

1
2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 REX – REAL ESTATE EXCHANGE,
7 INC.,

8 Plaintiff,

9 v.

10 ZILLOW, INC.; ZILLOW GROUP,
11 INC.; ZILLOW HOMES, INC.;
12 ZILLOW LISTING SERVICES, INC.;
13 TRULIA, LLC; and THE NATIONAL
14 ASSOCIATION OF REALTORS,

15 Defendants.

C21-312 TSZ

ORDER

16 THIS MATTER comes before the Court on the motion to dismiss, docket no. 115,
17 filed by Counterclaim-Defendant REX – Real Estate Exchange, Inc. (“REX”). Having
18 reviewed all papers filed in support of, and in opposition to, the motion, the Court enters
19 the following Order.

20 **Background**

21 On January 27, 2022, the National Association of REALTORS® (“NAR”) filed its
22 responsive pleading, docket no. 114. In its responsive pleading, NAR raises a
counterclaim against REX for false advertising in violation of the Lanham Act, 15 U.S.C.
§ 1125(a). Countercl. at ¶¶ 68–75 (docket no. 114). NAR alleges that REX has made
numerous “false and misleading statements of fact in commercial advertisements about

1 REX’s products, services and commercial activities.” *Id.* at ¶ 69. NAR challenges a
2 number of statements posted on REX’s website, www.rexhomes.com, concerning
3 whether REX’s clients pay buyer-agent commission fees and whether REX’s technology
4 is innovative, as well as statements alleging that NAR has enacted anticompetitive
5 policies that artificially inflate fees in real estate transactions. *See id.* at ¶¶ 7–50. NAR
6 alleges that REX’s statements have harmed NAR’s goodwill and reputation with its own
7 members and consumers. *Id.* at ¶ 63. REX now moves to dismiss NAR’s counterclaim
8 on grounds that NAR: (i) lacks Article III standing, (ii) lacks statutory standing under the
9 Lanham Act, and (iii) cannot use the Lanham Act to chill REX’s constitutional right to
10 challenge conduct it believes harms consumers. *See generally* Mot. to Dismiss (docket
11 no. 115).

12 **Discussion**

13 **1. Article III Standing**

14 “[L]ack of Article III standing requires dismissal for lack of subject matter
15 jurisdiction under Federal Rule of Civil Procedure 12(b)(1).” *Maya v. Centex Corp.*, 658
16 F.3d 1060, 1067 (9th Cir. 2011). In its motion to dismiss NAR’s counterclaim, REX
17 presents a facial, rather than a factual, jurisdictional challenge. A facial attack asserts
18 that the allegations of the pleading are insufficient on their face to invoke federal
19 jurisdiction. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1038 (9th Cir. 2004).
20 With respect to a facial challenge under Rule 12(b)(1), a plaintiff is entitled to the same
21 safeguards that apply to a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See*
22 *Friends of Roeding Park v. City of Fresno*, 848 F. Supp. 2d 1152, 1159 (E.D. Cal. 2012).

1 The allegations of the complaint are presumed to be true, *id.*, and the Court may not
2 consider matters outside the pleading without converting the motion into one for
3 summary judgment, *see White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

4 To bring suit in federal court, a plaintiff must have suffered sufficient injury to
5 satisfy the “case or controversy” requirement of Article III of the United States
6 Constitution. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Three elements are required to
7 establish the “irreducible constitutional minimum of standing.” *Lujan v. Defs. of*
8 *Wildlife*, 504 U.S. 555, 560 (1992).

9 First, the plaintiff must have suffered an “injury in fact”—an invasion of a
10 legally protected interest which is (a) concrete and particularized and
11 (b) actual or imminent, not conjectural or hypothetical. Second, there must
12 be a causal connection between the injury and the conduct complained of—
13 the injury has to be fairly traceable to the challenged action of the defendant,
14 and not the result of the independent action of some third party not before
15 the court. Third, it must be likely, as opposed to merely speculative, that the
16 injury will be redressed by a favorable decision.

