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AUG 02 2019

BEFORE THE REAL ESTATE COMMISSION

STATE OF NEVADA

SHARATH CHANDRA, Administrator,
REAL ESTATE DIVISION,
DEPARTMENT
OF BUSINESS & INDUSTRY,
STATE OF NEVADA,

Petitioner,

vs.

TERRY NELSON,

Respondent.

Case No. 2017-1715

NEVADA REAL ESTATE DIVISION'S
OPPOSITION TO RESPONDENT
TERRY NELSON'S MOTION TO
DISMISS

The REAL ESTATE DIVISION OF THE DEPARTMENT OF BUSINESS AND INDUSTRY OF THE STATE OF NEVADA ("Division"), by and through its counsel, Aaron D. Ford, Attorney General of the State of Nevada, and Peter Keegan, Deputy Attorney General, hereby submits the instant Opposition to Respondent Terry Nelson's Motion to Dismiss.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Legal Standard

A tribunal may only dismiss a complaint when it appears beyond a doubt that the petitioner could not prove a set of facts, which, if true, would entitle him to relief.¹

II. Argument

A. Respondent Violated NRS 645.633(1)(h) and/or NAC 645.605(6) By Breaching the Obligation of Absolute Fidelity to the Seller and the Obligation to Deal Fairly with All Parties to a Real Estate Transaction.

NAC 645.605(6) plainly states:

In determining whether a licensee has been guilty of gross negligence or incompetence under paragraph (h) of subsection 1 of NRS 645.633 or conduct which constitutes deceitful, fraudulent or dishonest dealing under paragraph (i) of that subsection, the Commission will consider, among other things, whether the licensee:

¹ See *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

1 6. Has breached his or her obligation of absolute fidelity to his or
2 her principal's interest or his or her obligation to deal fairly with
3 all parties to a real estate transaction.

4 The first violation alleged by Division's Complaint specifically alleges:

5 Respondent violated 645.633(1)(h) and/or NAC 645.605(6), on
6 each of the 21 listings, by not dealing fairly with the sellers for
7 the properties in question by obstructing the fair market and
8 limiting prospective buyers by offering an undesirable
9 commission, or no commission, to the buyer's broker; thereby, not
10 representing the sellers of the property with absolute fidelity.

11 At least 13 of the 21 transactions² involved short-transactions with third party lenders
12 whose approval was required for the short sale and required the transactions to be arm's
13 length sales. In a short sale, the lender is a party to the transaction and therefore owed a
14 duty of fairness by the Respondent. Respondent failed to deal fairly with the short sale
15 lender parties to the real estate transactions and therefore violated NAC 645.605(6).

16 The remaining eight transactions involve the Respondent violating NAC 645.605(6)
17 by limiting the open market for her principals, the sellers. Respondent's counsel confuses
18 the Division's alleged violation with an attempt to impose a commission structure, which
19 Respondent argues violates anti-trust laws. Instead, the Division's violation seeks to
20 prevent a broker breaching the obligation of absolute fidelity to his or her principal's
21 interest, as set forth in NAC 645.605(6). The Division does not seek ad hoc rule making
22 through its administrative complaint process in an effort to set a commission structure.
23 Rather, the Division's Complaint seeks to eliminate the behavior of the Respondent, which
24 was to conduct "pocket listings," whereby Respondent placed her efforts on obtaining a
25 double commission with her husband, rather than obtaining the highest price for her
26 principals.

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² 14070 Tourmaline Dr.; 2080 Blossom View Dr.; 2290 Lindley Way; 7615 Halifax Dr.; 7615 Rolling Clouds Dr.; 439 L St.; 11560 Tulepo St.; 3252 Parque Verde Lane; 2261 Matteoni Drive (12/30 Closing); 751 Tahoe Blvd., #5; 1920 Trainer Way; 3525 W. Plumb Lane; and 7280 Gemstone Drive.

