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REAL ESTATE COMMISSION
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**BEFORE THE REAL ESTATE COMMISSION
STATE OF NEVADA**

JOSEPH R. DECKER, Administrator, REAL
ESTATE DIVISION, DEPARTMENT OF
BUSINESS & INDUSTRY, STATE OF NEVADA,

Case No.: REN 14-05-04-044

Petitioner,

vs.

MARSHALL CARRASCO,

Respondent.

JOSEPH R. DECKER, Administrator, REAL
ESTATE DIVISION, DEPARTMENT OF
BUSINESS & INDUSTRY, STATE OF NEVADA,

Case No.: REN 15-08-07-012

Petitioner,

vs.

JOSHUA FOTENOT,

Respondent.

JOSEPH R. DECKER, Administrator, REAL
ESTATE DIVISION, DEPARTMENT OF
BUSINESS & INDUSTRY, STATE OF NEVADA,

Case No.: REN 15-08-08-013

Petitioner,

vs.

KATRINA KARASAWA,

Respondent.

JOINT MOTION TO DISMISS

COMES NOW, Respondents MARSHALL CARRASCO, JOSHUA FONTENOT and
KATRINA KARASAWA, by and through their attorney, James M. Walsh, Esq. of Walsh, Baker &

1 Rosevear, and hereby moves the Real Estate Commission of the State of Nevada to dismiss the
2 Complaints in the above entitled matters with prejudice. The basis of Respondent's Motion is the
3 failure of the Complaints to state facts upon which a violation can be found and the vague and arbitrary
4 nature of the statutes sought to be enforced and the violations alleged.

5 The only Complaints at issue before the Commission for purposes of this Motion are identical
6 alleging violations by Respondents Marshall Carrasco (hereinafter "Carrasco"), Joshua Fontenot
7 (hereinafter "Fontenot") and Katrina Karasawa (hereinafter "Karasawa").

8 The Complaints merely allege that in all cases Carrasco, as Agents for the original sellers who
9 accepted offers for sale of their property and Fontenot and Karasawa as Agents for the buyers who
10 purchased the property. The buyers then resold the properties months later for a profit. Carrasco,
11 Fontenot and Karasawa received commissions and later upon resale of the property to unrelated third
12 parties, Carrasco again received commissions. It is believed the Division alleges the Respondents
13 steered the re-sales to predetermined buyers. Again, there is no statutory violation associated with such
14 an allegation. On these limited facts and allegations, the Real Estate Division (hereinafter "Division")
15 alleges that Carrasco, Fontenot and Karasawa violated the provisions of NRS 645.633(1)(h) Gross
16 Negligence, NAC 645.605(6), and NRS 645.252(2) Duty/Reasonable Care to sellers. Additionally,
17 they allege that Respondents violated duties to sellers' mortgage lenders. It is not alleged that any of
18 the agent's actions violated the provisions of NRS 645.252(1)(d).

19 It is the Division's position that they "believe" that the transaction as alleged may be suspect.
20 They speculate that by additional marketing the lender may have received additional funds and they
21 wish to present the matter to the Commission for their opinion. As will be shown, Respondents have
22 violated no statutes or duties owed to the lender or to the sellers. This Commission's authority is
23 limited to those powers specifically set forth by statute, the Commission has no general or common law
24 powers but only those that have been conferred expressly to it. *Andrews v. Nevada State Board of*
25 *Cosmetology*, 86 Nev. 207, 467 P.2d 96 (2007). No place in the statutory grant of authority is
26 Commission given the power to use the formal Complaint procedure for contested matters to render
27 advisory opinions or to broaden statutory authorities, such as the Division seeks here.

1 **I. ARGUMENT**

2 The Division has previously investigated this specific conduct involving Respondent Carrasco.
3 This was *Ramos v. Carrasco*, Case No. REN 14-09-02-004 and *NRED v. Carrasco*, REN 14-10-01-
4 005. On January 28, 2014, the Division notified Carrasco that it had completed its investigation in that
5 matter and there was insufficient evidence to prove any violation of the Nevada Revised Statutes or the
6 Nevada Administrative Code Chapter 645. A copy of the Division's January 28, 2014 letter is attached
7 hereto as **Exhibit 1**. There are no new facts or investigatory activities which would have changed this
8 result. The only changed circumstance is the article in the Reno Gazette Journal of April 20, 2014,
9 which attacks short sale transactions of specific agents in the Northern Nevada area. Of interest, is the
10 article specifically recognizes that the actions are not illegal. It is not until after the appearance of this
11 article that those individuals mentioned in the article (Carrasco) are investigated by the Division.
12 Subsequently, the Division issued the Complaints at issue herein and those in common cases.
13 Curiously, the newspaper did a follow up article December 21, 2014 where it unabashedly takes full
14 credit for goading the Division into investigating these matters. Trial by press rather than based upon
15 the facts of law before the Commission.

16 Looking at the specific factual allegations of the Complaints it is clear there was no substantive
17 investigation of this transaction. In all transactions, the Division alleges a violation of the duty of care
18 to the seller and lender as a result of a resale profit. Had the Division conducted any investigation by
19 simply interviewing the sellers, it would have been quickly apparent that any allegations of gross
20 negligence cannot stand.

21 In all cases the short sale requires that the sellers receive nothing from the short sale proceeds
22 and that it is the lender who in fact makes its own independent determination as to value and the
23 amount of proceeds it will accept for the release of its lien. The lender is not a party to the real estate
24 transaction, but is a third party lien holder who in effect drives the structure of the transaction by
25 informing the parties of the amount it requires to release its lien and allow the closing of escrow. The
26 sellers will testify to these facts and apparently have never been interviewed by the Division.

