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BEFORE THE REAL ESTATE COMMISSION

STATE OF NEVADA

SHARAT CHANDRA, Administrator REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS & INDUSTRY, STATE OF NEVADA, *Petitioner,* vs. GORDON ROBERT ALLRED, *Respondent.*	**Case No.: 2016-1734** **AMENDED ANSWER TO COMPLAINT**

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AMENDED ANSWER TO COMPLAINT

COMES NOW Respondent GORDON ROBERT ALLRED, by and through his counsel of record, Scott Marquis of Marquis Aurbach Coffing, and hereby submits this Amended Answer to the Complaint, and shows as follows:

JURISDICTION

Respondent denies the allegations of this paragraph.

FACTUAL ALLEGATION

1. In answer to Paragraph 1 of the Complaint, Respondent admits that he was not licensed by the Division. Respondent lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding the Division's understanding of the relevant time period, and therefore denies the remaining allegations in Paragraph 1.

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2. In answer to Paragraph 2 of the Complaint, Respondent admits he did not hold a Cooperative Certificate from the Division. Respondent lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding the Division's understanding of the relevant time period, and therefore denies the remaining allegations in Paragraph 2.

3. In answer to Paragraph 3 of the Complaint, Respondent admits the allegations of Paragraph 3.

4. In answer to Paragraph 4 of the Complaint, Respondent admits that he was an agent for Marcus & Millichap Real Estate Investment Services, Inc. ("Marcus & Millichap") located in Ontario, California. Otherwise, Respondent denies the remaining allegations in Paragraph 4.

5. In answer to Paragraph 5 of the Complaint, Respondent admits that he signed an Interstate Brokerage Cooperation Agreement regarding commercial property located at 1101 South Highway 160, Pahrump, Nevada ("Best Western Cooperation Agreement"). Otherwise, Respondent denies the remaining allegations in Paragraph 5.

6. In answer to Paragraph 6 of the Complaint, Respondent admits that he signed the Best Western Cooperation Agreement on or about January 27, 2016 and that it has the quoted language. Otherwise, Respondent denies the remaining allegations in Paragraph 6.

7. In answer to Paragraph 7 of the Complaint, Respondent admits that the Best Western Cooperation Agreement has the quoted language. Otherwise, Respondent denies the remaining allegations in Paragraph 7.

8. In answer to Paragraph 8 of the Complaint, Respondent admits that the referenced Checklist identifies Division Form 542. Otherwise, Respondent denies the remaining allegations in Paragraph 6.

9. In answer to Paragraph 9 of the Complaint, Respondent denies the allegations of Paragraph 9.

10. In answer to Paragraph 10 of the Complaint, Respondent admits the allegations of Paragraph 10.

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11. In answer to Paragraph 11 of the Complaint, Respondent admits that the seller's settlement statement shows a $249,000.00 commission to "Marcus & Millichap." Otherwise, Respondent denies the remaining allegations of Paragraph 11.

12. In answer to Paragraph 12 of the Complaint, Respondent admits that he signed an Interstate Brokerage Cooperation Agreement regarding commercial property located at 650 West Front Street, Battle Mountain, Nevada ("Battle Mountain Cooperation Agreement"). Otherwise, Respondent denies the remaining allegations in Paragraph 12.

13. In answer to Paragraph 13 of the Complaint, Respondent states that the allegations are vague, ambiguous and unintelligible as to the time, place, location or other context of the alleged identification and therefore responds that he lacks sufficient information or belief to admit or deny how Marcus & Millichap may have identified Respondent, and on that basis denies the allegations of Paragraph 13.

14. In answer to Paragraph 14 of the Complaint, Respondent admits that he signed the Battle Mountain Cooperation Agreement on or about February 10, 2015 and that it has the quoted language. Otherwise, Respondent denies the remaining allegations in Paragraph 14.

15. In answer to Paragraph 15 of the Complaint, Respondent admits that the Best Battle Mountain Agreement has the quoted language. Otherwise, Respondent denies the remaining allegations in Paragraph 15.

16. In answer to Paragraph 16 of the Complaint, Respondent admits that there is an unsigned draft memorandum that has the quoted language. Otherwise, Respondent denies the remaining allegations in Paragraph 16.

17. In answer to Paragraph 17 of the Complaint, Respondent admits that he signed an Interstate Brokerage Cooperation Agreement regarding property located at 4300 West Tropicana Avenue, Las Vegas, Nevada ("Casino Site Cooperation Agreement"). Otherwise, Respondent denies the remaining allegations in Paragraph 17.

18. In answer to Paragraph 18 of the Complaint, Respondent admits that draft versions of marketing materials for the Casino Site may identify Respondent. Respondent lacks information and belief sufficient to determine what the Division means by "the exclusive land

offering advertisement" and therefore denies the remaining allegations of Paragraph 18.

19. In answer to Paragraph 19 of the Complaint, Respondent admits that draft versions of marketing materials for the Casino Site may identify Respondent. Respondent lacks information and belief sufficient to determine what the Division means by "other advertisements" and therefore denies the remaining allegations of Paragraph 19.

20. In answer to Paragraph 20 of the Complaint, Respondent states that the allegations are vague, ambiguous and unintelligible as to the time, place, location or other context of the alleged identification and therefore responds that he lacks sufficient information or belief to admit or deny how Marcus & Millichap may have identified Respondent, and on that basis denies the allegations of Paragraph 20.

21. In answer to Paragraph 21 of the Complaint, Respondent admits that he signed the Casino Site Cooperation Agreement on or about February 9, 2015 and that it has the quoted language. Otherwise, Respondent denies the remaining allegations in Paragraph 21.

22. In answer to Paragraph 22 of the Complaint, Respondent admits that the Casino Site Cooperation Agreement has the quoted language. Otherwise, Respondent denies the remaining allegations of Paragraph 22.

23. In answer to Paragraph 23 of the Complaint, Respondent admits that the memorandum has the quoted language. Otherwise, Respondent denies the remaining allegations in Paragraph 23.

24. In answer to Paragraph 24 of the Complaint, Respondent states that the allegations are vague, ambiguous and unintelligible as to the circumstances of the alleged entitlement and therefore responds that he lacks sufficient information or belief to admit or deny the allegations, and on that basis denies the allegations of Paragraph 24.

25. In answer to Paragraph 25 of the Complaint, Respondent admits the allegations of Paragraph 25.

VIOLATIONS

26. In answer to Paragraph 26 of the Complaint, Respondent denies the allegations contained therein.

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DISCIPLINE AUTHORIZED

27. The allegations contained in Paragraph 27 of the Complaint state legal conclusions and do not require a response from the Respondent; however, to the extent a response is required by rule, Respondent denies the allegations that are inconsistent with the referenced statutes.

28. The allegations contained in Paragraph 28 of the Complaint state legal conclusions and do not require a response from the Respondent; however, to the extent a response is required by rule, Respondent denies the allegations that are inconsistent with the referenced statutes.

29. The allegations contained in Paragraph 29 of the Complaint requests disciplinary action and do not require a response from the Respondent; however, to the extent a response is required by rule, Respondent denies the allegations contained therein.

DEFENSES & AFFIRMATIVE DEFENSES

30. The Complaint fails to state a claim against the Respondent upon which relief may be granted.

31. The Respondent is not guilty of violating any Order of the Nevada Real Estate Commission, any agreement with the Nevada Real Estate Division, or any provision of NRS 645 or any regulation adopted pursuant thereto.

32. The Respondent is not guilty of not exercising reasonable skill and care with respect to all parties to the real estate transactions at issue.

33. To the extent the Division has failed to produce all communications, reports, affidavits, or depositions in its possession which are relevant to the Complaint, the Complaint and the Division's claims should be barred. To the extent the Division intends to present evidence at the hearing obtained after notice to Respondent, it must show that the evidence was not available after diligent investigation before the time notice was given and the evidence was given or communicated to Respondent immediately after it was obtained.

