

The Honorable Thomas S. Zilly

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REX – REAL ESTATE EXCHANGE, INC., a
Delaware corporation,

Plaintiff,

v.

ZILLOW, INC., a Washington corporation;
ZILLOW GROUP, INC., a Washington
corporation; ZILLOW HOMES, INC., a
Delaware corporation; ZILLOW LISTING
SERVICES, INC., a Washington corporation;
TRULIA, LLC, a Delaware limited liability
company; and THE NATIONAL
ASSOCIATION OF REALTORS, an Illinois
trade association,

Defendants.

No. 2:21-cv-00312-TSZ

**PLAINTIFF’S MOTION TO DISMISS
NAR’S COUNTERCLAIM**

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25 *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*,
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1 *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*,
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11

12 *Glen Holly Ent., Inc. v. Tektronix, Inc.*,
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13 *Greenbelt Coop. Publ’g Ass’n v. Bresler*,
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15 *Hoffman v. Capital Cities/ABC, Inc.*,
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18 *L.A. Taxi Coop., Inc. v. Uber Techs., Inc.*,
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25 *Mattel, Inc. v. MCA Records, Inc.*,
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 4 492 F. Supp. 3d 768 (N.D. Ill. 2020) 3

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6 *Nat’l Coal. of Latino Clergy & Christian Leaders v. Arizona*,
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7 *Nat’l Treasury Emps. Union v. United States*,
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9 *New York Times Co. v. Sullivan*,
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11 *Newcal Indus., Inc. v. IKON Off. Sol.*,
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12 *Nissan Motor Co. v. Nissan Comput. Corp.*,
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14 *Or. Nat. Res. Council v. Mohla*,
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15 *Rice v. Fox Broad. Co.*,
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17 *Rodriguez v. City of San Jose*,
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18 *Sliding Door Co. v. KLS Doors, LLC*,
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19 *Sosa v. DIRECTV, Inc.*,
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21 *Theme Promotions, Inc. v. News Am. Mktg. FSI*,
 22 546 F.3d 991 (9th Cir. 2008) 16

23 *ThermoLife Int’l LLC v. Am. Fitness Wholesalers LLC*,
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 24 *aff’d*, 831 Fed. App’x 325 (9th Cir. 2020) 10, 11

25 *ThermoLife Int’l, LLC v. Am. Fitness Wholesalers, LLC*,
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1 *Walker v. City of Lakewood*,
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2

3 *Wojnarowicz v. Am. Fam. Ass’n*,
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4 *Women’s Student Union v. Dep’t of Educ.*,
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15 5 McCarthy on Trademarks and Unfair Competition § 27:96 (5th ed.) 12

16 5 McCarthy on Trademarks and Unfair Competition § 27:97 (5th ed.) 16

17 5 McCarthy on Trademarks and Unfair Competition § 27:109.50 (5th ed.) 13

18 6 McCarthy on Trademarks and Unfair Competition § 31:104 (5th ed.) 16

19

20 **OTHER AUTHORITIES**

21 National Association of Realtors, *Code of Ethics and Standards of Practice* (Jan. 1, 2022),
<https://cdn.nar.realtor/sites/default/files/documents/2022-COE-Standards-of-Practice-2021-12-15.pdf> (last accessed Feb. 17, 2022) 3

22

23 Patrick Woodall & Stephen Brobeck, Consumer Federation of America, *How the Real Estate
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http://www.consumerfed.org/pdfs/Real_Estate_Cartel_Study061906.pdf 13

24

25 William C. Erxleben, *In Search of Price and Service Competition in Residential Real Estate
Brokerage: Breaking the Cartel*, 56 WASH. L. REV. 179 (1981)..... 13

I. INTRODUCTION

The National Association of Realtors (“NAR”) alleges that REX is engaging in deceptive practices by bringing this lawsuit and by expressing its view on NAR’s conduct to the United States Department of Justice and in the court of public opinion. While NAR has and continues to robustly argue its own case in this lawsuit and in many other public forums, NAR now seeks to enjoin REX from itself speaking out against and challenging practices that it believes violate antitrust laws and harm competition. NAR’s Lanham Act claim should be dismissed because it infringes on REX’s First Amendment right to express opinions on legal and policy matters and for the other reasons discussed below.

NAR’s counterclaim takes aim at two assertions: (1) that REX said it is an innovator seeking to lower real estate commissions; and (2) that REX said it believes commissions are artificially maintained at high levels because of the anticompetitive rules and practices of NAR and its affiliated Multiple Listing Services (“MLSs”).

NAR admits it does not bring this claim on behalf of its members, and it admits it doesn’t compete with REX. As a trade association, NAR’s bare allegations of reputational injury to itself are too conclusory, indirect, and remote to confer Article III and statutory standing.

NAR also fails to allege necessary elements of its Lanham Act claim because REX’s statements are not commercial speech and are not provable or disprovable assertions of fact. REX’s legal and policy positions on NAR’s conduct are expressions of opinion protected by the First Amendment.

This protected speech includes materials cited by NAR and attached to its counterclaim: REX’s op-ed in *The Wall Street Journal*; interviews with journalists for *Forbes* and *Inman*, a leading real estate publication; reflections on the state of the real estate industry in blog posts; and press releases commenting on DOJ antitrust enforcement.

NAR itself robustly engages in the public debate about its practices. NAR also has taken

1 and continues to take shots at REX and its business practices in the court of public opinion. But
2 while NAR has every opportunity to defend its practices in this lawsuit, it should not be allowed
3 to use the Lanham Act to suppress REX’s protected speech just because NAR disagrees with the
4 message. The Lanham Act claim should be dismissed.