27 The sale prices were set by the banks after their review and appraisal and notification to the
28 sellers. On these facts, it is alleged that Respondents somehow unfairly dealt with the sellers. This

1 will not be the sellers testimony and is no way supported by the facts, nor can this possibly meet any
2 known definition of gross negligence. Gross negligence is defined in Nevada as being substantially and
3 appreciably higher in magnitude and more culpable than ordinary negligence. It is the equivalent of the
4 failure to exercise even a slight degree of care and requires a finding of reckless disregard of the
5 consequences affecting the life or property of another. See generally, *Hart v. Kline*, 61 Nev. 96, 116
6 P.2d, 672 (1941). In these transactions, there is also nothing inherently wrong with any dual agency
7 relationship. It is specifically authorized by statute and the representations complied with the statutory
8 requirements. NRS 645.252(1)(d).

9 In fact, as probably happened here, removing the taint of a distressed property (i.e., foreclosure
10 and short sale) from these properties automatically causes an increase in value. This is in addition to
11 normal market increase during the holding period. In addition, again any reasonable investigation and
12 the testimony will reveal that these were not just a simple flips but the investors expended substantial
13 sums rehabilitating the property, as well as incurring costs associated with the use of its funds in
14 purchase and rehabilitation of the property. The investor's returns made on the resale were
15 significantly less than alleged.

16 In these cases, from the facts, it is clear that no violation of any duty to the sellers occurred.
17 Beyond that, there is no duty owed by the agent to the lender. As mentioned, the lender is not a party
18 to the transaction but merely a lien holder who sets the terms under which will accept satisfaction of its
19 lien.

20 It has been held that no fiduciary duty exists between a lender and a borrower. These are, in
21 fact, an arm's length relationships and in these cases, actually an adversary one.¹ The lender in most
22 cases are seeking to foreclose on the seller's property. See, *Yerington Ford, Inc. vs. General Motors*
23 *Acceptance Corp.*, 359 F.Supp 2d 1075 (D. Nev. 2004). The contractual, agency and fiduciary
24 relationship existed by and between Respondents and their clients the sellers and/or buyers. It is
25 impossible to torture this relationship to imply that a duty of care and specifically a fiduciary duty
26 extend to the adversary of Respondents' clients. Respondents were specifically engaged to complete
27 transactions adverse to the lender's. To impose the tortured result, the Division seeks by claiming that

28 ¹ This adversary relationship was testified to at length by Respondents expert in *Decker v. Lococo*, Case No. 2014-3324. A copy of Mr. Hankla's testimony on this issue is attached hereto as Exhibit 2.

1 the lender is a party to the real estate transaction for purposes of a duty owed pursuant to NRS
2 645.252(2) would be to statutorily create a conflict of interest between agents and lenders. No rational
3 reading of the statute can create that result.

4 Further, rather than being a party to the real estate transaction in this matter, that being the sale
5 by and between the sellers and the purchasers, the short sale transaction created a separate and distinct
6 contractual arrangement between the sellers and the lenders which was separately enforceable by those
7 parties in a separate action. Therefore, the bank had entered into a separate contractual relationship,
8 separate and distinct from the sale transaction, between sellers and investors, where it agreed to accept,
9 after its own investigation and appraisal, a specified sum for the release of its lien. See, *Jones vs. Sun*
10 *Trust Mortgage*, 128 Nev. Adv. Op. 18 (2012).

11 **II. FOR THE COMMISSION TO IMPOSE SUCH A RESULT UNDER THE FACTS OF**
12 **THIS CASE WOULD CLEARLY BE AN ARBITRARY AND CAPRICIOUS RESULT**
13 **SUBJECT TO ATTACK**

14 Arbitrary and capricious being specifically defined as an exercise of discretion founded on
15 prejudice or preference rather than reason or contrary to the evidence or established rules of law. *State*
16 *of Nevada vs. Eighth Judicial District Court*, 127 Nev. Adv. Op. 84 (2011).

17 **III. RESPONDENTS DID NOT BREACH ANY DUTY OWED TO THE THIRD PARTY**
18 **MORTGAGE LENDER BECAUSE THEY ARE NOT IN A FIDUCIARY**
19 **RELATIONSHIP WITH THE MORTGAGE LENDER**

20 Nevada Revised Statutes 645.252(2) states that “a licensee who acts as an agent in a real estate
21 transaction... [s]hall exercise reasonable skill and care with respect to all parties to the real estate
22 transaction.” Nev. Rev. Stat. Ann. § 645.252. Similarly, California law draws a sharp distinction
23 between fiduciary duties owed by an agent to a principal and the non-fiduciary duties owed to third
24 persons. “In the specific context of disclosure, the fiduciary obligations of an agent to the principal to
25 ascertain and disclose the facts that are material to the interest of the principal *are different than those*
26 *of the broker to a third party* that is not the principal; the common law duty of honesty and fairness to
27 third parties does not create an affirmative duty to investigate or disclose.” See, *Miller & Starr*
28 *California Real Estate 3D*, Section 3:55 (*emphasis added*). The court so held in *Saffie v. Schmeling*,
stating that “while the real estate brokers owe their clients fiduciary duties, they owe third parties who

1 are not their clients, including the adverse party in a real estate transaction, *only those duties imposed*
2 *by regulatory statutes.*” *Saffie v. Schmeling*, 224 Cal. App. 4th 563, 568, 168 Cal. Rptr. 3d 766, 769
3 (2014)(*emphasis added*). A mortgage lender, i.e. a bank or financial lending institution, is, at best, a
4 third party to a real estate transaction. A mortgage lender has no fiduciary or contractual relationship
5 with the real estate agent.² Respondents owed the mortgage lender only those duties imposed by statute
6 – in these cases none. Based upon the facts alleged in the complaint, Respondents did not breach any
7 duties in his dealings with the mortgage lender.

