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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 FONTENOT,

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.

RESPONSE TO JOINT MOTION TO DISMISS

The REAL ESTATE DIVISION OF THE DEPARTMENT OF BUSINESS AND INDUSTRY OF THE STATE OF NEVADA (the "Division") hereby responds to the Joint Motion to Dismiss (the "Motion") filed by Respondents MARSHALL CARRASCO, JOSHUA FONTENOT and KATRINA KARASAWA (the "Respondents").

1 POINTS AND AUTHORITIES

2 I. A MOTION TO DISMISS CANNOT RESOLVE FACTUAL ISSUES

3 Respondents begin their argument by stating what will (or will not) be "the sellers["
4 testimony" at hearing, alleging facts that "probably happened here," and alleging the
5 expenditure of "substantial sums rehabilitating the property, as well as [the] incurring [of] costs
6 associated" therewith. Motion, pp. 3-4. Those factual allegations have neither been
7 presented nor proven. "The dispositive resolution of questions of fact is not part of a motion to
8 dismiss on the pleadings." Breliant v. Preferred Equities Corp., 112 Nev. 663, 668, 918 P.2d
9 314, 317 (1996).

10 Moreover, on a motion to dismiss for a failure to state a claim for relief, the allegations
11 in the Division's Complaints and Notices of Hearing (the "Complaints") must be accepted as
12 true by the Nevada Real Estate Commission (the "Commission"). See Brown v. Kellar, 97
13 Nev. 582, 583, 636 P.2d 874 (1981). The Complaints set forth numerous allegations of
14 Respondents' preferentialism of *specified* buyers over *specified* sellers and the sellers'
15 lenders with respect to *specified* properties, and *specified* actions allegedly undertaken to
16 monetize that preferentialism to benefit those buyers, and the Respondents themselves, at the
17 expense of *other parties* to the real estate transactions. The Division's Complaints also
18 include reference to the particular sections of the statutes and regulations involved - NRS
19 645.252(2), NRS 645.633(1)(h) and (i), NAC 645.600(1) and NAC 645.605(6).

20 In Crucil v. Carson City, 95 Nev. 583, 585, 600 P.2d 216 (1979), the Nevada Supreme
21 Court held that "the pleading of conclusions, either of law or fact, is sufficient so long as the
22 pleading gives fair notice of the nature and basis of the claim." Respondents' Motion does not
23 establish a failure by the Division to state facts upon which a violation of NRS and NAC
24 chapter 645 may be found.

25 II. THE APPLICABLE LAW IS NOT VOID FOR VAGUENESS

26 Respondents also claim that certain statutes and Commission regulations are
27 unconstitutionally vague. Motion, pp. 2, 6-8. Specifically, they contend that the concepts of
28 "gross negligence" and "not dealing fairly" do not provide explanation of "concrete and

1 unambiguous prohibited conduct." Motion, pp. 7-8. Although these terms may be general in
2 nature, they are not void for vagueness.

3 The due process clause does *not* require impossible standards of specificity. Sheriff of
4 Washoe County v. Martin, 99 Nev. 336, 339, 662 P.2d 634, 637 (1983). Rather, the Nevada
5 Supreme Court held that the criterion under which to examine an assertion of vagueness is:

6 whether the statute "either forbids or requires the doing of any act
7 in terms so vague that men of common intelligence must
8 necessarily guess at its meaning and differ as to its application...."
9 Equally important in a facial challenge for vagueness is whether the
10 statute impinges upon First Amendment freedoms. If not, a statute
11 may be stricken as unconstitutionally vague only if it is found to be
12 so "in all of its applications." Further, our standard of review is less
13 strict under a challenge for vagueness where the statute is directed
14 at economic regulations.

12 State v. Glusman, 98 Nev. 412, 420-21, 651 P.2d 639, 644-45 (1982) (citations omitted).

13 Here, Respondents do not claim any impingement upon First Amendment freedoms. Rather,
14 their Motion challenges statutes and regulations directed at economic regulations.

