

APR 03 2018

REAL ESTATE COMMISSION
Robert J. ...

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BEFORE THE REAL ESTATE COMMISSION

STATE OF NEVADA

10 SHARAT CHANDRA, Administrator
11 REAL ESTATE DIVISION, DEPARTMENT
12 OF BUSINESS & INDUSTRY,
13 STATE OF NEVADA,

Case No.: 2016-2900

ANSWER TO COMPLAINT

Petitioner,

14 vs.

15 GLEN D. KUNOFSKY,
16

Respondent.

ANSWER TO COMPLAINT

19 COMES NOW Respondent GLEN D. KUNOFSKY, by and through his counsel of
20 record, Scott Marquis of Marquis Aurbach Coffing, and in answer to the Complaint would show
21 as follows:

JURISDICTION

22 Respondent denies the allegations of this paragraph.

FACTUAL ALLEGATION

23
24
25 1. In answer to Paragraph 1 of the Complaint, Respondent admits the allegations
26 contained therein.

27 2. In answer to Paragraph 2 of the Complaint, Respondent admits the allegations

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MARQUIS AURBACH COFFING

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1 contained therein.

2 3. In answer to Paragraph 3 of the Complaint, Respondent admits that he was an
3 agent for Marcus & Millichap Real Estate Investment Services, Inc. ("Marcus & Millichap") and
4 is licensed by New York State as an Associate Broker, License No. 10301203289. Otherwise,
5 Respondent lacks knowledge or information sufficient to form a belief as to the truth of the
6 allegations regarding the Division's understanding of the relevant time period, and therefore
7 denies the remaining allegations in Paragraph 3.

8 4. In answer to Paragraph 4 of the Complaint, Respondent lacks knowledge or
9 information sufficient to form a belief as to the truth of the allegations in Paragraph 4, and
10 therefore denies the allegations contained therein.

11 5. In answer to Paragraph 5 of the Complaint, Respondent lacks knowledge or
12 information sufficient to form a belief as to the truth of the allegations in Paragraph 5, and
13 therefore denies the allegations contained therein.

14 6. In answer to Paragraph 6 of the Complaint, Respondent lacks knowledge or
15 information sufficient to form a belief as to the truth of the allegations in Paragraph 6, and
16 therefore denies the allegations contained therein.

17 7. In answer to Paragraph 7 of the Complaint, Respondent lacks knowledge or
18 information sufficient to form a belief as to the truth of the allegations in Paragraph 7, and
19 therefore denies the allegations contained therein.

20 8. In answer to Paragraph 8 of the Complaint, Respondent lacks knowledge or
21 information sufficient to form a belief as to the truth of the allegations in Paragraph 8, and
22 therefore denies the allegations contained therein.

23 9. In answer to Paragraph 9 of the Complaint, Respondent lacks knowledge or
24 information sufficient to form a belief as to the truth of the allegations in Paragraph 9, and
25 therefore denies the allegations contained therein.

26 10. In answer to Paragraph 10 of the Complaint, Respondent lacks knowledge or
27 information sufficient to form a belief as to the truth of the allegations in Paragraph 10, and

1 therefore denies the allegations contained therein.

2 11. In answer to Paragraph 11 of the Complaint, Respondent lacks knowledge or
3 information sufficient to form a belief as to the truth of the allegations in Paragraph 11, and
4 therefore denies the allegations contained therein.

5 12. In answer to Paragraph 12 of the Complaint, Respondent admits only that a
6 document exists that is dated on or about February 23, 2016 titled "INTERSTATE
7 BROKERAGE COOPERATION AGREEMENT – TURF STATE" ("Academy of Excellence
8 Agreement"), regarding property located at 2341 Comstock Drive, Las Vegas, Nevada.
9 Otherwise, the Academy of Excellence Agreement speaks for itself. Respondent denies any
10 remaining allegations contained in Paragraph 12.

11 13. In answer to Paragraph 13 of the Complaint, Respondent admits only that the
12 Academy of Excellence Agreement contains the language quoted in Paragraph 13 of the
13 Complaint in context of other statements. Otherwise, Respondent denies any remaining
14 allegations contained in Paragraph 13.