1 **B. The Handwritten Contractual Provisions Contained in the Offer and**
2 **Acceptance Agreement and Applicable Short Sale Addendums Placed**
3 **the Responsibility to Deposit the Earnest Money Within (1) Business Day**
4 **After Acceptance.**

5 **1. Violation 2**

6 Respondent's Motion to Dismiss argues that in order to prove a violation of
7 NRS 645.630(1)(k) against Respondent, the Division must prove that she actually *received*
8 the earnest money deposit. However, the second violation alleged by the Division's
9 Complaint specifically alleges:

10 RESPONDENT violated NRS 645.252 and/or NRS 645.630(1)(k)
11 on 18 occasions, including the listings for 296 E. Quail St; 14070
12 Tourmaline Dr.; 2080 Blossom View Dr.; 112 Michaelsen Dr.;
13 7615 Rolling Clouds Dr.; 439 L St.; 987 West Canary Circle; 6940
14 Flower St.; 11560 Tulepo St.; 3252 Parque Verde Lane; 2261
15 Matteoni Drive (4/28 Closing); 751 Tahoe Blvd., #5; 1920 Trainer
16 Way; 1935 Trainer Way; 3525 W. Plumb Lane; 935 Nevada St.;
17 945 Locomotive Way; and 7280 Gemstone Drive, by failing to
18 exercise reasonable skill and care to ensure that the buyer's
19 earnest money was timely deposited within one (1) business day
20 of the seller's acceptance, in accordance with the provisions of the
21 Offer and Acceptance Agreement and, where applicable the Short
22 Sale Addendum.

23 The Division submits that Respondent was responsible, pursuant to the plain hand written
24 terms of the Offer and Acceptance Agreement and the applicable Short Sale Addendums,
25 as well as the NRS 645.630(1)(k) to ensure that the earnest money deposit check was
26 deposited within (1) business day of acceptance. It is irrelevant that the Respondent claims
27 never to have handled the earnest money checks or that the checks were deposited into
28 escrow by the buyers; it was Respondent's legal obligation, pursuant to statute and
29 contract, to ensure the checks were timely deposited.

30 Similarly, Respondent's citation to NRS 645.310 is erroneous. NRS 645.310 plainly
31 states that the earnest money deposit must be deposited into the broker's account "***unless***
32 ***otherwise agreed in writing.***"(emphasis added). The plain handwritten terms contained
33 on both the Offer and Acceptance Agreements and applicable Short Sale Addendums clearly

1 state in writing, which was agreed to by all the parties, that the earnest money deposit,
2 evidenced by check, was to be ***held uncashed until acceptance and then deposited***
3 ***within one (1) business day of acceptance.*** (emphasis added).

4 NRS 645.630(1)(k) deals with the Broker's obligation to ensure timely "***deposit any***
5 ***check or cash received as earnest money before the end of the next banking day,***
6 unless otherwise provided in the purchase agreement." (emphasis added). The
7 Respondent's attempt to obfuscate the plain language of the statute by adding a
8 requirement that the Broker actually receives the earnest money deposit is unconvincing.
9 To protect the seller, it is the responsibility of the seller's broker/agent to ensure the buyer
10 actually submits an earnest money deposit, as required by the Offer and Acceptance
11 Agreement to protect the seller. Similarly, the seller's broker/agent is also responsible to
12 ensure, by exercising reasonable skill and care, the timely deposit of "***any***" earnest money
13 deposit. NRS 645.630(1)(k) (emphasis added).

