiliated MLSs. *See* NAR Suppl. Resp. to REX Interrog. No. 4 (docket no. 335-2 at 4). REX does not dispute that (i) an affiliated MLS will suffer no consequence if it chooses not to adopt the no-commingling rule, *see* Gansho Dep. (Oct. 28, 2022) at 27:10-29:2 (docket no. 335), or (ii) NAR takes no disciplinary action against MLSs that permit

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of the no-commingling rule is evidence of an anticompetitive agreement between the defendants. Like *Gold Medal, Moultrie* involves allegations of a concerted effort to enforce a mandatory rule. *See id.* at 1176.

the commingling of listings, *see id.* at 49:13-23, 66:11-15. Instead, REX argues that the optional nature of the no-commingling rule cannot immunize the defendants from antitrust liability.

Specifically, REX contends that the Northern District of Illinois previously rejected a "virtually identical" argument made by NAR when the United States Department of Justice challenged NAR's Virtual Office Website ("VOW") policies in the early 2000s. *See United States v. Nat'l Ass'n of Realtors*, No. 05 C 5140, 2006 U.S. Dist. LEXIS 86963, 2006 WL 3434263, at *2 (N.D. Ill. Nov. 27, 2006). At issue in that action were mandatory policies created by NAR in response to the increased use of VOWs (broker-created websites that enabled potential home-buyers to personally search MLS databases after registering as customers of the broker). *See* 2006 U.S. Dist. LEXIS 86963, [WL] at *2-3. At the time, VOWS "presented a competitive challenge to brokers" who relied on "traditional, non-Internet methods" to provide listings to their clients. 2006 U.S. Dist. LEXIS 86963, [WL] at *2. NAR's initial VOW policy contained a blanket "opt-out" provision which prohibited participating brokers in an MLS "from conveying a listing to his or her customers via the Internet without the permission of the listing broker." 2006 U.S. Dist. LEXIS 86963, [WL] at *3. Phrased differently, brick-and-mortar brokers could prevent their clients' listings from being displayed on VOWs altogether. *Id.* The initial policy also contained a selective opt-out provision that "allowed brokers to direct that their clients' listings not be displayed" on "a particular subset" of competing VOWs. *Id.*

Appendix C

After the Department of Justice informed NAR of its intent to challenge the policy, NAR rescinded its initial policy and adopted a modified version. 2006 U.S. Dist. LEXIS 86963, [WL] at *4. Although the modified policy differed from its predecessor in some respects, including the removal of the selective opt-out provision, it still contained a blanket opt-out provision forbidding "any broker participating in an MLS from conveying a listing to his or her customers via the Internet without the permission of the listing broker." *Id.* The policy, however, specifically exempted NAR's official website, Realtor.com, from the blanket opt-out provision. *Id.* Unlike the optional no-commingling rule at issue in this case, adoption of the VOW policies was mandatory, even though the exercise of the optout provisions was left to the discretion of individual brokers. *See id.* Significantly, unlike the present matter, the existence of an agreement was not at issue because NAR conceded, for the purposes of its motion to dismiss, that the challenged policies were "the product of a 'combination among NAR's members.'" *Id.* at *13.

REX similarly relies on *PLS.Com, LLC v. National Association of Realtors*, 32 F.4th 824 (9th Cir. 2022), to support its contention that the no-commingling rule itself is evidence of an anticompetitive agreement. There, NAR moved to dismiss a lawsuit challenging its "Clear Cooperation Policy," which allegedly sought to stifle competition from pocket listings (listings that are not shared on an MLS). *Id.* at 830. The Clear Cooperation Policy requires a broker to submit a listing "to the MLS for cooperation with other MLS participants" within one business day "of marketing a property to the public." *Id.*

Unlike the no-commingling rule, the Clear Cooperation Policy is mandatory, *see* Handbook (docket no. 329-2 at 49), and agents who fail to comply with the policy face "severe penalties, including in some cases several-thousand dollar fines, or suspension from, or termination of, their access to the MLS," *PLS.com*, 32 F.4th at 830.

NAR's promulgation of an optional model rule years before Zillow designed and implemented its two-tab display does not, standing alone, constitute evidence of "a common scheme" or concerted effort among its members to enforce the rule. *See Toscano*, 258 F.3d at 984. Unlike the mandatory rules discussed above, roughly 29% of NAR-affiliated MLSs have not adopted the no-commingling rule. Although REX contends that the no-commingling rule is nothing more than a "so-called voluntary" or mandatory rule, the record demonstrates that affiliated MLSs have independently decided whether to allow their participants to comingle listings without any input from NAR.[14]

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14. REX's reliance on *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation* ("*Hydrolevel*"), 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982), is similarly misplaced. Although this Court previously cited *Hydrolevel* for the proposition that a trade association's "so-called voluntary standards" could be deemed to be "repugnant to the antitrust laws," Order at 12 (docket no. 98) (quoting *Hydrolevel*, 456 U.S. at 570, 574), discovery in this action has shown that the no-commingling rule is in fact optional. Moreover, *Hydrolevel* is factually dissimilar from the present matter. In *Hydrolevel*, the Supreme Court held that an organization could be found liable for the antitrust violations of its agents acting with apparent authority. 456 U.S. at 570-74. There, a subcommittee vice

Despite REX's argument to the contrary, NAR-affiliated MLSs have not, with respect to the no-commingling rule, "surrendered [themselves] completely to the control of the association." *See Associated Press*, 326 U.S. at 19 (quoting *Anderson v. Shipowners Ass'n of Pac. Coast*, 272 U.S. 359, 362, 47 S. Ct. 125, 71 L. Ed. 298 (1926)). Moreover, the no-commingling rule requires only the separation of MLS and non-MLS listings, and REX has presented no evidence to support that Zillow redesigned its website in an allegedly misleading manner at NAR's or any MLS's direction. Zillow's independent decision to implement a uniform two-tab display because approximately 71% of NAR-affiliated MLSs have adopted the optional no-commingling rule does not demonstrate a common scheme between NAR and Zillow to conceal non-MLS listings behind a secondary tab on Zillow's platforms.

2. Certain Communications Between NAR, Zillow, and the MLSs

REX argues that certain communications between NAR, Zillow, and some MLSs constitute direct evidence of an alleged agreement to segregate, conceal, and demote non-MLS listings on Zillow's websites and mobile platforms. Direct evidence of an agreement, however,

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chairman for the American Society of Mechanical Engineers, Inc. ("ASME") was also employed as the vice president of a company that manufactured certain safety devices for water boilers. *Id.* at 559-64. The dispute in *Hydrolevel* arose when the individual used his position in ASME to harm a competing manufacturer by interpreting a widely-adopted code provision in a manner that declared the competitor's product unsafe. *Id.*

"is explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Citric Acid Litig.*, 191 F.3d at 1094 (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999)). The communications on which REX relies are not so explicit as to qualify as direct evidence of the requisite agreement. Likewise, these communications do not constitute circumstantial evidence because the communications do not tend "to exclude the possibility" that the defendants acted independently. *See Monsanto*, 465 U.S. at 764.

REX cites multiple emails between NAR and Zillow to support the existence of an agreement between the defendants to segregate, conceal, and demote non-MLS listings on Zillow's platforms.[15] *See, e.g.*, Ex. H to Goldfarb Decl. (docket no. 451-5) (Oct. 16, 2020, email from NAR to Zillow inviting Errol Samuelson to join NAR's Industry Relations Group); Ex. N to Goldfarb Decl. (docket no. 405-13) (June 26, 2017, email from Samuelson to Bob Goldberg congratulating Goldberg on his new role as NAR's CEO). Notably, these emails between NAR and Zillow do not discuss the no-commingling rule and do not suggest the existence of an agreement between the defendants to redesign Zillow's website in a manner that concealed REX's listings behind a purportedly misleading, non-default tab.

15. REX presents an email dated August 1, 2014, from then-NAR President Steve Brown concerning the commingling of listings, *see* Ex. B to Goldfarb Decl. (docket no. 451-2), but that email does not appear to have been sent to Zillow. Moreover, the email does not evidence any agreement between NAR and Zillow regarding Zillow's unilateral decision almost seven years later to adopt its two-tab display.