8 **IV. THE COMPLAINT LACKS THE REQUIRED PRECISION, GUIDANCE AND**
9 **ARTICULABLE STANDARD OF CARE TO ASSERT ANY VIOLATIONS OF A DUTY**
10 **AGAINST RESPONDENTS**

11 NRS 645.633(1)(h) is a statute that may subject those sanctioned under it with civil penalties
12 and potential loss of their license. Usually, this doctrine is applied in cases involving criminal liability,
13 but the void-for-vagueness doctrine has also been applied to cases solely implicating civil liability. *See*
14 *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-53 (1991)(holding that rules subjecting attorney to
15 discipline for speech were unconstitutionally vague). *FCC v. Fox Television Stations, Inc.* expanded
16 the scope of the void-for-vagueness doctrine, making it applicable to cases where the fair notice
17 element is involved:

18 “even when speech is not at issue, the void for vagueness doctrine addresses at
19 least two connected but discrete due process concerns: first, that regulated parties
20 should know what is required of them so they may act accordingly; second,
21 precision and guidance are necessary so that those enforcing the law do not act in
22 an arbitrary or discriminatory way.”

23 *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317, 183 L. Ed. 2d 234 (2012). The
24 Division’s complaint satisfies neither of these requirements. The complaint fails to allege a standard of
25 care, nor does it allege a duty owed to the sellers by Respondents based on an articulated standard of
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28 ² In fact, Respondent’s expert in Lococo specifically stated lenders will not rely on relator’s information and give it no
credence in their independent value determinations. (See, Exhibit 2, Hankla testimony, p. 110, ln. 13; p. 112 – p. 115)

1 care. NRS 645.633(1)(h)³ specifies a heightened standard of “gross negligence,” but does not define it.
2 The Supreme Court of Nevada has defined and adopted the following definition of “gross negligence.”

3 “Gross negligence is substantially and appreciably higher in magnitude and more
4 culpable than ordinary negligence. Gross negligence is equivalent to the failure to
5 exercise even a slight degree of care. It is materially more want of care than
6 constitutes simple inadvertence. It is an act or omission respecting legal duty of an
7 aggravated character as distinguished from a mere failure to exercise ordinary
8 care. It is very great negligence, or the absence of slight diligence, or the want of
9 even scant care. It amounts to indifference to present legal duty, and to utter
10 forgetfulness of legal obligations so far as other persons may be affected. It is a
11 heedless and palpable violation of legal duty respecting the rights of others. The
12 element of culpability which characterizes all negligence is, in gross negligence,
13 magnified to a higher degree as compared with that present in ordinary
14 negligence. Gross negligence is manifestly a smaller amount of watchfulness and
15 circumspection than the circumstances require of a prudent man. But it falls short
16 of being such reckless disregard of probable consequences as is equivalent to a
17 willful and intentional wrong. Ordinary and gross negligence differ in degree of
18 inattention, while both differ in kind from willful and intentional conduct which is
19 or ought to be known to have a tendency to injure.”

20 *Racine v. PHW Las Vegas, LLC*, No. 2:10-CV-01651-LDG, 2014 WL 4354111, at 15 (D. Nev. Sept. 2,
21 2014)(quoting *Hart v. Kline*, 61 Nev. 96, 116 P.2d 672, 674 (1941)). “Not dealing fairly” with the
22 sellers, the only conduct alleged in the complaint to violate a duty, falls far short of the heightened
23 gross negligence standard articulated above. Further, because the Division fails to allege any specific
24 acts or omissions, let alone any specific misconduct committed by Respondents that violates any
25 prohibited statutory conduct, the complaint and statutes lacks the requisite precision and guidance
26 necessary to overcome a void-for-vagueness challenge. The Court took care to emphasize “a
27 fundamental principle of our legal system is that laws which regulate persons or entities must give fair
28 notice of conduct that is forbidden or required... [t]his requirement of clarity in regulation is essential
to the protections provided by the Due Process Clause of the Fifth Amendment.” *F.C.C. v. Fox
Television Stations, Inc.*, 132 S. Ct. 2307, 2317, 183 L. Ed. 2d 234 (2012)(quoting *United States v.
Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L.Ed.2d 650 (2008)). The failure to articulate any

³ NRS 645.633(1)(h) states that “the Commission may take action pursuant to NRS 645.630 against any person subject to this section who is guilty of any of the following acts: gross negligence or incompetence in performing any act for which the person is required to hold a license pursuant to this chapter, chapter 119, 119A or 119B of NRS.” Nev. Rev. Stat. Ann. § 645.633(1)(h).

1 concrete and unambiguous prohibited conduct renders the statute void-for-vagueness and requires
2 dismissal of the Complaint.

3 **V. ADMINISTRATIVE RES JUDICATA**

4 The Commission has already heard an identical case and ruled upon identical facts as to the
5 existence of a breach of duty to the seller and the seller's lender. This was *Decker v. Lococo*, Case No.
6 2014-3324, and the companion brokers case of *Decker v. O'Brien*, Case No. REN 14-05-02-42. The
7 case was dismissed against O'Brien based upon the Commission's finding in *Lococo*. In *Lococo*, the
8 Commission found that no duty was breached or owed to the lender and the alleged conduct did not
9 constitute a violation of *Lococo's* duties to the seller. The Commission rendered a specific decision
10 and as required Findings of Fact and Conclusions of Law. See copy of decision filed January 23, 2015,
11 attached hereto as **Exhibit 3**.

12 The Commission is bound by the principals of *res judicata* and claim preclusion to rule in
13 conformance with its prior decision.

14 **A. Preclusion**

15 The "principles of claim preclusion [*res judicata*] and issue preclusion [*collateral estoppel*]...
16 apply both to administrative boards and to courts." *Lopes v. Board of Appeals of Fairhaven*, 27 Mass.
17 App. Ct. 754, 755, 543 N.E.2d 421, 422 (1989); see Restatement (Second) of Judgments 83 (1982).
18 These principles apply whether it is an agency considering the preclusive effect of either a prior court
19 or agency proceeding or a court considering the preclusive effect of a prior agency proceeding.