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34. To the extent that it seeks to do so by its Complaint, the Division lacks standing to enforce any agreements identified in the Complaint to which Respondent is a party.

35. Respondent is not guilty of any violation because the licensing and cooperative certificate scheme promulgated by the Nevada Real Estate Commission and/or the Nevada Real Estate Division, including NAC 645.180, 645.183, and 645.185, violates the United States Constitution's Commerce Clause for essentially the reasons set forth in Respondent's complaint in the currently pending lawsuit styled No. 2-16-CV-01299 *Marcus & Millichap Real Estate Investment Services of Nevada, Inc. et al. v. Decker et al.*, in the United States District Court for the District of Nevada, Southern Division, a copy of which is attached as **Exhibit 1** (without exhibits).

36. Respondent is not guilty of any violation because the Nevada Real Estate Commission ("NREC") and/or the Nevada Real Estate Division ("NRED") promulgated their licensing and cooperative certificate scheme, including NAC 645.180, 645.183, and 645.185, without following the required statutes, rules and regulations, including without limitation:

a. NREC failed to comply with the requirements for deliberating only in public meetings pursuant to a duly posted agenda with sufficient opportunity for informed and meaningful participation by the public, and that such public meetings include a discussion of the true purpose and true effect of a proposed regulation.

b. NREC and NRED failed to comply with the requirements for Regulation Workshops pursuant to a duly posted agenda with sufficient opportunity for informed and meaningful participation by the public, and with public discussion of the true purpose and true effect of a proposed regulation.

c. NREC and NRED failed to comply with the requirements for a Notice of Intent to Act Upon a Regulation that includes the true purpose and need of a proposed regulation, the true estimated economic effect of a proposed regulation, and the true effect on federal law including the United States Constitution.

d. NREC failed to comply with the requirements for written minutes of meetings accurately reflecting the basis for actions taken by NREC.

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e. On information and belief, NREC violated the prohibition on ex parte communications regarding matters pending before NREC.

f. NREC failed to comply with the requirement that the purpose of and policy behind a regulatory scheme be discussed in an open meeting and reflected in the written minutes thereof.

g. NRED failed to comply with the requirement that its Administrator provide an advisory opinion in appropriate circumstances.

h. NREC and NRED failed to comply with the requirement that a regulatory scheme be preceded by and supported by a duly issued and considered Small Business Impact Statement.

i. NREC and NRED failed to comply with the requirement under NRS 233B.066 that a regulatory scheme be preceded by and supported by a Legislative Review that identifies a true explanation of the need for the regulation, a true description of how public comment was solicited, a true summary of public response, and a true estimate of the economic effect of the regulation on the business which it is to regulate and on the public.

j. Respondent is not guilty of any violation because the Nevada Real Estate Commission and/or the Nevada Real Estate Division promulgated their licensing and cooperative certificate scheme, including NAC 645.180, 645.183, and 645.185, without statutory authority and in violation of the NRS 645.605.

37. NRED failed to comply with the requirement under NAC 645.680 that the complaint against Respondent be made on a standard form or affidavit.

38. NRED failed to adequately investigate the charges against Respondent. For instance, NRED failed to make any attempt to contact any consumers or any of the parties to the transactions identified in the Complaint.

39. NRS 645.680 requires that Respondent be provided, at least 30 days prior to any scheduled hearing, copies of all communications, reports, affidavits and depositions in the possession of NRED relevant to the Complaint. NRED and NREC have failed and refused to comply with this provision. On information and belief, NRED and NREC contend that they can

produce only those records on which they intend to rely, which is a plain violation of NRS 645.680, and which denies Respondent's due process rights.

40. NRED and NREC have historically interpreted and enforced NAC 645.185 in a manner that was contradictory to the plain language of the regulation. Namely, they have always precluded out of state brokers from offering real estate for sale in Nevada to a person other than a resident of Nevada, even though NAC 645.185 expressly allowed out of state brokers to offer real estate in Nevada for sale to a person other than a resident of Nevada. As historically and currently interpreted by NREC and NRED, the statutes and regulations relating to out of state brokerage activities are so ambiguous as to be unenforceable.

41. The Complaint is so ambiguous, uncertain and unintelligible that it fails to put Respondent on adequate notice of the charges against him, and therefore is a denial of Respondent's due process rights.

AFFIRMATION

42. Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the personal information of any person as defined in NRS 603A.040.

DATED this 16th day of August, 2017.

MARQUIS AURBACH COFFING

By _____
Scott A. Marquis, Esq.
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Las Vegas, Nevada 89145
Attorney for Gordon Allred

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CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, a true and correct copy of the foregoing instrument was served on the following parties:

Via Email
REAL ESTATE DIVISION
STATE OF NEVADA
3300 W. Sahara Avenue, Suite 350
Las Vegas, Nevada 89102
Attn: Rebecca Hardin, Commission Coordinator
Telephone: (702) 486-4074
Facsimile: (702) 486-4067
rhardin@red.nv.gov

Via Email
Keith A. Kizer
Senior Deputy Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
Telephone: (702) 486-3326
kkizer@ag.nv.gov
Attorney for Real Estate Division

DATED this 16th day of August, 2017.

Ely Chavez, an employee of
Marquis Aurbach Coffing

MARQUIS AURBACH COFFING
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Las Vegas, Nevada 89145
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Exhibit 1

BECK REDDEN LLP
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(*pro hac vice admissions pending*)
(*will comply with LR IA 10-2 within 45 days*)

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Attorneys for Marcus & Millichap Real Estate Investment Services of Nevada, Inc., Marcus & Millichap Real Estate Investment Services, Inc., Gordon Allred, Alvin Najib Mansour, Kevin Najib Mansour, Perry White, and Nenad Zivkovic.

FOR COMPLIANCE WITH NSCR 42.1 ONLY
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(Local Counsel)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
SOUTHERN DIVISION

MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES OF NEVADA, INC., MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES, INC., GORDON ALLRED, ALVIN NAJIB MANSOUR, KEVIN NAJIB MANSOUR, PERRY WHITE, and NENAD ZIVKOVIC, Plaintiffs, vs. JOSEPH DECKER, in his official capacity as Administrator of the Real Estate Division, Department of Business & Industry, State of Nevada, and NORMA JEAN OPATIK, NEIL SCHWARTZ, SHERRIE CARTINELLA, DEVIN REISS, and LEE K. BARRETT, in their official capacities as Commissioners of the Nevada Real Estate Commission, Defendants.	§	Civil Action No. 2:16-cv-1299 PLAINTIFFS' COMPLAINT AND REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF

PLAINTIFFS' COMPLAINT AND REQUEST
FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Marcus & Millichap Real Estate Investment Services of Nevada, Inc.; Marcus & Millichap Real Estate Investment Services, Inc. (together "Marcus & Millichap"); Gordon Allred; Alvin Najib Mansour; Kevin Najib Mansour; Perry White; and Nenad Zivkovic file this Complaint. Plaintiffs seek damages as well as declaratory, injunctive, and other relief as outlined below.

NATURE OF THIS ACTION

1. Plaintiffs challenge the unconstitutional prohibition against cooperation between Nevada real estate brokers and real estate agents licensed by other states found in the regulations promulgated by the Nevada Real Estate Commission ("NREC") in cooperation with the Administrator of the Nevada Real Estate Division ("NRED").[1] The NREC and NRED have elected to ban out-of-state real estate agents from almost any involvement in transactions involving the sale of Nevada property and in the representation of a Nevada buyer, even when such agents associate with a licensed Nevada broker. The last state to attempt to defend such a scheme was Kentucky, and its former policy—which was similar to the scheme in this case—was twice held to be an unconstitutional violation of the Commerce Clause of the United States Constitution. *See River Oaks Mgmt. v. Brown*, No. 3:06-CV-00451-S, 2007 WL 2571909 (W.D. Ky. Sept. 4, 2007); *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Skeeters*, 395 F. Supp. 2d 541 (W.D. Ky. 2005). This ruling has now been acknowledged by Kentucky's appellate court. *LexCin Partners, Ltd. v. Newmark S. Region, LLC*, No. 2008-CA-001170, 2009 WL 2341553, at *1 (Ky. Ct. App. 2009).