5 II. FACTUAL BACKGROUND

6 The Amended Complaint alleges that Zillow and NAR conspired to exclude REX’s
7 residential real estate listings from the primary results page that most consumers use to find their
8 new home. This group boycott by REX’s competitors violates antitrust law. It reduces
9 competition in the residential real estate brokerage market. It enforces NAR’s rules that prohibit
10 negotiation of commissions, which is unlawful price-fixing. And it restricts consumer choice and
11 innovation by boxing out alternatives to the traditional way of buying and selling homes,
12 resulting in higher costs for all.

13 REX is an innovator in the residential real estate business that seeks to lower
14 commissions paid by consumers, most of whom buy homes from brokers affiliated with NAR
15 and its MLSs. Dkt. No. 99, ¶ 6. “REX uses digital technology to market the home directly to
16 consumers” including with “proprietary technology.” *Id.*, ¶ 40. REX relied on Zillow and other
17 search platforms not subject to MLS rules to reach customers. *Id.*, ¶ 46.

18 REX alleges that Zillow and NAR conspired to eliminate REX as a competitive threat
19 through application and enforcement of rules adopted by NAR members, real estate firms who
20 compete with REX. *Id.*, ¶¶ 7–8. “The NAR controls a large portion of MLSs through local
21 associations of realtors, which are members of and governed by the NAR.” *Id.*, ¶ 24. REX asserts
22 that “industry practices, including mandated NAR-endorsed MLS member rules, preserve sky-
23 high real estate fees across the United States.” *Id.*, ¶ 33.

24 In its counterclaim, NAR denies that its “rules and multiple listing service
25 policies . . . prohibit negotiations between the listing broker and cooperating broker at any time

1 during the transaction,” citing to its Code of Ethics Standard of Practice 3-3. Dkt. No. 114, ¶¶ 43–
2 44 (PDF p. 27 of 33). But NAR’s Code of Ethics expressly prohibits a buyer’s agent from attempt
3 to “modify” the offer of compensation from a seller, stating, “REALTORS® . . . shall not use
4 the terms of an offer to purchase/lease to attempt to modify the listing broker’s offer of
5 compensation. . . .” Standard of Practice 16-16.¹ And NAR’s Handbook on Multiple Listing
6 Policy, which contains model MLS rules and procedures, *requires* that the listing broker make a
7 “blanket unilateral offer[] of compensation” to the buyer’s agent. Dkt. 85-2 at 131 of 184. As
8 one district court found, NAR rules permit only the “hypothetical possibility” of negotiating
9 commissions that routinely cost consumers tens of thousands of dollars every time they buy and
10 sell a home. *Moehrl v. Nat’l Ass’n of Realtors*, 492 F. Supp. 3d 768, 785 (N.D. Ill. 2020).

11 REX alleges that in January 2021, Zillow, as part of its entry into the real estate brokerage
12 business, changed its residential property search display to comply with NAR internet display
13 rules adopted by MLSs. Zillow admits in its answer that it made these changes to comply with
14 MLS rules. Dkt. No. 100, ¶ 84 (Zillow “was required to undergo audit checks of its display to
15 ensure compliance with the individual MLS’s rules”); *id.*, ¶ 85 (“[s]ome NAR-affiliated MLSs
16 reviewed Zillow’s proposed new display before Zillow implemented the change”); *id.*, ¶ 88
17 (Zillow is “required to comply with the local MLSs’ rules, some of which relate to the display
18 of listings on Zillow’s online platforms”).

19 Even though REX employs licensed real estate agents as Zillow and NAR members do,
20 *see* Dkt. No. 99, ¶ 39, Zillow’s changes placed REX listings behind a hidden tab labeled “Other
21 listings” while the main search tab was labeled “Agent listings.” *Id.*, ¶ 64. “Accordingly, REX
22 has lost clients, has been forced to co-list clients with MLS members, and has been repeatedly
23 questioned about the lack of visibility of REX listings on Zillow’s websites.” *Id.*, ¶ 140.

24 _____
25 ¹ *See* National Association of Realtors, *Code of Ethics and Standards of Practice* (Jan. 1, 2022),
<https://cdn.nar.realtor/sites/default/files/documents/2022-COE-Standards-of-Practice-2021-12-15.pdf> at PDF p. 7
(last accessed Feb. 17, 2022).

1 In its answer to the amended complaint, NAR admits it “is a trade association,” Dkt. No.
2 114, ¶ 23, 71, and that “REALTORS® are members of the NAR.” *Id.*, ¶ 22. NAR admits that it
3 “creates rules through the participation of its members,” *see id.*, ¶ 76; Dkt. No. 99, ¶ 76, and that
4 “it intends for REALTOR® association-owned multiple listing services to comply with
5 mandatory policies.” Dkt. No. 114, ¶ 79. These policies include authorizing “MLS participants
6 to display on their websites the listings of other participants and that this policy is known as
7 NAR’s IDX [internet display] Policy.” *Id.*, ¶ 101. If those rules aren’t followed, NAR admits that
8 members “who belong to an MLS that requires membership in a local REALTOR® association
9 can have their MLS access cut off if REALTOR® membership is suspended.” Dkt. No. 114,
10 ¶ 72.

11 The Amended Complaint provides background on other proceedings challenging NAR’s
12 anticompetitive conduct, including enforcement actions by the United States Department of
13 Justice and two consumer class action lawsuits. Dkt. No. 99, ¶¶ 37–38. It states that “[a]ccording
14 to DOJ’s complaint, these [NAR] rules ‘reduce price competition among brokers and lead to
15 higher prices and lower quality services for American home buyers and sellers.’” *Id.*, ¶ 37. “[T]he
16 district court judge presiding over [one of the consumer class actions] noted, ‘it is easy to
17 understand how’ [NAR’s commission rules] ‘could plausibly result in inflated commission
18 rates.’” *Id.*, ¶ 38.