15 14. In answer to Paragraph 14 of the Complaint, Respondent lacks knowledge or
16 information sufficient to form a belief as to the truth of the allegations in Paragraph 14, and
17 therefore denies the allegations contained therein.

18 15. In answer to Paragraph 15 of the Complaint, Respondent admits that draft
19 versions of marketing materials for the Academy of Excellence site may identify Respondent.
20 Respondent lacks information and belief sufficient to determine what the Division means by
21 "Advertising for the offering for sale" and therefore denies the remaining allegations of
22 Paragraph 15.

23 16. In answer to Paragraph 16 of the Complaint, Respondent admits only that a
24 document exists that is dated on or about May 19, 2016 titled "INTERSTATE BROKERAGE
25 COOPERATION AGREEMENT – TURF STATE" ("Walgreens Agreement"), regarding
26 property located at 2020 Reno Highway, Fallon, Nevada. Otherwise, the Walgreens Agreement
27 speaks for itself. Respondent denies any remaining allegations contained in Paragraph 16.

1 17. In answer to Paragraph 17 of the Complaint, Respondent admits only that the
2 Walgreens Agreement contains the language quoted in Paragraph 17 of the Complaint in context
3 of other statements. Otherwise, Respondent denies any remaining allegations contained in
4 Paragraph 17.

5 18. In answer to Paragraph 18 of the Complaint, Respondent admits that draft
6 versions of marketing materials for the Walgreens site may identify Respondent. Respondent
7 lacks information and belief sufficient to determine what the Division means by "Advertising for
8 the offering for sale" and therefore denies the remaining allegations of Paragraph 18.

9 19. In answer to Paragraph 19 of the Complaint, Respondent lacks knowledge or
10 information sufficient to form a belief as to the truth of the allegations in Paragraph 19, and
11 therefore denies the allegations contained therein.

12 20. In answer to Paragraph 20 of the Complaint, Respondent lacks knowledge or
13 information sufficient to form a belief as to the truth of the allegations in Paragraph 20, and
14 therefore denies the allegations contained therein.

15 21. In answer to Paragraph 21 of the Complaint, Respondent admits the allegations
16 contained therein.

17 22. In answer to Paragraph 22 of the Complaint, Respondent lacks knowledge or
18 information sufficient to form a belief as to the truth of the allegations in Paragraph 22, and
19 therefore denies the allegations contained therein.

20 23. In answer to Paragraph 23 of the Complaint, Respondent lacks knowledge or
21 information sufficient to form a belief as to the truth of the allegations in Paragraph 23, and
22 therefore denies the allegations contained therein.

23 24. In answer to Paragraph 24 of the Complaint, Respondent lacks knowledge or
24 information sufficient to form a belief as to the truth of the allegations in Paragraph 24, and
25 therefore denies the allegations contained therein.

26 25. In answer to Paragraph 25 of the Complaint, Respondent lacks knowledge or
27 information sufficient to form a belief as to the truth of the allegations in Paragraph 25, and

1 therefore denies the allegations contained therein.

2 26. In answer to Paragraph 26 of the Complaint, Respondent admits the allegations
3 contained therein.

4 27. In answer to Paragraph 27 of the Complaint, Respondent lacks knowledge or
5 information sufficient to form a belief as to the truth of the allegations in Paragraph 27, and
6 therefore denies the allegations contained therein.

7 **VIOLATIONS**

8 28. In answer to Paragraph 28 of the Complaint, Respondent denies the allegations
9 contained therein.

10 **DISCIPLINE AUTHORIZED**

11 29. The allegations contained in Paragraph 29 of the Complaint state legal
12 conclusions and do not require a response from the Respondent; however, to the extent a
13 response is required by rule, Respondent denies the allegations that are inconsistent with the
14 referenced statutes.

15 30. The allegations contained in Paragraph 30 of the Complaint state legal
16 conclusions and do not require a response from the Respondent; however, to the extent a
17 response is required by rule, Respondent denies the allegations that are inconsistent with the
18 referenced statutes.

