

APR 01 2015

BEFORE THE REAL ESTATE COMMISSION

STATE OF NEVADA

REAL ESTATE COMMISSION
BY *[Signature]*

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

Case No. REN 14-05-07-047

Petitioner,

vs.

KYLE KRCH,

Respondent.

RESPONSE TO 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 Motion to Dismiss (the "Motion") filed by Respondent KYLE KRCH (the "Respondent").¹

POINTS AND AUTHORITIES

I. THE COMPLAINT IS SUFFICIENTLY DESCRIPTIVE

Respondent claims that the Division's Complaint and Notice of Hearing (the "Complaint") provided him with insufficient notice as to the alleged violations. Motion, pp. 2, 13-15. NRS 233B.121, the statute relied upon by Respondent for his argument, provides, in pertinent part:

1. In a contested case, all parties must be afforded an opportunity for hearing after reasonable notice.
2. The notice must include:
 - (a) A statement of the time, place and nature of the hearing.
 - (b) A statement of the legal authority and jurisdiction under which the hearing is to be held.
 - (c) A reference to the particular sections of the statutes and regulations involved.
 - (d) A short and plain statement of the matters asserted....

¹ Michael Cullum Harding, respondent in Case No. 2014-3378, Jason Jairam, respondent in Case No. 2014-3377, and Anita Spencer, respondent in Case No. 2014-3376, all pending before the Nevada Real Estate Commission (the "Commission"), have joined in this Motion.

1 NRS 233B.121(1) and (2) (emphasis added). Likewise, Rule 8(a)(1) of the Nevada Rules of
2 Civil Procedure (*cited in Motion*, p. 13) requires that "a short and plain statement of the claim
3 showing that the pleader is entitled to relief" be included in a civil complaint. The Division's
4 Complaint includes all the items listed in NRS 233B.121(2). Complaint, pp. 1-10.

5 Moreover, the Division's Complaint sets forth numerous allegations of Respondent's
6 preferentialism of *specified* buyers over *specified* sellers and the sellers' lenders with respect
7 to *specified* properties, and *specified* actions allegedly undertaken to monetize that
8 preferentialism to benefit those buyers, and the Respondent himself, at the expense of *other*
9 *parties* to the real estate transactions. E.g., Complaint, ¶¶ 7, 8, 10, 13, 17, 18, 19, 21, 24, 28,
10 29, 31, 37, 38, 39, 43, 46, 47, 48, 50, 55, 58, 61, 62, 63, 67, 71, 72, 79, 82, 85, 88, 89, 92, 95,
11 98, 99.² The Division's Complaint also includes reference to the particular sections of the
12 statutes and regulations involved. Complaint, ¶¶ 101-105 (referencing NRS 645.252(1)(c)
13 and (2), NRS 645.633(1)(h) and (i), NAC 645.600(1), NAC 645.605(6) and NAC
14 645.640(1)(a)).

15 In Crucil v. Carson City, 95 Nev. 583, 585, 600 P.2d 216 (1979), the Nevada Supreme
16 Court held that "the pleading of conclusions, either of law or fact, is sufficient so long as the
17 pleading gives fair notice of the nature and basis of the claim." Respondent's Motion does not
18 establish a failure by the Division to allege facts that constitute alleged violations of NRS and
19 NAC chapter 645. It also does not substantiate Respondent's claim of being "left completely
20 in the dark." Motion, p. 15. The Division's Complaint is proper.

21 II. THE APPLICABLE LAW IS NOT VOID FOR VAGUENESS

22 Respondent also claims that certain statutes and Commission regulations are
23 unconstitutionally vague. Motion, pp. 2, 11-13. Specifically, he argues "that a person of
24 ordinary intelligence" could not understand the meaning of "reasonable skill and care,"
25 "absolute fidelity," and "dealing fairly" with respect to possible violations. Motion, p. 12.
26 Although these terms may be general in nature, they are not void for vagueness.

27
28 ² On a motion to dismiss for a failure to state a claim for relief, the allegations in the Division's Complaint must be accepted as true by the Commission. See Brown v. Kellar, 97 Nev. 582, 583, 636 P.2d 874 (1981).

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

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

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

11 Here, Respondent does not claim any impingement upon First Amendment freedoms. Rather,
12 his Motion challenges statutes and regulations directed at economic regulations.

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

22 **III. THE COMPLAINT IS NOT BARRED BY COLLATERAL ESTOPPEL**

23 Respondent's main argument is that the Complaint against him is barred by the
24 doctrine of collateral estoppel. Motion, pp. 1, 8-10. The Division acknowledges that that
25 argument has some initial merit as the Division is the Petitioner in all these actions before the
26 Commission. However, the complaint against O'Brien involved the *same exact transactions*
27 *and sellers and buyers* as those in the complaints against Lococo and Lewis. Respondent
28 himself recognizes those complaints "shared the same alleged facts." Motion, p. 7. Here, the

1 sellers and transactions set forth in this Complaint are *not* the same as those in the complaints
2 against O'Brien, Lococo and Lewis.

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

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

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

27 Even assuming this Commission's ruling in Lococo gave rise to some sort of legal
28 preclusion, that preclusion would not be available as to *this* Respondent. As acknowledged

1 by Respondent, the Complaint against him includes an allegation that he also violated NRS
2 645.252(1)(c) and/or NAC 645.640(1)(a) on *six* occasions by failing to disclose in writing that
3 he had an interest in the transaction or was acquiring, leasing or disposing of the property for
4 himself or for a member, firm, or entity with which he has such a relationship. Motion, p. 2
5 (citing Complaint, ¶ 104). Such a claim was *not* made against Lococo, O'Brien, or Lewis. The
6 Division contends that this *additional* allegation, if proven, provides a strong basis that
7 Respondent did not deal fairly or act with absolute fidelity in the transactions set forth in the
8 Complaint (as well as a basis for finding that he violated NRS 645.252(1)(c) and/or NAC
9 645.640(1)(a)).

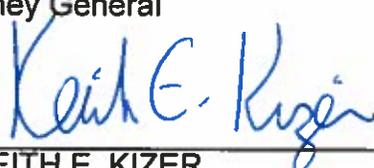
10 Finally, Respondent's references to NRS 34.160, 34.320 and 233B.135(3) are
11 misplaced.³ See Motion, pp. 10-11. While NRS 233B.135 sets forth the standard of review
12 for a petition for judicial review, it is not a jurisdictional constraint. This Commission has
13 jurisdiction to hear this Motion, and if the Motion is unsuccessful, to hear the Complaint.

14 IV. CONCLUSION

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

18 DATED this 30th day of March, 2015.

19 ADAM PAUL LAXALT
20 Attorney General

21 By: 

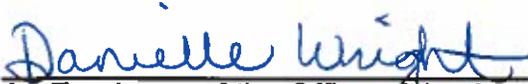
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28 ³ It is difficult to understand Respondent's claim that he is entitled to "immediate writ proceedings in the District Court" as the Commission's proceedings on the Motion and/or Complaint provide Respondent with "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170.

CERTIFICATE OF SERVICE

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

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