

FILED

APR 27 2015

REAL ESTATE COMMISSION
BY *[Signature]*

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

10
11 JOSEPH R. DECKER, Administrator, REAL
12 ESTATE DIVISION, DEPARTMENT OF
13 BUSINESS & INDUSTRY, STATE OF
14 NEVADA,

Case No. REN 14-05-07-047

Petitioner,

**REPLY IN SUPPORT OF
MOTION TO DISMISS**

vs.

15 KYLE KRCH,

Respondent.

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19 Respondent, Kyle Krch ("Krch"), hereby submits this Reply in support of his Motion to
20 Dismiss the Complaint filed by the Administrator of the Real Estate Division of the
21 Department of Business and Industry of the State of Nevada (the "Division") on December 3,
22 2014. This Reply is supported by the following Points and Authorities.¹

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28 ¹ Respondents, Michael Cullum Harding (Case No. 2014-3378), Jason A. Jairam (Case No. 2014-3377), and Anita Spencer (Case No. 2014-3376), filed joinders to Krch's Motion to Dismiss.

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POINTS AND AUTHORITIES

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2 1. The Division Ignores Binding Nevada Law, Which Requires Dismissal of the
3 Krch Complaint.

4 The Division's Response to Krch's Motion does not do a number of things. First, the
5 Division does not dispute, and therefore concedes, that issue preclusion (or collateral estoppel)
6 applies to these administrative proceedings as stated in Krch's Motion. See Krch's Motion to
7 Dismiss, at page 9, lines 6-13.

8 Second, the Division does not bother to address or argue against a single case that is
9 mentioned in Krch's argument concerning issue preclusion, let alone address the determinative
10 case referenced in the Motion – Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 194 P.3d 709
11 (2008). The reason for the Division's avoidance of these cases is clear – it had no compelling
12 response to Krch's argument, and it could not deal head on with the fact that the Five Star
13 Capital decision and other case law requires dismissal of this case.

14 Instead, the Division suggests that because the dismissed cases involve different facts
15 and different transactions, issue preclusion should not apply. The Division is wrong. It is
16 wrong because it ignores the very nature of the doctrine, which deals with issues that were
17 previously ruled upon. Issue preclusion necessarily focuses on the legal issue and does not get
18 mired in the factual minutiae of a case. Of course, all cases deal with slightly different facts,
19 but issue preclusion is concerned with the legal issue that sits at the very core of a particular
20 case.

21 As detailed in the Motion, the complaints all deal with the same statutes, the same
22 regulations, and the same legal theory that the Division is pursuing as to why the statutes and
23 regulations were allegedly violated by Krch and others. See Krch's Motion to Dismiss, at
24 pages 3-5. In the Lococo matter, the Division framed the legal issue for the Commission, and
25 the Division asked for the Commission's determination on the issue of "whether the way this
26 [property] was marketed and sold and then resold rises to the level of a violation. And that
27 violation would be not dealing fairly with the . . . sellers, not representing the sellers with
28 absolute fidelity and not dealing fairly with the sellers' mortgage lender." See Exhibit "12" to

1 Krch's Motion to Dismiss. at page 8, lines 13-18. Based on this question, the Division
2 "wanted to get a determination from the [Commission] on whether this was done with respect
3 to the NRS 645.633(1)(h) and (1)(i) pursuant to NAC 645.605(6) and/or NRS 645.252(2)."

4 See id. at page 11, lines 17-20.

5 This issue in the Lococo matter – and the issue that the Division took pains to avoid in
6 its Response – is the identical issue in the Krch Complaint and all of the other complaints too.
7 Issue preclusion bars the re-litigation of identical issues that have been previously decided by
8 the Commission. Because the Commission has previously decided this very issue, the Krch
9 Complaint must be dismissed.

10 In its Response, the Division does attempt to invoke the doctrine of stare decisis. The
11 doctrine is inapplicable because it involves courts dealing with legal precedent concerning
12 similar issues, but completely different parties. In contrast to that doctrine, issue preclusion
13 requires identical issues to be present, and it requires that the party against whom preclusion is
14 asserted in the new case to have been a party in the prior proceeding. All of these elements are
15 present in this case. Moreover, as previously noted, the Division does not dispute that issue
16 preclusion does apply to administrative proceedings such as this.

17 Third, the Division's Response ignored Krch's alternative argument that Krch owed no
18 fiduciary duty to the lenders involved in the transactions. See Krch's Motion to Dismiss, at
19 page 11, lines 24-28. Thus, even if the Commission somehow does not apply issue preclusion,
20 the alleged violations regarding lenders must be dismissed.