19 31. The allegations contained in Paragraph 31 of the Complaint state legal
20 conclusions and do not require a response from the Respondent; however, to the extent a
21 response is required by rule, Respondent denies the allegations that are inconsistent with the
22 referenced statutes.

23 **DEFENSES & AFFIRMATIVE DEFENSES**

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

26 33. The Respondent is not guilty of violating any Order of the Nevada Real Estate
27 Commission, any agreement with the Nevada Real Estate Division, or any provision of NRS 645

1 or any regulation adopted pursuant thereto.

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

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

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

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

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

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

27 b. NREC and NRED failed to comply with the requirements for Regulation

1 Workshops pursuant to a duly posted agenda with sufficient opportunity for informed and
2 meaningful participation by the public, and with public discussion of the true purpose and true
3 effect of a proposed regulation.

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

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

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

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

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

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

20 i. NREC and NRED failed to comply with the requirement under NRS
21 233B.066 that a regulatory scheme be preceded by and supported by a Legislative Review that
22 identifies a true explanation of the need for the regulation, a true description of how public
23 comment was solicited, a true summary of public response, and a true estimate of the economic
24 effect of the regulation on the business which it is to regulate and on the public.

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

1 and in violation of the NRS 645.605.

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

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

7 41. NRS 645.680 requires that Respondent be provided, at least 30 days prior to any
8 scheduled hearing, copies of all communications, reports, affidavits and depositions in the
9 possession of NRED relevant to the Complaint. NRED and NREC have failed and refused to
10 comply with this provision. On information and belief, NRED and NREC contend that they can
11 produce only those records on which they intend to rely, which is a plain violation of NRS
12 645.680, and which denies Respondent's due process rights.

13 42. NRED and NREC have historically interpreted and enforced NAC 645.185 in a
14 manner that was contradictory to the plain language of the regulation. Namely, they have always
15 precluded out of state brokers from offering real estate for sale in Nevada to a person other than a
16 resident of Nevada, even though NAC 645.185 expressly allowed out of state brokers to offer
17 real estate in Nevada for sale to a person other than a resident of Nevada.

18 43. As historically and currently interpreted by NREC and NRED, the statutes and
19 regulations relating to out of state brokerage activities are so ambiguous as to be unenforceable.

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

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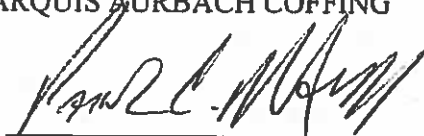
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AFFIRMATION

45. 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 22nd day of March 2018.

MARQUIS AURBACH COFFING

By 

Scott A. Marquis, Esq.
Nevada Bar No. 6407
Patrick C. McDonnell, Esq.
Nevada Bar No. 13188
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorney for Glen D. Kunofsky

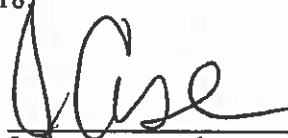
1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the date shown below, a true and correct copy of the foregoing
3 ANSWER TO COMPLAINT was served on the following parties:

4 *Via Email, Fax, and U.S. Mail*
5 REAL ESTATE DIVISION
6 STATE OF NEVADA
7 3300 W. Sahara Avenue, Suite 350
8 Las Vegas, Nevada 89102
9 Attn: Rebecca Hardin, Commission Coordinator
10 Telephone: (702) 486-4074
11 Facsimile: (702) 486-4067
12 rhardin@red.nv.gov

13 *Via Email, Fax, and U.S. Mail*
14 Keith A. Kizer
15 Senior Deputy Attorney General
16 555 E. Washington Ave., Ste. 3900
17 Las Vegas, Nevada 89101
18 Telephone: (702) 486-3326
19 kkizer@ag.nv.gov
20 Attorney for Real Estate Division

21 DATED this 22nd day of March, 2018.

22 
23 _____
24 J. Case, an employee of
25 Marquis Aurbach Coffing

MARQUIS AURBACH COFFING

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Las Vegas, Nevada 89145
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Exhibit 1

MARQUIS AURBACH COFFING
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Las Vegas, Nevada 89145
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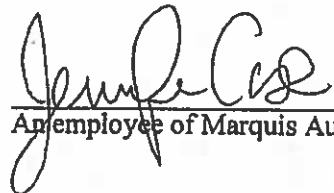
CERTIFICATE OF SERVICE

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

Via Email and US Mail
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
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Via Email and US Mail
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Las Vegas, Nevada 89101
Telephone: (702) 486-3326
kkizer@ag.nv.gov
Attorney for Real Estate Division

DATED this 22nd day of March, 2018.


