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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, Petitioner, vs. SUSAN KAY LOWE, Respondent.	Case No.: REN 14-04-11-040
JOSEPH R. DECKER, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS & INDUSTRY, STATE OF NEVADA, Petitioner, vs. MICHELLE PLEVEL, Respondent.	Case No.: REN 14-06-06-061

JOINT MOTION TO DISMISS

COMES NOW, Respondent SUSAN KAY LOWE (hereinafter "Lowe"), by and through her undersigned counsel Cassell von Baeyer, Esq. of Incline Law Group, LLP, and Respondent, MICHELLE PLEVEL (hereinafter "Plevel"), by and through her undersigned counsel, Roderic A. Carucci, Esq., and hereby move the Real Estate Commission of the State of Nevada (hereinafter "Division") to dismiss the Complaint in the above-entitled matters. The basis of Respondents' Motion is the failure of the Complaints to state facts upon which violations can be found, and the vague and arbitrary nature of the statutes sought to be enforced, and the violations alleged.

STATEMENT OF FACTS

The Complaint at issue before the Commission against Lowe is the alleged violation of NRS 645.600(1) for failure to supervise broker-salesperson Plevel with regard to Plevel's involvement in the sale of properties located at: (1) 1725 Gold Belt Drive, Reno, Nevada (hereinafter the "Gold Belt Property"); (2) 2219 Big Trail Circle, Reno, Nevada (hereinafter the "Big Trail Circle"); (3) 7075 Jermann Drive, Sparks, Nevada (hereinafter the "Jermann Drive Property"); (4) 12240 Jean Way, Reno, Nevada (hereinafter the "Jean Way Property"); (5) 1765 Wyoming Avenue, Reno, Nevada (hereinafter the "Wyoming Avenue Property"); (6) 17090 Amethyst Drive, Reno, Nevada (hereinafter the "Amethyst Property"); (7) 1795 Trabert Circle, Sparks, Nevada (hereinafter the "Trabert Property"); (8) 11785 Heartpine Street, Reno, Nevada (hereinafter the "Heartpine Property"); (9) 6475 Marissa Anne Court, Sparks, Nevada (hereinafter the "Marissa Anne Property"); and (10) 2835 Santa Ana Drive, Sparks, Nevada (hereinafter the "Santa Ana Property"). Lowe previously filed an Application for More Definite and Detailed Statement on December 29, 2014 seeking an explanation of what violations were even being alleged since it was not at all clear from the Complaint. Lowe received a Response to Application for More Definite and Detailed Statement dated January 2, 2015 (hereinafter "Response to Application") which stated in part: "Since the Division's Complaint "state[d] the matters in detail at the time the notice [was] served" on the Respondent as required by NRS 233B.121(2), a more definite and detailed statement is neither required nor needed."

The Plevel Complaint, at issue before the Commission, is the alleged violation of NRS 645.633(1)(h), pursuant to NAC 645.605(6) and / or NRS 645.252(2), in the same 10 sales transactions,

for not dealing fairly with the 10 named sellers and not dealing fairly with the 10 named sellers' lenders.

The Lowe Complaint alleges that Lowe "violated NAC 645.600(1) on ten occasions by failing to maintain adequate supervision of Plevel" who was a licensed real estate broker-salesperson at Chase International where Lowe was a broker. The basis for each alleged violation is the sale of each property in a short sale transaction and then the subsequent resale of the properties in an unrelated transaction in which Plevel was not involved. On these limited facts and allegations, and without addressing the particular circumstances surrounding the need for the initial sale and the improvements made to each property after the initial sale, and without interviewing any seller/homeowner, the Division alleges that Lowe violated NAC 645.600(1) by failing to maintain adequate supervision of Plevel and that Plevel violated her duty to deal fairly with the sellers. The Division further alleged that Plevel violated a duty to deal fairly with the seller's lender, where no such duty exists as a matter of law. While the Complaint against Lowe does not specifically articulate any alleged violations by Plevel of which Lowe failed to supervise, in Petitioner's Response to Lowe's Application, it alleges that "a broker-salesperson associated with the Lowe engaged in preferentialism of specified buyers over the specified sellers and the sellers' lenders, and sets forth actions allegedly undertaken to monetize that preferentialism to benefit those buyers, the broker-salesperson and the real estate firm associated with Lowe, at the expense of the other parties to the real estate transactions." It goes on to state that "the real estate broker-salesperson is alleged to have violated NRS 645.633(1)(h), pursuant to NAC 645.605(6) and/or NRS 645.252(2), by not dealing fairly with the sellers and the sellers' lenders based on the *same factual allegations* contained in the Complaint here."

Each property transaction described in the Complaint was a distressed property that was substantially underwater (i.e. the properties were worth much less than was owed) and each of the sellers were either in default under their mortgages or the properties were scheduled for foreclosure. Six out of the ten sellers had received a Notice of Default which was recorded against their property. See **Exhibit 1**. The short sale of each property prevented the foreclosure in each case and was therefore mutually beneficial to the seller of the property and the lender for each property.