21 Simply put, Five Star Capital and other applicable case law requires dismissal of this
22 case. The Division has already dismissed two complaints based on the Commission's previous
23 decision on these issues, and the Commission should dismiss the Krch Complaint because the
24 Division has refused to do so for apparently political or media-related reasons.

25 2. The Statutes and Regulations Are Vague, and the Division's Argument Is
26 Misplaced.

27 Again, in responding to Krch's Motion, the Division's Response curiously does not
28 address or argue against a single case that is mentioned in Krch's argument concerning the

1 vagueness of the relevant statutes and regulations. Instead, the Division cites a Nevada
2 Supreme Court case concerning the void for vagueness doctrine in a First Amendment context,
3 but then the Division goes on to concede that the very case it just cited is actually irrelevant
4 because the First Amendment is not a part of the Krch case at all. See Division's Response, at
5 page 3, lines 1-12.²

6 Importantly, the Division again does not dispute, and therefore concedes, a central
7 point of Krch's argument; namely that the void for vagueness doctrine applies with equal force
8 to these proceedings. See Krch Motion to Dismiss, at page 12, lines 11-16. And although the
9 Division suggests that a person should understand terms such as "deal fairly" and "absolute
10 fidelity," the Division's focus is necessarily misplaced under the relevant case law.

11 Specifically, in the Krch Complaint, the Division alleged violations of NRS
12 645.633(1)(h), NRS 645.633(1)(i), NRS 645.252(2), and NAC 645.605(6). Yet, in each of
13 these instances the statute or regulation "fails to define the . . . offense with sufficient
14 definiteness that a person of ordinary intelligence cannot understand what conduct is
15 prohibited," which is the applicable standard as detailed in Krch's Motion. See Krch Motion
16 to Dismiss, at pages 11-12. Indeed, NRS 645.252(2) requires an agent such as Krch to
17 "exercise reasonable skill and care," but the statute fails to articulate *how* Krch is supposed to
18 satisfy this requirement and it fails to give any hint as to what conduct is or is not prohibited.
19 Also, NAC 645.605(6) states that an agent must "deal fairly" in the transaction, but again this
20 regulation fails to detail *how* Krch is supposed to satisfy these requirements and it fails to give
21 any hint as to what conduct is or is not prohibited. How is an agent supposed to know when
22 s/he is "dealing fairly" with another when the penalty for not doing so can be the loss of his/her
23 license and when the Division may decide that an act by one person is objectionable but the
24 same act by another is not objectionable? The problem of statutory and regulatory vagueness,
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26 ² Although the Division does cite to In re Discipline of Lerner, 124 Nev. 1232, 1245, 197 P.3d 1067, 1077 (2008) in
27 support of its argument, the Court in Lerner emphasized that the vague phrase must also be interpreted along with
28 case law that helped to define the vague term. Here, there is no such case law, and the statutes and regulations must
stand or fall on their own. Krch contends, of course, that the statutes and regulations are impossibly vague and
therefore void.

1 which is present here, necessarily leads to inconsistent, prejudicial, and unfair results and
2 inconsistent, prejudicial, and unfair enforcement by the Division. At bottom and as Krch
3 argues in other parts of his Motion and Reply, Krch simply asks to be treated consistently and
4 fairly, both by the Division and by the Commission.

5 A fundamental tenet of our legal system is that “laws which regulate persons or entities
6 must give fair notice of conduct that is forbidden or required... [t]his requirement of clarity in
7 regulation is essential to the protections provided by the Due Process Clause of the Fifth
8 Amendment.” F.C.C. v. Fox Television Stations, Inc., 567 U.S. at ___, 132 S.Ct. at 2317
9 (citing United States v. Williams, 553 U.S. 285, 304 (2008)). Because all of the statutes and
10 regulations referenced in the Krch Complaint fail to articulate any concrete and unambiguous
11 conduct that is prohibited, these statutes and regulations are unconstitutionally vague and are
12 therefore void. Pursuant to the void for vagueness doctrine, the Krch Complaint must therefore
13 be dismissed.

14 It must also be emphasized that when you take the vagueness of the statutes and
15 regulations and compound it with the continued and just as problematic vagueness of the
16 Complaint, which is discussed below, the Division has put Krch and others in an impossible
17 position that violates Krch’s substantive and procedural Due Process rights.

18 3. The Krch Complaint Fails to Describe the Alleged Violations, and the
19 Division’s Attempt to Expand the Scope of the Complaint in Its Response to Krch’s Motion
20 Only Proves Krch’s Point.