An employee of Marquis Aurbach Coffing

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of Nevada, Inc., and Marcus & Millichap
Real Estate Investment Services, Inc.**

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**Attorneys for Plaintiffs Gordon Allred,
Alvin Najib Mansour, Kevin Najib
Mansour, Perry White, and Nenad
Zivkovic**

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
SOUTHERN DIVISION

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

Plaintiffs,

vs.

Sharath Chandra, in his official capacity as
Administrator of the Real Estate Division,
Department of Business & Industry, State of
Nevada, and

Norma Jean Opatik, Neil Schwartz, Wayne
Capurro, Devin Reiss, and Lee K. Barrett, in
their official capacities as Commissioners of
the Nevada Real Estate Commission,

Defendants.

Case Number 2:16-CV-01299

PLAINTIFFS' FIRST AMENDED
COMPLAINT AND REQUEST FOR
DECLARATORY AND INJUNCTIVE
RELIEF

1 Plaintiffs Marcus & Millichap Real Estate Investment Services of Nevada, Inc. and
2 Marcus & Millichap Real Estate Investment Services, Inc. (collectively "Marcus & Millichap")
3 and Plaintiffs Gordon Allred, Alvin Najib Mansour, Kevin Najib Mansour, Perry White, and
4 Nenad Zivkovic (collectively the "Individual Plaintiffs") file this First Amended Complaint.
5 Plaintiffs seek damages as well as declaratory, injunctive, and other relief.

6 NATURE OF THIS ACTION

7 1. Plaintiffs challenge a restrictive legal policy imposed by the Defendants on
8 Nevada's part of the national market for commercial real estate brokering services. The policy
9 consists of restrictive statutes, regulations, and enforcement efforts controlled by the Nevada
10 Real Estate Commission ("NREC") and the Nevada Real Estate Division ("NRED"). The policy

1 restrictions apply to out-of-state commercial real estate agents and brokers that are licensed by a
2 state other than Nevada and that seek to work in cooperation with in-state commercial real estate
3 brokers licensed by Nevada. Even if these out-of-state agents and brokers work in cooperation
4 with a local licensed broker, the Defendants' restrictive policy stops them from participating in
5 Nevada's part of the national market. This constitutes unconstitutional protectionism.

6 2. The last state to attempt to defend such a policy was Kentucky, and its former
7 policy—which was quite similar to the Defendants' policy—was twice held to be an
8 unconstitutional violation of the United States Constitution's Commerce Clause. *River Oaks*
9 *Mgmt. v. Brown*, No. 3:06-CV-00451-S, 2007 WL 2571909 (W.D. Ky. Sept. 4, 2007); *Marcus &*
10 *Millichap Real Estate Inv. Brokerage Co. v. Skeeters*, 395 F. Supp. 2d 541 (W.D. Ky. 2005); *see*
11 *LexCin Partners, Ltd. v. Newmark S. Region, LLC*, No. 2008-CA-001170, 2009 WL 2341553, at
12 *1 (Ky. Ct. App. 2009) (“The ‘turf state’ policy of the Kentucky Real Estate Commission was
13 later invalidated by the federal court”).

14 3. Plaintiffs cited this and other authority to the NREC and NRED in an effort to
15 stop their enforcement of the restrictions. But the NREC and NRED chose to ignore that
16 authority and continue to restrict constitutionally protected conduct. They threaten their local
17 industry's out-of-state competitors with administrative enforcement actions that include the
18 assessment of serious civil penalties, and they have now in fact carried out threats by penalizing
19 both brokers in Nevada and out-of-state agents and brokers for engaging in constitutionally
20 protected behavior. Thus, Plaintiffs have no choice but to pursue this action.