2. Plaintiffs have cited this and other authority to the NRED in an effort to convince it to stop enforcing these unconstitutional restrictions on out-of-state agents. But the NRED has chosen to ignore that authority. The NREC and NRED have refused to relent and continue to ban constitutionally protected interstate commerce. The NRED threatens those who engage in such commerce with administrative actions and civil penalties. Thus, plaintiffs have no choice but to file this action seeking to enforce their constitutional rights.

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[1] The NRED administers the provisions of Chapter 645 of the Nevada Revised Statutes, dealing with Real Estate Brokers and Salespersons. NEV. REV. STAT. § 645.045. The NREC is a commission which acts in an advisory capacity to the NRED, adopts regulations, conducts hearings, and may through regulation delegate any authority it has to the NRED Administrator. *Id.* § 645.050.

3. Pursuant to Federal Rule of Civil Procedure 5.1, and to the extent necessary, Plaintiffs are concurrently serving the Attorney General of Nevada with a Notice of Constitutional Question and a copy of Plaintiffs' Complaint and Request for Declaratory and Injunctive Relief.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3).

5. Venue is proper in this district under 28 U.S.C. § 1391(b)(1) because the NREC and NRED maintain their principal place of business and reside in this district. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to this action occurred in this district, in which the NREC and NRED sit. This action is properly assigned to this division pursuant to Dist. Nevada Loc. Civ. R. IA 1-8.

PARTIES

A. Plaintiffs

6. Marcus & Millichap Real Estate Investment Services of Nevada, Inc. is a subsidiary of Marcus & Millichap Real Estate Investment Services, Inc. It is headquartered in Calabasas, California. Marcus & Millichap Real Estate Investment Services of Nevada, Inc. has offices in Las Vegas and Reno, Nevada through which it services clients both within and outside the State of Nevada.

7. Marcus & Millichap Real Estate Investment Services, Inc. is headquartered in Calabasas, California. Marcus & Millichap Real Estate Investment Services, Inc. is the parent company for Marcus & Millichap Real Estate Investment Services of Nevada, Inc. and other subsidiary entities (collectively "Marcus & Millichap"). Marcus & Millichap entities

collectively service commercial real estate investment needs for clients across the United States, as well as in Canada.

8. Gordon Allred is First Vice President of Investments with Marcus & Millichap. Mr. Allred holds a California broker's license and works out of Marcus & Millichap's Ontario, California office. He resides in California.

9. Alvin Najib Mansour is Executive Vice President of Investments with Marcus & Millichap. He is also President for the Mansour Group, which is an entity affiliated with Marcus & Millichap. Mr. Mansour holds a California broker's license as well as a Texas broker's license, and works out of Marcus & Millichap's San Diego, California office. He resides in California.

10. Kevin Najib Mansour is Managing Partner for the Mansour Group, which is an entity affiliated with Marcus & Millichap. Mr. Mansour holds a California salesperson's license and works out of the Mansour Group's San Diego, California office. He resides in California.

11. Perry White is Vice President of Investments with Marcus & Millichap. Mr. White holds a Nevada broker's license and works out of Marcus & Millichap's Las Vegas, Nevada office. He resides in Nevada.

12. Nenad Zivkovic is an Associate with Marcus & Millichap. He is also a Senior Associate for the Mansour Group, which is an entity affiliated with Marcus & Millichap. Mr. Zivkovic holds a Nevada salesperson's license and works out of Marcus & Millichap's San Diego, California office. He resides in California.

B. Defendants

13. Joseph Decker is the Administrator of the NRED, and was appointed in 2014. He may be served at the principal office of the NRED as follows: Legal Administrative Officer;

State of Nevada, Department of Business & Industry; Real Estate Division; 2501 E. Sahara Avenue, Suite 303; Las Vegas, NV 89104.

14. Norma Jean Opatik was re-appointed as a commissioner of the NREC in 2015. She serves as President of the NREC. *See* NEV. REV. STAT. § 645.110. She holds a Nevada real estate license and works at 250 S. Highway 160 Suite 11; Pahrump, NV 89048. She may be served at the principal office of the NRED as follows: Legal Administrative Officer; State of Nevada, Department of Business & Industry; Real Estate Division; 2501 E. Sahara Avenue, Suite 303; Las Vegas, NV 89104.

15. Defendant Neil Schwartz was appointed as a commissioner of the NREC in 2013. He serves as Vice President of the NREC. *See* NEV. REV. STAT. § 645.110. He holds a Nevada license and works at 8290 W. Sahara #100; Las Vegas, NV 89117. He may be served at the principal office of the NRED as follows: Legal Administrative Officer; State of Nevada, Department of Business & Industry; Real Estate Division; 2501 E. Sahara Avenue, Suite 303; Las Vegas, NV 89104.

16. Defendant Sherrie Cartinella was appointed as a commissioner of the NREC in 2013. She serves as Secretary of the NREC. *See* NEV. REV. STAT. § 645.110. She holds a Nevada license and works at 3700 Lakeside Drive, Suite 100; Reno, NV 89509. She may be served at the principal office of the NRED as follows: Legal Administrative Officer; State of Nevada, Department of Business & Industry; Real Estate Division; 2501 E. Sahara Avenue, Suite 303; Las Vegas, NV 89104.

17. Defendant Devin Reiss was appointed as a commissioner of the NREC in 2014. He holds a Nevada license and works at 10120 S. Eastern #300; Henderson, NV 89052. He may be served at the principal office of the NRED as follows: Legal Administrative Officer; State of

Nevada, Department of Business & Industry; Real Estate Division; 2501 E. Sahara Avenue, Suite 303; Las Vegas, NV 89104.

18. Defendant Lee K. Barrett was appointed as a commissioner of the NREC in 2015. He holds a Nevada license and works at 2885 South Jones Boulevard; Las Vegas, NV 89146. He may be served at the principal office of the NRED as follows: Legal Administrative Officer; State of Nevada, Department of Business & Industry; Real Estate Division; 2501 E. Sahara Avenue, Suite 303; Las Vegas, NV 89104.

FACTS

A. Background

19. Plaintiffs include a national commercial real estate brokerage firm, one of its subsidiary entities, out-of-state licensed real estate agents, and real estate agents licensed in Nevada. All of the Plaintiffs are being deprived of their constitutional right to engage in interstate commerce free from protectionist, discriminatory, and unnecessarily burdensome state economic restraints.

20. The NRED is the state administrative agency that regulates the practice of real estate. The NREC is a state-constituted commission controlled by local Nevada real estate brokers, which issues regulations regarding the practice of real estate. As permitted by statute, the NREC, in conjunction with the NRED, has adopted regulations that allow licensed out-of-state agents to acquire a cooperative certificate, thereby ostensibly allowing the out-of-state agent to work in cooperation with a Nevada real estate broker. *See* NEV. REV. STAT. § 645.605.

21. But the policy adopted by the NREC and NRED—as evidenced through regulations and enforcement efforts—regarding cooperative certificates severely restrict the out-of-state agent's ability to engage in interstate commerce.

22. The newest version of this policy was implemented via a regulation made effective on April 4, 2016. *See* NEV. ADMIN. CODE § 645.185(11) (2016). It prohibits an out-of-state agent from using the cooperative certificate as authority to sell or attempt to sell real estate in Nevada on behalf of the owner of that real estate. Furthermore, it limits the agent's use of the cooperative certificate to only representing a non-Nevada resident in the purchase of real estate in Nevada.

23. The prior version of the regulation was little better. In the prior version, an out-of-state agent was prohibited from using the cooperative certificate as authority to sell or attempt to sell real estate in Nevada to a resident of Nevada. *See* NEV. ADMIN. CODE § 645.185(11) (2004). As this regulatory history demonstrates, the NREC and NRED have consistently favored protectionist and discriminatory policies as they have sought to cut back on the scope of an out-of-state agents' participation in the Nevada marketplace.