REX also contends that NAR "refereed" disputes between Zillow and certain MLSs regarding the no-commingling rule (Section 18.3.11). The majority of these emails, however, do not discuss the commingling of listings. *See, e.g.*, Ex. V to Goldfarb Decl. (docket no. 405-21) (Jan. 2021 email chain requesting NAR's interpretation of Sections 18.3.13 and .14); Ex. X to Goldfarb Decl. (docket no. 405-23) (Dec. 2020 email chain discussing Section 20.3.12); Ex. Y to Goldfarb Decl. (docket no. 405-24) (Dec. 2020 email chain discussing the display of expired or cancelled listings); Ex. AA to Goldfarb Decl. (docket no. 405-26) (Dec. 2020 email chain discussing the display of sold listings); Ex. CC to Goldfarb Decl. (docket no. 405-28) (Jan. 2021 email chain discussing an unrelated requirement). When the no-commingling rule was discussed, NAR noted its optional nature. *See, e.g.*, Ex. DD to Goldfarb Decl. (docket no. 405-29) (Feb. 4, 2021, email explaining that an MLS may prohibit the commingling of listings at its "local *option*" (emphasis in original)); *see also* Gansho Dep. (Dec. 8, 2022) at 213:14-22 (docket no. 335-1) (agreeing that MLSs "were free to make whatever decision they wanted on how an optional rule would be adopted and implemented").

REX cites a multitude of emails between NAR, Zillow, and certain MLSs, but none support an inference that Zillow acted at NAR's direction when designing its websites and implementing the two-tab display which allegedly caused REX's demise. Moreover, the fact that some MLSs sought assistance from NAR when interpreting certain model rules does not reasonably suggest the existence of a conspiracy. *See County of Tuolumme v. Sonora Cmty.*

Hosp., 236 F.3d 1148, 1156-57 (9th Cir. 2001) (finding in the context of medical credentialing that independent decisions to follow nonbinding recommendations did not constitute circumstantial evidence of an alleged conspiracy); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1459 n.34 (11th Cir. 1991) (explaining in the context of medical credentialing that a hospital board's likely decision "to follow the recommendations of the medical staff does not establish, or even reasonably suggest, the existence of a conspiracy"); *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 832 F.3d 1, 9 (1st Cir. 2016) ("We note that antitrust laws allow trade associations to make nonbinding recommendations about businesses and products."). REX has presented no evidence of an agreement or conspiracy which tends to exclude the possibility that Zillow acted independently when redesigning its websites and assigning REX's listings to the "Other listings" tab.[16]

16. REX argues that Zillow did not act independently when it enforced the no-commingling rule because approximately 71% of NAR-affiliated MLS had already adopted the rule. Essentially, REX contends that Zillow had no choice but to enforce the no-commingling rule given the rule's prevalence in the real estate market and Zillow's status as a national aggregator of listings data. This argument ignores important components of the alleged anticompetitive agreement that REX challenges in this action. Although Zillow's IDX agreements with certain MLSs required it to display MLS and non-MLS listings separately, the conspiracy REX alleges in this action involves more than the mere segregation of listings data. REX's antitrust claims are based on an alleged agreement to also conceal and demote non-MLS listings on Zillow's platforms, *see* Am. Compl. at ¶¶ 60, 110, 135, and the Court cannot ignore these crucial components of the challenged restraint.

Moreover, Zillow has presented evidence showing that its switch to IDX feeds was consistent with a proper business practice. *See Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 803 F.3d 1084, 1089 (9th Cir. 2015) (quoting *In re Citric Acid Litig.*, 191 F.3d at 1094).[17] Specifically, Zillow's independent decision to switch to IDX feeds was consistent with its desire to improve listings coverage, timeliness, and access, and to increase business model flexibility. *See, e.g.*, Barton Dep. at 91:7-92:6, Ex. 5 to Najemy Decl. (docket no. 345-3); Ex. 25 to Najemy Decl. (docket no. 345-16); Samuelson Decl. at ¶ 49 (explaining that syndication agreements were a "a significant vulnerability" for Zillow because MLSs could terminate the agreements without cause and with little notice); *see also id.* at ¶ 47 ("[C]ertain MLSs and brokers imposed restrictions on how often Zillow would obtain updated listings information [under the syndication agreements]"); Ex. JJJ to Goldfarb Decl. (docket no. 405-57) (recognizing that the user experience following Zillow's switch to IDX feeds would be "a wash, at best," but would provide Zillow "business model flexibility."). REX has provided no evidence, such as relevant communications between

17. When an action "hinges" on circumstantial evidence, a court's inquiry into whether a plaintiff's "showing is sufficient to establish an agreement proceeds in two steps:" (i) "the defendant can rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice; and if so (ii) "[t]he burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior." *See Stanislaus*, 803 F.3d at 1089 (quoting *In re Citric Acid Litig.*, 191 F.3d at 1094).

Zillow and any MLS, tending to show that Zillow was not engaging in permissible competitive behavior. The evidence demonstrates that instead of precluding REX's listings entirely, like websites such as Redfin did, *see* Ryan Dep. at 385:5-11 (docket no. 345), Zillow expended significant time and resources to ensure that REX's and other non-MLS listings would remain on its platforms, albeit under a separate tab, *see* Samuelson Decl. at ¶¶ 64, 67. REX contends that Zillow has "a financial interest in maintaining excessive" buyer agent or broker commission rates because Zillow "exacts a percentage" of buyer agent or broker "commissions earned on closed transactions by favored buyer agents or brokers" through its Premier Agent Flex program.[18] REX Resp. to Zillow Mot. for Summ. J. at 4, 13 (docket no. 402). But a "common motive for increased profits always exists," and does not, standing alone, provide circumstantial evidence of an agreement to demote and conceal listings on Zillow's platforms. *See In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d at 1194-95 & n.8 (discussing circumstantial evidence in the context of an alleged pricefixing conspiracy).

18. Zillow's Premier Agent program offers "advertising services, as well as marketing and technology products and services, to help real estate agents grow and manage their businesses." *See* Samuelson Decl. at ¶ 13. Under Zillow's Flex program, Zillow provides leads to select brokers or agents in exchange for a specified portion of a broker's or agent's commission if a transaction successfully closes. *See generally* Ex. UUU to Goldfarb Decl. (docket no. 405-68).

Appendix C

C. Zillow's IDX Agreements with Individual MLSs

Typically, a plaintiff is not required to "name all of the coconspirators in its complaint" or "sue all of the alleged conspirators inasmuch as antitrust coconspirators are jointly and severally liable for all damages caused by the conspiracy." *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1053 (9th Cir. 1981). REX could have, in theory, pursued an antitrust claim against Zillow for entering into allegedly anticompetitive IDX agreements with certain MLSs, even though those MLSs are not parties to this action. Thus, at oral argument, the Court inquired as to whether REX would have an antitrust claim against Zillow in the event the Court dismissed REX's claims against NAR. Tr. (July 27, 2023) at 24:14-17. REX did not address the Court's inquiry, and REX's Amended Complaint, its discovery in this action, its motions and briefs, and the oral arguments of its counsel all suggest that REX views NAR as an indispensable member of the conspiracy it alleged in the operative pleading. For example, REX refers repeatedly to Zillow joining an alleged "NAR/MLS cartel" throughout its Amended Complaint. *See, e.g.*, Am. Compl. at ¶ 60 ("When Zillow entered the cartel, it agreed to segregate, conceal, and demote non-MLS listings.").

Regardless, REX has failed to adduce evidence of alleged conspiracies between Zillow and individual MLSs. Although REX alleged that NAR, Zillow, and unnamed MLSs conspired to deny brokers such as REX effective access to Zillow's website, *see* Am. Compl. at ¶ 135, REX has presented no direct or circumstantial

evidence of such conspiracies, let alone any conspiracies involving only Zillow and individuals MLSs. For the reasons discussed above, the existence of written IDX agreements which require the segregation of listings does not support alleged conspiracies to also conceal and demote non-MLS listings on Zillow's platforms. Zillow independently designed and implemented the challenged two-tab display which allegedly caused REX's business failure, *see* Samuelson Decl. at ¶ 67, and Zillow did not make any changes to its websites or mobile platforms as a result of its review processes with individual MLSs, *see* Thomas Dep. at 25:12-18, Ex. 6 to Najemy Decl. (docket no. 345-4).