17 *Id.* at 560–61 (internal citations and quotations omitted). A plaintiff must clearly allege
18 facts demonstrating every element of standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338
19 (2016). “At the pleading stage, general factual allegations of injury resulting from the
20 defendant’s conduct may suffice, for on a motion to dismiss we presume that general
21 allegations embrace those specific facts that are necessary to support the claim.” *Lujan*,
22 504 U.S. at 561 (internal citations and quotations omitted).

23 An organization can bring suit in federal court under two theories of standing:
24 (i) by suing on its own behalf, or (ii) by suing on behalf of its members. In this case,
25 NAR brings the counterclaim on its own behalf. *See Countercl.* at ¶ 53 (claiming that

1 NAR has been harmed by REX’s allegedly false advertisements). Like any individual, to
2 sue on its own behalf, an organization must demonstrate that it suffered an injury in fact.
3 *La Asociación de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083,
4 1088 (9th Cir. 2010). “An organization suing on its own behalf can establish an injury
5 when it suffered ‘both a diversion of its resources and a frustration of its mission.’” *Id.*
6 (quoting *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)).¹ REX
7 contends that NAR’s counterclaim must be dismissed because NAR did not plead
8 sufficient facts to establish that it suffered an injury in fact. NAR does not dispute that it
9 failed to plead facts demonstrating a frustration of its organizational mission and a
10 diversion of its resources. Rather, NAR argues that it pleaded sufficient facts to establish
11 that it suffered a reputational injury. In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190,
12 (2021), the Supreme Court explained that “various intangible harms,” such as
13 reputational harm, can qualify as concrete injuries for standing purposes. *Id.* at 2204; *see*
14 *also Meese v. Keene*, 481 U.S. 465, 479 n.14 (1987) (“[T]he risk of this reputational
15 harm, as we have held earlier in this opinion, is sufficient to establish appellee’s standing
16 to litigate the claim on the merits.”).

17 NAR cites *Walker v. City of Lakewood*, 272 F.3d 1114 (9th Cir. 2001), and
18 *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989), for the
19 proposition that an organization’s allegations of reputational injury, standing alone, are
20

21 ¹ See also *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004); *Am. Diabetes Ass’n v.*
22 *U.S. Dep’t of the Army*, 938 F.3d 1147, 1154 (9th Cir. 2019); *Rodriguez v. City of San Jose*, 930 F.3d
1123, 1134 (9th Cir. 2019).

1 sufficient to establish injury in fact. These cases, however, do not support NAR’s
2 argument. Unlike in *Walker*, in which the organization was not paid for its services for
3 several months, was the subject of a performance complaint to a third party, lost staff
4 time responding to retaliatory activities, and lost other contracts, *see* 272 F.3d at 1124, in
5 this matter, NAR fails to allege anything more than generalized reputational harm.² The
6 organization in *Walker* also alleged that it “suffered injury in its ability to carry out its
7 purposes” *Id.* at 1124. Likewise, in *Presbyterian Church*, the Ninth Circuit found
8 that various church plaintiffs sufficiently alleged injury analogous to reputational or
9 professional harm that “interfered with the churches’ ability to carry out their religious
10 mission.” 870 F.2d at 522–23. The churches alleged that government surveillance
11 efforts occurring in the churches “impaired the churches’ ability to carry out their
12 religious missions” by deterring members from attending religious observances. *Id.* at
13 521–23. The churches also alleged that “clergy time [was] diverted from regular pastoral
14 duties” as a direct result of the challenged conduct. *Id.* at 522. Unlike the organizations
15 in *Walker* and *Presbyterian Church*, NAR does not allege a frustration of its mission or a
16 diversion of its resources.

17 In this case, NAR contends that REX has harmed NAR through the following
18 allegedly false claims: (i) REX offers low commissions and has superior technology,

19
20
21
22
² In *Walker*, the Ninth Circuit reviewed a district court order concerning summary judgment. 272 F.3d at 1124 (“Because this case is at the summary judgment stage, the [organization] must support [its] allegations with ‘specific facts.’” (citing *Lujan*, 504 U.S. at 561)). Accordingly, the Ninth Circuit used a different legal standard than the standard applicable to this Court’s consideration of REX’s motion to dismiss.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.