14 Finally, Respondent's Motion to Dismiss contradicts itself by identifying that NRS
15 645.630(1)(f) requires actual possession, but then arguing that NRS 645.630(1)(k), which
16 does not include that same actual possession language, somehow requires actual
17 possession. The plain language of NRS 645.630(1)(f) demonstrates that the Nevada
18 Legislature used the words "comes into his or her possession" to require actual possession.
19 As such, the absence of those words from a different subsection of the very same statute,
20 cannot be inferred to require actual possession. "When the Legislature includes particular
21 language in one section of a statute but omits it in another this Court presumes that the
22 Legislature intended a difference in meaning."³

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26 ³*Williams v. State Dep't of Corr.*, 402 P.3d 1260, 1264 (Nev. 2017) (internal quotation marks and
27 alterations omitted) citing *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("[The Legislature's] explicit
28 legal significance and should not be presumed to be random or devoid of meaning." (internal citations
omitted)).⁴

2. Violation 5

Respondent's Motion to Dismiss argues that the Division's complaint fails to allege that the Respondent ever came into possession of the earnest money deposit checks for the three (3) properties in question and therefore the Commission should dismiss the three (3) violations of NRS 645.630(1)(f) and/or NRS 645.252(2) alleged in the Division's Complaint. As identified in the Respondent's Motion to Dismiss, the Division's Complaint expressly alleges in each of the three real property transactions at issue, that "[t]he Offer and Acceptance Agreement contained an Earnest Money Deposit provision which specified that the buyer would issue a . . . earnest money check payable to Great Western Real Estate, to be held uncashed until acceptance and then deposited within one (1) business day" of seller's acceptance of offer. *Complaint* pg. 3 at ¶ 15 (Quail Street); pg. 5-7 ¶¶ 33; 34; 40; 41 (Tourmaline Drive); pg. 8 ¶ 55; 56 (Blossom View Drive).

The Division submits that because the checks were made payable to Great Western Real Estate, as evidenced by the Respondent's Motion to Dismiss Exhibit 1, the checks were at some point, should have been in the actual possession of the Respondent. *See* Respondent's Motion to Dismiss, Exhibit 1, NRED-EXH 4 – 00026-00027; NRED –EXH 5 00088-00089, 000112; NRED-EXH 6 00166. To support this contention, the earnest money deposit check for the Quail Street property was indorsed by Terry Nelson to First American Title in accordance with the provisions of the Offer and Acceptance Agreement. *See Exhibit 1*, NRED-EXH 4 –00027. The Respondent's contention that the three earnest money deposit checks made out to her brokerage did not come into her possession is absurd.

The Respondent's Motion to Dismiss then goes on to argue that the Division's complaint fails to allege a "triggering" event for the purposes of NRS 645.630(1)(f)'s reasonable time for remittance requirement. In response, the Division submits that its Complaint plainly alleges that the contractual terms contained within each of the applicable Offer and Acceptance Agreements state the triggering language for the alleged violation of NRS 645.630(1)(f)'s reasonable remittance of the earnest money deposit as follows: "held uncashed until acceptance and then deposited within one (1) business day."

1 In sum, the Division's Complaint plainly alleges facts demonstrating a violation of NRS
2 645.630(1)(f) on three occasions where the Respondent failed to comply with the written
3 contractual terms of the Offer and Acceptance Agreements by timely depositing checks
4 made payable to her brokerage into escrow.

5 **C. The Division Has Agreed to Stipulate to Dismiss the Allegations**
6 **Contained in Paragraph 3 of the Violation Section of its Complaint.**

7 As indicated by the Respondent, the Division has agreed to dismiss the 15 violations
8 alleged, regarding failure to timely place the subject properties on the MLS, in paragraph
9 3 of the violation section of its Complaint. The Respondent did provide the Division with
10 copies of MLS waivers applicable to the 15 properties identified, albeit after having already
11 been requested by the Division's investigator to provide a complete copy of the brokerage
12 file for the subject properties. It should be noted that, though not alleged in the Division's
13 Complaint, pursuant to NRS 645.635(6), "[f]ailure to produce any document, book, or record
14 in his or her possession or under his or her control, concerning a real estate transaction
15 under investigation by the Division" constitutes an independent ground for disciplinary
16 action.