Moreover, REX has presented the Court with no legal analysis of an antitrust claim involving only Zillow and individual MLSs, and has failed to identify which specific MLSs are involved in the alleged conspiracies. As the Court previously noted, approximately 71% of NAR-affiliated MLSs have adopted the no-commingling rule. NAR Suppl. Resp. to REX Interrog. No. 4 (docket no. 335-2 at 4). Other MLSs that are not affiliated with NAR have nevertheless adopted a no-commingling policy. Samuelson Decl. at ¶¶ 24, 27, 65. For example, the Northwest Multiple Listing Service (which covers the Seattle market) is not affiliated with NAR, *see id.* at ¶ 27, but has adopted a no-commingling rule, *see* Zillow Resp. to REX Interrog. No. 3 (docket no. 329-10). Despite adopting a no-commingling rule, the Northwest Multiple Listing Service is presumably not a member of the alleged NAR/MLS cartel conspiracy because it is not a NAR-affiliated MLS. *See* Am. Compl. at ¶ 8 ("Zillow

recently joined NAR-affiliated MLSs and adopted their associational rules to conceal all non-MLS listings on Zillow's heavily trafficked websites."). Throughout the course of this dispute, REX has focused at all times on Zillow's decision to join an alleged nationwide conspiracy with NAR and its members (the alleged "NAR/MLS cartel"). REX has not premised its antitrust allegations on any agreements between Zillow and individual MLSs.

For the reasons discussed above, the Court concludes that NAR and Zillow have met their burden of demonstrating the absence of a genuine issue of material fact concerning the existence of an alleged agreement between the defendants to segregate, conceal, and demote non-MLS listings on Zillow's websites and mobile platforms. Because NAR and Zillow have established that REX cannot prove the threshold component of its antitrust claims, the Court GRANTS NAR's motion for summary judgment, docket no. 331, and the deferred portion of Zillow's motion for summary judgment, docket no. 339, and DISMISSES with prejudice REX's antitrust claims against the defendants under federal and state law.[19] Having dismissed the antitrust claims, the Court

19. Because the Court concludes that REX has not made a factual showing sufficient to establish the threshold requirement of its antitrust claims, the Court need not address whether the alleged agreement was an unreasonable restraint of trade. *Epic Games*, 67 F.4th at 981 (explaining that "a Section 1 inquiry has both a threshold component (whether there is a contract, combination, or conspiracy) and a merits component (whether it is unreasonable)"). Importantly, "[e]conomic injury to a competitor does not equal injury to competition, *Cascade Cabinet Co. v. W.*

DENIES the portion of REX's motion for partial summary judgment, docket no. 332, as it relates to the existence of an agreement for antitrust purposes. REX has failed to establish as a matter of law that Zillow adopted the two-tab display that gives rise to REX's antitrust claims pursuant to an agreement between the defendants.

CONCLUSION

For the foregoing reasons, the Court ORDERS:

(1) NAR's motion for summary judgment, docket no. 331, and the deferred portion of Zillow's motion for summary judgment, docket no. 339, are GRANTED, and REX's antitrust claims under the Sherman Act, 15 U.S.C. § 1 (COUNT I), and the analogous antitrust provision of the CPA, RCW 19.86.030 (COUNT VI), are DISMISSED with prejudice.

(2) REX's motion for partial summary judgment, docket no. 332, is DENIED in part as to the existence of an agreement for purposes of REX's antitrust claims,

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Cabinet & Millwork Inc., 710 F.2d 1366, 1373 (9th Cir. 1983), and the "elimination of a single competitor, without more, does not prove anticompetitive effect," *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 812 (9th Cir. 1988); *see also Gorlick Dist. Ctrs., LLC v. Car Sound Exhaust Sys., Inc.*, 723 F.3d 1019, 1024-25 (9th Cir. 2013) ("[A plaintiff] must demonstrate injury to competition in the market as a whole, not merely injury to itself as a competitor."). The present record does not demonstrate harm to competition resulting from the challenged restraint and shows only harm to REX itself.

and is otherwise DEFERRED in part as to the falsity of Zillow's tab labels for purposes of its false advertising claim against Zillow under Section 43 of the Lanham Act (COUNT II).

(3) The Court having dismissed all claims against NAR in this action, the Clerk is DIRECTED to terminate NAR as a party.

(4) The Clerk is further DIRECTED to send a copy of this Order to all counsel of record.

IT IS SO ORDERED.

Dated this 16th day of August, 2023.

/s/ Thomas S. Zilly
Thomas S. Zilly
United States District Judge

APPENDIX D — BRIEF FOR THE UNITED STATES AS AMICUS CURIAE TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 20, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-685

REAL ESTATE EXCHANGE, INC.,

Plaintiff-Appellant,

v.

ZILLOW GROUP, INC.;
NATIONAL ASSOCIATION OF REALTORS,

Defendants-Appellees.

On Appeal from the
United States District Court for the
Western District of Washington
No. 2:21-cv-00312-TSZ (Hon. Thomas S. Zilly)

Filed June 20, 2024

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

[TABLES INTENTIONALLY OMITTED]

STATEMENT OF INTEREST

The United States enforces the federal antitrust laws and has a strong interest in their correct application. The

United States also has a significant interest in preventing anticompetitive conduct in the realestate industry. The United States has challenged various rules and practices of the National Association of Realtors ("NAR") and regional multiple listing services ("MLSs"), *see, e.g., United States v. Consolidated Multiple Listing Service, Inc.,* No. 3:08-cv-01786-SB(D.S.C. 2008); *United States v. NAR,* No. 05 C 5140, 2006 WL 3434263 (N.D. Ill. Nov. 27, 2006); *United States v. NAR,* No. 1:05-cv-5140 (N.D. Ill. 2005), and has recently filed amicus briefs in this Court in cases challenging a different NAR policy.[1]

The United States has a particular interest in ensuring that courts properly apply the concerted-action requirement under Section 1 of the Sherman Act and has filed numerous briefs on that subject in the Supreme Court[2] and in the court of appeals.[3]

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1. *See* Brief for the United States as Amicus Curiae in Support of Neither Party, *Top Agent Network, Inc. v. NAR,* 2023 WL 5526711 (9th Cir. Aug. 28, 2023) (No. 21-16494), https://www.justice.gov/atr/casedocument/file/1574016/dl?inline; Brief for the United States as Amicus Curiae in Support of Neither Party, *PLS.com, LLC v. NAR,* 32 F.4th 824 (9th Cir. 2022) (No. 21-55164), https://www.justice.gov/atr/casedocument/file/1400951/dl?inline.

2. *See, e.g.,* Brief for the United States as Amicus Curiae, *United States Soccer Federation, Inc. v. Relevent Sports, LLC,* No. 23-120 (U.S. Mar. 14, 2024), 2024 WL 1135355, https://www.justice.gov/d9/2024-03/420647.pdf; Brief for the United States as Amicus Curiae Supporting Respondents, *Visa Inc. v. Osborn,* 137 S. Ct. 289 (2016) (Nos. 15-961, 15-962) (dismissed as improvidently granted), https://www.justice.gov/atr/case-document/file/905436/dl?inline; Brief for the United States as Amicus Curiae Supporting Petitioner, *American Needle, Inc. v. National Football League,* 560 U.S. 183 (2010) (No. 08-661), 2009 WL 3070863, https://www.justice.gov/atr/casedocument/file/485906/dl.

3. *See e.g.,* Brief for the United States of America as Amicus Curiae in Support of Neither Party, *Tesla, Inc. v. Louisiana Auto.*

Appendix D

The United States files this amicus brief under Federal Rule of Appellate Procedure 29(a) to address the district court's apparently limited view of when optional association rules can represent concerted action under Section 1. Although the district court appeared to recognize that purportedly optional rules could constitute concerted action when they are mandatory in practice, there are additional ways that optional rules constitute concerted action that the court did not appear to consider. Vacatur and remand are appropriate for the district court to apply the proper legal framework to the evidence. The United States takes no position on the ultimate outcome of the case.

