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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

HomeLight, Inc.

The Plaintiff

vs.

Dmitry Shkipin et al.

The Defendant

Case No.: 3:22-cv-03119-TLT

Homelight, Inc. v. Shkipin et al.

**MEMORANDUM IN SUPPORT OF
SECOND MOTION TO DISMISS
COMPLAINT AND NOTICE OF MOTION**

DATE: Tuesday, March 14, 2023

TIME: 9:00 a.m.

COURTROOM: San Francisco, Courtroom 09,
19th Floor

JUDGE: Hon. Trina L. Thompson

NOTICE OF MOTION AND MOTION HEARING

1. PLEASE TAKE NOTICE that on Tuesday, March 14, 2022 at 9:00 a.m. at United States District Court, 450 Golden Gate Avenue, San Francisco, Courtroom 09, 19th Floor before the Honorable Trina L. Thompson, I will, and hereby do, move for an ORDER GRANTING SECOND MOTION TO DISMISS COMPLAINT. The motion will be based on this MEMORANDUM IN SUPPORT OF SECOND MOTION TO DISMISS COMPLAINT AND NOTICE OF MOTION; and the [PROPOSED] ORDER GRANTING SECOND MOTION TO DISMISS COMPLAINT.
2. The Defendant Dmitry Shkipin respectfully submits this Second Motion to dismiss claims against the Defendant for: lack of statutory standing for Trademark Infringement (15 U.S.C. § 1114); lack of statutory standing for Lanham Act Section 43(a) False Advertising (15 U.S.C. § 1125 (a)).

INTRODUCTION

Dmitry Shkipin personally operates on online media service HomeOpenly. HomeLight is a licensed real estate broker in the State of California. On October 27, 2022, the Court has issued a ruling ORDER DENYING MOTIONS TO DISMISS Re: ECF 15, 18, (“Order”) stating that “Plaintiff HomeLight and defendants HomeOpenly, Inc. and Dmitry Shkipin (“Shkipin”) operate online platforms that match real estate agents with residential homebuyers or sellers,” among other provisions.

Dmitry Shkipin submits a Second Motion to Dismiss to address a critical issue of law that was not addressed by the Order: *real estate brokers and online two-sided marketplaces are not competitors and are incapable of occupying the same “zone of interest.”*

The defendant Dmitry Shkipin personally disagrees with the fact that my unpaid critic reviews about real estate brokers are commercial speech because the HomeOpenly service is funded by clearly-labeled ads from sales of products unrelated to real estate representation,

MEMORANDUM IN SUPPORT OF SECOND MOTION - 2 CASE NUMBER: 3:22-cv-03119-TLT

1 however, the Defendant does respect the jurisdiction of the Court and all of its Orders. The
 2 purpose of this Second Motion is neither to object to the Order, nor to argue with the Court, but
 3 to address an issue of law that was left unanswered by the merits of the Order.
 4

5 JURISDICTION

6 The venue is appropriate in the Northern District of California pursuant to 28 U.S.C. §
 7 1391, 28 U.S.C. § 1404(a), and 15 U.S.C. § 22. This Court has federal question jurisdiction
 8 pursuant to 28 U.S.C. § 1331; 28 U.S.C. § 1337; 15 U.S.C. § 1116; 15 U.S.C. § 1117; and 28
 9 U.S.C. § 1367.
 10

11 PROCEDURAL BACKGROUND

12 HomeLight, Inc. initially sought relief in a Complaint for Trademark Infringement (15
 13 U.S.C. § 1114) and Section 43 of the Lanham Act False Advertising (15 U.S.C. § 1125(a))
 14 against HomeOpenly, Inc. and Dmitry Shkipin. Dmitry Shkipin filed a First Motion to Dismiss
 15 Complaint on June 18, 2022 and a Motion to Dismiss a Single Party on June 22, 2022. On
 16 October 27, 2022, the Court issued an Order Denying Motions to Dismiss Re: ECF 15, 18.
 17 Dmitry Shkipin presently operates HomeOpenly platform as a sole proprietor and is not
 18 presently represented by counsel.
 19

20 LEGAL STANDARD

21 In general, a court may not consider facts outside the complaint when deciding a motion
 22 to dismiss without converting it into a summary-judgment motion. Lee v. City of L.A., 250 F.3d
 23 668, 688 (9th Cir. 2001), overruled on other grounds by Galbraith v. Cty. of Santa Clara, 307
 24 F.3d 1119, 1125-26 (9th Cir. 2002). There are, however, two exceptions to this general rule: (1)
 25 requests for judicial notice and (2) the incorporation-by-reference doctrine. *Id.* A court is
 26 required to take judicial notice of facts “if a party requests it and the court is supplied with the
 27 necessary information” that shows the facts are “not subject to reasonable dispute.” Fed. R. Evid.
 28

201(b). Facts are not subject to reasonable dispute if they are “generally known within the trial court’s territorial jurisdiction,” or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Id. The incorporation-by-reference doctrine allows courts to consider materials outside the complaint when those materials are extensively referred to in the complaint or when the document is integral to a plaintiff’s claims. Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018).