19 “NAR admits that there are pending federal lawsuits in which private plaintiffs purport
20 to challenge NAR rules,” and that “Paragraph 37 [of the amended complaint] contains language
21 from a complaint filed by the United States.” Dkt. No. 114, ¶ 37. The DOJ complaint stated
22 certain NAR rules “reduce price competition among brokers and lead to higher prices and lower
23 quality service for American home buyers and sellers.” Dkt. No. 99, ¶ 37.

24 Now, one year after this lawsuit began, NAR asserts a Lanham Act counterclaim against
25 REX based on allegations encompassed by REX’s complaint. In summarizing its Lanham Act

1 counterclaim, NAR alleges that “[f]rom its inception, REX has sought to draw a distinction
2 between its services and those offered by members of NAR by publicly promoting itself as an
3 ‘innovator’ and accusing NAR and its members of engaging in illegal or unfair conduct.” Dkt.
4 No. 114, ¶ 3 (PDF p. 22 of 33). NAR alleges that “REX’s campaign of false claims about its own
5 services, false statements about multiple listing services affiliated with NAR, and false claims
6 about NAR, including those identified above, has deceived consumers.” *Id.*, ¶ 51.

7 But NAR admits in its answer that the following allegations from REX’s Amended
8 Complaint are “legal conclusions,” Dkt. No. 114, ¶ 118:

9 The concealment of non-MLS listings from Zillow and Trulia's sites are a group boycott
10 perpetuated by NAR and MLS members against non-member competitors. Zillow's
11 agreement to comply with rules that segregate MLS listings on their websites, and in turn
12 demote competitive non-MLS listings, violates federal and state antitrust law. The recent
13 changes are an illegal, exclusionary act.

13 III. ARGUMENT AND AUTHORITY

14 NAR’s Lanham Act counterclaim should be dismissed for at least three separate reasons.
15 First, NAR lacks Article III standing to assert this claim on its own behalf. NAR admits it does
16 not bring this claim on behalf of its members, and it fails to plead the elements of organizational
17 standing or to allege a concrete and particularized injury in fact. Spending money to defend this
18 lawsuit is not sufficient injury to confer standing.

19 Second, NAR lacks statutory standing to bring this claim under the Lanham Act because
20 it does not adequately plead proximate causation. Alleging injury to NAR *members*—real estate
21 brokers who compete with REX—is not the same as alleging injury to NAR *itself*.

22 Finally, NAR fails to plead sufficient facts to state a claim for false advertising. REX’s
23 commentary on the state of the real estate industry is not commercial speech, as the Lanham Act
24 requires. It is speech about important legal and policy issues and is protected by the First
25 Amendment. REX’s views on commercial, legal, and social matters are also not statements of

1 fact, but opinions.

2 **A. NAR LACKS ARTICLE III STANDING TO BRING THIS CLAIM.**

3 Article III limits federal court jurisdiction to cases or controversies that meet the
4 “irreducible constitutional minimum” necessary for standing: (1) injury in fact; (2) causation;
5 and (3) redressability. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624
6 F.3d 1083, 1088 (9th Cir. 2010) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).
7 The party invoking federal jurisdiction bears the burden of establishing these elements. *Lujan v.*
8 *Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). NAR does not meet its burden to allege injury in
9 fact.

10 **1. NAR Does Not Allege “Injury in Fact” to Itself as an Organization.**

11 NAR does not purport to bring this claim on behalf of its members, but instead on its own
12 behalf. *See, e.g.*, Dkt. No. 114, ¶¶ 53, 73–74. An organization may establish injury in fact to
13 itself only “if it can demonstrate: (1) frustration of its organizational mission; and (2) diversion
14 of its resources to combat the particular [conduct] in question.” *Am. Diabetes Ass’n v. United*
15 *States Dep’t of the Army*, 938 F.3d 1147, 1154 (9th Cir. 2019) (quoting *Smith v. Pac. Props. &*
16 *Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004)) (alteration in original).

17 NAR does not allege facts showing that REX’s activities frustrate any organizational
18 mission. That omission alone is fatal to NAR’s organizational standing. *See Women’s Student*
19 *Union v. Dep’t of Educ.*, No. 21-CV-01626-EMC, 2021 WL 3932000, at *4 (N.D. Cal. Sept. 2,
20 2021). Absent a showing of “direct conflict” between a defendant’s conduct and an
21 organization’s expressly stated goals, “it is entirely speculative whether the defendant’s conduct
22 is impeding the organization’s activities.” *Nat’l Treasury Emps. Union v. United States*, 101 F.3d
23 1423, 1430 (D.C. Cir. 1996); *see also Rodriguez v. City of San Jose*, 930 F.3d 1123, 1136 (9th
24 Cir. 2019) (finding no standing where organizations “offered no theory explaining their
25 organizational harm”); *Nat’l Coal. of Latino Clergy & Christian Leaders v. Arizona*, No. CV 10-

1 943-PHX-SRB, 2010 WL 11586703, at *7 (D. Ariz. Dec. 10, 2010) (finding injury “too
2 speculative” to confer standing where organization failed to allege its mission was “frustrated in
3 some specific and identifiable way”).

4 NAR also fails to allege facts demonstrating that “it was forced to divert resources . . .
5 because of” REX’s activities. *Lake Forest*, 624 F.3d at 1088. This, too, is dispositive: a failure
6 to assert factual allegations of resource reallocation requires dismissal. *See id.* (holding that an
7 organization must “show that it would have suffered some other injury if it had not diverted
8 resources to counteracting the problem”). An organization “merely going about its business as
9 usual” lacks organizational standing under Article III. *Am. Diabetes Ass’n*, 938 F.3d at 1155.