Many, if not all of the ten transactions involved a seller who had previously been denied a loan modification. All of the sellers wanted to rid themselves of the home as quickly as possible through a short sale, with the condition of the short sale being forgiveness of the loan deficiency by the lender. In each case forgiveness of debt was obtained by Plevel. Thus, each seller obtained the benefit of the bargain sought: short sale of an underwater home and forgiveness of the deficiency.

Each of the sellers sought to accomplish the short sale as quickly as possible and did not want to be confronted with the possibility of a short sale buyer seeking financing who fell out of the transaction after the sale had been approved by the lender. Thus, only cash buyers were sought and procured. Plevel did not have a single preferred buyer; the ten transactions cited demonstrate multiple buyers.

Plevel did not represent the short sale buyer in any subsequent sale transaction, sometimes referred to as a "flip." Neither Plevel nor Lowe have knowledge of repairs or improvements made to a home subsequent to the short sale. Plevel and Lowe also lack any percipient knowledge of any appreciation or profit taken benefitting the short sale buyer on a subsequent sale, as they had no involvement with such resales.

It is the Division's position that they "believe" that the transactions as alleged <u>may</u> be suspect. They speculate that, by additional marketing, the lender may have received additional funds and is seeking what presents itself as an advisory opinion on novel legal theories. See Transcript p. 11and p. 116.

This Commission's authority is limited to those powers specifically set forth by statute, the Commission has no general or common law powers but only those that have been conferred expressly to it. *Andrews v. Nevada State Board of Cosmetology*, 86 Nev. 207, 467 P.2d 96 (2007). No place in the statutory grant of authority is the Commission given the power to use the formal complaint procedure for contested matters to render advisory opinions or to broaden statutory authorities, such as the Division seeks here. As will be shown, Respondents have violated no statutes or duties owed to the lender or to the sellers.

JANUARY HEARING

The alleged violations at issue have already been adjudicated against one other unrelated defendant and the Division found no violations in almost identical factual circumstances as those

alleged in the Complaints against Plevel and Lowe. It is important to note that the Division heard the case against Respondent Jason Allen Lococo (hereinafter "Lococo"), Case No. 2014-3324, wherein the same causes of action, surrounding almost identical facts as those at issue here, were heard and adjudicated. The Division similarly found that Lococo did not violate NRS 645.633(1)(h) pursuant to NAC 645.605(6) and/or NRS 645.252(2), with respect to dealing fairly with the Brumers (seller) and with respect to dealing fairly with the Brummers' mortgage lender, *see Transcript* attached as **Exhibit 2**, P. 128-138, because the Division found that <u>neither the agent nor the broker owes any duty to a seller's lender in a short sale</u>. *Id.*

The decision in Lococo was based on factual circumstances that were nearly identical to those asserted in this Complaint. The facts at issue in Lococo include a short sale of a property and then a later resale of the property at a higher price. The Division's decision in that case sets a strong precedent that pursuant to current statutes a) agents/brokers owe no duty to a seller's lender; b) there is no inherent violation in a properly disclosed dual agency; and c) the subsequent resale of property purchased in a short sale for a profit is not inherently a violation of any applicable statute governing real estate sales person/brokers.

In fact, as a result of the Lococo decision, the Commission immediately dismissed the similarly situated case against Steven P. O'Brien (hereinafter "O'Brien"), Case No. REN 14-05-02-042. Shortly thereafter, the Division voluntarily dismissed its Complaint against Hope Lewis, presumably because it recognized that it could not sustain any action against her based on the findings in the Lococo case.

It appears that the only reason other defendants, such as Plevel and Lowe, have not similarly been dismissed is the unfounded witch hunt being conducted by the Reno Gazette Journal (hereinafter "RGJ"). Jason Hidalgo, *Short Sale Flipping Puts Housing Rebound on Shaky Ground*, RGJ, April 20, 2014; Jason Hidalgo, *RGJ Investigates: Questionable short sales down, but not out in Nevada*, RGJ, December 21, 2014. It is worth noting that the reporters of the RGJ have no expertise in real estate, no expertise in short sales, no expertise in interpreting the Nevada Revised Statutes, and no authority to declare a violation of the statues. Notably, the RGJ articles admit and state that none of the alleged acts are illegal in Nevada. *Id.*

DISCUSSION

The Division has not offered any facts which prove any violation of any governing statute. Rather it has attempted to twist and wrap an unfounded and unprecedented interpretation of existing statutes around some novel theory that agents and brokers somehow owe some duty to a sellers' lender in a short sale transaction. Additionally, without recognizing all of the potential consequences of a foreclosure, and the benefits to a seller of a short sale of distressed real estate, the Division has, in this case, distorted the duties owed by an agent to a party to the transaction.