21 4. Plaintiffs previously served the Attorney General of Nevada with a Notice of
22 Constitutional Question and a copy of Plaintiffs' Original Complaint and Request for
23 Declaratory and Injunctive Relief, ECF No. 1.

1 JURISDICTION AND VENUE

2 5. This Court has subject matter jurisdiction over this action because of 28 U.S.C.
3 § 1331 and 28 U.S.C. § 1343(a)(3).

4 6. Venue is proper in this district under 28 U.S.C. § 1391(b)(1) because the NREC
5 and NRED maintain their principal place of business and reside in this district. Venue is proper
6 under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to this action
7 occurred in this district, in which the NREC and NRED reside. This action is properly assigned
8 to this division pursuant to Rule IA 1-8 of the Local Rules of Practice for the United States
9 District Court for the District of Nevada.

10 PARTIES

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

15 8. Plaintiff Marcus & Millichap Real Estate Investment Services, Inc. is
16 headquartered in Calabasas, California. It is the parent company for Marcus & Millichap Real
17 Estate Investment Services of Nevada, Inc. and other subsidiary entities. Marcus & Millichap
18 entities service commercial real estate investment needs for clients across the United States, as
19 well as in Canada.

20 9. Plaintiff Marcus & Millichap Real Estate Investment Services, Inc. and Plaintiff
21 Marcus & Millichap Real Estate Investment Services of Nevada, Inc. are referred to collectively
22 as "Marcus & Millichap."

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

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

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

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

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

20 15. Plaintiffs Gordon Allred, Alvin Najib Mansour, Kevin Najib Mansour, Perry
21 White, and Nenad Zivkovic are referred to collectively as the "Individual Plaintiffs."

22 16. Defendant Sharath Chandra is the NRED Administrator and has held that position
23 since at least 2016. He was preceded by Joseph Decker, who held that position at the time of the

1 original complaint's filing. In this situation, Federal Rule of Civil Procedure 25 provides for the
2 automatic substitution of the successor officer as a party, without the need for a motion or order.
3 See Fed. R. Civ. P. 25(d); ECF No. 71 at 7 n.2. Mr. Chandra may be served at the principal
4 office of the NRED as follows: Legal Administrative Officer; State of Nevada, Department of
5 Business & Industry; Real Estate Division; 2501 E. Sahara Avenue, Suite 303; Las Vegas, NV
6 89104.

7 17. Defendant Norma Jean Opatik is an NREC Commissioner and has held that
8 position since at least 2015. She holds a Nevada real estate license and works at 250 S. Highway
9 160 Suite 11; Pahrump, NV 89048. She has appeared in this action and no further service is
10 necessary.

11 18. Defendant Neil Schwartz is an NREC Commissioner and has held that position
12 since at least 2013. He holds a Nevada license and works at 8290 W. Sahara #100; Las Vegas,
13 NV 89117. He appeared in this action and no further service is necessary.

14 19. Defendant Wayne Capurro is an NREC Commissioner and has held that position
15 since at least 2016. He was preceded in that position by Sherrie Cartinella, who held the position
16 at the time of the original complaint's filing. He holds a Nevada license. In this situation,
17 Federal Rule of Civil Procedure 25 provides for the automatic substitution of the successor
18 officer as a party, without the need for a motion or order. See Fed. R. Civ. P. 25(d); ECF No. 71
19 at 7 n.2. Mr. Capurro may be served at the principal office of the NRED as follows: Legal
20 Administrative Officer; State of Nevada, Department of Business & Industry; Real Estate
21 Division; 2501 E. Sahara Avenue, Suite 303; Las Vegas, NV 89104.

1 20. Defendant Devin Reiss is an NREC commissioner and has held that position since
2 at least 2014. He holds a Nevada license and works at 10120 S. Eastern #300; Henderson, NV
3 89052. He has appeared in this action and no further service is necessary.

4 21. Defendant Lee K. Barrett is an NREC commissioner and has held that position
5 since at least 2015. He holds a Nevada license and works at 2885 South Jones Boulevard; Las
6 Vegas, NV 89146. He has appeared in this action and no further service is necessary.

