

FILED

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REAL ESTATE COMMISSION
Frank Perez



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BEFORE THE REAL ESTATE COMMISSION
STATE OF NEVADA

10 SHARATH CHANDRA, Administrator,
11 REAL ESTATE DIVISION,
12 DPEARTMENT OF BUSINESS &
INDUSTRY, STATE OF NEVADA

13 Petitioner,

14 v.

15 GAVIN M. ERNSTONE

16 Respondent.

CASE NO: 2017-1239

ANSWER

18 COMES NOW Respondent, GAVIN M. ERNSTONE, by and through his attorney
19 of record, Frank Perez, Esq, and the law office of Frank Perez, Ltd. and in response to
20 Petitioner's Complaint, on file herein, admits, denies and alleges as set forth below.

21
22 **FACTUAL ALLEGATIONS**

23 1. Answering Paragraph 1 of the Complaint on File, Respondent admits the
24 allegations set forth in said paragraph.

25 2. Answering Paragraph 2 of the Complaint on File, Respondent admits the
26 allegations set forth in said paragraph.
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1 3. Answering Paragraph 3 of the Complaint on File, Respondent admits the
2 allegations set forth in said paragraph.

3 4. Answering Paragraph 4 of the Complaint on File, Respondent admits the
4 allegations set forth in said paragraph.
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6 5. Answering Paragraph 5 of the Complaint on File, Respondent admits the
7 allegations set forth in said paragraph.

8 6. Answering Paragraph 6 of the Complaint on File, Respondent states the
9 allegations calls for a legal conclusion, and therefore Respondent denies the allegations
10 set forth in said paragraph.
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12 7. Answering Paragraph 7 of the Complaint on File, Respondent responds that upon
13 information and belief, plans were prepared and approved, but a residence was not
14 completed by the Yanceys, the Respondent denies the remaining allegations set forth in
15 said paragraph.
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17 8. Answering Paragraph 8 of the Complaint on File, Respondent admits, the
18 property was placed on the market, the Respondent denies the remaining allegations set
19 forth in said paragraph.
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21 9. Answering Paragraph 9 of the Complaint on File, Respondent states the
22 allegation is vague as to time, and therefore denies the allegations set forth in said
23 paragraph.
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25 10. Answering Paragraph 10 of the Complaint on File, Respondent admits the
26 Yancey's entered an agreement to sell the property, Respondent denies the remaining
27 allegations set forth in said paragraph.
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1 11. Answering Paragraph 11 of the Complaint on File, Respondent admits to
2 preparing the document to reflect the terms negotiated by the Parties to the transaction,
3 Respondent denies the remaining allegations set forth in said paragraph.
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5 12. Answering Paragraph 12 of the Complaint on File, Respondent responds that the
6 document speaks for itself, Respondent denies the remaining allegations set forth in said
7 paragraph.
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9 13. Answering Paragraph 13 of the Complaint on File, Respondent responds that the
10 document speaks for itself, Respondent denies the remaining allegations set forth in said
11 paragraph.
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13 14. Answering Paragraph 14 of the Complaint on File, Respondent responds that the
14 document speaks for itself, Respondent denies the remaining allegations set forth in said
15 paragraph.
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17 15. Answering Paragraph 15 of the Complaint on File, requires a legal conclusion
18 and Respondent responds that the document speaks for itself, Respondent denies the
19 remaining allegations set forth in said paragraph.
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21 16. Answering Paragraph 16 of the Complaint on File, Respondent admits to
22 preparing the document to reflect the terms negotiated by the Parties to the transaction,
23 Respondent denies the remaining allegations set forth in said paragraph
24

25 17. Answering Paragraph 17 of the Complaint on File, Respondent responds that the
26 allegation is compound and vague such as that Respondent cannot respond and therefore
27 Respondent denies the allegations set forth in said paragraph.
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1 18. Answering Paragraph 18 of the Complaint on File, Respondent responds that the
2 calculations set forth in the paragraph are accurate, but Respondent denies the remaining
3 allegations set forth in said paragraph.
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5 19. Answering Paragraph 19 of the Complaint on File, Respondent denies the
6 allegations set forth in said paragraph.

7 20. Answering Paragraph 20 of the Complaint on File, Respondent denies the
8 allegations set forth in said paragraph.
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10 21. Answering Paragraph 21 of the Complaint on File, Respondent denies the
11 allegations set forth in said paragraph.

12 22. Answering Paragraph 22 of the Complaint on File, Respondent that the document
13 speaks for itself, Respondent denies the remaining allegations set forth in said
14 paragraph.
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16 23. Answering Paragraph 23 of the Complaint on File, Respondent denies the
17 allegations set forth in said paragraph.

18 24. Answering Paragraph 24 of the Complaint on File, Respondent is without a
19 sufficient basis to admit or deny the allegations and therefore denies the allegations set
20 forth in said paragraph.
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22 25. Answering Paragraph 25 of the Complaint on File, Respondent denies the
23 allegations set forth in said paragraph.
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25 26. Answering Paragraph 26 of the Complaint on File, Respondent denies the
26 allegations set forth in said paragraph.
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1 27. Answering Paragraph 27 of the Complaint on File, Respondent denies the
2 allegations set forth in said paragraph.

3 28. Answering Paragraph 28 of the Complaint on File, Respondent denies the
4 allegations set forth in said paragraph.
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6 29. Answering Paragraph 29 of the Complaint on File, Respondent denies the
7 allegations set forth in said paragraph.