24. Under the NREC's and NRED's policy, even if a national brokerage firm maintains an office and a licensed broker in Nevada (as Marcus & Millichap does), that broker is prohibited from using the resources of his or her own firm to promote Nevada properties and assist clients. The NRED has the ability to enforce this ban on national firms engaging in interstate commerce by leveling civil fines and conducting disciplinary actions against the national firms, their out-of-state agents, and their in-state agents.

B. The Commercial Real Estate Market

25. Commercial real estate is promoted and sold nationally and internationally. Buyers of investment properties, which range from small private concerns to large institutional investors, often have diversified portfolios that include investment properties located in different

states. This is especially true for large institutional investors, which frequently invest in specialized types of property on a regional or national basis.

26. As distinct from residential real estate, investors in commercial real estate typically develop long-term relationships with one or more broker advisors upon whom they rely to assist in managing and growing their portfolios. In this respect, commercial investors often view their real estate agents as trusted advisors and partners. Among other things, such agents generally have an expertise in the type of investment their clients favor along with an in-depth understanding of each client's investment objectives. Such specialization, coupled with access to a national platform of commercial properties, assists the agent in maximizing value for his or her client in both the purchase and the sale of commercial real estate.

27. Commercial real estate is a national marketplace in which buyers and sellers of real estate are often located in states other than where the commercial property is located. Consequently, commercial brokerage firms expend significant resources to develop integrated networks of brokers who can promote listings to investors with whom they have relationships, assist existing clients in the listing and marketing of properties located in different states, coordinate multi-state transactions (which are increasingly common), and share expertise on specific types of transactions. In contrast, local brokers who choose not to (or are not permitted to) cooperate or work with out-of-state agents are not able to compete on the basis of market access and expertise, both of which are especially important if a seller is to be able to market a property effectively to the largest possible pool of qualified buyers. Additionally, such local brokers do not generally have the resources to efficiently coordinate multi-state transactions, nor do they typically possess the same in-depth understanding of a national client's investment

strategies, objectives, and portfolio that national brokers have by virtue of their established long-term relationships.

28. Buyers and sellers of commercial property are predominantly sophisticated private and institutional investors. These investors often have diversified portfolios that include specialized types of property located in multiple states. Accordingly, commercial brokers must be able to promote properties nationally, advise on a multitude of different (and often complex) transactions, and analyze the financial aspects of transactions involving the specific type of property at issue.

29. Because the market for commercial real property is national, agents in different states must work together to efficiently and effectively meet client needs. This is true regardless of whether the client wishes to list commercial properties for sale or to buy commercial properties that have been listed by another broker. Whatever the commercial asset class, whether retail shopping properties, single tenant properties, commercial office assets, or some other category of commercial real estate, successful commercial brokerage requires sophisticated financial analysis attuned to the asset class in question as well as national marketing to find and match interested buyers and sellers.

30. As a result of the national nature of the market and the multitude and complexity of the different types of transactions, commercial brokerage firms compete on the basis of, among other things, their ability to: (1) bring capital to local and regional markets by matching buyers and sellers nationally; (2) coordinate complex multi-state transactions; and (3) provide value-added consulting services such as strategic planning, market analysis, value analysis, trend forecasts, and counseling. Also important is a firm's knowledge of submarkets and market segments, which is essential to planning investment strategies, evaluating investment

opportunities, and handling multi-state transactions. In short, commercial brokerage firms function as a sort of real estate investment bank by serving as investment advisors and assisting in the efficient placement of capital.

31. There are a number of national commercial real estate brokerage firms that provide highly specialized investment brokerage services to private and institutional investors nationwide for transactions involving a wide variety of commercial properties. Marcus & Millichap is one of the largest of such firms. Marcus & Millichap, like other commercial brokerage firms, is not involved in brokering personal residences among individual homeowners. It brokers only commercial (income producing) property.

32. Commercial brokerage firms often have offices in multiple states, if not throughout the country. Marcus & Millichap has offices in most major U.S. cities, with more than 1,600 affiliated commercial real estate agents across the country. All of Marcus & Millichap's agents are duly licensed in one or more states or jurisdictions, are managed by full-time veteran executives and carry errors and omissions insurance, so there is little question about oversight and accountability. These agents share information within the firm and work together to meet their clients' needs efficiently and seamlessly.

33. Clients of national brokerage firms like Marcus & Millichap frequently have large portfolios with properties in many states, and transactions can and often do involve a client's entire multi-state portfolio.

34. Clients choose commercial firms such as Marcus & Millichap precisely because their agents work together, sharing information and expertise and acting as intermediaries with their established contacts to broker commercial property. The benefits of such an integrated approach are readily apparent in the context of complex multi-state transactions (e.g., the

simultaneous sale of retail chain stores in multiple states), which enable clients to realize substantial efficiencies while limiting transaction costs.

35. Investors in commercial real estate assets typically rely on close business relationships with those who represent them as brokers or agents. Many brokers and agents have served as the exclusive representative for an investor-client throughout relationships spanning 5, 10, and 20 years or more. Commercial brokerage firms such as Marcus & Millichap have invested considerable resources developing a nationwide network of commercial property owners, developers, investors, and other commercial real estate agents. That network enables them to identify and market properties more efficiently and effectively than would otherwise be possible by a single local firm dependent exclusively on "cold calls" and advertisements. And the network allows trusted brokers and agents to manage transactions around the country with the cooperation of local brokers, much like trusted lawyers licensed in their home state litigate cases around the country with the cooperation of local counsel.

36. Additionally, commercial brokerage firms, especially national brokerage firms, have developed sub-specialties in various types of properties, transactions and representations that involve unique expertise and specialized knowledge typically not possessed by a single broker or local firm.

37. In sum, permitting cooperation between Nevada brokers and out-of-state agents benefits consumers by ensuring that they obtain the best possible advice and counsel and have efficient and effective access to the national investment market. But permitting such cooperation presents a competitive threat to local Nevada brokers who choose not to affiliate with out-of-state agents, and thus cannot offer clients the same national networks or expertise. The obvious purpose of the NREC's and NRED's protectionist policy is to benefit Nevada brokers by

protecting those brokers from competition with national firms in the interstate marketing and sale of Nevada commercial property. The result is simple economic protectionism of Nevada brokers. The effect is an undue burden on interstate commerce.

38. Marcus & Millichap has offices in Las Vegas and Reno, and it ensures that all transactions involving Nevada real estate are overseen by a licensed Nevada broker, even where the buyer and seller are not Nevada residents and never enter the state. By working with Marcus & Millichap agents in other states, Marcus & Millichap's Nevada offices have assisted its national investor clients in the national marketing, sale, and purchase of many Nevada real estate listings.

C. The NREC's and NRED's Unconstitutional Policy

39. The NREC together with the NRED constitutes the state regulatory body that issues real estate brokerage licenses and regulates and imposes discipline on brokers for violations of its rules or of state statutes governing real estate law. Heading the NREC are five commissioners. In accordance with Nevada Revised Statute § 645.090, each commissioner must have been actively engaged in business either as a Nevada real estate broker for 3 years or as a Nevada broker-salesperson for 5 years. NEV. REV. STAT. § 645.090. Apart from the NREC, the NRED is tasked with administering Chapter 645 of the Nevada Revised Statutes, which set forth the relevant state laws regulating the practice of real estate. NEV. REV. STAT. § 645.045.

40. The NREC acts in an advisory capacity to the NRED, adopts regulations, conducts hearings, and may through regulation delegate any authority it has to the NRED Administrator. *Id.* § 645.050. The NREC or the NRED Administrator, with approval of the NREC, may from time to time adopt reasonable regulations for the administration of the relevant statutory scheme regarding real estate. *Id.* § 645.190.