10 To invoke this Court’s jurisdiction, NAR must allege facts showing standing *independent*
11 of REX’s lawsuit. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d
12 936, 943 (9th Cir. 2011). Resources expended in or related to litigation cannot alone constitute
13 the necessary injury. *Walker v. City of Lakewood*, 272 F.3d 1114, 1124 n.3 (9th Cir. 2001) (“An
14 organization cannot, of course, manufacture the injury necessary to maintain a suit from its
15 expenditure of resources on that very suit.” (quoting *Spann v. Colonial Vill., Inc.*, 899 F.2d 24,
16 27 (D.C. Cir. 1990))); *Fair Hous. Council of Suburban Philadelphia v. Montgomery*
17 *Newspapers*, 141 F.3d 71, 80 (3d Cir. 1998); *NAACP v. City of Kyle*, 626 F.3d 233, 238–39 (5th
18 Cir. 2010) (finding no injury sufficient for organizational standing where resource expenditures
19 were litigation-related or were no different from the organizations’ ongoing lobbying activities).
20 NAR does not allege that it made any expenditures in response to REX’s allegations other than
21 litigation expenses.

22 2. *NAR’s Alleged Reputational Harm Is Not “Injury in Fact.”*

23 Article III standing requires an injury that is “concrete and particularized” and “actual or
24 imminent, not conjectural or hypothetical.” *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 863 (9th
25 Cir. 2003) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). NAR’s bare and

1 conclusory allegations of reputational damage do not meet that standard. Lost goodwill and
2 business reputation damage allegations “must be more than speculative and conclusory” to
3 constitute an injury, *see In re Cray Inc.*, 431 F. Supp. 2d 1114, 1134 (W.D. Wash. 2006) (Zilly,
4 J.); it is “not enough to say that your reputation was harmed without explaining how.” *Crabtree*
5 *v. Experian Info. Sols., Inc.*, 948 F.3d 872, 880 (7th Cir. 2020); *see also Ashcroft v. Iqbal*, 556
6 U.S. 662, 663 (2009) (“Threadbare recitals of the elements of a cause of action, supported by
7 mere conclusory statements, do not suffice.”).

8 The counterclaim asserts that “[a]s a result of REX’s false statements, NAR’s goodwill
9 and reputation, both with its own members and consumers, has been harmed” and that “NAR
10 has suffered and is likely to continue to suffer harm to its reputation and a lessening of the
11 goodwill associated with its services and commercial activities.” Dkt. No. 114, ¶¶ 62, 73. But
12 NAR “points to no definite reasons” to believe that REX’s conduct “tarnished the company’s
13 goodwill, affected its future business prospects, or lessened its position” as the country’s largest
14 trade association. *Crabtree*, 948 F.3d at 880. Indeed, its allegations are precisely the sort of
15 “unadorned, the-defendant-unlawfully-harmed-me accusation[s]” that *Iqbal* held insufficient
16 under Fed. R. Civ. P. 8(a). *See Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550
17 U.S. 544, 555 (2007)).

18 Because NAR fails to plead the elements of organizational standing and fails to identify
19 a concrete and particularized injury in fact, NAR lacks Article III standing. Its counterclaim must
20 be dismissed.

21 **B. NAR LACKS STATUTORY STANDING TO BRING THIS CLAIM UNDER**
22 **THE LANHAM ACT.**

23 A party asserting a false advertising claim “must demonstrate standing beyond the typical
24 Article III requirements.” *Bobbleheads.com, LLC v. Wright Bros., Inc.*, 259 F. Supp. 3d 1087,
25 1097 (S.D. Cal. 2017) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S.

1 118, 131 (2014)). First, the plaintiff must show that its claim is within the “zone of interests”
2 protected by the Lanham Act by alleging “an injury to a commercial interest in reputation or
3 sales.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131–32 (2014).
4 Second, the plaintiff must allege facts establishing that its injuries were proximately caused by
5 the defendant’s violation of the Lanham Act. *Id.* at 132.

6 To establish proximate cause sufficient for standing, NAR must show “economic or
7 reputational injury flowing *directly* from the deception wrought by the defendant’s advertising.”
8 *Id.* at 133 (emphasis added). Direct injury occurs when “deception of consumers causes them to
9 withhold trade from the plaintiff,” but not when “the deception produces injuries to a fellow
10 commercial actor that in turn affect the plaintiff.” *Id.* at 133–34. “When a defendant harms a
11 plaintiff’s reputation by casting aspersions *on its business*, the plaintiff’s injury flows directly
12 from the audience’s belief in the disparaging statements.” *Id.* at 138 (emphasis added).

13 The counterclaim alleges that REX, by misrepresenting its business model, attempted “to
14 persuade consumers to use its services instead of those offered by multiple listing services and
15 members of NAR.” Dkt. No. 114, ¶ 61. But NAR does not bring this claim on behalf of its
16 members or MLSs, it is not in the brokerage business, and it admits that it is “not a competitor
17 to REX and is not claiming it was injured because it is a competitor to REX.” Dkt. No. 114,
18 ¶¶ 23, 52. NAR does not allege that consumers, brokers, or anyone else have withheld trade from
19 NAR itself. *See* Dkt. No. 114, ¶¶ 51, 60–61, 63.

