

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

SCOTT AND RHONDA BURNETT)
RYAN HENDRICKSON, JEROD BREIT,)
SCOTT TRUPIANO, and JEREMY KEEL,)
on behalf of himself and all others similarly)
situated,)

Plaintiffs,)

Case No: 4:19-cv-00332-SRB

v.)

THE NATIONAL ASSOCIATION OF)
REALTORS, REALOGY HOLDINGS)
CORP., HOMESERVICES OF AMERICA,)
INC., BHH AFFILIATES, LLC,)
HSF AFFILIATES, LLC,)
INC., RE/MAX LLC, and KELLER)
WILLIAMS REALTY, INC.,)

Defendants.)

**MOTION BY KELLER WILLIAMS REALTY, INC.’S FOR LEAVE TO
ISSUE RULE 45 SUBPOENA**

Defendant Keller Williams Realty, Inc. (“Keller Williams”) moves this Court for leave to issue the focused subpoena attached to this motion as Exhibit A to third party REX – Real Estate Exchange (“REX”).¹ Although fact discovery closed on April 29, 2022, *see* Fourth Amended Scheduling Order at 2 (Dkt. 543), Keller Williams seeks leave to pursue this limited third-party discovery to follow up on information disclosed for the first time during a deposition noticed by Plaintiffs of Will Fried, a former REX employee (and current REX consultant), taken on April 29, the last day of fact discovery.

¹ Keller Williams will add the dates of issuance and compliance to the proposed subpoena at such time as the Court grants the leave requested in this motion.

REX is a real estate brokerage based in Austin, Texas but operating in a number of cities around the country (but not in the State of Missouri). REX purports to operate without participating in multiple listing services and, by doing so, is not subject to the rules at issue in this case. REX voluntarily provided to Plaintiffs recordings of phone conversations between real estate brokers and REX representatives that REX and Plaintiffs contend show that competing brokers “steer” buyers away from properties listed by REX. Plaintiffs have had access to these recordings for some time, but waited until the final day of fact discovery to seek discovery about the recordings themselves—including attempting to lay a foundation for the use of the recordings at trial.²

More specifically, on April 29, Plaintiffs took the deposition of Will Fried, a former REX employee and current REX consultant, apparently in an effort to authenticate the recordings. During his deposition, Mr. Fried described the universe of recordings and transcripts of those recordings maintained by REX and the method he used to find the recordings REX shared with Plaintiffs among the broad universe of calls that REX recorded.

Keller Williams seeks to obtain from REX a copy of the transcripts of all of the phone calls from which Mr. Fried found and selected the specific recordings REX shared with Plaintiffs and, if necessary, copies of recordings of certain calls not shared voluntarily by REX with Plaintiffs. Mr. Fried selectively picked and shared with Plaintiffs only certain of the calls that REX recorded and transcribed and, if Plaintiffs seek to use these recordings in this case, Defendants deserve an opportunity to discover the contents of other recorded calls and evaluate how they might bear on the issues in this case.

² This motion addresses only the question of discovery related to the REX recordings and not any issues relating to the admissibility of the recordings at trial, which Defendants will likely contest.

Plaintiffs would suffer no prejudice from Keller Williams issuing this targeted subpoena. The subpoena, which is directed to REX, imposes no burden on Plaintiffs. The narrowly tailored subpoena also imposes insignificant burden on REX because it seeks copies only of discrete and easy-to-locate files. Plaintiffs also cannot complain about the introduction of new discovery at this point when, on May 6, 2022, they filed a Third Amended Class Action Complaint (Dkt. 759) naming three new class representatives, which will necessitate further discovery. Plaintiffs also continue to take depositions they were unable for scheduling reasons to complete before April 29.

Keller Williams conferred with Plaintiffs on May 6 and May 9 about this motion and shared with them the specific requests contained in the attached subpoena to REX. Plaintiffs stated that they did not intend to oppose this motion.

Accordingly, Keller Williams requests leave to issue the attached subpoena to REX.

Dated: May 10, 2022

Respectfully submitted:

Counsel for Keller Williams Realty, Inc.

/s/David R. Buchanan

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2022, the foregoing was served on all counsel of record via the Court's CM/ECF system.

/s/ David R. Buchanan
Counsel for Keller Williams Reality, Inc.

EXHIBIT A

UNITED STATES DISTRICT COURT

for the

Western District of Missouri



Burnett, et al.

Plaintiff

v.

National Association of Realtors, et al.

Defendant

Civil Action No. 16-cv-332-SRB

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: REX - Real Estate Exchange, 3300 North Interstate Hwy. 35, Suite 149, Austin, TX 78705

(Name of person to whom this subpoena is directed)

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: Document specified in the attached Exhibit A.

Table with 2 columns: Place (Holland & Knight, LLP, 98 San Jacinto Blvd., Suite 1900, Austin, TX 78701) and Date and Time.

Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Table with 2 columns: Place and Date and Time.

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date:

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Keller Williams Realty, Inc., who issues or requests this subpoena, are:

David C. Kully, Holland & Knight, LLP, 800 17th St, NW, Suite 1100, Washington, DC 20006, (202) 469-5415

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 16-cv-332-SRB

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____ .

I declare under penalty of perjury that this information is true.

Date: _____
_____ *Server's signature*

_____ *Printed name and title*

_____ *Server's address*

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

SCHEDULE A

The following definitions and instructions shall apply to these document requests:

1. “Plaintiffs” means any plaintiff or representative of any plaintiff (including counsel, experts, or consultants) in *Burnett, et al. v. NAR, et al.*, No. 19-cv-332-SRB (W.D. Mo.) (formerly captioned *Sitzer, et al. v. NAR, et al.*, No. 16-cv-332-SRB (W.D. Mo.)) or *Moehrl, et al. v. NAR, et al.*, No 1:19-cv-01610 (N.D. Ill.).

2. “Representative” shall mean any and all agents, employees, servants, independent contractors, consultants, officers, directors, associates, or other persons acting or purporting to act on Your behalf or on behalf of the person or entity in question.

3. “You” or “Your” or “REX” means REX – Real Estate Exchange, including its predecessors, wholly owned or controlled subsidiaries or affiliates, successors, parents, other subsidiaries, departments, divisions, joint ventures, other affiliates and any organization or entity that the responding party manages or controls, including those merged with or acquired, together with all present and former directors, officers, employees, agents, attorneys, representatives or any persons acting or purporting to act on their behalf.

4. If You contend that you are entitled to withhold from production any documents requested herein on the basis of attorney/client privilege, work-product protection, or other legally recognized grounds, identify the nature of the document(s), the date for same, the author, and the person to whom the document was addressed; identify each individual who has seen the document, each individual who has received a copy of the document and from whom the document was received; and state the basis upon which You contend You are entitled to withhold the document from production. Accordingly, please provide a formal written privilege log of all claimed privileged documents and information.

DOCUMENTS

1. One full copy of all transcriptions of the recordings of all in-bound calls to REX that REX recorded, had transcribed, and were used by REX consultant (and former REX employee) Will Fried to identify the recordings that REX provided to Plaintiffs and about which Mr. Fried testified during his April 29, 2022 deposition.

2. One copy of each of the of the recordings of the in-bound calls to REX referred to in Specification No. 1.