In order to understand the facts at issue in this case, all facts surrounding each individual property must be analyzed to determine whether any law or statute was violated by Plevel. To determine whether Lowe failed to supervise, the Division must consider the facts and allegations as set forth in the Complaint against Plevel. Lowe cannot have failed in her duty to supervise if Plevel, the agent, did not fail in her duty to her clients in the ten transactions alleged in the complaints. However, it appears from the documents provided by the Division (documents numbered 003-407) pursuant to its Notice of Documents Filed December 3, 2014, that neither the Division nor the Attorney General's Office conducted any substantive investigation of any of the transactions involved. No agent of the Division spoke with any of the sellers. No agent of the Division spoke with any of the buyers. No one spoke with any of the lenders. No one appears to have reviewed the public property records to see how many of these properties were in the formal foreclosure process. In short, no one made any investigation at all to assess whether any party was, or even felt, they had been harmed or damaged in these transactions. Without any substantive investigation, the Division has simply assumed that either the seller or the lender was harmed in these transactions. The allegations are based on an alleged violation of the duty of care Plevel owed to the seller and the lender simply on the factual basis that each of the properties were sold at a higher price several months after the original short sale. Had the Division conducted any investigation by simply interviewing any of the sellers or lenders of the properties referenced in the Complaints, it would have been apparent that any allegations of gross negligence cannot stand.

Each transaction involved a short sale where the seller was in danger of losing his/her property at a foreclosure sale. Each seller contacted Plevel for help and requested that she find a buyer on terms

set in conformance with the short sale terms that the bank would accept, which Plevel did. The primary interest of each of the sellers was to obtain forgiveness of debt from the lender upon completion of the short sale. This was accomplished in each case by Plevel. Further, an actual investigation of the circumstances of each short sale would have revealed that the purchasers were able to resell the properties at a profit because they improved the properties, they removed the taint of a distressed sale and they risked their investment by correctly forecasting overall increasing market values. Neither Plevel nor Lowe participated or benefited in any way in any resale of these ten properties. The fact that these investors made money, as their stakeholders would expect, does not by any stretch of the imagination mean that the sellers or the lenders were disadvantaged or harmed in any way to the advantage of Plevel or Lowe.

1. **The Division is precluded from asserting the same alleged violations that were previously rejected by the Commission, and the Commission must therefore dismiss the Complaint against Plevel/Lowe.**

The doctrine of issue preclusion or collateral estoppel bars re-litigation of an issue when: (1) the party against whom preclusion is asserted was either a party to the prior proceeding or in privity with a party; (2) the prior proceeding resulted in a final ruling on the merits; (3) there was a full and fair opportunity to litigate the identical issue in the prior proceeding; and (4) the issue to be decided in the present case is identical to an issue decided in the prior proceeding. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008); see also *Syverson v. IBM Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007).

Collateral estoppel can be used offensively or defensively. Offensive use of collateral estoppel is used by a plaintiff to prevent a defendant from relitigating an issue that the defendant unsuccessfully litigated in another case against the same or a different party. In contrast, the defensive use of collateral estoppel "occurs when a defendant seeks to prevent the plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.4 (1979). Thus, issue preclusion applies in cases where the parties are not identical (*Jacobs v. CBS Broadcasting, Inc.*, 291 F.3d 1173, 1176 n. 2 (9th Cir. 2002)), and defensive collateral estoppel "precludes a plaintiff from relitigating identical issues by merely switching adversaries." *Parklane Hosiery Co.*, 439 U.S. at 329.

Courts have long recognized the important reasons for preventing serial plaintiffs from acting with impunity. Indeed, the doctrine of collateral estoppel has the dual purpose of protecting litigants from the burden of relitigating an identical issue that has been litigated with the same or different party and of promoting judicial economy by preventing needless litigation. *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 880 (9th Cir. 2007); see also *Parklane Hosiery Co.*, 439 U.S. at 326. Put simply, courts acknowledge "the extremely important policy underlying the doctrine of collateral estoppel – that litigation of issues at some point must come to an end." *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 463 (5th Cir.), cert. denied, 404 U.S. 940 (1971).

Additionally, issue preclusion applies to administrative proceedings. *Campbell v. State, Dep't of Taxation,* 108 Nev. 215, 218, 827 P.2d 833, 835 (1992) (citations omitted); *Jerry's Nugget v. Keith*, 111 Nev. 49, 54, 888 P.2d 921, 925 (1995). This makes intrinsic sense because when governmental or administrative bodies assert a position on matters of law or policy, they have an obligation to explain themselves and to be consistent. And if not, consistency is enforced through the application of issue preclusion. *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984) (approving defensive collateral estoppel against the government).

In this case, it is clear that issue preclusion applies to prevent the Division from relitigating against Plevel/Lowe previously litigated issues that have already been before and decided by the Commission. The Division litigated the same alleged violations and the same legal theories in the Lococo matter as cited in the Plevel matter; namely, alleged violations of NRS 645.633(1)(h) (Gross Negligence), NRS 645.252(2) (Reasonable Care), and NAC 645.605(6) (Absolute Fidelity). Similarly, the Division similarly dismissed the O'Brien matter again with identical issues as those alleged in the Lowe Complaint; namely the alleged violation of NAC 645.600(1).

In the Lococo hearing, the Division had a full and fair opportunity to litigate these identical issues and alleged violations, and the Lococo matter resulted in a final ruling on the merits in which the Commission rejected the Division's legal arguments in totality. See **Exhibit 2**. Because the Division is a party to the Lococo proceeding and these proceedings and because all of the *Five Star Capital* elements are met, the Division is precluded from relitigating against Plevel/Lowe the same alleged violations that were rejected by the Commission.