20 At best, the counterclaim can be read to allege injury to NAR’s members and/or MLSs
21 that *in turn* may affect NAR. This, however, is one step too attenuated to establish standing under
22 *Lexmark*. *See BBK Tobacco & Foods LLP v. Cent. Coast Agric. Inc.*, No. CV-19-05216-PHX-
23 MTL, 2021 WL 1751134, at *9 (D. Ariz. May 4, 2021) (providing that conclusory allegation of
24 harm to consumers “does not adequately allege that [defendant’s] purportedly false advertising
25 proximately caused any reputational or economic injury to [plaintiff]”); *ThermoLife Int’l, LLC*

1 *v. Am. Fitness Wholesalers, LLC*, 831 Fed. App'x 325, 325–26 (9th Cir. 2020) (finding no
2 proximate causation where plaintiff failed to “plausibly connect its 2016 drop in sales of
3 component ingredients to [defendant’s] alleged advertising”); *Alexander v. Falk*, 828 Fed. App'x
4 350, 352 (9th Cir. 2020) (finding no standing where plaintiffs failed to show that alleged
5 misrepresentations proximately caused a cognizable injury). *Cf. Ass’n of Wash. Pub. Hosp. Dists.*
6 *v. Phillip Morris, Inc.*, 241 F.3d 696, 701–03 (9th Cir. 2001); *Blaylock v. First Am. Title Ins.*
7 *Co.*, No. C06-1667RAJ, 2008 WL 8741396, at *7, *10–11 (W.D. Wash. Nov. 7, 2008) (Jones,
8 J.) (listing Washington cases following *Phillip Morris* and Lanham Act cases finding indirect
9 injury insufficient).

10 While *Lexmark* declined to adopt a bright-line direct-competitor test for standing, *see*
11 572 U.S. at 136, the Court emphasized that “a plaintiff who does not compete with the defendant
12 will often have a harder time establishing proximate causation.” *Id.* District courts applying
13 *Lexmark* affirm that a plaintiff asserting a false advertising claim “must allege a harm related to
14 the plaintiff’s success *in the market*, not just between the parties.” *Mitcheson v. El Antro LLC*,
15 No. CV-19-01598-PHX-GMS, 2020 WL 7075239, at *16 (D. Ariz. Dec. 3, 2020),
16 *reconsideration denied*, 2021 WL 2539700 (D. Ariz. Jan. 28, 2021) (emphasis added); *see also*
17 *ThermoLife Int’l LLC v. Am. Fitness Wholesalers LLC*, No. CV-18-04189-PHX-JAT, 2020 WL
18 122874, at *3 (D. Ariz. Jan. 10, 2020), *aff’d*, 831 Fed. App'x 325 (9th Cir. 2020) (citing *Jack*
19 *Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1037 (9th Cir.
20 2005)).

21 NAR does not plead proximate causation in part because it does not explain how **REX’s**
22 statements about **REX’s own** business in turn harm **NAR**. NAR does not allege that it competes
23 with REX in any market. NAR is a trade association. REX sells brokerage services. NAR alleges
24 “no common marketplace” where REX and NAR compete for business. *Mitcheson*, 2020 WL
25 7075239, at *16. NAR’s failure to connect the dots from REX’s alleged false advertising to

1 NAR's purported reputational damage means there is no standing. *See ThermoLife*, 2020 WL
2 122874, at *3.

3 **C. NAR CANNOT USE THE LANHAM ACT TO CHILL REX'S**
4 **CONSTITUTIONAL RIGHT TO CHALLENGE CONDUCT IT BELIEVES**
5 **HARMS CONSUMERS.**

6 A Lanham Act Section 43(a) claim requires allegations of (1) a false statement of fact,
7 (2) by the defendant in commercial advertising or promotion, (3) about its own or another's
8 product.² NAR alleges that REX falsely promoted itself as an "innovator" and falsely stated that
9 NAR and its affiliated MLSs are violators of the antitrust laws. These are statements of opinion,
10 not of fact, and they cannot give rise to a Lanham Act claim. In addition, most of the statements
11 NAR challenges are not commercial speech, nor are they directed at NAR.³ Finally, the *Noerr-*
12 *Pennington* doctrine protects REX's First Amendment right to speak to and about its
13 government-petitioning conduct in the courts, the United States Department of Justice, and other
14 governmental bodies.

15 **1. REX's Opinions Are Not Statements of Fact.**

16 Liability for false advertising under the Lanham Act requires, among other things, a *false*
17 representation of *fact*. 15 U.S.C. § 1125(a)(1). A representation of fact is one that is provable of
18 being either true or false; an opinion is not a fact. *See Coastal Abstract Serv., Inc. v. First Am.*
19 *Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999). Opinions on commercial, legal, or social matters

20 ² *See Newcal Indus., Inc. v. IKON Off. Sol.*, 513 F.3d 1038, 1052 (9th Cir. 2008) (quoting 15 U.S.C.
21 § 1125(a)(1)(B)). The other required claim elements include (1) that the statement actually deceived or has the
22 tendency to deceive a substantial segment of its audience; (3) the deception is material; (4) the defendant caused its
false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the
false statement. *Id.*

23 ³ Of the fourteen exhibits NAR attaches to its counterclaim, ten do not reference NAR or its services. *See* Dkt. Nos.
24 114-1, 114-5, 114-7, 114-8, 114-9, 114-10 (no reference to NAR); 114-2 (quoting a NAR survey); 114-6 (REX sued
25 NAR); 114-12 & 114-13 (DOJ backed out of settlement with NAR). The remaining four exhibits express REX's
legal and policy position that NAR rules harm consumers. Dkt. Nos. 114-3 ("REX poses a direct challenge to the
dual commission structure set by NAR."); 114-4 (NAR "enacted a series of anticompetitive practices"); 114-11
("NAR flouting federal antitrust laws"); 114-14 (summarizing REX's response to NAR's effort to quash DOJ civil
investigative demand).

1 are not within the scope of the Lanham Act. 5 McCarthy on Trademarks and Unfair Competition
2 § 27:96 (5th ed.).

3 Neither REX's opinions about its own business nor about NAR's practices can give rise
4 to a Lanham Act claim. NAR attempts to base its deceptive practices claim on REX statements
5 like these:

- 6 • REX is "disrupting the real estate market" because "the traditional purchasing method
7 makes buying a home overly complicated." Dkt. No. 114-2 at 2 of 4.
- 8 • "MLS real estate commissions are high" and "REX is changing the real estate game"
9 by "tackling the big challenges of improving the deeply dysfunctional but critically
important U.S. residential real estate market." Dkt. No. 114-7.