ARGUMENT

(I) HomeOpenly does not share the same “zone of interest” in conjunction with any real estate brokers

In the legal matter, David McLaughlin v. HomeLight, Inc. C.D. Cal. Case No. 2:21-cv-05379-MCS-KES (Source: https://www.pacermonitor.com/public/case/40853311/David_McLaughlin_v_HomeLight_Inc_e_t_al) David McLaughlin was legitimate licensed real estate broker in California who attempted to advance claims against HomeLight for false advertising under the Lanham Act. In the ORDER RE: MOTION TO DISMISS (ECF NO. 14) the court has stated that: “HomeLight contends that McLaughlin brings this lawsuit as an aggrieved potential consumer of its real estate agent referral service, not as a direct competitor” as the overall legal premise for the Order to dismiss of McLaughlin’s claims against HomeLight with prejudice.

However, there is no such thing (Source: <https://schema.org/Thing>) as lawful “real estate agent referral service” for any business incident to or part of a settlement service involving a federally related mortgage loan anywhere in the United States. Such designation does not exist by the mere prevalence of RESPA Section 8(a) and Regulation X where “[a]ny referral of a settlement service is not a compensable service.”

David McLaughlin (CA-DRE License 01256235) is a salesperson for a broker Outwest Holdings, Inc. (CA-DRE License 01523573). HomeLight, Inc. (CA-DRE License 01900940) is a broker, like any other. Both, David McLaughlin and HomeLight are licensed real estate entities, classified as NAICS Code 531210 - Offices of Real Estate Agents and Brokers (Source: <https://www.justice.gov/atr/naics-and-sic-codes-used-division>) (Source: <https://schema.org/RealEstateAgent>). In their complaint, David McLaughlin has failed to recognize and plead the appropriate facts that designate HomeLight as a “sham” brokerage and “hub” in a consumer allocation conspiracy that comprises of +/-28,000 “partner agents.” This legal matter is relevant because it demonstrates the full extent of HomeLight’s highly deceptive efforts to promote a non-existent designation of a “real estate agent referral service,” not merely before consumers and lawful participants in the relevant markets, but also before the federal court system.

Dmitry Shkipin is not a licensed real estate agent, or a licensed real estate broker in any United States state licensing jurisdictions. It is a matter of public record that HomeLight Inc. is a licensed real estate broker in the State of California. Courts regularly take judicial notice of “undisputed matters of public record, including documents on file in federal or state courts.” Harris v. Cty. of Orange, 682 F.3d 1126, 1131-32 (9th Cir. 2012) Information made publicly available by government entities, including data, is also subject to judicial notice. See Daniels-Hall v. Nat’l Educ. Ass’n, 629 F.3d 992, 998-99 (9th Cir. 2010); Teixeira v. Cty. of Alameda, 873 F.3d 670, 676 n.6 (9th Cir. 2017)

HomeOpenly is a genuine two-sided marketplace operate in their distinctly different “zones of interest.” A digital media platform (Source: <https://schema.org/OnlineBusiness>), such as HomeOpenly, does not engage in brokerage activities, it simply operates with inputs and outputs (I/O) communications between information processing systems *about* real estate activities, services, products, etc. HomeOpenly, does not operate or is licensed as a broker, nor

1 does it derive any revenues as one. This means that I cannot plausibly drive any sales away from
 2 HomeLight brokerage to myself because my platform simply does not produce any sales of the
 3 same type, or category reported in the Income Statement of any licensed brokerage.
 4

5 HomeOpenly produces one thing and one thing alone – *information*. At its core, editorial
 6 content is about proving value to the reader. Most editorial information in the digital age is
 7 supported with clearly-labeled ads, starting from the New York Times (NYSE: NYT) articles
 8 that are mostly supported with ads (aside from subscriptions revenues) and ending with search
 9 results produced by Google (NASDAQ: GOOGL). HomeOpenly Open Marketplace (Source:
 10 <https://homeopenly.com/Real-Estate-Agents-Commissions-Rebates>) does not sell any broker
 11 services to users either, it merely informs some users (consumers) about available savings in
 12 their area across the United States and allows other users (agents and brokers) to advertise
 13 services for free to potential customers. Hence, the only thing a two-sided Open Marketplace
 14 offers to anyone is *information*, and never *services of a broker*.
 15

16 According to California Department of Real Estate (Source:
 17 <https://www.dre.ca.gov/files/pdf/refbook/ref19.pdf>) a real estate brokerage is defined to conduct
 18 business activities where “[o]verall, the real estate business consists of the production,
 19 marketing and financing of real property. Real estate brokerage involves agency directed, for
 20 compensation, primarily toward the sale, exchange, lease, rental, financing, or managing of real
 21 property or a business opportunity.” Brokerage Operations are further defined as:
 22

23 “With regard to the sale of real property, brokerage operations may be divided into
 24 several elements:

25 1. securing listings (developing an inventory) through leads, referrals, and direct
 26 canvassing;

27 2. prospecting for buyers through various forms of advertising;
 28

1 3. negotiating or bringing together a “meeting of the minds” of buyer and seller;

2
3 4. assisting in whatever manner necessary with closing (transfer of the property by the
4 required instruments).