15 In fact, the terms at issue here are part of NRS and NAC chapter 645. They are within
16 the statutory scheme explicitly regulating the professional conduct of real estate licenses. In
17 In re Discipline of Lerner, 124 Nev. 1232, 1245, 197 P.3d 1067, 1077 (2008), the Nevada
18 Supreme Court disciplined a state licensee and denied his facial vagueness challenge to a
19 rule of *professional conduct* when the allegedly vague term's meaning "is readily perceptible in
20 light of authority construing the term." Likewise, the terms at issue here are readily
21 perceptible in light of authority construing them. Under the Court's "less strict" standard of
22 review, the disputed terms in NRS and NAC chapter 645 are not unconstitutionally vague.

23 **III. THE COMPLAINTS ARE NOT BARRED BY RES JUDICATA**

24 Respondents' final argument is that the Complaints against them are barred by the
25 doctrine of administrative re judicata. Motion, p. 8. The Division acknowledges that that
26 argument has some initial merit as the Division is the Petitioner in all these actions before the
27 Commission. However, the complaint against O'Brien involved the *same exact transactions*
28 *and sellers and buyers* as those in the complaints against Lococo and Lewis. Here, the

1 sellers and transactions set forth in the Complaints are *not* the same as those in the
2 complaints against O'Brien, Lococo and Lewis. That is a distinction of significance.

3 Respondents are asking this Commission to bind itself to its Lococo decision without
4 comparing and contrasting the different *factual* allegations between the complaints. In Bailey
5 v. State, 95 Nev. 378, 385, 594 P.2d 734, 738 (1979), the Nevada Supreme Court stated "that
6 the facts and circumstances of each case are to be considered on an individual basis, taking
7 into account the nature of the task and the difficulties encountered." See also Interstate Tel.
8 Coop., Inc. v. Public Utilities Comm'n, 518 N.W.2d 749, 751-52 (S.D. 1994) (res judicata did
9 *not* prevent subsequent lawsuit between *same* parties involved in prior lawsuit in light of fact
10 that subsequent suit involved "*different parcels of land*, at later point in time" because although
11 the court was "considering similar issues, they do not arise from the same set of facts")
12 (emphasis added). Res judicata is inapplicable in such circumstances.¹

13 Respondents' preclusion plea fails even if it is more accurately construed as one
14 invoking the doctrine of *stare decisis*. In Motor Cargo v. Public Serv. Comm'n, 108 Nev. 335,
15 337, 830 P.2d 1328, 1330 (1992), the Court stated that even if an agency "failed to follow
16 some of its prior decisions, the [agency] has not thereby abused its discretion. In Nevada,
17 administrative agencies are not bound by *stare decisis*."

18 In State, Dep't of Taxation v. Chrysler Group LLC, 129 Nev. ___, 300 P.3d 713, 716 n.3
19 (Adv. Op. 29, May 2, 2013), the respondent argued "that it is entitled to a refund because an
20 administrative law judgment granted one upon similar facts in the past and, because the
21 statutes have not since been amended, there is no legal basis for a different decision." The
22 Nevada Supreme Court, relying on Motor Cargo, rejected that argument because Nevada
23 administrative agencies are not bound by *stare decisis*. *Id.* The Division is not barred from
24 pursuing its Complaints against Respondents, and the Commission is not barred from hearing
25 the Complaints on their merits.

26 . . .

27
28 ¹ Respondents' conclusory statement claiming a clear "arbitrary and capricious result" (Motion, p. 5) would be unfounded if the Commission finds *factual* differences of consequence among the six complaints.

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

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IV. CONCLUSION

Respondents' Motion fairly identifies disagreements with the Division over whether Respondents' alleged conduct constitutes statutory and/or regulatory violations. A hearing before this Commission is the appropriate avenue for the resolution of those disagreements.

DATED this 30th day of March, 2015.

ADAM PAUL LAXALT
Attorney General

By: Keith E. Kizer
KEITH E. KIZER
Deputy Attorney General
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
(702) 486-3326
Attorneys for Real Estate Division

1 CERTIFICATE OF SERVICE

2 I do hereby certify that I am an employee of the Office of the Attorney General and that
3 on the 30th day of March, 2015, I served a true and accurate copy of the RESPONSE TO
4 JOINT MOTION TO DISMISS by mailing via United States mail, first class, postage prepaid,
5 to:

6
7 James M. Walsh, Esq.
8 Walsh, Baker & Rosevear
9 9468 Double R Boulevard, Suite A
10 Reno, NV 89521

11 *Danielle Wright*
12 An Employee of the Office of the Attorney General