In practical terms, the Division already recognized the public policy benefit in defensive collateral estoppel when it dismissed the O'Brien Complaint and the Lewis Complaint after the Commission rejected the Division's arguments in the Lococo matter. Not only did that decision protect O'Brien and Lewis from the burden of relitigating an identical issue that had already been before the Commission as a matter of "first impression," but it also promoted judicial economy by preventing needless litigation from both the Division's perspective and the perspective of O'Brien and Lewis. Now, as it pertains to Plevel/Lowe, they too should receive the same legal and equitable treatment that O'Brien and Lewis received. Law and equity demand dismissal in this case, and for these reasons, the Plevel and Lowe Complaints must be dismissed.

Lastly, it is important to note that by failing to treat Plevel, Lowe, and the other respondents the same as Lococo, O'Brien, and Lewis – which is, of course, what issue preclusion requires the Division and the Commission to do – the Division is also abusing its discretion, acting in an arbitrary and capricious manner, and acting in excess of its statutory authority, all of which subjects the Division and the Commission to judicial review under NRS 233B.135(3) as well as immediate writ proceedings in the District Court. See NRS 34.320 (a "writ of prohibition. . . arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person"); *Olsen Family Trust v. District Court,* 110 Nev. 548, 552, 874 P.2d 778, 781 (1994) (the purpose of a writ of prohibition is to restrain a party "from acting without authority of law in cases where wrong, damage and injustice are likely to follow from such action"); see also NRS 34.160 (a "writ [of mandamus] may be issued . . . to compel the performance of an act").

2. **<u>Plevel and Lowe acted in accordance with all statutory duties and the complaint fails to state any fact that supports any statutory violation.</u>**

Procuring a buyer and relieving a seller of an unwanted underwater property that they can no longer afford is the essence of satisfying an agent / broker's duties of care to the parties to a transaction. The Division implies, without any supporting facts or law, that Plevel somehow unfairly dealt with the seller of each property and that Lowe failed to supervise Plevel.

Nevada Revised Statutes 645.252(2) states that "a licensee who acts as an agent in a real estate transaction...[s]hall exercise reasonable skill and care with respect to all parties to the real estate transaction. Nev. Rev. Stat. Ann. § 645.252. The Division alleges that Plevel and Lowe somehow did not meet this standard of care but fails to articulate any basis for this allegation. In fact, the division has alleged that the facts of the Plevel and Lowe Complaints somehow rise to the level of gross negligence.

The facts asserted in the Complaints do not even come close to meeting the standard for ordinary negligence, much less the heightened standard of gross negligence. Gross negligence is defined in Nevada as being substantially and appreciably higher in magnitude and more culpable than ordinary negligence. It is the equivalent of the failure to exercise even a slight degree of care and requires a finding of reckless disregard of the consequences affecting the life or property of another. See generally, *Hart v. Kline,* 61 Nev. 96, 116 P.2d 672 (1941).

While the Complaints allege a violation of NRS 645.633, the Complaints fail to allege a standard of care, or how Plevel and/or Lowe may be guilty of gross negligence or incompetence. Nev. Rev. Stat. § 645.633(1)(h)[1] specifies a heightened standard of "gross negligence," but does not define it. The Supreme Court of Nevada has defined and adopted the following definition of "gross negligence:"

> "Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is, in gross negligence, magnified to a higher degree as compared with that present in ordinary negligence. Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a

[1] 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).

> willful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional conduct which is or ought to be known to have a tendency to injure."

Racine v. PHW Las Vegas, LLC, No. 2:10-CV-01651-LDG, 2014 WL 4354111, at 15 (D. Nev. Sept. 2, 2014)(quoting *Hart v. Kline*, 61 Nev. 96, 116 P.2d 672, 674 (1941)). "Not dealing fairly" with the sellers, the only allegation in the Complaint that allegedly violates a duty, falls far short of the heightened gross negligence standard articulated above.

Under no reasonable interpretation of the facts alleged in the Division's complaint could gross negligence be found. There is no evidence presented that suggests that the purchase price for each property sold was anything but the fair market value of a distressed property. In fact, appraisals and/or broker price opinions found in the transaction files of many of the transactions cited in the Complaints support the contracted sales price. See documents provided by the Division numbered 003-407. The Division has not articulated or provided any facts that support the vague allegation that Plevel was preferential to the buyers in these transactions. There was no "preference" in pricing that can be supported and the documentary evidence of the transaction clearly shows, through the short sale approvals and HUDs, that Plevel successfully negotiated deficiency waivers in <u>all</u> cases and in many cases negotiated relocation assistance, <u>to the seller's benefit</u>.

As is industry practice, each lender had the opportunity to and likely conducted its own investigation and set the price that the seller was able to accept to short sell each property. *See Transcript* at P. 109. The seller accepted the price releasing the seller from any further obligation with regard to the property. There is no circumstance where, under these facts, Plevel could be found grossly negligent in representing the seller nor can Lowe be found to have not properly supervised Plevel.