5 Typically, brokerage firms compete for listings and cooperate with other brokers who
6 desire to find buyers for the listings.”

7
8 A real estate broker, even if he or she heavily utilizes Internet as a marketing medium, is
9 still a real estate broker because of the way a licensed entity derives revenue, rather than what it
10 claims to be. North American Industry Classification System (NAICS) codes identify firms’
11 primary business activities (Source: [https://www.investopedia.com/terms/b/business-](https://www.investopedia.com/terms/b/business-activities.asp)
12 [activities.asp](https://www.investopedia.com/terms/b/business-activities.asp)) based on consistent economic concepts to identify establishments that use the
13 same or similar processes to produce goods or services, grouped together (Source:
14 <https://www.justice.gov/atr/naics-and-sic-codes-used-division>).

15 HomeLight and HomeOpenly would *normally* operate in two distinctly different “zones
16 of interest.” HomeLight operates as a licensed real estate entity, classified as NAICS Code
17 531210 - Offices of Real Estate Agents and Brokers. HomeOpenly, on the other hand, operates a
18 two-sided online marketplace classified as NAICS 519130 - Internet Publishing and
19 Broadcasting and Web Search Portals. Under *normal* economic principles and conditions,
20 HomeLight, a broker, and HomeOpenly, an online two-sided marketplace, are not legitimate
21 competitors.
22

23 However, in an effort to misrepresent itself as a “referral service” to consumers,
24 HomeLight brokerage encroaches into the “zone of interest” occupied by HomeOpenly classified
25 as NAICS 519130 - Internet Publishing and Broadcasting and Web Search Portals. Such “zone
26 of interest” encroachment is a product of broker-to-broker collusion where HomeLight acts as a
27 “hub” brokerage that designates and falsely promotes itself as an unbiased online “agent
28

1 matching service” in an effort to distribute real estate services fulfilled and by “partner agents” to
 2 consumers, and in an effort to earn kickbacks from their future home sales and/or future home
 3 purchases. *The encroachment into the “zone of interest” occupied by HomeOpenly is a direct*
 4 *result of HomeLight’s refusal to compete with other real estate brokers.*

5
 6 HomeOpenly, therefore, maintains proper standing under Article III, Section 2, Clause 1
 7 of the United States Constitution to bring legitimate claims for damages under Section 43 of the
 8 Lanham Act, 15 U.S.C. § 1125(a) against HomeLight where “the §1125(a) cause of action
 9 extends *to plaintiffs* who [*genuinely*] fall within the zone of interests protected by that statute and
 10 whose injury was proximately caused by a violation of that statute.” Lexmark Int’l, Inc. v. Static
 11 Control Components, Inc., 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392, 24 Fla. L. Weekly
 12 Supp. 623 (2014)

13
 14 HomeLight “zone of interests” on the other hand, only applies under 15 U.S.C. § 1125(a)
 15 and 15 U.S.C. § 1114 when invoked by some other real estate entity or against some other real
 16 estate entity, because HomeLight derives revenue from primary business activities based on
 17 consistent economic concepts associated with licensed real estate entities.

18 Even setting aside my Free Speech protections allotted under the First Amendment,
 19 HomeLight has no standing for any claims under 15 U.S.C. § 1125(a) and 15 U.S.C. § 1114
 20 against HomeOpenly as a matter to Lexmark v. Static Control Components “zone of interest”
 21 ruling where “[t]wo-sided platforms differ from traditional markets in important ways. Most
 22 relevant here, two-sided platforms often exhibit what economists call “indirect network effects.”
 23 Indirect network effects exist where the value of the two-sided platform to *one group* of
 24 participants depends on how many members of a *different group* participate.” Ohio v. Am.
 25 Express Co., 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2018)

26
 27 A *genuine* real estate brokerage cannot lawfully operate as a two-sided online
 28 marketplace (or any type of *lawful* online platform that match real estate agents with residential
 MEMORANDUM IN SUPPORT OF SECOND MOTION - 8 CASE NUMBER: 3:22-cv-03119-TLT

homebuyers or sellers) for the purpose of “matching” consumers and real estate professionals because a real estate brokerage cannot lawfully attract *third-party members* of that same professional designation, *as a group*, without simultaneously forming a cartel. “Only other two-sided platforms can compete with a two-sided platform for transactions.” Ohio v. Am. Express Co., 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2018)

Under Ohio v. Am. Express Co. ruling, HomeLight brokerage is perfectly welcome to attract the first group, consumers, as a licensed brokerage entity to offer some real estate services, but it is decisively unable to attract the *required* second group of third-party brokers or “partner agents” of participants because they are direct competitors with HomeLight that conduct the same exact business activities as prescribed by their state-issued professional affiliation licenses.