STATEMENT OF THE ISSUE

Whether the district court applied an incomplete legal framework in evaluating when an association's optional rules can represent concerted action under Section 1 of the Sherman Act.

Dealers Ass'n, No. 23-30480 (5th Cir. Oct. 19, 2023), https://www.justice.gov/d9/2023-10/417214.pdf; Brief for the United States of America as Amicus in Support of Neither Party, *Relevent Sports, LLC v. United States Soccer Federation, Inc.,* 61 F.4th 299 (2d Cir. Mar. 7, 2023) (No. 21-2088), https://www.justice.gov/atr/case-document/file/1442196/dl?inline; Brief of the United States of America as Amicus Curiae in Support of Neither Party, *Sulitzer v. Tippins,* 31 F.4th 1110 (9th Cir. Apr. 21, 2022) (No. 20-55735), https://www.justice.gov/atr/casedocument/file/1342616/dl?inline.

Appendix D

STATEMENT

A. Background

1. NAR's No-Commingling Rule

NAR is a trade association of real-estate brokers and agents. 1-ER-24–25. Local NAR associations often own and operate multiple listing services (MLSs), which are considered to be NAR-affiliated MLSs. 1-ER-25 n.5. MLSs operate databases containing residential real estate listings in their particular geographic region. 1-ER-22–23. The approximately 585 MLSs in the United States are thus gatekeepers to critical information about residential homes for sale within their respective areas. 1-ER-23.

With a membership of approximately 1.4 million professionals, NAR influences many aspects of the real-estate profession. 1-ER-24. One such way is by promulgating its Handbook on Multiple Listings Policy ("Handbook"). This Handbook is "is intended to guide member associations of REALTORS® in the operation of [their MLSs] consistent with the policies established by [NAR's] Board of Directors." 1-ER-25 (citing Dkt. 329-2 at 5). NAR's Handbook contains rules that are labeled "mandatory" for NAR-affiliated MLSs as well as other model rules labeled as "recommended," "optional," or "informational." 1-ER-25. For the non-mandatory model rules, NAR does not require its affiliated MLSs to certify that they have adopted them, and MLSs that forgo them do not lose access to NAR's insurance policy, as they would if they failed to adopt a mandatory rule.

1-ER-27. However, if an MLS chooses to adopt a model rule, the MLS's members—its participating agents and brokers—must comply with the rule. 1-ER-27–28; *see also* 3-ER-336, 342, 433 (NAR Handbook provisions require MLS participants to agree to follow all MLS rules and regulations).

This case involves an optional model rule in NAR's Handbook called the "no-commingling rule" or "segregation rule."[4] Promulgated by NAR sometime after 2001 and most recently amended in 2017, the no commingling rule provides that MLS listings "must be displayed separately from listings obtained from other sources." 1-ER-26–27 (quoting Dkt. 392-2, at 105). Although designated as "optional," the nocommingling rule belongs to a set of display-related rules that, per NAR's Handbook, "cannot be modified" "if adopted," 3-ER-416; in other words, NAR requires its affiliated MLSs that adopt the rule to adopt it in full. A large majority—approximately 71%—of NAR-affiliated MLS have adopted the no-commingling rule. 1-ER-26, 43.

2. REX and Zillow

REX was a startup real estate broker aimed at providing clients with a lower-cost alternative to the high commissions prevalent in the real-estate industry. 1-ER-30. To keep commissions low, REX attempted to bypass

4. This brief will refer to the rule as the "no-commingling rule" for consistency, as the district court did in its summary-judgment opinion. *See* 1-ER-26 n.6 (recognizing the rule is also called the "segregation rule").

listing properties with MLSs to avoid mandatory buyer-broker or agent commissions that NAR required for its affiliated MLSs. 1-ER-31 & n.9. Instead, REX promoted its clients' properties on websites like Zillow, Google, Facebook, and Instagram. 1-ER-31.

In particular, REX relied on Zillow, which operates the most visited network of residential real estate websites and mobile apps in the United States that consumers use to search for homes for sale. 1-ER-22. To ensure broad coverage, Zillow compiles listings from multiple sources, including those from MLSs and from other sources, such as REX or "for sale by owner" properties. Before January 2021, Zillow's search results combined listings from all sources into a single display. 1-ER-22–23, 27.

As part of an effort to access more comprehensive, up-to-date listings, Zillow began to shift toward using Internet Data Exchange ("IDX") feeds directly from MLSs. 1-ER-23. To gain access to MLSs' IDX feeds, Zillow had to become a licensed brokerage and have its brokers apply to become members in local MLSs, many of which were affiliated with NAR. 1-ER-23–24. Zillow also became a member of NAR. Dkt. 407, at 5–6.

Of the MLSs that Zillow joined, the vast majority were NAR-affiliated MLSs, and approximately two-thirds had adopted the nocommingling rule. 1-ER-28. As a member of those MLSs, Zillow was required to comply with the no-commingling rule in those regions.

Zillow complied with the rule by segregating search results into two separate tabs: (1) a default tab labeled

"Agent listings" for MLS listings, and (2) a non-default tab labeled "Other listings" obtained from non-MLS sources, which would be shown only if a user clicked on that tab. 1-ER-28. Many Zillow users disliked having to navigate between two tabs to see available listings, and customer complaints to Zillow increased by 32% in the weeks following the change. 1-ER-29. Zillow also disliked the rule, and Zillow attempted multiple times to get NAR to require MLSs to allow commingling of MLS and non-MLS listings. 1-ER-30.

After Zillow implemented the new two-tab display, REX's listings were relegated to the "Other listings" tab. 1-ER-29, 31. Page views of REX's listings on Zillow's platforms dropped by as much as 80%, and REX's clients had trouble finding their listings on Zillow. 1-ER-31–32. Facing difficulties reaching potential home buyers through Zillow, REX shuttered its residential real estate brokerage business about 18 months after Zillow's display change. 1-ER-32.

B. Procedural History

REX sued NAR and Zillow under Section 1 of the Sherman Act and state antitrust law, among other laws. REX alleged that NAR and Zillow, along with non-party NAR-affiliated MLSs, conspired to segregate and demote the listings of non-MLS brokerages (such as REX) on Zillow's platforms through the no-commingling rule, which was promulgated by NAR, enforced by adopting MLSs, and followed by their members. 4-ER-663, 668 (Am. Compl., ¶¶ 110, 135).

Appendix D

The district court denied several motions to dismiss REX's antitrust claims. *See* 4-ER-682, Dkt. 108.[5] As relevant here, the court rejected NAR's argument that there could be no unlawful agreement because the no-commingling rule is optional, reasoning that the complaint adequately alleged there was "*no choice* but to comply with NAR's so-called optional rules." 4-ER-693.

After discovery, the district court granted summary judgment to the defendants on the Section 1 claim. 1-ER-32–33. First, the court determined that the no-commingling rule, standing alone, did not constitute direct or circumstantial evidence of an agreement between NAR and Zillow to demote non-MLS listings. 1-ER-36–37. The court rejected Zillow's implementation of the rule as evidence of an agreement on the ground that the rule was optional, distinguishing several cases cited by REX. 1-ER-38–42. The court also noted that NAR-affiliated MLSs "independently decided" to adopt the rule, and Zillow "acted independently" when redesigning its display. 1-ER-38, 42–43. The court rejected REX's argument that Zillow had no choice but to redesign its display to comply with the rule, reasoning that the alleged conspiracy was not only to segregate but also to conceal and demote non-MLS listings, which resulted from Zillow's own design choices. 1-ER-45–46, 46 n.16.

Second, the district court concluded that certain communications between NAR, Zillow, and the MLSs also

5. The United States filed a statement of interest for the limited purpose of addressing a 2008 consent decree between the United States and NAR. Dkt. 95, at 2.

did not constitute direct or circumstantial evidence of the alleged agreement. 1-ER-43–45. NAR's communications about the no-commingling rule "noted its optional nature." 1-ER-44–45. Moreover, although "some MLSs sought assistance from NAR when interpreting certain model rules," the court stated that this did not "reasonably suggest the existence of a conspiracy" because independent decisions to follow nonbinding recommendations do not support a finding of a conspiracy. 1-ER-45. Finally, the court determined that Zillow had presented evidence that it switched to the MLSs' IDX feeds to improve its business. 1-ER-46.