There is no factual basis in the Division's Complaints to support an allegation that Plevel violated her duty to the seller by giving preferentialism to any buyer. In a short sale, there are generally three consequences that a seller faces when considering a short sale: (1) a lender's reservation of a deficiency action which could subject the seller to litigation and a potential judgment for tens if not hundreds of thousands of dollars; (2) significant tax liability based on debt forgiveness; and (3) the seller will have to move and incur the costs of such move. Worse yet, if a seller cannot accomplish a

short sale they will likely face foreclosure which comes with additional stress as well as legal, tax and severe credit consequences that can plague a seller for seven or more years. In effect, without a successful short sale, underwater homeowners face years of financial challenges.

In every transaction at issue here, the seller was relieved of substantial debt on an underwater property and Plevel was able to negotiate a deficiency waiver with the lender on the seller's behalf. Additionally, every transaction was closed in time to qualify for the Mortgage Debt Relief Act so each seller was able to avoid the potentially substantial tax consequences of a short sale. Finally, in seven out of the ten sales at issue, the seller received relocation assistance. This relocation assistance gave those sellers cash to help them with their relocation and ease the financial hardship of a move.

Based on these facts, it is unclear how, under any circumstance, Plevel could have shown preferentialism to the buyer over the seller or how she violated any statutory duty of care owed to her clients. Since the final sales price is dictated by the lender and the lender can reject any offer for any reason, the seller in each transaction benefitted just as much as the buyer in each transaction, if not more.

Under no reading of the facts could a reasonable person conclude that Respondent failed to "exercise even a slight degree of care." *Hart v. Kline,* 61 Nev. 96, 116 P.2d 672 (1941). As set forth herein, Plevel was able to achieve a favorable result for her clients, relieving them from the distressed real estate debt by finding a willing and capable buyer, while also negotiating with the bank to waive the deficiency left after the short sale in each case. Respondent was also able to obtain relocation assistance for many of the homeowners to help her clients with transition and expense of moving. The Division has not produced any facts to support their claim of gross negligence or even ordinary negligence in this case.

The Division has merely stated that the properties were resold at a higher price and in hopes that the commission will infer that there was some sort of wrong-doing because of this. However, this does not meet any known definition of negligence nor does it meet the burden of proving any form of negligence, particularly, gross negligence.

3. **A real estate sales person/broker owes no duty to a seller's lender in a short sale.**

There is no duty owed by an agent/broker to a seller's lender in a short sale. As mentioned, the lender is not a party to the transaction, but merely a lien holder who may agree to release its lien and settle a debt for less than the amount owed. Plevel and Lowe competently represented their clients in accordance with all statutory duties[2].

Although the Nevada Supreme Court has not ruled on the issue, this Nevada District Court has predicted that the Nevada Supreme Court would hold that a lender does not owe a fiduciary duty, as "an arms-length lender-borrower relationship is not fiduciary in nature, absent exceptional circumstances." *Nascimento v. Wells Fargo Bank, NA,* 2:11-CV-1049 JCM (GWF) (D. Nev. 2013) The relationship is, in fact, an adversary relationship. The contractual, agency, and fiduciary relationship exists by and between Plevel, Lowe, and their sellers and/or buyers as is set forth by statute and as interpreted by case law. It is impossible to construe this relationship to imply that a duty of care and specifically a fiduciary duty extended to the adversary, the lender, of Plevel and Lowe's clients. Plevel and Lowe were specifically engaged to complete a transaction adverse to each lender. To impose the tortured result the Division seeks by claiming that the lender is a party to the real estate transaction for purposes of a duty owed pursuant to NRS 645.252(2) would be to statutorily create a conflict of interest between agents and lenders. No rational reading of that statute should create that result.

Further, rather than the lender being a party to the real estate transactions, the short sale transaction created a separate and distinct contractual arrangement between the seller and the bank which is separately enforceable by those parties in a separate action. Both the Nevada Supreme Court and Article 3 judges have affirmed this adversarial relationship. *See Transcript* at P. 107. Therefore, the bank had entered into a separate contractual relationship, separate and distinct from the sale transaction between seller and purchaser, where it agreed to accept, after its own investigation and appraisal, a specified sum for the release of its lien on each property. See, *Jones v. Sun Trust Mortgage,* 128 Nev. Adv. Op. 18 (2012). A lender in a short sale has the right to deny a short sale,

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[2] See, e.g., Miller & Starr California Real Estate 3D, Section 3:55; Saffie v. Schmeling, 224 Cal. App. 4th 563, 568, 168 Cal. Rptr. 3d 766, 769 (2014) ("while the real estate brokers owe their clients fiduciary duties, they owe third parties who are not their clients, including the adverse party in a real estate transaction, only those duties imposed by regulatory statutes"). Moreover, in reaching its conclusion in the Lococo matter, the Commission already necessarily determined that Lococo did not owe a fiduciary duty to lenders. The Division recognized this determination when it dismissed the O'Brien and Lococo matters.

request a higher price and even to reserve an action for deficiency against a borrower. No lender, in any of the transactions at issue, even after conducting an appraisal of the value of the property denied the short sale or reserved the right to deficiency. The lender in one transaction demanded a higher price, which was agreed upon by the buyer.