20 **B. Res Judicata**

21 The doctrine of *res judicata* bars relitigation of legal claims that were (or could have been)
22 determined in an earlier action. Restatement (Second) of Judgments 17-19 and 24. Administrative
23 decisions are *res judicata* when an agency acts after a trial type hearing. See *United States v. Utah*
24 *Construction & Mining Co.*, 384 U.S. 391, 421-22 (1966). However, the application of *res judicata*
25 before an administrative agency may be limited by statute. See *Alexander v. Garner-Denver Co.*, 415
26 U.S. 36, 54 (1974)(an arbitrator's decision under collective bargaining agreement is not given
27 preclusive effect in a later statutory discrimination action before a court or specialized administrative
28 agency). No such limitation is present herein.

1 **VI. CONCLUSION**

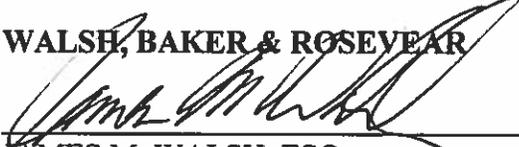
2 Based upon the foregoing, it is respectfully requested that the Complaints as to Respondents be
3 dismissed with prejudice.

4 **Affirmation Pursuant to NRS 239B.030**

5 The undersigned does hereby affirm that the preceding document does not contain the social
6 security number of any person.

7 DATED this 4th day of March, 2015.

8 **WALSH, BAKER & ROSEVEAR**

9 
10 _____
11 JAMES M. WALSH, ESQ.
12 Nevada State Bar No. 796
13 9468 Double R Boulevard, Suite A
14 Reno, Nevada 89521
15 (775) 853-0883
16 Attorneys for Respondents
17 Jason Lococo and Steven P. O'Brien
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1 CERTIFICATE OF SERVICE

2 I, the undersigned, declare under penalty of perjury, that I am an employee of WALSH, BAKER,
3 ROSEVEAR & LOOMIS, PC that I am over the age of eighteen (18) years, and that I am not a party to,
4 nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing
5 document on all parties to this action by:

6 Placing an original or true copy thereof in a sealed envelope placed for collection and
7 mailing in the United States Mail, at Reno, Nevada postage paid, following the ordinary
8 course of business practices;

9 addressed as follows:

10 Keith E. Kizer
11 Deputy Attorney General
12 555 East Washington Avenue, Suite 3900
13 Las Vegas, Nevada 89101
14 Attorneys for Real Estate Division

15 Joseph R. Decker, Administrator
16 Department of Business and Industry
17 Real Estate Division
18 2501 East Sahara Avenue
19 Las Vegas, Nevada 89104-4137

20 I declare under penalty of perjury that the foregoing is true and correct.

21 Executed this 4th day of March, 2015.

22 

23 Denise Vollmer, an employee of
24 Walsh, Baker, Rosevear & Loomis, PC
25
26
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EXHIBIT 1

EXHIBIT 1

BRIAN SANDOVAL
Governor

STATE OF NEVADA



BRUCE H. BRESLOW
Director

GAIL J. ANDERSON
Administrator

DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION

www.red.state.nv.us

January 28, 2014

Marshall Carrasco
Marshall Realty
9740 S McCarran Blvd #103
Reno, NV 89523

Re: Ramos vs. Carrasco
REN 14-09-02-004

NRED vs. Carrasco
REN 14-10-01-005

Dear Mr. Carrasco:

The Division has completed its investigation of the above referenced matter.

After thorough investigation, there was insufficient evidence to prove you violated NRS or NAC Chapter 645. The two files listed have been closed.

The decision to close this matter is made without prejudice. The Division reserves the right to reopen its investigation should such action be warranted.

Should you have any questions, please feel free to contact me at (775) 687-4280 extension 304.

Sincerely,

Jan R Holle
Chief, Compliance/Audit

A handwritten signature in black ink, appearing to read "Kip R. Steele".

Kip R. Steele
Compliance/Audit Investigator

EXHIBIT 2

EXHIBIT 2

1

BEFORE THE
NEVADA REAL ESTATE COMMISSION

-oOo-

NEVADA REAL ESTATE DIVISION
Complainant,

vs. Case No. 2014-3324

JASON ALLEN LOCOCO,
Respondent.

NEVADA REAL ESTATE DIVISION
Complainant,

vs. Case No. REN 14-05-02-042

STEVEN P. O'BRIEN
Respondent.

TRANSCRIPT OF PROCEEDINGS FROM AUDIOTAPE
HEARING

January 7, 2015

Henderson City Hall
Council Chambers Conference Room
240 Water Street
Henderson, Nevada

Transcribed By: MARIAN S. BROWN PAVA, CCR #169, RPR
CALIFORNIA CSR #4525

Hoogs Reporting Group
775-327-4460

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I N D E X					
2	RESPONDENT WITNESS:	DIRECT	CROSS	REDIRECT	REXCROSS
3	PAULA BRUMMER	22	33		
4	JASON LOCOCO	47	51		
5	STEVE O'BRIEN	62	66	70	
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Hoogs Reporting Group
775-327-4460

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1 -oOo- APPEARANCES -oOo-

2 COMMISSIONERS IN ATTENDANCE:

3 DEVIN REISS, Clark County
NEIL SCHWARTZ, Clark County
4 SHERRIE CARTINELLA, Washoe County
RICHARD JOHNSON, Washoe County
5 NORMA JEAN OPATIK, Nye County

6 STAFF IN ATTENDANCE:

7 Administration Section: Rebecca Hardin
Teralyn Thompson

8

9 Education Section: Ingrid Trillo
Safia Anwari
VaNessa Finona

10

11 Enforcement Section: Jan Holle
Daryl McCloskey
Linda Chavez
12 Carolyn Washington

13 Licensing Section: Susan Clark

14 Attorney General: Kimberly Arguello
Keith Kizer
15 Chris Eccles

16 FOR THE PETITIONER:

17 KEITH KIZER, ESQ.
Deputy Attorney General
18 555 East Washington Avenue
Las Vegas, Nevada 89101
19

20 FOR THE RESPONDENTS:

21 WALSH, BAKER, ROSEVEAR & LOOMIS
By: JAMES MIKE WALSH, ESQ.
22 9468 Double R Boulevard, Suite A
Reno, Nevada 89521
23
24
25

Hoogs Reporting Group
775-327-4460

1 (Recess taken.)

