

FILED

JUL 01 2024

NEVADA COMMISSION OF APPRAISERS

Neale

1 KAEMPFER CROWELL
 Lesley Miller, No. 7987
 2 Elva Castaneda, No. 15717
 1980 Festival Plaza Drive, Suite 650
 3 Las Vegas, Nevada 89135
 Telephone: (702) 792-7000
 4 Facsimile: (702) 796-7181
 Email: lmiller@kcnvlaw.com
 5 Email: ecastaneda@kcnvlaw.com

6 Attorneys for Thomas L. Witherby

7 STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY REAL

8 ESTATE DIVISION - APPRAISERS

9 STATE OF NEVADA

10 SHARATH CHANDRA, Administrator,
 11 REAL ESTATE DIVISION,
 DEPARTMENT OF BUSINESS AND
 12 INDUSTRY, STATE OF NEVADA,

Case No. 2020-492, AP21.045.S

13 Petitioner,

**RESPONDENT'S OPPOSITION TO
MOTION TO DISMISS
RESPONDENT'S MOTION TO
MODIFY REVOCATION ORDER**

14 vs.

15 THOMAS L. WITHERBY
 (License No. A.0001528-CR),

16 Respondent.

17
 18
 19 Thomas Witherby ("Mr. Witherby"), by and through his attorneys
 20 Lesley Miller and Ellsie Lucero of the law firm Kaempfer Crowell, hereby submits
 21 this opposition to Petitioner Real Estate Division of the Department of Business and
 22 Industry of the State of Nevada ("Division") Motion to Dismiss Respondent's
 23 Motion to Modify Revocation Order. Mr. Witherby responds to the Motion to
 24 Dismiss as follows:

1 **I. INTRODUCTION**

2 On April 23, 2024, the Commission considered Mr. Witherby's Motion
3 to Reconsider the Revocation Order. The Commission denied the motion as
4 untimely, but provided two alternatives to Mr. Witherby: (1) that he reach a
5 settlement with the Division; or (2) that he file a motion to modify under
6 NRS 233B.131(3) presenting additional evidence to the Commission. On that same
7 day, the Division clearly expressed its unwillingness to reach any resolution with
8 Mr. Witherby. Therefore, Mr. Witherby filed a motion to modify under
9 NRS 231B.131(3) which presents evidence not previously considered by the
10 Commission in entering its October 10, 2023 Revocation Order. The evidence
11 demonstrates that there was no harm to the claimant in this case or anyone such that
12 the revocation of his already expired Nevada appraiser license should be modified
13 as well as the \$63,897.22 fine to a more appropriate amount in light of the lack of
14 harm to the claimant and State of Nevada.

15 **II. ARGUMENT**

16 **A. Mr. Witherby Filed His Motion to Modify Under NRS 233B.131(3)**
17 **Pursuant to the Commission's Instructions, and the Commission**
18 **Has Jurisdiction to Modify the Revocation Order.**

19 The Commission instructed Mr. Witherby that he could move for
20 modification of the October 10, 2023 Revocation Order under NRS 233B.131(3).
21 Under NRS 233B.131(3), a party may move for modification of an agency's findings
22 after the receipt of additional evidence. Mr. Witherby has presented as additional
23 evidence the deed for the property he appraised to show that the property sold for
24 the same amount he appraised it for, \$300,000.00. This evidence is material because

1 it shows that there was no harm as a result of Mr. Witherby's alleged violations of
2 his duties as an appraiser. Although this evidence existed prior to the October 10,
3 2023 Revocation Order, the Commission did not consider it because the case
4 proceeded on default. The Commission decided the case based on the administrative
5 file which did not contain evidence of the sales price for the property at issue.
6 Therefore, the Commission should consider this additional evidence and modify the
7 Revocation Order to a lesser penalty in light of the lack of harm.