10 These are "generalized, vague, unspecific assertions" of opinion that do not constitute
11 false advertising. *Glen Holly Ent., Inc. v. Tektronix, Inc.*, 352 F.3d 367, 379 (9th Cir. 2003); *see*
12 *also Coastal Abstract*, 173 F.3d at 731 (statement that plaintiff was "too small" to handle
13 business, along with implication that defendant was large enough to handle that business, was
14 nonactionable puffery that could not be proven false); *Coral Ridge Ministries Media, Inc. v.*
15 *Amazon.com, Inc.*, 406 F. Supp. 3d 1258, 1286–87 (M.D. Ala. 2019), *aff'd*, 6 F.4th 1247 (11th
16 Cir. 2021) (statement that plaintiff was a "hate group" was not a provable fact and could not
17 sustain a Lanham Act claim).

18 Even assuming for the sake of argument that any of the statements NAR challenges
19 constitutes "commercial speech," "advertising which merely states in general terms that one
20 product is superior is not actionable." *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.*
21 *Inc.*, 911 F.2d 242, 246 (9th Cir. 1990). An advertiser's statement that its lamps are "far brighter
22 than any lamp ever before offered for home movies" is not false advertising, but a specific,
23 measurable statement like "35,000 candle power and 10-hour life" could give rise to a claim. *Id.*
24 (quoting *Smith-Victor Corp. v. Sylvania Elec. Prods., Inc.*, 242 F. Supp. 302, 308 (N.D. Ill.
25 1965)). By that logic, REX's statements that it "sav[es] time," offers a "more enjoyable process,"

1 and employs “[b]etter marketing” are nonactionable opinions. Dkt. No. 114-8; *see also Cook*,
 2 911 F.2d at 246 (holding advertisement claiming lower costs and better service than competitor
 3 “not actionable as false advertising”).

4 REX’s opinions about the legality of NAR’s business model likewise cannot sustain a
 5 Lanham Act claim. Statements purporting to interpret a statute or forecast a legal outcome are
 6 opinions, not facts. *Coastal Abstract*, 173 F.3d at 731–32; *Dial A Car, Inc. v. Transp., Inc.*, 82
 7 F.3d 484, 489 (D.C. Cir. 1996); *see also* 5 McCarthy on Trademarks and Unfair Competition
 8 § 27:109.50 (5th ed.) (explaining that most “statements to the press and to customers of [one’s]
 9 opponent emphasizing the strength of the position they have taken in the litigation” are
 10 nonactionable opinion). REX’s various opinions challenging the legality of NAR’s rules under
 11 the antitrust laws, therefore, cannot result in liability for false advertising. *See, e.g.*, Dkt. Nos.
 12 114-3, 114-4, 114-12, 114-14.

13 The constitutional protection afforded to opinions extends to REX’s opinion that NAR’s
 14 conduct is unlawful.⁴ *See, e.g., Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 908 (9th Cir.
 15 2002), *cert. denied*, 123 S. Ct. 993, 154 L. Ed. 2d 912 (2003) (dismissing as “nonactionable
 16 rhetorical hyperbole” party representative’s use of the words “bank robber,” “heist,” “crime,”
 17 and “theft” in trademark litigation) (internal quotation marks omitted); *Greenbelt Coop. Publ’g*
 18 *Ass’n v. Bresler*, 398 U.S. 6, 14 (1970) (concluding that use of the word “blackmail” to describe
 19

20 ⁴ NAR accuses REX of “publicly claim[ing] that NAR and multiple listing services are engaged in criminal activity”
 21 because of the title given to REX’s general counsel’s op-ed in *The Wall Street Journal*. Dkt. No. 114, ¶¶ 45, 49;
 22 Dkt. Nos. 114-12, 114-13. But it was *The Wall Street Journal*, not REX’s general counsel, who generated the
 23 headline. In any case, that word has been used in connection with real estate brokerage activities for many years.
 24 *See, e.g.,* William C. Erxleben, *In Search of Price and Service Competition in Residential Real Estate Brokerage: Breaking the Cartel*, 56 WASH. L. REV. 179, 184–185 (1981); Patrick Woodall & Stephen Brobeck, Consumer Federation of America, *How the Real Estate Cartel Harms Consumers and How Consumers Can Protect Themselves* (June 2006), http://www.consumerfed.org/pdfs/Real_Estate_Cartel_Study061906.pdf (last accessed Feb. 16, 2022).

25 Both articles are referenced in a document NAR placed in the record in this lawsuit: *Competition in the Real Estate Brokerage Industry: A Report by the Federal Trade Association and U.S. Department of Justice* (Apr. 2007). *See* Dkt. No. 66-1 at 13 n.57 (PDF p. 19 of 79); *id.* at 59 n.293 (PDF p. 65 of 79).

1 plaintiff's negotiating tactics could not reasonably be understood to imply criminal activity).

2 **2. *REX's Statements in and to the Media Are Not Commercial Speech and Are***
 3 ***Protected by the First Amendment.***

4 To fall within the category of “commercial advertising or promotion,” a representation
 5 must be (1) commercial speech; (2) by a defendant who is in commercial competition with
 6 plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services; and
 7 (4) disseminated sufficiently to the relevant purchasing public to constitute “advertising” or
 8 “promotion” within that industry. *Coastal Abstract*, 173 F.3d at 735. Under the Lanham Act,
 9 “[t]he core notion of commercial speech is ‘speech which does no more than propose a
 10 commercial transaction.’” *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1181 (9th Cir. 2003),
 11 *overruled on other grounds by Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952
 12 F.3d 1051 (9th Cir. 2020) (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410,
 13 422 (1993)). “If speech is not ‘purely commercial’—that is, if it does more than propose a
 14 commercial transaction—then it is entitled to full First Amendment protection.” *Nissan Motor*
 15 *Co. v. Nissan Comput. Corp.*, 378 F.3d 1002, 1017 (9th Cir. 2004); *see also New York Times Co.*
 16 *v. Sullivan*, 376 U.S. 254, 266 (1964). REX's various statements to the media—whether in
 17 newspapers, blog posts, or interviews—cannot give rise to a Lanham Act claim because such
 18 statements are not commercial speech. These represent most of the materials attached as exhibits
 19 to NAR's counterclaim.