41. Chapter 645 of the Nevada Revised Statutes explicitly recognizes that out-of-state real estate agents may work cooperatively with Nevada brokers. Section 645.280(1) of the Nevada Revised Statutes expressly indicates that "[a] licensed real estate broker may pay a commission to a licensed broker of another state." And Section 645.605 deals with the "[c]ertificate authorizing out-of-state licensed broker[s] to cooperate with broker[s] in Nevada." NEV. REV. STAT. § 645.605. The statute gives the NRED Administrator the "authority to issue certificates authorizing out-of-state licensed brokers to cooperate with Nevada brokers." *Id.* Moreover, it gives the NREC the "authority to promulgate rules and regulations establishing the conditions under which such certificates shall be issued and cancelled, all subject to the provisions and penalties of this chapter." *Id.*

42. As part of that regulatory power, the NREC has promulgated three regulations dealing specifically with the cooperative certificate: Nevada Administrative Code §§ 645.180, 645.183, and 645.185. Together, these regulations set forth how an out-of-state agent may acquire a cooperative certificate and the conditions for the use of such a certificate.

43. Nevada Administrative Code § 645.185, in particular, deals with the use of the certificate. The current version of this regulation, made effective on April 4, 2016, provides: "An out-of-state broker may not use a cooperating broker's certificate as authority to sell or attempt to sell real estate in Nevada on behalf of the owner of that real estate. Such a certificate may be used only for the purpose of allowing the out-of-state broker or salesperson to represent a person other than a resident of Nevada in the purchase of real estate in Nevada." NEV. ADMIN. CODE § 645.185(11) (2016). The previous version provided: "An out-of-state broker may not use a cooperating broker's certificate as authority to sell or attempt to sell real estate in Nevada to a resident of Nevada. Such a certificate may be used only for the purpose of allowing the out-

of-state broker or salesperson to offer real estate in Nevada for sale to a person other than a resident of Nevada." NEV. ADMIN. CODE § 645.185(11) (2004). Both versions of the regulation are constitutionally and statutorily impermissible.

44. The NREC has promulgated this regulation for the purported purpose of enforcing Nevada laws that regulate the practice of real estate brokerage. Never mind that nothing in Nevada statutory law restricts such cooperation to the representation of out-of-state buyers. The NREC's regulation is absolute. It applies even where a Nevada broker within the same national firm as the out-of-state agent is involved and supervises the transaction to ensure compliance with Nevada law. It applies even where the seller does not reside in Nevada. It applies where a Nevada seller has an established relationship with an out-of-state agent and desires that agent's participation in the transaction. And it applies when a Nevada buyer has a similarly longstanding relationship with an out-of-state agent and desires that agent's participation in the transaction.

45. By way of example, under the regulation, a California real estate agent who attempts to help his California client in the sale of Nevada commercial property would be engaging in inappropriate brokering activity, even if a Nevada broker is supervising the transaction. For the reasons set forth in this Complaint, such regulation violates both the U.S. Constitution and Nevada statutory law.

46. The NREC's and NRED's ban against out-of-state agents' involvement in the sale of Nevada property *and* in the representation of Nevada buyers serves only one purpose: to protect local Nevada brokers from competition by severely limiting the ability of regional and national brokerage firms to offer integrated services to their investor clients. Under the NREC's regulation and the NRED's enforcement actions, a local Nevada office of a regional or national commercial broker, operated by a licensed Nevada broker, is prohibited from collaborating with

the firm's other agents to promote Nevada properties, provide value-added consulting services, or share expertise. The NREC's restrictions serve to unfairly protect the commissions of Nevada commercial brokers, who enjoy a virtually captive market without the competitive forces inherent in a national marketplace.

47. In truth, the NREC's and NRED's policy harms the very consumers—buyers and sellers of Nevada commercial property—that the NREC and NRED are charged with protecting. Consumers are injured by this restrictive regulation because it (1) reduces the pool of qualified investors for Nevada properties; (2) deters capital investment in Nevada; (3) prevents consumers from utilizing real estate professionals with whom they have established relationships; and (4) limits consumers in their ability to obtain specialized knowledge and expertise. Out-of-state brokers and brokerage firms are injured because they are limited in their ability to compete on the basis of superior service and expertise for business involving interstate transactions.

D. The NREC's and NRED's Policy Violates Nevada Law

48. As stated above, the NREC's regulation and the NRED's attendant enforcement efforts do not derive their mandate from Nevada statutory law. Rather, the policy misreads the relevant Nevada statutory language and exercises a limiting power that has not been granted to either the NREC or NRED. Section 645.605 of the Nevada Revised Statutes deals with the "[c]ertificate authorizing out-of-state licensed broker[s] to cooperate with broker[s] in Nevada." NEV. REV. STAT. § 645.605. The statute gives the NRED Administrator the "authority to issue certificates authorizing out-of-state licensed brokers to cooperate with Nevada brokers." *Id.* Moreover, it gives the NREC the "authority to promulgate rules and regulations establishing the conditions under which such certificates shall be issued and cancelled, all subject to the provisions and penalties of this chapter." *Id.*

49. The NREC, therefore, has the power to set forth the "conditions under which such certificates shall be issued and cancelled." *Id.* It has done so through Nevada Administrative Code §§ 645.180, 645.183, and 645.185. For example, § 645.180 sets out the application requirements for the out-of-state agent, including the requirement that the agent provide a copy of his or her current license issued in another state, and detail his or her employment and disciplinary history. NEV. ADMIN. CODE § 645.180. Section 645.183 provides that the NRED Administrator may deny the cooperative certificate for any reason which is sufficient to deny a Nevada license, permit, or registration and empowers the Administrator to initiate disciplinary proceedings. *Id.* § 645.183. Finally, § 645.185 contains additional safeguards. For example, § 645.185(8) provides that the out-of-state broker who is cooperating with the Nevada broker is governed by the same provisions as Nevada brokers. *Id.* § 645.185(8). Any violation by the out-of-state broker subjects his or her cooperative certificate *and* the Nevada broker's license to fine, suspension, or revocation. *Id.*

50. But § 645.185(11) represents more than a *condition* for the issuance or cancellation of a cooperative certificate. Rather, it limits the very nature of "cooperation" by insisting that an out-of-state broker may only represent a non-Nevada resident in the purchase of real estate in Nevada.

51. The NREC's regulation has no basis in Nevada law. Nevada's law in fact contemplates local brokers collaborating with out-of-state agents on Nevada real estate transactions, and that law does not qualify the word "cooperate." *See* NEV. REV. STAT. § 645.605. The NREC's current regulation severely restricts the ability of out-of-state brokers to assist their clients in connection with Nevada property. Even if the out-of-state broker has a longstanding relationship with the client, and an intimate understanding of the type of property

involved in a transaction, they are relegated to the sidelines under the NREC's regulation. They cannot negotiate the transaction nor have any involvement in the purchase or sale of the property.

52. More importantly, as discussed in more detail below, the NREC's regulation and the NRED's attendant enforcement actions violate the Commerce Clause of the United States Constitution. Their policy discriminates against, obstructs, and unreasonably burdens interstate commerce. It seeks to protect the economic interests of local Nevada brokers by banning any other agents or brokers from many "brokerage" activities in transactions involving Nevada property. It effectively assures that, even in interstate transactions, all substantive activity in connection with the property may only be performed by local brokers. In addition, the NREC's regulation and the NRED's attendant enforcement actions violate Plaintiffs' First Amendment rights by improperly restricting Plaintiffs' freedom of speech.

E. The NRED's Administrative Enforcement Actions and Investigations

53. The NRED has now begun actively enforcing the NREC's unauthorized and unconstitutional regulation. The NRED has begun several investigations against out-of-state and in-state agents affiliated with Marcus & Millichap. The NRED has also taken action: it has issued cease and desist orders against three out-of-state agents affiliated with Marcus & Millichap. Marcus & Millichap and its agents and brokers face the threat of imminent prosecution for engaging in constitutionally protected activity.