2 CHAIRPERSON OPATIK: -- Division, Nevada Real
3 Estate Division vs. Jason Allen Lococo.

4 MR. WALSH: We would call Kirk Hankla, please.

5 JAMES KIRK HANKLA,
6 being first duly sworn by the chairperson
7 was examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MR. WALSH:

10 Q Would you state your name, please, sir.

11 A James Kirk Hankla.

12 Q Mr. Hankla, what is your profession or
13 occupation, sir?

14 A I am the president --

15 CHAIRPERSON OPATIK: Excuse me. Excuse me, but
16 you've been previously sworn.

17 THE WITNESS: That's right.

18 THE ATTORNEY: Spell your last name for me, please.

19 THE WITNESS: H-a-n-k-l-a. I'm the one who gave
20 you the card just at the end of the last session.

21 THE ATTORNEY: Thank you.

22 THE WITNESS: You're welcome.

23 BY MR. WALSH:

24 Q And I'm sorry, sir. What is your profession
25 or occupation?

1 brick and mortar?

2 A Let's see. Hawaii, California, Nevada,
3 Arizona, Texas, Arizona, Oregon and Washington.

4 Q And licensed in additional jurisdictions?

5 A Oh, we're licensed in most of the states.

6 Let's get out a map.

7 Q All right. Are you a member of any
8 professional organizations?

9 A Yes, I am a member of the California Mortgage
10 Managers Association, the National Mortgage Managers
11 Association and the newly reformed Nevada Board of
12 Managers Association.

13 Q And in those positions and as a result of
14 that experience, sir -- and, I'm sorry, you said how many
15 years in the mortgage banking industry?

16 A Oh, 31.

17 Q All right. Are you familiar with the current
18 short-sale practices?

19 A I am.

20 Q All right. And are you familiar with HAFA,
21 H-A-F-A, for example?

22 A We were never directly involved in that, but
23 I'm familiar with what it's about.

24 Q Okay. And are you familiar, sir, with the
25 lender's responsibility and the lender's role in those

1 A I am the president and CEO of International
2 City Mortgage.

3 Q Can you give me a brief history of your
4 educational and occupational background, sir?

5 A All right. I graduated from the college of
6 William and Mary in Williamsburg, Virginia, in the
7 fall -- or, rather, the spring of 1983.

8 I got into the mortgage banking business pretty
9 much after that. I've held a California real estate
10 broker's license since 1986. That license is necessarily
11 inactive in my current capacity of someone who certifies
12 junior mini-mortgage-backed securities.

13 Q All right. And what is your experience, if
14 any, in ownership of agencies in the real estate
15 industry?

16 A I owned Coldwell Banker Alliance Realty from
17 sometime in 1990 -- 1998 until June of 2006, when I sold.
18 That company was number 29 in the entire Coldwell Banker
19 system worldwide.

20 Q And did you practice in any other
21 jurisdictions, other than California or Nevada?

22 A Well, the mortgage bank, we had brick and
23 mortar in eight states and we're licensed in several
24 more.

25 Q Okay. In which states are you -- do you have

1 short-sale situations?

2 A Yes, I am.

3 Q And is there any set of circumstances, sir,
4 where the lender is a party to the underlying real estate
5 transactions?

6 A Only when we're the seller.

7 Q Okay. And you are familiar, as you've sat
8 here and listened and reviewed documents, with the
9 transaction involving 11 Woodstock in Carson City?

10 A Um-hum.

11 Q Okay. And just for the court reporter, you
12 can't say "um-hum."

13 A Yes. Yes, I'm familiar.

14 Q Okay. And in that transaction, sir, was --
15 were either of the lenders parties to that?

16 MR. KIZER: I am just going to object to that
17 question and any reference that goes to the ultimate
18 question of fact. I have no problem with the witness
19 talking about traditional sales or sales in general, but
20 as far as this specific sales goes, we're asking the
21 Commission to make a finding that the lender here was a
22 party, as per NRS Chapter 645. So I would object to the
23 extent it's going -- testimony on the ultimate question
24 of fact. Thank you.

25 MR. WALSH: And that is appropriate testimony for

1 an expert witness in a contested judicatory proceeding.
2 The expert is allowed to provide opinions on the ultimate
3 question of fact to provide guidance and benefit to the
4 trier of fact, which are you all.

5 CHAIRPERSON OPATIK: All right. I just have one
6 question. Are you -- is this witness an expert witness
7 or a witness that is part of the --

8 MR. WALSH: He is an expert witness.

9 CHAIRPERSON OPATIK: Without -- without party to
10 the contract, to the --

11 MR. WALSH: That's correct.

12 CHAIRPERSON OPATIK: -- transaction at all?

13 MR. WALSH: He is not a party to, he is not
14 affiliated, he is not a member of, he is not a
15 respondent, he is not a petitioner. He's -- other than a
16 retained expert, he is a stranger to this transaction.

17 CHAIRPERSON OPATIK: Even having stated so, I think
18 I am going to sustain the objection. I'll sustain the
19 objection.

20 MR. WALSH: And on what basis?

21 CHAIRPERSON OPATIK: The basis that the -- the
22 facts that are being presented or the facts -- the
23 allegations that are being brought forward are really
24 irrelevant to the question that you asked.

25 MR. WALSH: The allegation is that he violates a

1 MR. KIZER: And, Madam Chair, we have in the record
2 from both sides -- we have all the documents regarding
3 the sale of this property, we have the documents from the
4 lender, Wells Fargo, in evidence. So I'm not -- I don't
5 understand what the need for an expert is on reading
6 those documents. The Commission is more than capable of
7 reading those documents, and counsel is more than capable
8 of referring to those documents.

9 So, again, this is not a matter of providing
10 guidance to the Commission, this is a matter of
11 stating -- acting as a commissioner, stating what he
12 believes is a -- who is a party and who is not a party.