8 **B. The Commission Also Has Jurisdiction to Modify the Revocation**
9 **Order Under NRS 645C.525.**

10 Under NRS 645C.525, a Commission order revoking an appraiser
11 license does not prohibit the Commission from continuing a disciplinary proceeding
12 against an appraiser:

13 **NRS 645C.525 Investigations, disciplinary proceedings, fines**
14 **and penalties not affected by expiration, revocation or voluntary**
15 **surrender of certificate, license or registration card. The**
16 **expiration or revocation of a certificate, license or registration card**
by operation of law or by order or decision of the Commission or a
court of competent jurisdiction, or the voluntary surrender of a
certificate, license or registration card by a certified or licensed
appraiser or registered intern does not:

17 1. **Prohibit the Commission or Division from initiating or**
18 **continuing an investigation of, or action or disciplinary proceeding**
19 **against, the certified or licensed appraiser or registered intern as**
20 **authorized pursuant to the provisions of this chapter or the**
21 **regulations adopted pursuant thereto; or**

22 2. Prevent the imposition or collection of any fine or penalty
23 authorized pursuant to the provisions of this chapter or the regulations
24 adopted pursuant thereto against the certified or licensed appraiser or
registered intern.

Therefore, even after the Commission or a court has filed a disciplinary order, the
Commission can continue a disciplinary proceeding against an appraiser. The
legislative history of NRS 645C.525 shows that it was enacted to grant the

1 Commission the ability to take action against individuals after investigations have
2 been conducted and even after their licenses are expired, suspended, or revoked. *See*
3 *Hearing Before the Senate Committee on Commerce and Labor, 71st Leg (2001)*
4 (statement of Pat Coward, Nevada Association of Realtors); *Hearing Before the*
5 *Assembly Committee on Commerce and Labor, 71st Leg. (2001)* (statement of David
6 Walker, Dept. of Business & Industry, Real Estate Division). The language of
7 NRS 645C.525 states that it applies to orders or decisions of the Commission or a
8 court. Thus, pursuant to this provision, the Commission has jurisdiction to continue
9 Mr. Witherby's proceeding and modify the Revocation Order even after the district
10 court entered an order on the petition for judicial review.

11 **C. The Division's Allegation that Mr. Witherby's Motion is Frivolous**
12 **is Baseless.**

13 The Division was present at the April 23, 2024 hearing in which the
14 Commission instructed Mr. Witherby that he could file a motion to modify the
15 Revocation Order. The Division is also aware that Mr. Witherby only did this
16 because the Division was unwilling to reach a resolution with him. The Division
17 continues to take a heavy-handed approach to the prosecution of this case in light of
18 the lack of harm to the claimant and the State of Nevada. Mr. Witherby simply
19 comes before the Commission in a last attempt for some relief from an order that has
20 deprived him of his ability to make a living and to pay an unreasonably high fine.

21 ///

22 ///

23

24

1 **III. CONCLUSION**

2 For the reasons set forth above, Mr. Witherby requests that the
3 Commission deny the Division's Motion to Dismiss and grant Mr. Witherby's
4 Motion to Modify the October 10, 2023 Order.

5 KAEMPFER CROWELL

6 

7 Lesley Miller, No. 7987
8 Elva Castaneda, No. 15717
9 1980 Festival Plaza Drive, Suite 650
10 Las Vegas, Nevada 89135

11 Attorneys for Thomas L. Witherby

12

13

14

15

16

17

18

19

20

21

22

23

24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CERTIFICATE OF SERVICE

I served the attached **RESPONDENT’S OPPOSITION TO MOTION TO DISMISS RESPONDENT’S MOTION TO MODIFY REVOCATION ORDER** by placing a true copy of it in a sealed envelope with postage prepaid in the U.S.

Mail and by electronic mail addressed to:

CHARVEZ FOGER, Deputy
Administrator
Deputy Attorney General
3300 West Sahara Avenue, Suite 350
Las Vegas, NV 89102
Cfoger@red.nv.gov

ZIWEI ZHENG, ESQ.
Deputy Attorney General
Nevada Bar No. 16351
555 East Washington Avenue
Las Vegas, NV 89101
zzheng@ag.nv.gov

CHRISTAL P. KEEGAN, ESQ.
Deputy Attorney General
Nevada Bar No. 12725
5420 Kietzke Lane, #202
Reno, Nevada 89511
ckeegan@ag.nv.gov

Attorneys for Real Estate Division

DATED July 1, 2024

s/Kimberly Rupe
Kimberly Rupe
An employee of Kaempfer Crowell