In a typical short sale, the first thing the lender does is try to figure out what the property is worth using primarily three methods of valuation: (1) the lender looks at Automated Valuation Models (AVMOs); (2) the lender may contact brokers to get broker price opinions; and (3) the lender then may consider whether the property will need rehabilitation prior to the sale. *See Transcript* p. 109. The primary interest of a lender is to get the property off of the balance sheet as quickly as possible. *Id.* It is not uncommon for a lender to demand a higher transaction price before approving a short sale; the lender controls the transaction and independently grants or denies its approval. In at least one of these ten cases, the lender did exactly that: denied the offer and demanded a higher transaction price. Basically, the lender forced the parties to the transaction to renegotiate the deal.

Plevel owed the mortgage lender only those duties imposed by statute – honesty and fairness but nothing else – because she was not in a fiduciary relationship with the mortgage lender. This position is supported by the expert testimony of James Kirk Hankla (see Transcript at P. 107) at the Lococo hearing in January and further supported by his Affidavit of Mr. Hankla in Support of Joint Motion to Dismiss, attached hereto as **Exhibit 3.** Based on the clear and unequivocal testimony of Mr. Hankla that the relationship between agent and lender in a short sale is an adversarial relationship, the Division found no violation of statute could be found and dismissed the Complaint against Lococo. To find otherwise now would be inconsistent with the Division's January findings. Plevel did not breach any duty owed in her dealings with any mortgage lender and therefore Lowe cannot be found to have failed to supervise her.

The Division's Complaint contains allegations that are unfounded and unwarranted. Plevel and Lowe did not violate any statutes with their representation in any of the transactions listed in the Division's Complaints. All protocols and procedures were followed correctly and all parties were represented fairly and diligently to a favorable result. Plevel and Lowe owed no fiduciary duty or heightened standard of care to any lender. Each lender did its own evaluation and set the sale price for

each property preventing the property from being foreclosed upon. In fact, even if information was offered by an agent, the lender would not rely on it or even consider it in most circumstances due to the adversarial relationship that exists. *See Transcript* at P. 110.

4. **Plevel and Lowe followed all guidelines with respect to dual agency and disclosures under Nevada Law.**

Dual agency is specifically authorized under NRS 645.252(2). In these transactions, there is nothing inherently wrong with the dual agency relationship. All disclosures were giving to the parties by Plevel to comply with the statutory requirements. Nev. Rev. Stat. § 645.252(1)(d). There are no allegations in the Complaint against Plevel or Lowe that Plevel failed to have the statutorily required waiver of dual agency relationship signed by any of the parties to the transaction for any of the ten properties listed in the Complaint.

In each of the ten cases alleged, Plevel represented the buyer and the seller in the short sale transaction. The appropriate forms supplied by the Multi Listing agency and the Broker, Chase, were signed by the buyers and sellers waiving the conflict. This is standard and accepted procedure and does not constitute misconduct.

In each case alleged, Plevel either obtained a waiver from the seller, pursuant to the local Multilist requirement, to post the listing within a defined period of time, or the listing was timely posted. There does not appear to exist any Nevada regulation or statute requiring that a listing real estate agent or broker post all listings with the local Multilist. The local Multilist is a for profit entity. It sells its services to participating Brokers and promulgates its own local requirements for participating Brokers, one of which is how or when listings should be placed with the agency. This is not an activity within the regulatory scope of the Division; thus, attempts to impose disciplinary action in this regard constitute an abuse of discretion.

5. **The properties were not properly investigated to determine other circumstances surrounding a higher sale price after the short sale.**

Any reasonable investigation and the testimony will reveal that this was not just a simple flip, but the investor of each property expended substantial sums rehabilitating the property, as well as

incurring costs associated with the use of its funds in purchase and rehabilitation of the property. In fact, as probably happened here, removing the taint of a distressed property (i.e., foreclosure and short sale) from each property automatically causes an increase in its value. Mr. Paul Jameson, an expert who testified in the January hearing, noted that Fannie May and FHA recognize that they will allow or understand a property appreciating from the relief of distress up to 20% in a 90-day period. *See Transcript* at P. 78. Additionally, RealtyTrac, a company that provides analytics to the real estate industry since 1966, has stated that, in their experience, they generally see a 15% reduction in sales price based on the distress alone. *See Transcript* at P. 79.

It is also possible that market conditions may have improved prior to the subsequent resale; the Division has presented no evidence or allegations to refute such an assumption. In the January hearing Mr. Jameson discussed how market conditions did in fact increase in the same time period at issue here, which directly lead to an increase in sale price. *See generally Transcript* at P. 76. The return made on each resale was significantly less than the alleged "profit" for each property.

Resale of a property at a higher price is indicative of good business sense not wrong doing or gross negligence of the original agent/broker. There are numerous factors that go into an increased price, including but not limited to, removing the taint of distressed real estate, improvements to the property, and an overall increase in the real estate market. Plevel/Lowe were not involved in <u>any</u> of the subsequent transactions and therefore could not and did not benefit from the second sale of each property.