The court noted that, although REX could have alleged Zillow entered into anticompetitive agreements with MLSs, REX focused on NAR "as an indispensable member of the conspiracy," rather than alleging "any agreements between Zillow and individual MLSs." 1-ER-48–50. In addition, the court concluded that REX failed to present evidence of a conspiracy between Zillow and individual MLSs. 1-ER-48–50.

SUMMARY OF THE ARGUMENT

Concerted action is a threshold element in a Section 1 case and encompasses any arrangement that "joins together separate decisionmakers" and thus "deprives the marketplace of independent centers of decisionmaking." *Am. Needle, Inc. v. NFL,* 560 U.S. 183, 195 (2010). The district court applied an incomplete legal framework in evaluating whether REX had presented a genuine dispute of material fact on concerted action in this case.

Appendix D

I. Under Supreme Court precedent, there are at least three ways that optional rules can involve concerted action: (1) a purportedly optional rule could be mandatory in practice; (2) an association's adoption of an optional rule can itself be concerted action; and (3) an optional rule can invite others to participate in a common plan.

II. The district court considered and rejected the first theory—that NAR's "optional" no-commingling rule was mandatory in practice. But even if the no-commingling rule is optional, that is not determinative on concerted action in this case. In particular, REX's arguments appear to have the most support under the third theory: REX has alleged a common plan among NAR, MLSs, and their members, under which (i) NAR promulgated the optional no-commingling rule and invited MLSs to adopt it, (ii) knowing that MLSs that adopt the rule will enforce it—unmodified—on their members, and (iii) in which Zillow later acquiesced by complying with the no-commingling rule (despite disfavoring it). This Court should vacate the judgment below and remand the case for the district court to fully consider whether there is adequate evidence of concerted action under this third theory.

ARGUMENT

Section 1 prohibits every "contract," "combination," or "conspiracy" that unreasonably restrains trade. 15 U.S.C. § 1. The Supreme Court has identified two primary elements for such a claim: (i) whether an arrangement is a "contract, combination, or conspiracy"—i.e., "concerted action"; and (ii) whether that concerted action

"unreasonably restrains trade." *Am. Needle, Inc.*, 560 U.S. at 186. Each element is a separate inquiry. *Id.*

This appeal focuses on the threshold element of concerted action, which forms a "basic distinction" between Section 1 and Section 2 of the Sherman Act. *Am. Needle,* 560 U.S. at 190. The Sherman Act "treat[s] concerted behavior [under Section 1] more strictly than unilateral behavior," which is cognizable only under Section 2's prohibition against monopolization. *Id.* In drawing this distinction, Congress recognized that "[c]oncerted activity inherently is fraught with anticompetitive risk" because it "deprives the marketplace of independent centers of decisionmaking that competition assumes and demands." *Id.* (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768–69 (1984)).

Concerted action thus embraces any arrangement that "joins together separate decisionmakers" and thus "deprives the marketplace of independent centers of decisionmaking." *Am. Needle,* 560 U.S. at 195. This standard does not rest on "formalistic distinctions" but rather on "a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Id.* at 191; *see Ohio v. Am. Express Co.*, 585 U.S. 529, 542–43 (2018) (explaining that "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law") (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992)). "No formal agreement is necessary" for there to be concerted action; it is sufficient if the adherents share a "unity of purpose or a common

design and understanding, or a meeting of minds in an unlawful arrangement." *Am. Tobacco Co. v. United States,* 328 U.S. 781, 810 (1946).

Applying this approach, the Supreme Court and this Court have repeatedly applied Section 1 to trade associations' rules and policies governing their members' separate businesses. *See, e.g., FTC v. Ind. Fed'n of Dentists,* 476 U.S. 447, 451–52 (1986) (dental association rule forbidding members from submitting x-rays to insurers); *NCAA v. Bd. of Regents of the Univ. of Okla.,* 468 U.S. 85, 99 (1984) (NCAA plan restricting members' licensing of television rights); *Nat'l Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 681 (1978) (engineering society's ethical canon barring competitive bidding); *PLS.com, LLC v. NAR,* 32 F.4th 842, 843 (9th Cir. 2022), *cert. denied,* 143 S. Ct. 567 (2023) (NAR policy prohibiting pocket listings). As the Supreme Court has observed, "members of such associations often have economic incentives to restrain competition," and the "standards set by such associations have a serious potential for anticompetitive harm." *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 500 (1988); *see Associated Press v. United States,* 326 U.S. 1, 19 (1945) ("[C]ombinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose.").

Many of those cases involved mandatory rules, but concerted action is not limited to an association's binding rules. Optional association rules affecting members' separate businesses can also constitute concerted action under at least three different theories: (1) an optional rule

can be mandatory in practice; (2) an association's adoption of an optional rule can itself be concerted action; and (3) an optional rule can invite others to join in concerted action.

Here, the district court relied on the "optional" nature of the no commingling rule—and the lack of an enforcement mechanism by NAR on MLSs to adopt the rule—to conclude that there was no concerted action. 1-ER-38–42. But the court failed to consider other factors—such as NAR's role in promulgating the rule to segregate listings and prohibiting modifications by MLSs adopting the rule; the effect of an MLS adopting the rule of making it mandatory on its members; and MLSs' role in enforcing the rule on their members—that suggest that NAR proposed a common plan to MLSs and their members to segregate and demote non-MLS listings.

If uncorrected, the district court's incomplete approach creates a risk that associations like NAR could evade antitrust scrutiny for many anticompetitive schemes by using optional rules. Vacatur and remand are appropriate for the district court to fully consider whether there is adequate evidence of concerted action under the correct legal framework.

Part I sets out the legal basis supporting three theories under which optional rules can embody concerted action under Section 1. Part II discusses how the district court considered the first theory, but its analysis of concerted action was incomplete, because it failed to consider other potentially viable theories related to the allegations in this case. Because the United States does not have access

to the sealed record in this case, this brief does not take an ultimate position on the application of the law to the facts here.

I. Association Rules Can Embody Concerted Action Under Section 1 Even When They Are Not Mandatory.

Congress broadly defined concerted action because of its inherent anticompetitive risk. *See supra,* p. 12. Optional association rules can constitute concerted action under at least three theories. We discuss the support for each theory in turn.

A. First, an association rule can be optional in name but mandatory in practice. In *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), the Supreme Court held that "a naked agreement was clearly shown" by a defendant bar association's fee schedule that purported to be "merely advisory." *Id.* at 781–82. The Court noted that the schedule was not "purely advisory" because, although the bar association had not taken "formal disciplinary action to compel adherence," it had published reports espousing the schedules and issued ethics opinions indicating that attorneys may not ignore the schedules, such that a "fixed, rigid price floor arose from" the schedule. *Id.* at 776–78, 781.

Similarly, the Supreme Court has recognized that rules and codes promulgated and published by a trade association, "while only advisory, have a powerful influence" when the trade association was "'in reality an

extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce.'" *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.,* 456 U.S. 556, 559, 570 (1982) (quoting *Fashion Originators' Guild of Am., Inc. v. FTC,* 312 U.S. 457, 465 (1941)). Some of the Society's standards were incorporated into federal and state regulations by reference, and the association's power and influence made it such that the "so-called voluntary standards" were mandatory in practice. *Id.* at 559, 563, 570–71.

B. Second, concerted action exists when association members adopt an optional rule concerning their separate businesses, either through a vote or other procedures involving delegated authority to association leadership. The association's agreement to promulgate the optional rule is itself concerted action under Section 1 that joins together separate decisionmakers. *See Am. Needle,* 560 U.S. at 195.[6]

The Supreme Court recognized this type of concerted action in *Associated Press,* 326 U.S. 1, which addressed an association's adoption of by-laws. The Associated Press's by-laws restricted competition from non-members in two ways: (1) prohibiting members from selling news to non-members and (2) granting members an optional veto power to block non-member competitors from gaining membership. *Id.* at 4. The Court determined that the Associated Press's role in setting up both sets of by-laws

6. Although the optionality of the rule may affect the extent of any anticompetitive effects, that is a separate inquiry from concerted action under Section 1. *Am. Needle,* 560 U.S. at 186.

was concerted action, even though a member's exercise of the optional veto power over a competitor's membership application was left to the discretion of individual members. *Id.*

The Supreme Court likewise recognized this theory of concerted action specifically with respect to real estate associations in *United States v. National Association of Real Estate Boards,* 339 U.S. 485 (1950) (*NAREB*). In *NAREB,* the Court held that a "non-mandatory" schedule of rates prescribed by the real estate association constituted price-fixing. *Id.* at 488.[7] Regardless of whether the schedule was mandatory or optional on the association members, the schedule itself was "proof of consensual action fixing the uniform or minimum price" by the real estate association. *Id.* at 489.