21 Krch respectfully requests that the Commission simply reads the Krch Complaint. The
22 “Factual Allegations” section cites certain alleged facts about the various transactions and then
23 immediately after that section, the Complaint includes a “Violations” section. In neither of
24 these sections will one find any allegations that state or specify that Krch did or did not
25 perform any particular act with respect to a particular transaction. See Exhibit “1” to Krch
26 Motion to Dismiss. In neither of these sections will one find what alleged conduct violated a
27 specific statute or regulation. See generally id.

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1 These deficiencies of specificity in the Complaint are not legal technicalities; instead,
2 they cut to the heart of Due Process requirements. Courts have expressly stated that “[m]ere
3 recitals of the elements of a cause of action, supported only by conclusory statements, do not
4 suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). And Courts in Nevada have been
5 consistent in requiring that a complaint must, at a minimum, “set forth sufficient facts to
6 establish all necessary elements of a claim for relief so that the adverse party has adequate
7 notice of the nature of the claim and relief sought.” Hay v. Hay, 100 Nev. 196, 198, 678 P.2d
8 672, 674 (1984) (citing Johnson v. Travelers Ins. Co., 89 Nev. 467, 472, 515 P.2d 68, 71
9 (1973)).

10 In applying these standards, a Nevada Court dismissed a complaint’s allegations when
11 the plaintiffs asserted conclusory allegations against the defendant: “The Couturiers fail to
12 allege any facts to explain *how* their units are sub-par in quality . . . [and] [t]his is merely a
13 conclusory allegation that does not satisfy the pleading standards of Iqbal and Twombly.”
14 Couturier v. American Invsco Corp., 10 F.Supp.3d 1143, 1152 (2014) (emphasis added).

15 Here, the Krch Complaint is plainly deficient. Under the specific and applicable case
16 law that Krch cited in his Motion, Krch has not been provided “adequate notice of the nature of
17 the claim” or put on notice regarding *why* or *how* he allegedly violated the statutes or
18 regulations.

19 In response, the Division would have the Commission read into the Complaint alleged
20 facts and theories that are simply not present. For the first time and in order to save its vague
21 Complaint, the Division articulates notions of supposed “preferentialism” in relation to Krch’s
22 alleged conduct. See Division’s Response, at page 2, lines 5-14. None of these new notions
23 are stated in the Complaint. It was certainly in the Division’s power to be specific with its
24 allegations and to be specific as to what Krch allegedly did or did not do wrong regarding a
25 statute or regulation, but on all accounts, the Division failed. And because of this failure, the
26 Complaint must similarly fail.

27 Accordingly, the Krch Complaint’s vagueness and lack of notice concerning the
28 allegations against him violates Krch’s substantive and procedural Due Process rights because

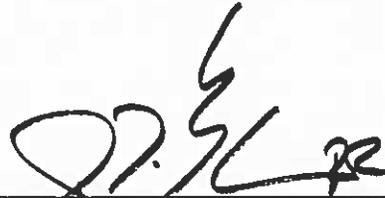
1 he is simply not in a position to respond to these vague and conclusory allegations. Krch
2 cannot mount a defense under NRS 233B.121(4), Couturier, or Iqbal under these
3 circumstances, and the Krch Complaint must therefore be dismissed.

4 CONCLUSION

5 As stated in the Motion to Dismiss and for the above-stated reasons, all allegations and
6 alleged violations set forth in the Krch Complaint – except for the alleged violation detailed in
7 Paragraph 104 – must be dismissed with prejudice.

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

10 DATED this 24th day of April 2015.

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PROOF OF SERVICE

I, Martha Hauser, declare:

I am employed in the City of Reno, County of Washoe, State of Nevada by the law offices of Holland & Hart LLP. My business address is 5441 Kietzke Lane, Second Floor, Reno, Nevada 89511. I am over the age of 18 years and not a party to this action.

I am readily familiar with Holland & Hart LLP's practice for collection and processing of its outgoing mail with the United States Postal Service. Such practice in the ordinary course of business provides for the deposit of all outgoing mail with the United States Postal Service on the same day it is collected and processed for mailing.

On April 24, 2015, I served the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS** by U.S. mail and UPS Next Day Air by placing true copies thereof in Holland & Hart LLP's outgoing mail as follows:

U.S. Mail

Real Estate Division
State of Nevada
Attn: Legal Administrative Officer
2501 East Sahara Avenue
Las Vegas, Nevada 89104-4137

UPS Next Day Air

Keith E. Kizer
Deputy Attorney General
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on April 24, 2015.



Martha Hauser