20 NAR's counterclaim aims to penalize REX for speech at the core of the First
 21 Amendment,⁵ including an article about REX in *Forbes* magazine, an interview with the
 22 company's co-founder in *Business Rockstars*, and an op-ed penned by its general counsel in *The*
 23 *Wall Street Journal*. *See* Dkt. Nos. 114-9, 114-10, 114-12. But the law is clear: “[s]tatements
 24
 25

⁵ “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right . . . to petition the government for a redress of grievances.” U.S. CONST. amend. I.

1 made to the media and published in a journalist’s news article concerning a matter of public
2 importance are not commercial speech, and are protected under the First Amendment.” *L.A. Taxi*
3 *Coop., Inc. v. Uber Techs., Inc.*, 114 F. Supp. 3d 852, 864 (N.D. Cal. 2015); *see also Boule v.*
4 *Hutton*, 328 F.3d 84, 91 (2d Cir. 2003) (“The statements by the Khidekels in *ARTnews* contribute
5 to reporters’ discussion of an issue of public importance and occur in a forum that has
6 traditionally been granted full protection under the First Amendment.”); *Hoffman v. Capital*
7 *Cities/ABC, Inc.*, 255 F.3d 1180, 1185 (9th Cir. 2001) (holding that magazine article using an
8 altered photograph of a celebrity to showcase a designer gown was noncommercial speech
9 because the article did not have the sole purpose of selling a particular product).

10 NAR also seeks to hold REX liable for certain statements critical of NAR that REX
11 distributed in other media outlets. For example, NAR objects to REX’s press release that NAR
12 “has enacted a series of anti-competitive policies—including making agent commissions non-
13 negotiable to brokers who want to put their listings on the MLS—to prevent competitors from
14 offering consumers lower transaction fees.” Dkt. No. 114, ¶ 42; Dkt. No. 114-4; *see also* Dkt.
15 Nos. 114-11, 114-12, 114-13, 114-14. But informational campaigns and commentary are
16 precisely the sort of non-commercial speech that the Ninth Circuit has held to be “entitled to full
17 First Amendment protection.” *Nissan*, 378 F.3d at 1017; *see also Boule*, 328 F.3d at 91 (“[W]e
18 have been careful not to permit overextension of the Lanham Act to intrude on First Amendment
19 values.”). “Negative commentary . . . does more than propose a commercial transaction and is,
20 therefore, non-commercial.” *Nissan*, 378 F.3d at 1017; *see also Edward Lewis Tobinick, MD v.*
21 *Novella*, 848 F.3d 935, 952 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 449, 199 L. Ed. 2d 348
22 (2017) (holding author’s blog posts, which contained allegedly false and defamatory statements
23 about physician’s medical practice, did not constitute commercial speech subject to the Lanham
24 Act because posts did not propose commercial transactions).

1 NAR may not use the Lanham Act to silence speech with which it disagrees.
 2 *Wojnarowicz v. Am. Fam. Ass'n*, 745 F. Supp. 130, 141–42 (S.D.N.Y. 1990) (recognizing that
 3 the Lanham Act’s prohibition against false advertising “has never been applied to stifle criticism
 4 of the goods or services of another by one . . . who is not engaged in marketing or promoting a
 5 competitive product or service.” (citing S. 1883, 101st Cong., 1st Sess., 135 Cong. Rec. 1207,
 6 1217 (April 13, 1989))); 5 McCarthy on Trademarks and Unfair Competition § 27:97 (5th ed.)
 7 (“Lanham Act § 43(a) cannot be used to stifle criticism of a company’s goods or services by
 8 another who is not a competitor.”). The counterclaim should be dismissed.

9 **3. *The Noerr-Pennington Doctrine Protects REX’s First Amendment Right to***
 10 ***Petition the Government for Relief from NAR’s Anticompetitive Conduct.***

11 “The essence of the *Noerr-Pennington* doctrine is that those who petition any department
 12 of the government for redress are immune from statutory liability for their petitioning conduct.”
 13 *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1008 (9th Cir. 2008). *Noerr-*
 14 *Pennington* immunity applies to petitions to courts as well as to administrative agencies, *see Or.*
 15 *Nat. Res. Council v. Mohla*, 944 F.2d 531, 533–34 (9th Cir. 1991); it applies not only to the
 16 petitioning activity itself but also to incidental or related conduct. *Sosa v. DIRECTV, Inc.*, 437
 17 F.3d 923, 934 (9th Cir. 2006).

18 *Noerr-Pennington* has also been applied to Lanham Act false advertising claims. 6
 19 McCarthy on Trademarks and Unfair Competition § 31:104 (5th ed.); *Sliding Door Co. v. KLS*
 20 *Doors, LLC*, No. EDCV 13–00196 JGB, 2013 WL 2090298, at *6 (C.D. Cal. May 1, 2013);
 21 *AirHawk Int’l, LLC v. TheRealCraigJ, LLC*, No. SACV1600624JVSKESEX, 2017 WL 3891214,
 22 at *3 (C.D. Cal. Jan. 19, 2017); *see also Theme Promotions*, 546 F.3d at 1008 (“[B]ecause *Noerr-*
 23 *Pennington* protects federal constitutional rights, it applies in *all contexts*, even where a state law
 24 doctrine advances a similar goal.”) (emphasis added).