Similarly, where a car dealer association sent its members a schedule of list prices, this Court found that the schedule had been "an agreed starting point," and thus was concerted action. *Plymouth Dealers' Association of N. Cal. v. United States,* 279 F.2d 128, 129–132 (9th Cir. 1960). Setting a starting point for competitors' pricing processes removed an aspect of independent price-setting. Thus, "the fact that the dealers used the fixed uniform list price in most instances only as a starting point[] is of no consequence." *Id.* at 132; *accord In re Flat Glass Antitrust Litig.,* 385 F.3d 350, 362–63 (3d Cir. 2004); *In*

7. That *NAREB* involved Section 3 rather than Section 1 of the Sherman Act is immaterial to the analysis; Section 3 merely extends the prohibitions of Section 1 to U.S. territories and the District of Columbia. *See* 15 U.S.C. § 3.

re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 656 (7th Cir. 2002).

C. Third, an optional rule can serve as an invitation for others to join in concerted action. For example, in *Interstate Circuit v. United States*, 306 U.S. 208 (1939), a manager of two movie theater companies sent identical letters to eight major national film distributors, mentioning that the same letter was being sent to all of them and asking the distributors to impose certain restrictions on secondary runs of certain films. The distributors responded by imposing the restrictions. *Id.* at 217–18. The Supreme Court explained that, because the letter "advised that the others were asked to participate," each of the distributors knew "that concerted action was contemplated and invited," and the Court found an agreement between the distributors on that basis. *Id.* at 226; *see also United States v. Masonite Corp.*, 316 U.S. 265, 274–76 (1942) (the "circumstances surrounding the making of [the bilateral contracts]" left "no room for doubt" that they hatched a broader price-fixing conspiracy between manufacturers and sellers of building materials).

II. Remand Is Appropriate For The District Court To Consider Whether There Is Sufficient Evidence Of A Common Scheme Among NAR And Adopting MLSs, In Which Zillow Acquiesced.

The district court considered the first theory discussed above, *supra* I.A: that the no-commingling rule, though purportedly optional, was mandatory in practice,

rejecting a motion to dismiss on that basis. 4-ER-693. The court noted that, even though the rule is optional on its face, REX had alleged that brokerages and agents "have *no choice* but to comply with NAR's so-called optional rules." *Id.* (citing *Hydrolevel,* 456 U.S. at 570). Likewise, at summary judgment, the district court recognized that mandatory rules would be concerted action, though noting that discovery showed that the no-commingling rule "is in fact optional," with 29% of NAR-affiliated MLSs declining to adopt the no commingling rule. 1-ER38–42, 42 n.14.

Lacking access to the full record, we assume that conclusion to be correct. But, as discussed above, the optionality of the no-commingling rule is not determinative on the existence of concerted action in this case. Thus, the district court's analysis of concerted action was incomplete.

In particular, REX's arguments find the most support under the third theory discussed above, *supra* I.C, where an optional rule served as an invitation to others to join in concerted action. (The second theory discussed above, *supra* LB, also appears to be implicated on the facts here, but it does not in and of itself reach Zillow, *see infra,* note 8.) REX has alleged a common plan among NAR, MLSs, and their members, under which NAR promulgated the optional no-commingling rule and invited MLSs to adopt it, knowing that MLSs that adopt the rule will enforce it—unmodified—on their members (who have agreed to follow MLS rules). *See* Dkt. 407, at 10–11 (REX arguing that NAR is "a bottoms-up and top-down organization which coordinates its members' conduct and facilitates

cooperation between them'" and "[t]hrough its members, NAR promulgates rules that are then enforced on its members by NAR and NAR MLSs"). While Zillow was not part of this common plan at its formation, it allegedly joined this common scheme when becoming a member of NAR and affiliated MLSs and complying with the no-commingling rule despite being opposed to it. Dkt. 407, at 5–6; 1-ER-28, 30.

If proved, this would be a cognizable form of concerted action under Section 1. NAR is a collection of competitors in the same industry, and the adoption of the no-commingling rule by NAR's Board of Directors concerning that industry (through authority delegated to them), Dkt. 406, at 2, joined together separate centers of economic decisionmaking. *See Am. Needle,* 560 U.S. at 195; *see also id.* at 191 ("[W]e have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity.") (citing *United States v. Sealy, Inc.,* 388 U.S. 350, 352–56 (1967), and other cases); *see, e.g.,* Dkt. 423, at 5 (REX arguing that "[w]hen NAR promulgates model rules—mandatory or otherwise—it engages in concerted activity by a group of competitors").[8]

8. If REX were only challenging NAR's promulgation of the no commingling rule, the second theory would be applicable. This theory would not reach Zillow, however, since it was not a NAR member when the rule was adopted. Yet the third theory provides a potential way in which the concerted action among NAR's members in promulgating the no-commingling rule may have been expanded to include local MLSs and their members

Moreover, the nature of NAR's no-commingling rule was allegedly such that it served as an invitation for further coordinated action by adopting MLSs and their members. *See* Dkt. 407, at 5 (REX arguing that "there was an open invitation to join NAR's existing anticompetitive agreement among its members to enforce the Segregation Rule."). Because NAR's Handbook provided that the no commingling rule "cannot be modified" if adopted (due to restrictions on modifying display rules), 3-ER-416, all MLSs adopting the rule knew that other MLSs were being invited to adopt the same rule, and that if they chose to adopt the rule, they would all adopt the same rule, with no deviations. In addition, both NAR and MLSs knew that adopting MLSs would enforce the rule on their members—who had agreed to follow MLS rules. *See, e.g.,* Dkt. 423, at 2 (REX arguing that "[l]ogic dictates that once a rule such as the Segregation Rule is widely adopted and enforced by competitors, it will have a binding impact"); *id.* at 5 (REX arguing that "[a]ny claim of optionality is illusory because the Rule has a binding impact on all affected competitors" like Zillow); *see also Hydrolevel,* 456 U.S. at 559.

Indeed, this type of alleged common scheme is similar to the one in *Interstate Circuit,* where the movie theater manager sent the same letter to distributors asking them to impose certain restrictions so that the distributors knew "that concerted action was contemplated and invited" and then adhered to the common plan. 306 U.S.

(including ones like Zillow allegedly acquiescing to the common scheme after it went into practice). *See infra,* pp. 24–25.

at 226; *see supra,* p. 20 (discussing *Interstate Circuit*). Likewise, here, REX has argued that MLSs knew that concerted action "was contemplated and invited" by NAR's promulgation of the no-commingling rule. *Id.* And with NAR's coordination (including by prohibiting MLSs from altering the rule), the MLSs that adopted NAR's no-commingling rule all adopted the same rule, 1-ER-26, signifying their "adherence to the [common] scheme." *Interstate Circuit,* 306 U.S. at 226; *cf. Arandell Corp. v. Centerpoint Energy Servs., Inc.,* 900 F.3d 623, 634 (9th Cir. 2018) ("[A]ny conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy.") (quoting *Esco Corp. v. United States,* 340 F.2d 1000, 1008 (9th Cir. 1965)).