By own admission, in the Complaint, “HomeLight is not a referral network” yet in in other times, HomeLight states that agents are “part of our deep referral network” (Source: <https://thesiliconreview.com/magazine/profile/homelight-bringing-greater-transparency-to-the-real-estate-process>) In some setting, HomeLight claims that “it does not operate as a brokerage” (Source <https://academy.disclosures.io/en/a-homelight-company>) and yet it firmly locks every “partner agent” into a “broker-to-broker fee once [he/she] close the deal.” (Source: <https://www.homelight.com/referrals>) Whatever HomeLight is, there is no lawful designation for a “real estate agent referral service,” and if there is one, I do not share a common “zone of interest” with one. (Source: <https://homeopenly.com/guide-locked-322-cv-03119/Why-Open-Marketplace-Does-Not-Offer-Referrals>)

HomeLight is neither a genuine two-sided platform, nor is it a genuine brokerage, but “a group of similar independent companies who join together to control prices and limit competition,” which is the exact definition of a cartel. (Source: <https://dictionary.cambridge.org/us/dictionary/english/cartel>)

1 A two-sided platform is one in which a single firm provides interrelated services to two
2 or more groups of users. Dmitry Shkipin is an operator of a genuine two-sided online
3 marketplace, and alongside HomeLight Inc., a licensed real estate broker, lawfully unable to
4 occupy the same “zone of interest” under a formal designation called “real estate agent referral
5 service.”
6

7 A notion that a brokerage is able to match consumers with third-party agents is a
8 dangerous precedent for a novel form of business activity where unaffiliated members of the
9 same licensed professional designation are able to lawfully network themselves into “groups.”
10 Only an entirely different type of entity, defined by Ohio v. Am. Express Co. ruling as a two-
11 sided platform, is able to connect groups of consumers to groups of service providers for some
12 forms of transactions. Otherwise, markets and consumers will be exposed to activities devised
13 and operated by horizontal networks of competitors linked together into common schemes.
14

15 CONCLUSION

16 With respect, I ask that the Court reconsider HomeLight’s standing for claims under
17 Trademark Infringement (15 U.S.C. § 1114) and Section 43 of the Lanham Act False
18 Advertising (15 U.S.C. § 1125(a)) because their “zone of interest” designation falls into an
19 entirely separate category from that occupied by the defendant. Such ruling would not contradict
20 the Court’s other elements established in the Order, because the Court did not yet address the
21 “zone of interest” arguments presented in the First Motion to Dismiss.
22

23
24 DATED: October 28, 2022

/s/ Dmitry Shkipin

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26
27
28 Dmitry Shkipin, pro se

Dmitry Shkipin, pro se
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

HomeLight, Inc.

The Plaintiff

vs.

Dmitry Shkipin et al.

The Defendant

Case No.: 3:22-cv-03119-TLT

Homelight, Inc. v. Shkipin et al.

[PROPOSED] ORDER

**GRANTING SECOND MOTION TO
DISMISS COMPLAINT**

DATE: Tuesday, March 14, 2023

TIME: 9:00 a.m.

COURTROOM: San Francisco, Courtroom 09,
19th Floor

JUDGE: Hon. Trina L. Thompson

1 On October 28, 2022, the Defendant, Dmitry Shkipin, filed a Second Motion to Dismiss the
2 Complaint filed by the Plaintiff, HomeLight, Inc., which was filed on May 27, 2022 in this
3 Court. Upon consideration of the pleadings, the papers, arguments of counsel, all the evidence on
4 the record, and with good cause appearing,
5

6 IT IS HEREBY ORDERED that:

7 The Defendant's Motion to Dismiss Complaint is GRANTED with prejudice. Plaintiff lacks
8 statutory standing for Trademark Infringement (15 U.S.C. § 1114); Plaintiff lacks statutory
9 standing for Lanham Act Section 43(a) False Advertising (15 U.S.C. § 1125 (a)); where Court
10 determined that the claimant's interests do not fall within the same "zone of interests" protected
11 by the statute under the Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118,
12 129–34 (2014) two-step inquiry.
13

14 THEREFORE, the Court hereby orders that the Defendant's Motion to Dismiss Plaintiff's
15 Complaint is granted in its entirety.

16 IT IS SO ORDERED.

17
18 Dated: _____
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