17 **D. Respondent's Motion to Dismiss Attempts to Mince the Words of NRS**
18 **645.252(1)(a) and NRS 645.605(4)(b) to Avoid the Requirement to Have**
19 **Disclosed In Writing Her Marital Relationship with Brian Nelson, the**
20 **Buyer's Agent in the 13 Applicable Transactions.**

21 **1. Respondent's Failure to Make Written Disclosure**

22 The martial relationship between the Respondent, acting as the Seller's Broker, her
23 husband, acting as the Buyer's agent qualifies as "material and relevant facts, data or
24 information, which the licensee knows, . . . relating to the property which is the subject of
25 the transaction. Respondent's Motion to Dismiss does not provide any evidence of the
26 disclosure of the martial relationship to the parties. The Motion to Dismiss also fails
27 demonstrate through legislative history or otherwise, that the NRS 645.252(1)(a)'s
28 language "relating to the property" is limited to physical attributes to the property which
is the subject of the transaction.

1 Indeed, the Legislative History for NRS 645.252(1)(a) or Senate Bill 403 (1995) is
2 readily available online at the Nevada Legislature's Research Division's Legislative History
3 Search. In fact, when S.B. 403 was introduced on May 16, 1995, to the Senate Committee
4 on Commerce and Labor, Senator Townsend identified that "[w]hat we are trying to do is
5 help the consumer understand the licensee's relationship either to another licensee, the
6 property itself, to the group for which they may work, for the broker, all of those
7 interrelationships."⁴

8 Respondent's Motion to Dismiss next goes on to attack the Division's Complaint
9 arguing that the Division failed to allege a violation of NRS 645.633(1) in relation to the 13
10 violations of NRS 645.605(4)(b) alleged in paragraph 4 of the violations section of the
11 Division's Complaint. The Division acknowledges that paragraph 4 of the violations section
12 of its Complaint does not cite either NRS 645.633(1)(h) or (i) as a basis for the violation;
13 however, NRS 645.633(1)(b) grants the Commission authority to "take action pursuant to
14 NRS 645.630 against any person subject to that section who is guilty of any of the following
15 acts: (b) [v]iolating any order of the Commission, any agreement with the Division, any of
16 the provisions of this chapter, chapter 116, 119, 119B, 645A, or 645C of NRS, *or any*
17 *regulation adopted pursuant thereto.*" (emphasis added). As such, because the
18 Division's Complaint alleges a violation of NAC 645.605(4) in its violation section and
19 identifies both NRS 645.630 and NRS 645.633 in the "Discipline Authorized" section of its
20 Complaint, the Commission should treat the alleged Violation of NRS 645.605(4) as an
21 independent regulatory violation punishable under NRS 645.633(1)(b).

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28 ⁴See <https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1995/SB403,1995.pdf>

1 Contrary to the Respondent's attempt to create a "quasi -criminal" or heightened
2 pleading standard for the Division's NRS 233B administrative complaint, the pleading
3 standard pursuant to NRS 233B.121 is notice pleading.⁵ Here, Respondent has been placed
4 on notice of the violations alleged and the Division's Complaint makes citation to the legal
5 authority for those violations.

6 2. Affidavit of "Arm's Length Transaction"

7 Respondent's Motion to Dismiss misstates the purpose of the Affidavit of "Arm's
8 Length Transaction." Pursuant to the PHH Affidavit of Arm's Length Transaction, the
9 Respondent, as the Seller's Listing and Purchaser's Broker, and her Husband, as the
10 Buyer's agent and "Transaction Facilitator," were required to sign under penalty of perjury
11 that all the statements in the Affidavit are true and correct. Moreover, the first paragraph

12 ⁵ **NRS 233B.121 Notice of hearing in contested case; contents of notice; representation
13 by counsel; opportunity to respond and present evidence and argument; fees and mileage for
14 witnesses; informal disposition; voluntary surrender of license in contested case deemed
disciplinary action; contents of record; transcriptions; findings of fact.**