13 So, again, the documentation speaks for itself and
14 I'm not sure why there's a need to go beyond that with
15 respect to that ultimate question.

16 CHAIRPERSON OPATIK: Let me ask you this,
17 Mr. Kizer. Did you have -- did you know what witnesses
18 were going to be called?

19 MR. KIZER: Yes.

20 CHAIRPERSON OPATIK: You had a witness list?

21 MR. WALSH: And I have no problem with this witness
22 testifying as to, again, general practices in the field
23 and his experience in the field. But, again, if they're
24 looking right at 11 Woodstock Avenue and this specific
25 transaction, that's a specific finding for the

1 duty to the lender and that duty is based on an
2 interpretation he believes strained and structured,
3 stretch, that the lender is a party to the transaction.
4 And this witness can testify based on his experience as
5 an expert that not only by law, under the holdings of the
6 Nevada Supreme Court the lender is an adversary in this
7 situation and is not a party to the transaction. The
8 lender is a third-party lienholder, not a party.

9 CHAIRPERSON OPATIK: Understood, but then you were
10 going into who were the parties -- who were the
11 principals of the corporation.

12 MR. WALSH: No.

13 CHAIRPERSON OPATIK: Was that not your last
14 question?

15 MR. WALSH: No, it was not. I'm sorry if I --

16 CHAIRPERSON OPATIK: Restate the question.

17 MR. WALSH: My question was -- is that under this
18 particular transaction --

19 CHAIRPERSON OPATIK: Um-hum.

20 MR. WALSH: -- has he seen anything that would make
21 the lenders, the two lenders -- the first and the
22 second -- in this transaction parties to the real estate
23 transaction?

24 CHAIRPERSON OPATIK: In his opinion?

25 MR. WALSH: In his opinion, yes.

1 Commission. That's not a general testimony by an expert
2 as to practicing -- that's our objection.

3 CHAIRPERSON OPATIK: As to speaking to this
4 transaction, this witness really doesn't have any
5 personal knowledge. He was not there during the
6 transaction. He was not there during the negotiations.
7 As an expert witness he can speak generally and that's
8 true.

9 MR. WALSH: Well, that -- that is true, but an
10 expert witness also, in any kind of a trial, if he is
11 given knowledge and facts of the particular
12 transaction -- it's no different than a causation expert
13 in an accident case.

14 You hire a mechanical engineer or you hire an
15 engineer to say: Okay. I've looked at the evidence.
16 Here's -- here's what I've been told. Here's what I
17 know. The car was going, in my opinion, 55 miles an hour
18 when he ran the stop sign, based on the skid marks, based
19 on this, based on that.

20 They take their expertise and knowledge and apply
21 them to the facts of a particular case and render an
22 opinion. And this gentleman is qualified to do that.

23 MR. KIZER: I'm not sure what he's bringing to the
24 table outside the documents that have already been
25 accepted by this Commission, pursuant to counsel.

1 MR. WALSH: And he's entitled to render an opinion
2 based upon those documents and to take -- based on the
3 testimony that's been presented here.

4 It is the Division that is raising the issue that,
5 number one, that the lender is a party to this
6 transaction to whom we owe a fiduciary duty or some duty
7 of care.

8 And this witness can say: Based upon what I know
9 of the industry practices, based upon what I know of this
10 transaction, that is absolutely not true.

11 CHAIRPERSON OPATIK: Okay. Then let's -- let's do
12 this. The State does not know where they're going with
13 it. Let's allow it for a few moments and let's see if it
14 goes someplace awry. Okay?

15 MR. KIZER: Very good.

16 CHAIRPERSON OPATIK: The objection is overruled.

17 BY MR. WALSH:

18 Q Mr. Hankla, do you remember the question?

19 A I don't. I'm shocked, but I don't.

20 Q I think I would ask you two questions.

21 Basically, has -- from an industry standpoint is the
22 lender considered a party to a short-sale transaction?

23 A Well, a lender is a party to the transaction
24 as a lienholder, you know, but we don't feel that we are
25 owed any fiduciary duty from the real estate brokers

1 obligation or duty of care to a lender.

2 In this particular transaction did you see or hear
3 anything that would change or modify your opinion?

4 A No.

5 Q And you've heard, also, the testimony here
6 that there's -- based on some duty of care owed to the
7 bank, that the bank may have been shorted on this
8 transaction or may have been able to get more money.

9 Based upon your experience as a mortgage lender how
10 did the bank fair in this transaction?

11 A Well, from everything I heard today I would
12 say that the guy at the bank deserves a gold star. And
13 if I was Mr. Jameson's boss, I might be asking him to
14 bring his playbook.

15 Q So the bank did great, the investor did not
16 so good?

17 A That's my opinion, yeah. I mean, it looked
18 to me like, when you look at that number of 269, and
19 exactly where they wound up, and ultimately where the
20 investor went at the end of the day, the guy making the
21 call for the bank did a pretty darn good job.

22 Q Can you tell us, sir, the analysis that a
23 bank would do in a short-sale situation in deciding how
24 much money they would demand from a short-sale
25 transaction?

1 involved.

2 And I would further say that the Nevada Supreme
3 Court has become very clear on it, as well as several
4 other real-live Article 3 judges. So, in fact, the
5 relationship between lender and borrower is not
6 fiduciary, it is, in fact, adversarial.

7 And so the suggestion that a real estate broker who
8 is representing a principal could also be working in the
9 best interests of the bank, of the lender, I'm sorry, you
10 just can't get there from here. That does not work.

11 Q I want you to clarify one thing. You -- just
12 for the benefit of the Commission that, as I understand
13 it, are not lawyers -- thank you.