6. <u>The failure to articulate any concrete and unambiguous violations of the statute or misconduct renders the Complaint void-for-vagueness.</u>

Because the Division fails to allege any specific acts or omissions, let alone any specific misconduct committed by Plevel/Lowe, the complaints lack the requisite precision and guidance necessary to overcome a void-for-vagueness challenge. NRS 645.633(1)(h) is a statute that may subject those sanctioned under it with civil penalties and potential loss of their license. Usually, the void-for-vagueness doctrine is applied in cases involving criminal liability, but the void-for-vagueness doctrine has also been applied to cases solely implicating civil liability. *See Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1048-53 (1991) (holding that rules subjecting attorney to discipline for speech

were unconstitutionally vague). *F.C.C. v. Fox Televisions Stations, Inc.* expanded the scope of the void-for-vagueness doctrine, making it applicable to cases where the fair notice element is involved:

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

F.C.C. v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317, 183 L. Ed. 2d 234 (2012). The Complaints filed by Mr. Decker satisfies neither of these requirements. The Complaints fail to allege a standard of care, and fail to allege a violation of any duty owed by Plevel/Lowe based on any articulable standard of care.

In *F.C.C. v. Fox Televisions Stations*, the Court took care to emphasize "a fundamental principle of our legal system is that laws which regulate persons or entities must give fair 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)).

Nevada courts have applied the void-for-vagueness doctrine to city and county ordinances and have concluded that "[a]n ordinance which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application, violates the first essential element of due process, i.e., the notion of fair notice or warning" and must be declared void for vagueness. *Eaves v. Board of Clark County Comm'rs*, 96 Nev. 921, 923, 620 P.2d 1248, 1249-50 (1980) (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67, 68 (1960); accord *Smith v. Goguen*, 415 U.S. 566, 572 (1974); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). Aside from due process concerns, a vague law permits, and even encourages, arbitrary and discriminatory enforcement. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

Here, in the Plevel Complaint, the Division has alleged violations of NRS 645.633(1)(h), NRS 645.252(2), and NAC 645.605(6). However, in each of these instances, the statute or regulation "fails to define the...offense with sufficient definiteness that a person of ordinary intelligence cannot understand what conduct is prohibited." *Eaves v. Board of Clark County Comm'rs*, 96 Nev. 921, 923, 620 P.2d 1248, 1249-50 (1980). For example, NRS 645.252(2) requires an agent such as Plevel to "exercise reasonable skill and care," but the statute fails to articulate *how* Plevel is supposed to satisfy this requirement and it fails to give any hint as to what conduct is or is not prohibited. Similarly, NAC 645.605(6) states that an agent such as Plevel has an "obligation of absolute fidelity" to her client and must "deal fairly" in the transaction, but again this regulation fails to *how* Plevel is supposed to satisfy these requirements and it fails to give any hint as to what conduct is or is not prohibited. Nev. Admin. Code § 645.605(6). One wonders how a person is supposed to know when s/he is "dealing fairly" with another when the penalty for not doing so can be the loss of his/her license. Also, NRS 645.633(1)(h) mentions "gross negligence," but it does not define the term or detail a particular standard of care. Nev. Rev. Stat. § 645.633(1)(h).

The vagueness of the statutes and regulations is compounded by the failure to articulate any concrete and unambiguous violations of the statutes and regulations which renders the Plevel/Lowe Complaints void-for-vagueness. Under NRS 233B.121(2), the Division is required, at a minimum, to provide sufficient notice to Plevel/Lowe of the "statutes and regulations" they are alleged to have violated and "a short and plain statement of the matters asserted." Nev. Rev. Stat. § 233B.121(2). The purpose, of course, is to provide proper and adequate notice to Plevel/Lowe of the allegations against them so they have an "opportunity [which] must be afforded all parties to respond and present evidence and argument on all issues involved" pursuant to NRS 233b.121(4).

NRS 233B.121(2)(d)'s usage of the "short and plain statement" language is no accident. The language echoes that of NRCP 8(a), which provides that in a civil complaint, a party asserting a claim must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." As the U.S. District Court of Nevada recently stated in *Couturier v. American Invsco Corp.*, 10 F.Supp.3d 1143 (2014), in applying the federal equivalent of NRCP 8, "[w]hile Rule 8 does not require detailed factual allegations, it demands more than 'labels and conclusions' or a 'formulaic recitation of the

elements of a cause of action.'" Id. at 1148 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Indeed, "[m]ere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Thus, in a civil lawsuit, a complaint must, at a minimum, "set forth sufficient facts to establish all necessary elements of a claim for relief so that the adverse party has adequate notice of the nature of the claim and relief sought." *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (citing *Johnson v. Travelers Ins. Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973)).

In applying these standards, the Court in *Couturier* dismissed a complaint's allegations when the plaintiffs asserted conclusory allegations against the defendant: "The Couturiers fail to allege any facts to explain how their units are sub-par in quality . . . [and] [t]his is merely a conclusory allegation that does not satisfy the pleading standards of *Iqbal* and *Twombly*." *Couturier*, 10 F.Supp.3d at 1152 (emphasis added). These standards all act to protect a party's due process rights by ensuring that the defendant is given notice of the allegations against him/her so that s/he can fairly and adequately mount a defense. Due process applies with equal force to administrative proceedings, especially where those proceedings affect a person's rights and his/her livelihood.