8 30. Answering Paragraph 30 of the Complaint on File, Respondent denies the
9 allegations set forth in said paragraph.
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11 **AFFIRMATIVE DEFENSES**

- 12 1. The Complaint fails to state claims upon which relief can be granted.
- 13 2. The Complaint fails to name an indispensable party, who without which, full and
14 complete relief cannot be accorded
- 15 3. The Restrictive Covenant that is the subject of the Complaint is void and
16 unenforceable as drafted and/or as implemented.
- 17 4. The terms and conditions of the Restrictive Covenant, if valid, are unconscionable
18 by their very nature, and thus unenforceable.
- 19 5. The claims set forth are barred by the doctrine of collateral estoppel.
- 20 6. The claims are barred by the doctrine of res judicata.
- 21 7. The Doctrine of commercial frustration and or impossibility render the Restrictive
22 Covenant unenforceable.
- 23 8. Pursuant to N.R.C.P. 11, as amended, all possible affirmative defenses may not
24 have been alleged herein insofar as sufficient facts were not available after
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1 reasonable inquiry upon the filing of Defendant's Answer, and therefore, this
2 answering Defendant reserves the right to amend his Answer to allege additional
3 affirmative defenses, if subsequent investigation so warrants
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5 DEFENSES

6 The Parties to the transaction are the Sellers Scott Yancey and Amie Yancey
7 (Sellers). The other Party to the transaction are James Hurtado and Stephanie Hurtado
8 (Buyers). Chapter 645 does not contain a specific definition of what constitutes a
9 "Party" to a transaction. However, the statutory scheme describes an agent/broker's
10 duty to their clients and those that are on the other side of the transaction.¹ The statutory
11 scheme identifies the Seller and any Potential Buyer or Buyer as the "Parties" to the
12 transaction. Howard Hughes Properties, Inc. is not a party to the transaction. It is a
13 predecessor in interest, but not a party as contemplated by Chapter 645. The
14 Respondent's duties to the "Parties" would be the Sellers and Buyers in the transaction
15 at issue.
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18 In discharging his duties, the Respondent followed the negotiated agreement
19 between the parties. The Seller no longer desired to live in Las Vegas, and therefore
20 sought to sell the property at issue. The desire was to break even, meaning recover the
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24 ¹ See NRS 645.193 Real Estate Division to prepare and distribute forms setting forth certain
duties owed by licensees. The Division shall prepare and distribute to licensees:

- 25 1. A form which sets forth the duties owed by a licensee who is acting for only one party to
a real estate transaction.
26 2. A form which sets forth the duties owed by a licensee who is acting for more than one party
to a real estate transaction.
27 3. A form which sets forth the duties owed by a real estate broker who assigns different
licensees affiliated with his or her brokerage to separate parties to a real estate transaction.
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1 costs Sellers put into the property; via dues, developing plans for construction and other
2 costs associated with the sale. The buyer was willing to pay a some representing those
3 out of pocket expenses. An arm's length negotiation took place and the Parties to the
4 transaction agreed on the terms. Respondent followed the negotiated terms and
5 prepared the purchase agreement accordingly. There is no evidence that Respondent
6 acted improperly to the actual Parties to the transaction.
7

8 Howard Hughes Properties, Inc. (HH) filed the complaint, apparently to avoid
9 pursuing a claim in District Court. HH states that the "transfer fee" is designed to
10 "prevent real estate speculation in the Ridges". See Document 000003, of the Notice of
11 Documents. The "transfer fee" is to be measured as:
12

13 "The greater of (a) ten percent of the entire consideration received by the
14 transferor for the transfer of the lot (with or without improvements) or (b)
15 Fifty Percent (50%) of the difference between the entire consideration
16 received by the transferor for the transfer of the lot (with or without
17 improvements) less the Purchase Price Paid transferor as the Grantee of the
18 Lot and Less the Escrow Fee, Title Insurance, and Transfer Taxes Paid by
the Transferor Upon the conveyance of the Lot to Transferee... (See
document 000004)

19 The restrictive covenant's purpose is served if the Seller does not make a profit
20 on the transaction. Speculative building does not take place, and the next buyer is still
21 required to construct a home. However, the restrictive convent precludes a seller from
22 recouping the costs in obtaining construction plans, obtaining approval of the plans
23 (including from HH), and commission due under the terms of a sale.
24

25 Seller's desire was to break even. However, the restrictive covenant made that
26 impossible, due to not allowing offsets for broker commissions and recovery of
27 investment costs. This has the consequence, in this case, of reducing the value of the
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1 property. The Parties to the transaction (Seller/Buyer) are free to negotiate the purchase
2 price based upon the value of the property and the value of the plans. Whether Seller
3 ultimately uses the plans is irrelevant, as there was an intrinsic value to the plans during
4 negotiations. The restrictive covenant does not preclude a Seller from recouping its out
5 of pocket costs in this manner, nor does it set forth a minimum purchase price. It is
6 respectively submitted the restrictive covenant as drafted and implemented is an undue
7 burden on the alienability of property and against public policy.
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10 Respondent's actions do not equate to gross negligence or incompetence. The
11 Parties negotiated at arm's length regarding what they considered a fair price for the
12 property.
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14 FRANK PEREZ, LTD

15 By: 

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