Although the district court appeared to suggest that NAR could not be a part of the alleged conspiracy because the rule it promulgated was optional, *see* 1-ER-38–42, 48, courts have recognized that a ringleader proposing a common scheme can be a part of a broader, single conspiracy with the other participants. For example, in *Masonite,* Masonite had entered into bilateral contracts with sellers that required the distribution of Masonite's patented product at fixed prices, and thus created a price-fixing conspiracy between the distributors. 316 U.S. at 280. Similarly, in *Toys "R" Us, Inc. v. FTC,* 221 F.3d 928 (7th Cir. 2000), Toys "R" Us "had acted as the coordinator of a horizontal agreement among a number of toy manufacturers," through "a network of vertical agreements between [it] and the individual manufacturers." *Id.* at 930. And in *United States v. Apple, Inc.,* 791 F.3d 290 (2d Cir. 2015), the court affirmed liability

for Apple's coordinating role in a conspiracy because of "strong evidence that Apple consciously orchestrated a conspiracy among the Publisher Defendants" and that Apple had "consciously played a key role in organizing [their] collusion." *Id.* at 316. Here, in addition to NAR's promulgation and dissemination of the rule, there was evidence that NAR also played an orchestrating role by advising MLSs on the interpretation of its model rules. 1-ER-45.

The district court considered it significant that NAR had no role in enforcing the no-commingling rule. *See* 1-ER-27 ("NAR does not mandate compliance with its optional rules"); 1-ER-39–40 (an MLS "will suffer no consequence if it chooses not to adopt the no-commingling rule"). But there was no apparent reason for *NAR* to enforce the nocommingling rule when it allegedly knew that *MLSs* would enforce it. This Court addressed this sort of MLS enforcement scheme in *PLS.com,* where the challenged NAR policy (the Clear Cooperation Policy) was enforced by MLSs. 32 F.4th at 830. "Agents who did not comply faced severe penalties, including in some cases severa1-thousand dollar fines, or suspension from, or termination of, their access to the MLS." *Id.* A similar enforcement scheme allegedly applied here. *See* Dkt. 423, at 1.

The district court distinguished *PLS.com* on the ground that MLSs had to adopt the Clear Cooperation Policy, 1-ER-41–42, but that distinction goes more to the question of *which* MLSs are part of the common scheme than to whether one *exists.* A policy or rule does not have

to be mandatory to be part of an agreed-upon common scheme. From the perspective of MLS members—brokers and agents—in the 71% of MLSs adopting the rule, 1-ER-26, they are bound to follow the no-commingling rule and subject to the same penalties for noncompliance as with mandatory NAR rules.[9]

Associated Press is also on point. While some of the by-laws in *Associated Press* were mandatory, prohibiting members from selling news to nonmembers, others were optional in an important respect, granting members veto power to block non-members who compete with them from gaining membership, exercised at the individual

9. Even if there were no enforcement mechanism, that would not mean that no concerted action exists. "Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line." *NAREB,* 339 U.S. at 489. Thus, "the fact that no penalties are imposed for deviations" from an agreed-upon price schedule "is not material" to the existence of concerted action. *Id.*; *see PLS.com,* 32 F.4th at 843 (whether the defendant adhered to a common scheme "by formally adopting the Clear Cooperation Policy after NAR required it or by voluntarily adopting a substantially equivalent policy beforehand makes no difference"); *United States v. Realty Multi-List, Inc.,* 629 F.2d 1351, 1375–76, 1385 (5th Cir. 1980) (explaining "it is irrelevant that the restrictive practice may not be strictly enforced by its terms," because "the antitrust laws do not require that we wait until the restraint is accomplished before we hold invalid a rule which gives an association power to produce unjustified anticompetitive effects"). Indeed, for mandatory rules governing members' conduct, proof of enforcement is unnecessary because the existence of the rule is direct evidence of concerted action. *Relevent Sports, LLC v. United States Soccer Fed'n, Inc.,* 61 F.4th 299, 307 (2d Cir. 2023), *cert. denied,* 144 S. Ct. 1391 (2024).

member's discretion. *See supra* p. 18. Nevertheless, the Supreme Court held that both types of by-laws were concerted action and that they unreasonably restrained trade by limiting non-members' ability to access AP reports.[10] This case involves a similar set of binding and optional rules in that NAR's Handbook gives affiliated MLSs the option to adopt the no commingling rule but requires MLS members to agree to adhere to MLS rules and prohibits adopting MLSs from altering this optional rule once adopted.

The United States's prior challenge to NAR's Virtual Office Website ("VOW") policies, *see NAR,* 2006 WL 3434263, also is instructive. Operated by brokers, VOWs enabled potential home buyers to search MLS databases themselves, placing downward pressure on commission rates. *Id.* at *2. In response, NAR adopted initial and modified VOW policies that contained an opt-out provision allowing brokers participating in MLSs to forbid other brokers from conveying listings to their customers without the permission of the listing broker. *Id.* at *3–*4. Thus, as the district court noted, while "adoption of the VOW policies was mandatory, . . . the exercise of the opt-out provisions was left to the discretion of individual brokers." 1-ER-41; *see also NAR,* 2006 WL 3434263, at *3–4. Here, the district court distinguished the *NAR,* VOW decision

10. *NAREB,* 339 U.S. at 488, which involved an association's "non-mandatory" price schedule, similarly recognizes concerted action in contexts involving some element of optionality. *See supra,* pp. 18–19. The district court did not address *NAREB.* While REX did not raise *NAREB* at the summary judgment stage, it had cited *NAREB* in prior briefs. Dkt. 90, at 16; Dkt. 102, at 19.

on the basis that NAR had conceded concerted action in that case. 1-ER-41. But the district court failed to note that the *NAR,* VOW decision expressly rejected NAR's argument that Section 1 "is not implicated" when "the association leaves its members free to act independently." *NAR,* 2006 WL 3434263, at *14.

While Zillow was not part of this alleged common scheme at its formation, it is well-established that a firm may become a participant in an unlawful scheme if that firm comes to share with the other adherents a "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Am. Tobacco,* 328 U.S. at 810; *see Arandell,* 900 F.3d at 634 (a plaintiff need not show "that each defendant or all defendants must have participated in each act or transaction") (quoting *Esco Corp.,* 340 F.2d at 1006). REX has argued that there was such a "meeting of minds" here, for although Zillow disliked the rule, Zillow felt compelled to follow it to obtain the benefits of MLS membership, and thus complied with the rule by adopting the two-tab display. 1-ER-27–28. Zillow thus allegedly acquiesced in the alleged common scheme. *See United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 161 (1948) ("[A]cquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one."); *Epic Games, Inc. v. Apple, Inc.,* 67 F.4th 946, 982 (9th Cir. 2023) ("[N]umerous antitrust cases involv[e] agreements in which one party set terms and the other party reluctantly acquiesced."). Even if the specific method of separating the listings was left to Zillow's discretion, the no-commingling rule allegedly served as "an agreed starting point," which

"had been agreed upon between competitors" and "in some instances in the record respected and followed" as part of their common plan to segregate and thereby demote non-MLS listings. *Plymouth Dealers' Ass'n*, 279 F.2d at 132. Remand is appropriate for the district court to fully consider this possibility.

CONCLUSION

This Court should vacate and remand the case for the district court to fully consider the evidence of concerted action under the third theory discussed above.

Respectfully submitted,

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June 20, 2024

APPENDIX E — STATEMENT OF INTEREST ON BEHALF OF THE UNITED STATES TO THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED AUGUST 10, 2021

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

STATEMENT OF INTEREST ON BEHALF
OF THE UNITED STATES OF AMERICA

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.

Appendix E

Filed August 10, 2021

The Honorable Thomas S. Zilly

INTEREST OF THE UNITED STATES

The United States respectfully submits this statement pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal court. The United States is principally responsible for enforcing the federal antitrust laws, *United States v. Borden Co.*, 347 U.S. 514, 518 (1954); *see* 15 U.S.C. §§ 4, 25, and has a strong interest in their correct application. We submit this statement to prevent the drawing of unwarranted inferences from a now-expired 2008 consent decree between the United States and defendant The National Association of Realtors (NAR). The United States takes no position on any other issue in the case.

STATEMENT

1. During the early 2000s, the United States investigated and resolved an antitrust case involving NAR rules that allegedly thwarted the utility and growth of Internet websites operated by real estate brokers who sought to compete by providing online services to sellers or buyers of residential real property. Doc. 85-3, *United States v. NAR* Complaint ¶¶ 1-7. The United States sought to protect innovation and competition by ensuring that multiple-listing services (MLS) would treat brokers

employing Internet websites in the same way that the MLSs treated brokers who provide services through traditional "brick-and-mortar" business models. *Id.* ¶ 2.