In the present case, even a cursory review of the Plevel and Lowe Complaints reveal substantial and fatal defects. The Plevel/Lowe Complaints list certain alleged facts about various transactions, but none of these factual allegations state or specify that Plevel or Lowe did or did not perform any particular act. Instead, in a section entitled "Violations," the Complaint states – in a conclusory fashion and without explanation – that Plevel violated certain statutes or regulations and that Lowe failed to supervise Plevel. Remarkably, the "Violations" section does not even articulate what alleged conduct violated a statute or regulation, and it does not even specify what transactions and which of Plevel's alleged actions regarding these transactions allegedly were violative of statutes or regulations. Plevel/Lowe therefore are not provided "adequate notice of the nature of the claim" or put on notice regarding why or how they allegedly violated the statutes or regulations.

As a result, Plevel is left completely in the dark as to what she did that allegedly violated a statute or regulation, or regarding to which transaction these supposed acts or non-acts relate. Consequently, the Plevel's Complaint's vagueness and lack of notice concerning the allegations against her violates Plevel's substantive and procedural due process rights because she is simply not in a

position to respond to these vague and conclusory allegations. Plevel cannot mount a defense under NRS 233B.121(4), *Couturier*, or *Iqbal* under these circumstances, and the Plevel Complaint must therefore be dismissed. Similarly, since it is unknown how or when Plevel violated any statute or regulation, Lowe has no way to mount a defense under NRS 233B.121(4), *Courturier*, or *Iqbal* under these circumstances, because she has no way of know how or when she allegedly failed to supervise Plevel.

7. **Given the outcome of the O'Brien/Lococo hearings, the failure to dismiss the Plevel/Lowe Complaints would be inconsistent and therefore arbitrary and capricious.**

As mentioned above, it would be hard to find a set of facts more similar to those in the Lococo case heard in January than are present here. Based on the findings in that case, the Division should dismiss the complaint against Plevel and Lowe. Any other finding would be arbitrary and capricious.

The Division has already found in the Lococo case and, impliedly, by its dismissal of O'Brien and Hope Lewis, that agent/brokers owe no duty to a seller's lender in a short sale. It would be inconsistent for the Division to somehow find that such a duty exists in some cases but not all. Such inconsistent decisions would not only violate our clients' substantive and procedural due process rights, but it also runs afoul of NRS 233B.135(3). Under NRS 233B.135(3), the court may set aside the Commission's decision if that decision is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of reliable, probative and substantial evidence on the whole record; or (f) arbitrary and capricious or characterized by abuse of discretion. Nev. Rev. Stat. § 233B.135(3).

An agency's decision is arbitrary and capricious if it was not "based on a consideration of the relevant factors" or if there was a "clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). A decision here that conflicts with that recently rendered in Lococo would be arbitrary and capricious and therefore an abuse of discretion. An abuse of discretion occurs when the decision is not supported by substantial evidence. *Meridian Gold Co. v. State Dept. of Taxation,* 81 P.3d 516, 517, 119 Nev. 630 (Nev. 2003). Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Id.*

No evidence has been shown by the Division that comes close to asserting any difference between this case and the case set forth in Lococo. There is no "substantial evidence," or any evidence for that matter, that support a conclusion by any reasonable mind that Lowe or Plevel did anything in violation of any statute or in any way violated their duty of care to their clients.

CONCLUSION

The Complaints against Lowe and Plevel should be dismissed with prejudice. The exact issues, and cases with almost identical facts as alleged here, have already been finally adjudicated in a proceeding where the Division found that no law or duty owed was violated by the agent or broker. Lowe did not fail to supervise Plevel and Plevel followed all the guidelines and procedures as set forth in the Nevada Revised Statutes and Nevada Administrative Code. Plevel disclosed every dual agency as required, represented her clients vigorously to a favorable outcome, and upheld all her fiduciary duties to all of her clients. Neither Plevel nor Lowe had any duty to any of the lenders in these transactions as each lender was represented by separate counsel and analyzed each property on their own to detertmine a price and terms each lender was willing to accept for the release of its lien against the properties.

The Division has failed to state any claim upon which a violation can be found. This, coupled with its prior decisions to dismiss similar claims <u>on the very same legal basis</u> on which it is attempting to charge Plevel and Lowe, requires the Division to dismiss the complaints against Plevel and Lowe, with prejudice. The failure to do so would pervert the applicable law and, in light of its prior decisions, would be inconsistent, arbitrary and capricious.

Affirmation Pursuant to NRS 239B.030

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

DATED this 12 day of March, 2015.

INCLINE LAW GROUP, LLP

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INDEX OF EXHIBITS

1.	Notice of Defaults	42 Pages
2.	Transcript of Proceedings from Audiotape Hearing January 7, 2015.	139 Pages
3.	Affidavit of Mr. Hankla in Support of O'Brien and Lococo's Joint Motion to Dismiss	7 Pages

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am an employee of INCLINE LAW GROUP, LLP that I am over the age of eighteen (18) years, and that I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing document on all parties to this action by placing an original or true copy thereof in a sealed envelope placed for collection and mailing in a FedEx repository, at Reno, Nevada postage paid, following the ordinary course of business practices; addressed as follows:

Real Estate Division, State of NV
Attn: Legal Administrative Officer
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Courtesy copy sent via email

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

Executed this 11th day of March, 2015.

Jeremy L. Krenek, an employee of
Incline Law Group, LLP