54. Significantly, although Plaintiffs Gordon Allred, Alvin Najib Mansour, Kevin Najib Mansour, Perry White, and Nenad Zivkovic are currently facing investigations and possible disciplinary actions, to Plaintiffs' knowledge no complaint has been made by the buyer, the seller, or any other participant in the property transaction at issue. In other words, no participants have been complaining about any aspects of the deals. Rather, as evidenced by the

NRED's correspondence and as detailed below, the investigations at issue here were seemingly brought on the NRED's own initiative based on information the NRED acquired from website biographies or informational pamphlets.

55. If the NREC and NRED are successful in obtaining penalties or sanctions against Marcus & Millichap, out-of-state agents, or in-state agents for allegedly violating their protectionist policy, those penalties or sanctions would eliminate competition from national commercial brokerage firms to the benefit of Nevada licensees.

56. The NRED currently has the following investigations and disciplinary actions open against the following Plaintiffs:

a. Plaintiff Gordon Allred – Mr. Allred is First Vice President of Investments with Marcus & Millichap. Mr. Allred holds a California broker's license and works out of Marcus & Millichap's Ontario, California office. He resides in California. On April 5, 2016, the NRED notified Mr. Allred that it has "received information against" him and had opened a case for investigation—styled *NRED v. Allred* Case No. 2016-1734—based on his listing and/or selling certain properties in Nevada. **Ex. A** at 1. The letter asked Mr. Allred to explain why he is soliciting the sale of property in Nevada without a Nevada license, and asked for transaction files. *Id.* The letter did not detail any complaints by transaction participants against Mr. Allred, but only attached his website biography, which includes certain descriptions of brokerage activities in Nevada. Just two days later, on April 7, 2016, the NRED issued a cease and desist order to Mr. Allred. **Ex. B** at 1–3. The order held that Mr. Allred does not hold a Nevada license, and the NRED Administrator ordered Mr. Allred "to cease and desist from engaging in the business of, acting in the capacity of, any form of advertisement or/and [sic] sale of

property and/or assume to act as a real estate agent or any other position that requires" a Nevada license. The NRED threatened Mr. Allred that a failure to comply would necessitate the filing of a formal complaint for prosecution with the Clark County District Attorney or the Office of the Attorney General. *See* NEV. REV. STAT. § 645.230.

b. Plaintiff Alvin Najib Mansour – Mr. Mansour is Executive Vice President of Investments with Marcus & Millichap. He is also President for the Mansour Group, which is an entity affiliated with Marcus & Millichap. Mr. Mansour holds a California broker's license as well as a Texas broker's license, and works out of Marcus & Millichap's San Diego, California office. He resides in California. On May 31, 2016, the NRED notified Mr. Mansour that it has "received information against" him and had opened a case for investigation—styled *NRED v. Mansour, A* Case No. 2016-2402—based on his listing and/or selling certain properties in Nevada. **Ex. C** at 1. The letter asked Mr. Mansour to explain why he is soliciting the sale of property in Nevada without a Nevada license, and asked for transaction files. *Id.* The letter did not detail any complaints by transaction participants against Mr. Mansour, but only attached an informational pamphlet, which includes descriptions of brokerage activities in Nevada. On the very same day, the NRED issued a cease and desist order to Mr. Mansour. **Ex. D** at 1–3. The order held that Mr. Mansour does not hold a Nevada license, and the NRED Administrator ordered Mr. Allred "to cease and desist from engaging in the business of; acting in the capacity of; any form of advertisement and/or sale of property; assuming to act as a real estate broker, broker-salesperson, salesperson or any other position that requires" a Nevada license. The NRED threatened Mr. Mansour that a failure to comply

would necessitate the filing of a formal complaint for prosecution with the Clark County District Attorney or the Office of the Attorney General. *See* NEV. REV. STAT. § 645.230.

c. Plaintiff Kevin Najib Mansour – Mr. Mansour is Managing Partner for the Mansour Group, which is an entity affiliated with Marcus & Millichap. Mr. Mansour holds a California salesperson's license and works out of the Mansour Group's San Diego, California office. He resides in California. On May 31, 2016, the NRED notified Mr. Mansour that it has "received information against" him and had opened a case for investigation—styled *NRED v. Mansour, K* Case No. 2016-2403—based on his listing and/or selling certain properties in Nevada. **Ex. E** at 1. The letter asked Mr. Mansour to explain why he is soliciting the sale of property in Nevada without a Nevada license, and asked for transaction files. *Id.* The letter did not detail any complaints by transaction participants against Mr. Mansour, but only attached an informational pamphlet, which includes descriptions of brokerage activities in Nevada. On the very same day, the NRED issued a cease and desist order to Mr. Mansour. **Ex. F** at 1–3. The order held that Mr. Mansour does not hold a Nevada license, and the NRED Administrator ordered Mr. Allred "to cease and desist from engaging in the business of; acting in the capacity of; any form of advertisement and/or sale of property; assuming to act as a real estate broker, broker-salesperson, salesperson or any other position that requires" a Nevada license. The NRED threatened Mr. Mansour that a failure to comply would necessitate the filing of a formal complaint for prosecution with the Clark County District Attorney or the Office of the Attorney General. *See* NEV. REV. STAT. § 645.230.

d. Plaintiff Perry White – Mr. White is Vice President of Investments with Marcus & Millichap. Mr. White holds a Nevada broker's license and works out of Marcus &

Millichap's Las Vegas, Nevada office. He resides in Nevada. On April 28, 2016, the NRED notified Mr. White that he had been added to the investigation involving Nevada properties brokered by certain other Plaintiffs. The investigation against Mr. White is styled *NRED v. White* Case No. 2016-2032. **Ex. G** at 1. The letter did not detail any complaints by transaction participants against Mr. White. While no cease and desist order has been issued, Mr. White faces the threat of sanctions and prosecution as a result of this investigation.

e. Plaintiff Nenad Zivkovic – Mr. Zivkovic is an Associate with Marcus & Millichap. He is also a Senior Associate for the Mansour Group, which is an entity affiliated with Marcus & Millichap. Mr. Zivkovic holds a Nevada salesperson's license and works out of Marcus & Millichap's San Diego, California office. He resides in California. On May 31, 2016, the NRED notified Mr. Zivkovic that he had been added to the investigation involving Nevada properties brokered by certain other Plaintiffs. The investigation against Mr. Zivkovic is styled *NRED v. Zivkovic* Case No. 2016-2404. **Ex. H** at 1; *see also* **Ex. I**. The letter did not detail any complaints by transaction participants against Mr. Zivkovic, but only attached an informational pamphlet, which includes descriptions of brokerage activities in Nevada. While no cease and desist order has been issued, Mr. Zivkovic faces the threat of sanctions and prosecution as a result of this investigation.

57. In sum, these investigations and disciplinary actions concern an alleged violation of the NREC's and NRED's policy forbidding cooperation between in-state brokers and out-of-state agents regarding the sale of Nevada property.

F. The NREC's Regulation Violates the Commerce Clause

58. Challenges to state statutes and regulations under the Commerce Clause are analyzed under a two-tiered approach. *S.D. Myers, Inc. v. City and Cty. of S.F.*, 253 F.3d 461, 466 (9th Cir. 2001). When a state statute or regulation directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the statute or policy is generally struck down without further inquiry. *Id.* If the statute or regulation has only indirect effects on interstate commerce and regulates evenhandedly, however, a Commerce Clause analysis requires examination into whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds any local benefits. *Id.* Under either approach, "[t]he 'central rationale' of the dormant Commerce Clause 'is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.'" *Id.* (*quoting C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994)).

59. In this case, the NREC's and NRED's discriminatory and protectionist policy—as seen through regulation and attendant enforcement actions—fails under either tier of the Commerce Clause analysis.