- 15 1. In a contested case, all parties must be afforded an opportunity for hearing after reasonable notice.
- 16 2. The notice must include:
 - 17 (a) A statement of the time, place and nature of the hearing.
 - 18 (b) A statement of the legal authority and jurisdiction under which the hearing is to be held.
 - 19 (c) A reference to the particular sections of the statutes and regulations involved.
 - 20 (d) A short and plain statement of the matters asserted. If the agency or other party is unable to state
21 the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the
22 issues involved. Thereafter, upon application, a more definite and detailed statement must be furnished.
- 23 3. Any party is entitled to be represented by counsel.
- 24 4. Opportunity must be afforded all parties to respond and present evidence and argument on all issues
25 involved. An agency may by regulation authorize the payment of fees and reimbursement for mileage to
26 witnesses in the same amounts and under the same conditions as for witnesses in the courts of this state.
- 27 5. Unless precluded by law, informal disposition may be made of any contested case by stipulation,
28 agreed settlement, consent order or default. If an informal disposition is made, the parties may waive the
requirement for findings of fact and conclusions of law.
6. The voluntary surrender of a license in a contested case shall be deemed to constitute disciplinary
action against the licensee.
7. The record in a contested case must include:
 - (a) All pleadings, motions and intermediate rulings.
 - (b) Evidence received or considered.
 - (c) A statement of matters officially noticed.
 - (d) Questions and offers of proof and objections, and rulings thereon.
 - (e) Proposed findings and exceptions.
 - (f) Any decision, opinion or report by the hearing officer presiding at the hearing.
8. Oral proceedings, or any part thereof, must be transcribed on request of any party. The party making
the request shall pay all the costs for the transcription.
9. Findings of fact must be based exclusively on a preponderance of the evidence and on matters officially
noticed.

(Added to NRS by 1967, 808; A 1977, 56, 1062; 1985, 350; 2015, 707)

1 of the Affidavit plainly states "Lender, in consideration for the representations made below
2 by Seller(s), Buyer(s), *and their respective agents*, agrees to short sale on the express
3 condition that Seller(s), Buyer(s), *and their respective agents (including without*
4 *limitation, real estate agents, escrow agents, and title agents) each truthfully*
5 *represents, affirms, and states as follows:[.]*"

6 Respondent's argument that the Affidavit's representations were only required of the
7 Seller(s) and Buyer(s) misstates the Affidavit's purpose. It should also be noted that the
8 Respondent failed to produce a signed copy of the Affidavit.

9 **E. NRS 645.254(4)'s Waiver Form Requirement is a Legislative Mandate and**
10 **Not Within the Purview of the Commission to Set Aside.**

11 **1. Alleged Violation No. 6 & 7**


12 The Respondent's failure to comply with NRS 645.254(4) requirement to obtain
13 clients' signatures on the Division's Form 636 waiver is a per se violation of law. The
14 Commission does not have the authority to set these seven (7) alleged violations aside;
15 however, the Commission does have the authority and discretion to set the applicable
16 discipline, in line with the facts of this case, for the seven (7) alleged violations.

17 **III. Conclusion**

18 The Division respectfully requests that the Commission deny the Respondent's
19 Motion to Dismiss and proceed with a hearing in this matter.

20 DATED this 2nd day of August 2019.

21 AARON D. FORD
22 Attorney General

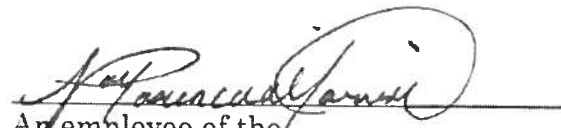
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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on August 2, 2019, I deposited for mailing in the United States Mail, first-class prepaid postage, at Carson City, a true and correct copy of the foregoing **NEVADA REAL ESTATE DIVISION'S OPPOSITION TO RESPONDENT TERRY NELSON'S MOTION TO DISMISS**, addressed to the following:

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