Specifically, in 2003 NAR adopted a policy relating to "virtual office websites" (VOWs) that allowed brokers to opt out of having their MLS listings displayed on the VOW sites of competing brokers and prohibited VOWs from engaging in certain conduct. *Id.* ¶ 3. The United States investigated NAR's VOW policy and sued NAR in 2005. The United States and NAR settled the case and agreed to the 2008 consent decree. The decree prohibited NAR from adopting or enforcing any rule or practice that prohibited a broker from using a VOW or from impeding a broker's ability to operate a VOW. Doc. 85-4, Final Judgment 5-6.

2. Plaintiff REX challenges the Zillow defendants' implementation of a NAR rule providing:

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

Doc. 1, Complaint ¶ 85. The Court has referred to this as the No-Commingling Rule. REX alleges that Zillow and NAR's concerted action to "make non-MLS listings

accessible only via a recessed, obscured, and deceptive tab that consumers do not see, and even professional real estate agents find deceiving," *id.* ¶ 8, violates, among other things, Section 1 of the Sherman Act, 15 U.S.C. § 1.

3. REX moved for a preliminary injunction. NAR, in opposition to REX's motion, cited a NAR policy, supposedly similar to the No-Commingling Rule, that appears in an attachment to the 2008 consent decree:

> An MLS may not prohibit Participants from downloading and displaying or framing listings obtained from other sources, e.g., other MLSs or from brokers not participating in that MLS, etc., ***but may require either that (i) such information be searched separately from listings obtained from other sources, including other MLSs.***

Doc. 84, NAR Mot. To Dismiss 3-4 (NAR's emphasis). The Court, in its Order denying REX's motion, also referenced the 2008 consent decree:

> In addition, the Court notes that a 2008 consent decree expressly permits NAR to adopt a policy that its affiliated MLSs may require that their listings "be searched separately from listings obtained from other sources, including other MLSs." Ex. A to Consent Decree at § IV(3), Ex. 27 to Glass Decl. (docket no. 66-27).

Doc. 80, Order 13 (footnote omitted).

Appendix E

The Zillow defendants and NAR now have moved to dismiss the Complaint, and NAR again has cited the 2008 consent decree and moved the Court to take judicial notice of it.

ARGUMENT

By claiming that the government "approved" the search policy in the attachment to the 2008 consent decree, *see* Doc. 93, NAR Reply in Support of Mot. To Dismiss 7-8, NAR implies that the government has determined that the policy—and by extension the No-Commingling Rule—is consistent with the antitrust laws. That implication, however, is incorrect.[1] The 2008 consent decree resolved the United States' antitrust claims against NAR for specific exclusionary policies targeting brokers using innovative online platforms. In that case, the United States did not examine the rest of NAR's policies, including the No-Commingling Rule, and therefore those policies simply were not subjected to antitrust scrutiny. *See* https://www.justice.gov/atr/case-document/file/505761/download, at 35 (agreeing

1. The inference of lawfulness that NAR would draw is also procedurally improper. Even assuming that the Court could take judicial notice of the 2008 consent decree, the Court cannot draw inferences from it that are disputed by REX. Doc. 91; *cf. Lee v. City of Los Angeles*, 250 F.3d 688, 690 (9th Cir. 2001) ("On a Rule 12(b)(6) motion to dismiss, when a court takes judicial notice of another court's opinion, it may do so not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.") (internal quotation marks and citation omitted).

that "[NAR's] IDX Policy was NOT the subject of the DOJ's pre-complaint investigation, complaint, amended complaint or discovery" and "the United States takes no position as to the permissibility under the antitrust laws of NAR's IDX Policy"). Contrary to NAR's argument, therefore, those other policies, including the supposedly similar search policy that appears in an attachment to the 2008 consent decree as part of NAR's IDX Policy, were in no sense analyzed and found consistent with antitrust laws.

As explained above, the government case that resulted in the 2008 consent decree challenged a NAR rule of broad application that allowed traditional real estate brokers to "opt out" of providing their sellers' MLS listings to internet-based agencies. The alleged purpose and anticompetitive effect of NAR's policy was to "impose greater restrictions and limitations on brokers with Internet-based business models than on traditional brokers." Doc. 85-3 ¶ 35. The conduct challenged here by REX—alleged "display bias" by one particular aggregator of residential real estate listings, Zillow, caused by segregating search results (MLS listings from non-MLS listings) in a particular way—is different from the conduct challenged in the government's 2005 case. The government did not there challenge either the No-Commingling Rule or the supposedly similar search policy cited by NAR.

The government "approved" the search policy cited by NAR only to the extent of permitting it as part of the Modified VOW Policy required by the 2008 consent decree. The policy appears in a lengthy attachment that revised

NAR's policies to comply with the decree's injunctions. The 2008 decree did not affirmatively determine the policy challenged in this case (or any other NAR policies noted in the attachment to the decree) to be pro-competitive or lawful.

A consent decree that does not expressly prohibit certain aspects of a defendant's conduct, and merely permits the defendant to continue such conduct that was neither investigated nor challenged, does not imply that the conduct is, or has been determined to be, lawful. The government may have many reasons having nothing to do with lawfulness for not challenging particular conduct at the time of the decree or for permitting conduct to continue subject to later investigation. In *Penne v. Greater Minneapolis Area Bd. of Realtors*, 604 F.2d 1143 (8th Cir. 1979), the defendant realty board argued that its dissemination of commission rate information was permitted by an earlier settlement and injunction stating that "[n]othing in this injunction shall be deemed to prohibit" that conduct. The Court of Appeals rejected that argument, stating "[t]he short answer to this argument is that nothing in the Forbes injunction . . . can be construed to countenance the sort of dissemination of price information as is here involved if such dissemination is shown to have anticompetitive effects forbidden under the Sherman Act." *Id.* at 1150.

Consistent with *Penne*, the 2008 consent decree contained an express reservation of the United States' rights in Section IX, "No Limitation on Government Rights." Doc. 85-4 at 11. That section provides that

"[n]othing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule or practice adopted or enforced by NAR or any of its Member Boards." This reservation applies to the entire Final Judgment, not just to the "Permitted Conduct," and it therefore renders unavailing NAR's attempt to distinguish *Moehrl v. NAR*, 492 F. Supp. 3d 768 (N.D. Ill. 2020), on the ground that the NAR rule challenged there was only "permitted" by the decree rather than "approved" (Doc. 93 at 8). This reservation also confirms that the United States did not permit—much less "approve"—NAR to use the consent decree to shield from future investigation or challenge "any Rule or practice adopted or enforced by NAR or any of its Member Boards." Doc. 85-4 at 11.

In any event, the 2008 consent decree was limited to a ten-year term, Doc. 85-4 § X, which shows that it was not intended to apply long into the future when the real estate industry likely would have changed. The decree expired in 2018 and should not be read to apply to industry developments, such as the massive growth of Zillow into an allegedly critical platform for marketing homes directly to consumers (as opposed to through a multiple listing service), which hardly existed in 2008. *See generally NCAA v. Alston*, 141 S. Ct. 2141, 2021 U.S. LEXIS 3123, *59 (June 21, 2021) ("And judges must be open to clarifying and reconsidering their decrees in light of changing market realities.").

In two other pending cases, NAR has tried similarly to use the 2008 consent decree to shield conduct that the government neither investigated nor challenged in the 2005 case that resulted in the decree. The United States responded with Statements of Interest in those cases, and both courts properly declined to draw any inference in favor of NAR from the 2008 consent decree. *See Sitzer v. NAR*, 420 F. Supp. 3d 903 (W.D. Mo. 2019) (no mention of 2008 consent decree despite NAR's argument based on it); *Moehrl*, 492 F. Supp. 3d at 786 ("The Court agrees with the United States that nothing in the [2008] consent decree can be read to immunize the practices challenged here from antitrust scrutiny."). The United States thus respectfully requests that this Court decline NAR's invitation to draw a similarly unwarranted inference here.

CONCLUSION

No inference should be drawn from the 2008 consent decree that the No-Commingling Rule is consistent with the antitrust laws.

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Respectfully Submitted,

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Appendix E

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