25 Under the *Noerr-Pennington* doctrine, all of REX’s efforts before the government,

1 including the courts, the Department of Justice, and Congress, are protected speech and cannot
2 be the basis of a Lanham Act claim. REX cannot be held liable for statements made in litigation,
3 about the litigation, or informing others of its intent to vindicate its legal rights. *See Sosa*, 437
4 F.3d at 935 (providing that conduct “sufficiently related to petitioning activity” receives *Noerr-*
5 *Pennington* protection); *Sliding Door Co.*, 2013 WL 2090298, at *6 (holding that email
6 informing purchasers or potential purchasers of plaintiff’s pending patent infringement action
7 against defendants was protected by *Noerr-Pennington*).

8 Most of the exhibits attached to NAR’s counterclaim are communications “related to
9 petitioning activity” that cannot give rise to a Lanham Act claim. *See, e.g.*, Dkt. Nos. 114-11,
10 114-12, 114-13, 114-14; *Sliding Door Co.*, 2013 WL 2090298, at *6 (quoting *Sosa v. DIRECTV*,
11 *Inc.*, 437 F.3d 923, 935 (9th Cir. 2006)). Communications are sufficiently related to petitioning
12 activity when they “relate to [a party’s] legal rights” or seek to exert pressure on government
13 actors through the medium of public opinion. *See AirHawk Int’l*, 2017 WL 3891214, at *3; *E. R.*
14 *R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140–41 (1961) (holding that
15 railroads’ “publicity campaign to influence governmental action falls clearly into the category of
16 political activity” shielded from antitrust liability); *Columbia Pictures Indus., Inc. v. Prof’l Real*
17 *Estate Inv’rs, Inc.*, 944 F.2d 1525, 1529 (9th Cir. 1991), *aff’d*, 508 U.S. 49 (1993) (“[W]here
18 underlying litigation is not a sham, attendant publicity is protected by *Noerr-Pennington*.”)
19 (citing *Aircapital Cablevision, Inc. v. Starlink Commc’ns Grp., Inc.*, 634 F. Supp. 316, 326 (D.
20 Kan. 1986)); *Aircapital Cablevision, Inc. v. Starlink Commc’ns Grp., Inc.*, 634 F. Supp. 316, 326
21 (D. Kan. 1986) (publicity campaign related to lawsuit shielded from liability by *Noerr-*
22 *Pennington*).

23 Even if this case also has some commercial benefit for REX, it does not change the
24 analysis. *Noerr-Pennington* immunizes from suit “publicity campaign[s] directed at the general
25 public and seeking government action.” *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090,

1 1092 (9th Cir. 2000). A commercial purpose does not strip that protection. Indeed, as the Ninth
2 Circuit explained in *Sosa v. DIRECTV, Inc.*, “in nearly every instance in which *Noerr-*
3 *Pennington* has been applied, including *Noerr* itself, the petitioning conduct at issue was carried
4 out to further the petitioning party’s commercial interests.” 437 F.3d at 934 n.8. As a result,
5 REX’s news posts and articles about its legal rights vis-à-vis NAR are protected to the fullest
6 reach of the First Amendment.

7 **IV. CONCLUSION**

8 For the foregoing reasons, NAR’s counterclaim should be dismissed.

9 RESPECTFULLY SUBMITTED this 17th day of February, 2022.

10 *s/ Michael Vaska*

11 Michael Vaska, WSBA #15438

12 *s/ Benjamin Hodges*

13 Benjamin Hodges, WSBA #49301

14 *s/ Bianca Chamusco*

15 Bianca Chamusco, WSBA #54103

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*Attorneys for Plaintiff REX – Real Estate
Exchange, Inc.*

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REX – REAL ESTATE EXCHANGE, INC., a
Delaware corporation,

Plaintiff,

v.

ZILLOW, INC., a Washington corporation;
ZILLOW GROUP, INC., a Washington
corporation; ZILLOW HOMES, INC., a
Delaware corporation; ZILLOW LISTING
SERVICES, INC., a Washington corporation;
TRULIA, LLC, a Delaware limited liability
company; and THE NATIONAL
ASSOCIATION OF REALTORS, an Illinois
trade association,

Defendants.

No. 2:21-cv-00312-TSZ

**[PROPOSED] ORDER GRANTING
PLAINTIFF’S MOTION TO DISMISS
NAR’S COUNTERCLAIM**

Before the Court is Plaintiff’s Motion to Dismiss NAR’s Counterclaim. Having reviewed the pleadings and the file in this matter, the Court is fully informed and hereby **GRANTS** Plaintiff’s motion.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. NAR’s counterclaim is dismissed with prejudice and without leave to amend for lack of jurisdiction and because it fails to state a claim upon which relief can be granted.

IT IS SO ORDERED.

[PROPOSED] ORDER GRANTING
PLAINTIFF’S MOTION TO DISMISS
NAR’S COUNTERCLAIM - 1
Case No. 2:21-cv-00312

FOSTER GARVEY PC
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PHONE (206) 447-4400

1 DATED this ____ day of ____, 2022.

3 _____
4 The Honorable Thomas S. Zilly
5 United States District Judge

6
7 Presented By:

8 FOSTER GARVEY PC

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10 Michael Vaska, WSBA #15438

11 s/ Benjamin Hodges

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24 *Attorneys for Plaintiff REX – Real Estate Exchange, Inc.*

25
26
[PROPOSED] ORDER GRANTING
PLAINTIFF'S MOTION TO DISMISS
NAR'S COUNTERCLAIM - 2
Case No. 2:21-cv-00312

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CERTIFICATE OF SERVICE

I certify that on February 17, 2022, I electronically filed the foregoing document with the Clerk of the Court via CM/ECF which will notify all parties in this matter who are registered with the Court's CM/ECF filing system of such filing. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 17th day of February, 2022.

s/ McKenna Filler _____
McKenna Filler

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