1. The NREC's and NRED's policy directly regulates or discriminates against interstate commerce

60. The NREC's regulation violates the first tier of the Commerce Clause analysis. Under the current NREC regulation, out-of-state brokers are prevented from involvement in transactions involving the sale of Nevada property and in the representation of a Nevada buyer, even when such agents associate with a licensed Nevada broker. Thus, an out-of-state broker may not form a commercial relationship with: (1) a Nevada buyer; (2) a Nevada seller; or (3) a non-Nevada seller for transactions involving Nevada properties. The NREC, and by extension

the NRED, are thus discriminating against interstate commerce to the benefit of local Nevada brokers. This discrimination is felt most acutely by national brokerage firms and their clients. It also harms all buyers and sellers of Nevada commercial property by denying them the services, networks, expertise, and access to national markets that national commercial brokerage firms can provide. The effect of the NREC's regulation is to favor local brokers over out-of-state agents. The result is that licensed out-of-state agents are precluded from participating in interstate commerce with regard to Nevada property transactions. For these reasons as well, the NREC's regulation and the NRED's attendant enforcement actions violate the Commerce Clause. *See Skeeters*, 395 F. Supp. 2d at 549; *see also River Oaks Mgmt.*, 2007 WL 2571909, at *6–7.

2. The burden on interstate commerce clearly exceeds any benefit to Nevada

61. The NREC's regulation and the NRED's attendant enforcement actions also violate the second tier of the Commerce Clause analysis. The NREC and NRED have no legitimate interest in forbidding licensed out-of-state agents from working with Nevada brokers in brokering transactions involving Nevada property. The NREC's regulation imposes burdens on interstate commerce that are clearly excessive in relation to any supposed local benefits. *See River Oaks Mgmt.*, 2007 WL 2571909 at *8. The NREC's regulation places a "heavy burden" on interstate commerce by restricting market access and isolating Nevada from the national market. *Id.* Prohibiting cooperation between out-of-state agents and licensed Nevada brokers does not serve a legitimate public interest, especially if the out-of-state agent is licensed and the Nevada broker oversees the interstate transaction. *Id.* Indeed, only Nevada brokers benefit from such restrictions, as they are able to reap the financial rewards of no national competition and a virtual monopoly on Nevada real estate transactions. Everyone else, including Nevada property

owners, out-of-state agents, and national brokerage firms suffers at the hands of the NREC's and NRED's protectionist policies.

62. Furthermore, the NREC and NRED can achieve the goal of competent broker representation through less burdensome means. Requiring out-of-state agents to be licensed, and to work in conjunction with a licensed Nevada broker who is responsible for insuring compliance with Nevada law, would serve to protect Nevada property owners without unduly burdening interstate commerce or discriminating against out-of-state agents. *Skeeters*, 395 F. Supp. 2d at 549. Any legitimate concern the NREC and NRED might have with the activities of out-of-state agents would be adequately addressed by the involvement and supervision of the cooperating Nevada broker. As the court in *Skeeters* noted, a supervising local broker would be legally and professionally responsible for the acts of the cooperating broker and could "'make certain that the guidelines, regulations and laws of [Nevada] are observed while the out-of-state broker can advise the foreign investor on matters critical to its overall interests.'" *Id.* at 549–50 (quoting *Furr v. Fonville Morisey Realty, Inc.*, 503 S.E.2d 401, 406 (N.C. Ct. App. 1998)). "'[W]hen, as happens with increasing frequency in our state, the buyer/lessee is an out-of-state investor or corporation with complex interests and concerns best known to its regular brokers in its home state, the interests of the parties are better served if the out-of-state party is allowed to rely on the combined efforts of a local broker and a broker familiar with its particular situation.'" *Id.* at 549. "'[I]ndeed, the complete exclusion of its regular broker from a transaction may well render the foreign buyer/lessee more vulnerable to fraud.'" *Id.* at 550 (quoting *Furr*, 503 S.E.2d at 406).

63. There is no legitimate local regulatory purpose for prohibiting the involvement of out-of-state agents in brokering the sale of Nevada commercial property *or* the representation of

Nevada buyers, especially when Nevada licensees are involved to ensure compliance with applicable local regulations.

64. There is no legitimate local regulatory purpose for prohibiting the involvement of out-of-state agents in brokering Nevada commercial property where that agent has an established relationship of trust and confidence with a particular seller or buyer of Nevada real estate.

65. If all states were to adopt policies similar to the NREC's and NRED's, it would be virtually impossible for consumers of real estate brokerage services to obtain consistent investment advice, maintain a diverse portfolio of properties, engage in multi-state transactions, and maximize property values or identify investment opportunities without expending substantial additional resources. Buyers and sellers would not be permitted to work with a single national broker analyzing and consulting on their whole portfolio. Instead, real estate investors would need to employ scores of local brokers focused only on properties in their individual states. And each of those local brokers would be legally prohibited from even discussing other properties the client owns or might have interest in with potential buyers or sellers, for fear of transgressing the protectionist policies in the state where the client's other properties or possible acquisition targets may be located.

66. When taken to its logical conclusion, the gridlock that would result if all 50 states adopted the NREC's and NRED's approach is apparent. A seller with properties in ten states would have to retain ten separate agents, one in every state, who would be negotiating contracts and closing deals for each state. These separate agents would literally be prohibited from working together to effectuate the seller's overall business objectives, because any involvement by any other broker would violate the protectionist policies in a broker's local jurisdiction. Likewise, each buyer, at significant financial and transaction costs, would have to retain an agent

licensed in the state of each property's location and segregate communications between them. A purchaser who desires to buy property in ten states would have to retain ten agents, all working independently. A deal that could have been completed principally by two agents, with appropriate supervision, in a single transaction would thus require 20 agents and ten transactions. This obstruction of interstate commerce is precisely what the Commerce Clause forbids.

G. *The NREC's Regulation and NRED's Enforcement Actions Restrict Plaintiffs' Freedom of Speech Rights, Violating the First and Fourteenth Amendments*

67. To effect their protective scheme, the NREC and NRED restrict the speech of those involved in Nevada real estate transactions in a variety of ways. These restrictions include both content-based and speaker-based restrictions. They restrict broad marketing speech directed at a wide audience and speech that does no more than propose a commercial transaction to a particular market participant.

68. The NREC regulation and its implementation by the NRED restrict Plaintiffs' speech proposing a commercial transaction to buyers or sellers of Nevada real estate. First, as demonstrated by the cease and desist orders, the NRED has ordered that the out-of-state agents refrain from "any form of advertisement" as a real estate agent or licensee. *See, e.g.*, **Ex. A** at 1. Second, the cease and desist order more broadly prohibits the out-of-state agents from "engaging in the business of" real estate, "acting in the capacity of" a real estate agent, "any form of . . . sale of property," or "assum[ing] to act" as a real estate agent. *See, e.g.*, **Ex. A** at 1. But a critical part of being a real estate broker, as Nevada statutory law recognizes, includes the negotiating of deals. NEV. REV. STAT. § 645.030. Negotiation involves speech. Therefore, when Plaintiffs propose and negotiate commercial transactions, communicate with market participants, and market properties, they are engaging in commercial speech. Accordingly, the NREC and the NRED prohibit commercial speech.

69. This commercial speech neither relates to unlawful activity nor is it misleading. Thus, Plaintiffs' commercial speech is subject to protection and, at a minimum, the NREC and NRED must justify the regulation as consistent with the First Amendment. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 565 (1980). To be consistent with the First Amendment, the NREC and NRED must demonstrate: (1) the asserted governmental interest is substantial; (2) the regulation advances the governmental interest asserted in a direct and material way; and (3) the regulation is not more extensive than is necessary to serve that interest. *Id.* at 565; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995).

70. The NREC's regulation and the NRED's enforcement efforts do not directly advance any substantial governmental interest. Silencing out-of-state brokers directly advances no substantial state interest. Rather, the regulation and enforcement efforts serve primarily to protect local brokers. The present and threatened disciplinary actions at issue demonstrate the incongruity of the regulatory scheme with any substantial interest. Here, the NREC and NRED seek to penalize Plaintiffs for exercising protected commercial speech in connection with a Nevada real estate transaction despite the fact that no participant of the transaction has complained of any harm.