14 You mentioned the Article 3 judges. What are
15 those?

16 A Oh, those are the guys who are appointed by
17 the President, confirmed by the Congress.

18 Q To sit where?

19 A On federal benches.

20 Q Okay. Bankruptcy and federal district
21 courts?

22 A That's right.

23 Q And then, Mr. Hankla, you -- with regard to
24 this particular transaction, you've rendered your opinion
25 that in general there is no fiduciary duty, there is no

1 A Well, the first thing we're going to do is
2 we're going to try to figure out what the property is
3 worth. The ways we're going to do that -- there are
4 specifically three ways.

5 We're going to -- we're going to look at the AVMOs,
6 so that's the Automated Valuation Models. We are going
7 to use somebody like CoreLogic or Inner Fence or maybe
8 even Clerk Capital. We're going to look at their
9 computer model runs to see what they come up with.

10 And then we may contact a couple of brokers in the
11 community, what we call broker price opinions.

12 And then once we have an idea of what it is worth,
13 we're going to factor in, you know: Gee, what do we
14 think the holding time is? What does the property look
15 like? What do we have to do? Are we going to have to
16 hire somebody? Are we going to have to have a contractor
17 to go in there to rehabilitate this place before we sell
18 it?

19 We're primarily in the interests in going and
20 getting it off our balance sheet just as quickly as
21 possible because it's a nonperforming asset and those are
22 bad. They more or less come right off your balance
23 sheet.

24 Q Okay. And are you interested in doing that
25 as quickly as possible?

1 A Absolutely.

2 Q Okay. And in developing that information
3 would you rely upon the seller's agents?

4 A No.

5 Q And why not?

6 A Because they're not working for us and we
7 couldn't ask them to.

8 Q And why could you not ask them to work for
9 you?

10 A Because -- well, like I stated earlier, the
11 Nevada Supreme Court in One Sutters has already very
12 clearly laid out that the relationship between borrower
13 and lender is adversarial.

14 Q And why is it adversarial?

15 A Well, because our interests are opposed. Us
16 as the lender are looking to get as much as money as we
17 can. The client is looking to get as much money as they
18 can. And that's an adversarial relationship.

19 It would be a whole lot like being -- you wouldn't
20 want to be accused of crime and have the State -- the
21 State's attorney also representing you. That's not how
22 the system is supposed to work.

23 And there's a similar situation between a borrower
24 and a lender.

25 Q And would that be particularly true where the

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1 lender is attempting to foreclose on the property?

2 A Oh, sure, absolutely.

3 Q And are you familiar, sir, with the
4 rehabilitative period, first of a seller who is facing a
5 foreclosure versus a short sale?

6 A Yeah, it depends on whether it's an FHA
7 transaction or a conventional transaction, but I can tell
8 you in the case of a conventional transaction, we
9 would -- Fannie Mae -- the Fannie Mae regs would say that
10 the borrower can be rehabilitated in two years if there
11 were extenuating circumstances.

12 Extenuating circumstances would be things like
13 illness, death, that type of thing.

14 Apart from that it would be three years. And in
15 the case of a foreclosure, without extenuating
16 circumstances, seven.

17 Q And so that, the little shorter period of
18 time, would be to the benefit of, say, Ms. Brummer in
19 this -- in this case?

20 A Absolutely. The date that it hits the credit
21 report starts the clock ticking.

22 Q The -- in short-sale transactions in general,
23 from the standpoint of a lender, do you have any
24 objection that the property may be purchased by an
25 investor for purposes of resale in the near future?

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1 A It's not our concern, really. I mean, it's
2 the next lender's concern.

3 What we don't want to do is -- we want to avoid
4 fraud. That is a -- that's really what a lot of these
5 time periods have to do with. It would have something to
6 do with, for example, like a favored buyer coming in or a
7 family member or something like that and attempt to crime
8 down the number on a bank.

9 Q All right. And you're certainly not aware of
10 any of those allegations or facts that would support that
11 in this case?

12 A There's nothing here that looks like that at
13 all.

14 MR. WALSH: That's all I have of this witness.

15 CHAIRPERSON OPATIK: Mr. Kizer?

16 MR. KIZER: I have no questions of the witness.

17 Thank you.

18 COMMISSIONER CARTINELLA: Question, just to
19 clarify, again.

20 You said that you didn't feel like the agents had
21 any -- you know, they would be in an adversarial-type
22 situation, it wouldn't be that they would be working as a
23 bank.

24 Who does your broker price opinions?

25 THE WITNESS: Well, that would depend on where the

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1 property is. We're in lots of states.

2 COMMISSIONER CARTINELLA: Well, but would it be --

3 THE WITNESS: We would call -- we would call two or
4 three local brokers. I mean, I don't do that, I have
5 folks that do that.

6 COMMISSIONER CARTINELLA: But you do have a broker
7 or a realtor or a licensee do the broker price opinion?

8 THE WITNESS: When there's a broker price opinion,
9 it's always done by a licensee.

10 COMMISSIONER CARTINELLA: Okay. Thank you.

11 THE WITNESS: Thank you.

12 CHAIRPERSON OPATIK: Wait. Mr. Kizer, you had no
13 questions?

14 MR. KIZER: I do not.

15 CHAIRPERSON OPATIK: I am so sorry, then. I do
16 have a question.

17 So the relationship between the listing broker and
18 the lender is by definition adversarial, so to speak,
19 through the seller?

20 THE WITNESS: Unless the principal is the bank.

21 CHAIRPERSON OPATIK: Right. On a short sale.

22 THE WITNESS: That's right, it is an adversarial
23 relationship.

24 CHAIRPERSON OPATIK: Okay. But -- so if that
25 listing broker were to have blatantly lied somehow to the

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1 negotiator or the lender, would they be free of recourse?

2 THE WITNESS: I cannot imagine us going after a
3 broker. I mean, I would imagine it's a little bit like a
4 situation with an attorney.

5 We're not going to take the listing broker's word
6 for it. We are going to do our own due diligence. And
7 we may bring our own brokers and we're going to run our
8 own AVMs and if necessary we'll do an appraisal or maybe
9 even two.