71. The NREC's regulation and the NRED's enforcement efforts are also more extensive than is necessary to regulate any substantial interest. Again, any legitimate concern the Nevada regulatory agencies might have with the activities of out-of-state agents could be adequately addressed by the involvement and supervision of the cooperating Nevada broker. *Skeeters*, 395 F. Supp. 2d at 549-50. Such a proposal, used by states across the United States,

adequately addresses any legitimate concern without Nevada's draconian restrictions, which silence out-of-state brokers in connection with Nevada real property transactions.

72. Moreover, legislation or government regulation which imposes a specific, content-based ban is subject to heightened judicial scrutiny. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 131 S. Ct. 2653, 2664 (2011). The NRED's prohibition on advertising is a content-based ban, specifically regulating speech based on the content.

73. Finally, advertising Plaintiffs' involvement in a real estate transaction through marketing materials is commercial speech. Many national real estate brokers, including Marcus and Millichap brokers, are hired for their recognized expertise in particular commercial real estate transactions. Advertising provides truthful, factual information relevant to the transaction. The NREC and NRED seek to stop this marketing content because they do not like the message: advertising by non-Nevada brokers who bring national expertise and recognition to a transaction and may therefore take business away from Nevada brokers.

H. Irreparable Harm

74. Without intervention from this Court, Plaintiffs face irreparable harm from the NREC's regulation and the NRED's enforcement of this protectionist regime. Such enforcement deprives Plaintiffs of their rights under the Commerce Clause of the United States Constitution to engage in interstate commerce free from protectionist, discriminatory, and/or unnecessarily burdensome state economic restraints.

75. The NREC's regulation and the NRED's enforcement efforts have the potential to threaten the livelihoods of Nevada brokers and agents. *See* NEV. ADMIN. CODE § 645.185(8).

76. The NREC's regulation and the NRED's enforcement efforts deny non-Nevada licensees, including licensees affiliated with Marcus & Millichap, access to Nevada markets and prevent them from being able to service their long-standing clients.

77. The NREC's regulation and the NRED's enforcement efforts injure owners of Nevada commercial property, by preventing them from engaging the brokers of their choice when they wish to sell their properties, by preventing them from obtaining valuable investment and marketing services provided by national brokerage firms, and by potentially depressing the value of their property by segregating Nevada commercial property from the national marketplace.

78. The NREC's regulation and the NRED's enforcement efforts injure Nevada-based investors and potential investors by preventing them from openly accessing the interstate market for valuable investment services with respect to their potential Nevada property.

79. The NREC's regulation and the NRED's enforcement effort also violate Plaintiffs' First Amendment free speech rights, made applicable to the states through the Fourteenth Amendment. The policy restricts the free flow of truthful, factual information relevant to commercial real estate transactions based on the content of the message and the speaker. Without intervention from this Court, Plaintiffs face irreparable harm from this continued suppression of Plaintiffs' free speech rights.

COUNT I

42 U.S.C. § 1983, Violation of the Commerce Clause

80. Plaintiffs restate and reallege the allegations set forth above.

81. Defendants, under color of state law, have imposed and continue to enforce the NREC's regulation prohibiting cooperation between Nevada brokers and non-Nevada licensed

agents in many aspects of the interstate brokerage of Nevada commercial property. Nevada law, as interpreted by the NREC and the NRED, and the associated regulations and enforcement efforts, create a protectionist, discriminatory, and/or unreasonably burdensome restraint on interstate commerce in violation of the Commerce Clause of the United States Constitution.

COUNT II

42 U.S.C. §1983, Violation of the First Amendment

82. Plaintiffs restate and reallege the allegations set forth above.

83. Defendants, under color of state law, have imposed and continue to enforce the NREC's regulation. Nevada law, as interpreted by the NREC and the NRED, and the associated regulation and enforcement efforts, deprive Plaintiffs of their right to freedom of speech in violation of the First Amendment to the United States Constitution as applied to Nevada, the NREC, and the NRED under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

COUNT III

28 U.S.C. § 2201, Declaratory Relief

84. Plaintiffs restate and reallege the allegations set forth above.

85. Plaintiffs seek a declaration that Nevada Revised Statute § 645.605 does not prohibit licensed out-of-state agents from brokering Nevada property transactions in conjunction with a licensed Nevada real estate broker in *any* fashion, and that the NREC's regulation found at Nevada Administrative Code § 645.185(11) and the NRED's associated enforcement efforts violate Nevada law.

86. Plaintiffs also seek a declaration that the NREC's regulation found at Nevada Administrative Code § 645.185(11) and the NRED's associated enforcement efforts violate the

Commerce Clause of the United States Constitution, obstructing Plaintiffs' rights to engage in interstate commerce in transactions involving Nevada property.

87. To the extent this Court finds that the NREC's regulation found at Nevada Administrative Code § 645.185(11) and the NRED's associated enforcement efforts *do not* conflict with Nevada law, Plaintiffs seek a declaration that Nevada Revised Statute § 645.605 violates the Commerce Clause of the United States Constitution to the extent it purports to prohibit out-of-state licensed real estate agents from collaborating with Nevada brokers in the brokering of Nevada commercial property in *any* fashion.

88. To the extent this Court finds that the NREC's regulation found at Nevada Administrative Code § 645.185(11) and the NRED's associated enforcement efforts *do not* conflict with Nevada law, Plaintiffs seek a declaration that Nevada Revised Statute § 645.605 violates Plaintiffs First Amendment free speech rights, made applicable to the state of Nevada by the Fourteenth Amendment.

COUNT III

42 U.S.C. § 1988, Attorneys' Fees

89. Plaintiffs restate and reallege the allegations set forth above.

90. Plaintiffs bring this action to vindicate their civil rights under the United States Constitution.

91. Because Defendants have violated Plaintiffs' civil rights, Plaintiffs are entitled to an award of attorneys' fees and other allowable expenses pursuant to 42 U.S.C. § 1988.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that final judgment be entered against Defendants declaring, ordering and adjudicating that:

(a) The NREC's and NRED's policy, including the attendant regulations and enforcement efforts, violates Nevada law;

(b) The NREC's and NRED's policy, including the attendant regulations and enforcement efforts, violates the Commerce Clause of the United States Constitution;

(c) The NREC's and NRED's policy, including the attendant regulations and enforcement efforts, violates the First Amendment to the United States Constitution as made applicable to the state of Nevada, the NREC, and the NRED through the Fourteenth Amendment to the United States Constitution;

(d) To the extent Nevada Revised Statute § 645.605 is found to support the NREC's and NRED's policy, including the attendant regulations and enforcement efforts, that statute violates the Commerce Clause of the United States Constitution;

(e) To the extent Nevada Revised Statute § 645.605 is found to support the NREC's and NRED's policy, including the attendant regulations and enforcement efforts, that statute violates the First Amendment to the United States Constitution as made applicable to the state of Nevada, the NREC, and the NRED through the Fourteenth Amendment to the United States Constitution;

(f) Defendants be enjoined from enforcing the NREC's and NRED's unconstitutional policy, and specifically from initiating or prosecuting any further disciplinary investigations, prosecutions, or other actions arising from such enforcement efforts;

(g) Defendants be enjoined from enforcing their ban on cooperation between Nevada brokers and out-of-state agents in the interstate brokerage of Nevada commercial property;

(h) Defendants be enjoined from enforcing their advertising ban on non-Nevada agents or brokers;

(i) Defendants be enjoined from enforcing their ban on non-Nevada brokers proposing commercial transactions of Nevada real property, even when such brokers represent someone other than an out-of-state buyer;

(j) Defendants be enjoined from enforcing their ban on non-Nevada brokers engaging in any communication, whether written or oral, that may be construed as "negotiation," even when such brokers represent someone other than an out-of-state buyer;

(k) Defendants dismiss all pending investigations and/or disciplinary actions initiated or prosecuted under the NREC's and NRED's unlawful policy;

(l) Plaintiffs be awarded all costs and attorneys' fees to which they are entitled; and

(m) Such further relief as the Court may deem just and reasonable.

DATED this 10th day of June, 2016.

Respectfully submitted,

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FOR COMPLIANCE WITH NSCR 42.1 ONLY

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