10 CHAIRPERSON OPATIK: So if it were determined that
11 the -- that the lender did not get the best price in
12 their opinion because they were being misinformed by the
13 broker, then you would not -- you would not --

14 THE WITNESS: Well, there's no form --

15 CHAIRPERSON OPATIK: -- the broker?

16 THE WITNESS: -- for the broker to even inform the
17 lender. We are flat out not going to listen to them.
18 It's irrelevant.

19 You've got somebody who is representing somebody
20 who is trying to get out of the house. We get it. We're
21 not listening to them. What they say bears absolutely no
22 bearing on what we do. They can say anything they want.
23 And that's what they do. They're talking to us, they're
24 saying, "Hey, we think it's worth this."

25 We're checking our numbers and we're saying, "No,

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1 it isn't."

2 CHAIRPERSON OPATIK: Okay.

3 THE WITNESS: Or maybe we're agreeing.

4 CHAIRPERSON OPATIK: Okay. So -- but the real
5 estate agent does negotiate with the negotiator. They do
6 converse. They do talk. They do -- they do try to come
7 to an agreement.

8 THE WITNESS: Well, sure. But, you know, we -- our
9 negotiator, whoever is working for us in this capacity,
10 we've got the number in mind. Now, maybe they can sway
11 us a little bit one way or the other. Maybe we're
12 looking -- you know, we're looking at a whole lot of
13 factors.

14 CHAIRPERSON OPATIK: True. Understood. But if you
15 determine that that -- that the information that swayed
16 you came from the real estate agent, would that then --
17 would that -- would you ever -- would they be in a
18 position to be pursued by the --

19 THE WITNESS: No. No, they don't work for us. We
20 have -- they have no fiduciary obligation to us,
21 whatsoever. They can't. The law is set up that way.

22 CHAIRPERSON OPATIK: Okay. No further questions
23 from me.

24 MALE VOICE: Not me.

25 CHAIRPERSON OPATIK: Okay. The witness is excused.

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EXHIBIT 3

EXHIBIT 3

BEFORE THE REAL ESTATE COMMISSION

JAN 23 2015

STATE OF NEVADA

REAL ESTATE COMMISSION

Robert Akad

JOSEPH R. DECKER, Administrator,
REAL ESTATE DIVISION, DEPARTMENT
OF BUSINESS & INDUSTRY,
STATE OF NEVADA,

Case No. 2014-3324

Petitioner,

DECISION

vs.

JASON ALLEN LOCOCO,

Respondent.

This matter came on for hearing before the REAL ESTATE COMMISSION, STATE OF NEVADA ("Commission") on Wednesday, January 7, 2015, at the Henderson City Hall, Council Chambers Conference Room, 240 Water Street, Henderson, Nevada. Keith E. Kizer, Deputy Attorney General, appeared and prosecuted the Complaint against the licensee, Jason Allen Lococo ("Lococo"), on behalf of Joseph R. Decker, Administrator of the Real Estate Division, Department of Business & Industry, State of Nevada ("Division"). Lococo, along with his attorney, Michael J. Walsh, appeared and participated at the hearing.

It appears to the satisfaction of the Commission that Lococo received lawful notice of the Complaint and that the Commission has jurisdiction over this matter and may proceed to make a determination.

The matter having been submitted for decision based upon the allegations of the Complaint, the Commission now enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

The Commission, based upon the testimony and evidence presented at the hearing, finds by substantial evidence that the following facts have been proven.

1. Lococo, at the relevant times mentioned in this Complaint, has been licensed as a real estate salesperson, license number S.0170529, since May 13, 2011, and is currently in

1 active status and subject to the jurisdiction of the Division and the provisions of NRS chapter
2 645 and NAC chapter 645.

3 2. Steven P. O'Brien ("O'Brien") has been licensed as a real estate broker, license
4 number B.1000912.LLC since November 16, 2011, and was a broker for Harcourts NV1 at the
5 relevant times mentioned in this Complaint.

6 3. Lococo was associated with O'Brien and Harcourts NV1 at the relevant times
7 mentioned in this Complaint.

8 4. With respect to a property Lococo was contracted to sell, Lococo facilitated
9 potential buyer in return for the buyer using Harcourts NV1 in its attempt to buy and resell the
10 property.

11 5. On or about February 4, 2013, Paula and Steven Brummer (the "Brummers")
12 entered into an Exclusive Right to Sell Contract, which engaged Lococo to list and sell real
13 property located at 11 Woodstock Circle, Carson City, Nevada (the "Woodstock Circle
14 Property").

15 6. Lococo had the Brummers sign a Multiple Listing Service waiver.

16 7. On or about March 8, 2013, Northern Nevada Capital, LLC ("NNCL") offered to
17 buy the Woodstock Circle Property, and the Brummers accepted the offer.

18 8. O'Brien acted as the agent for NNCL.

19 9. On or about May 10, 2013, the sale on the Woodstock Circle Property closed
20 with a final purchase price of \$300,000, resulting in Harcourts NV1, via Lococo and O'Brien,
21 receiving both sides of the sales commission.

22 10. On or about September 6, 2013, NNCL resold the Woodstock Circle Property for
23 \$355,000, approximately \$55,500 more than its purchase price.

24 11. For that sale, O'Brien was NNCL's agent, so Harcourts NV1 received the seller's
25 commission on that sale.

26 CONCLUSIONS OF LAW

27 The Commission, based upon the preponderance of the evidence, makes the following
28 legal conclusions.

**Certificate of Service
(NRS 645.680)**

I certify that on the 29th day of January, 2015, I deposited a copy of the foregoing:

DECISION

in the United States Mail, postage pre-paid, in Las Vegas, Nevada, through the State of Nevada mailroom, certified mail addressed to the following respondent at their last known address as follows:

Certified No. 7013 1090 0000 1902 9149

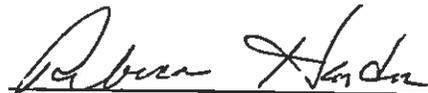
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**Rebecca Hardin
Commission Coordinator**