7 FACTS

8 22. Plaintiffs are a national commercial real estate brokerage firm, one of its
9 subsidiary entities, out-of-state licensed real estate agents and brokers, and real estate agents and
10 brokers licensed in Nevada. Defendants have deprived Plaintiffs of their constitutional right to
11 engage in interstate commerce free from protectionist, discriminatory, and excessively
12 burdensome restrictions; and Defendants threaten to continue doing so in the future.

13 **A. The Commercial Real Estate Market.**

14 23. Commercial real estate is promoted and sold nationally and internationally.
15 Buyers of investment properties, which range from small private concerns to large institutional
16 investors, often have diversified portfolios that include investment properties located in different
17 states. This is especially true for large institutional investors, who frequently invest in
18 specialized types of property on a regional or national basis.

19 24. As distinct from residential real estate, investors in commercial real estate
20 typically develop long-term relationships with one or more broker advisors upon whom they rely
21 to assist in managing and growing their portfolios. In this respect, commercial investors often
22 view their real estate agents as trusted advisors and partners. Among other things, such agents
23 generally have an expertise in the type of investment their clients favor along with an in-depth

1 understanding of each client's investment objectives. Such specialization, coupled with access to
2 a national platform of commercial properties, assists the agent in maximizing value for his or her
3 client in both the purchase and the sale of commercial real estate.

4 25. Commercial real estate is a national marketplace in which buyers and sellers of
5 real estate are often located in states other than where the commercial property is located.
6 Consequently, commercial real estate brokerage firms expend significant resources to develop
7 integrated networks of brokers who can promote listings to investors with whom they have
8 relationships, assist existing clients in the listing and marketing of properties located in different
9 states, coordinate multi-state transactions (which are increasingly common), and share expertise
10 on specific types of transactions.

11 26. In contrast, local brokers who choose not to (or are not permitted to) cooperate
12 with out-of-state agents are not able to compete on the basis of market access and expertise, both
13 of which are especially important if a seller is to be able to market a property effectively to the
14 largest possible pool of qualified buyers. Additionally, such local brokers do not generally have
15 the resources to efficiently coordinate multi-state transactions, nor do they typically possess the
16 same in-depth understanding of a national client's investment strategies, objectives, and portfolio
17 that national brokers have by virtue of their established long-term relationships.

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

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

9 29. As a result of the national nature of the market and the multitude and complexity
10 of the different types of transactions, commercial brokerage firms compete on the basis of,
11 among other things, their ability to: (1) bring capital to local and regional markets by matching
12 buyers and sellers nationally; (2) coordinate complex multi-state transactions; and (3) provide
13 value-added consulting services such as strategic planning, market analysis, value analysis, trend
14 forecasts, and counseling. Also important is a firm's knowledge of submarkets and market
15 segments, which is essential to planning investment strategies, evaluating investment
16 opportunities, and handling multi-state transactions. In short, commercial brokerage firms
17 function as a sort of real estate investment bank by serving as investment advisors and assisting
18 in the efficient placement of capital.

19 30. A number of national commercial real estate brokerage firms provide highly
20 specialized investment brokerage services to private and institutional investors nationwide for
21 transactions involving a wide variety of commercial properties. Marcus & Millichap is one of
22 the largest such firms. Marcus & Millichap, like other commercial brokerage firms, is not

1 involved in brokering personal residences among individual homeowners. It brokers only
2 commercial (income producing) property.

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

10 32. Clients choose commercial firms such as Marcus & Millichap precisely because
11 their agents and brokers work together, sharing information and expertise and acting as
12 intermediaries with their established contacts to broker commercial property. The benefits of
13 such an integrated approach are readily apparent in the context of complex multi-state
14 transactions (e.g., the simultaneous sale of retail chain stores in multiple states), which enable
15 clients to realize substantial efficiencies while limiting transaction costs.

16 33. Investors in commercial real estate assets typically rely on close business
17 relationships with those who represent them as brokers or agents. Many brokers and agents have
18 served as the exclusive representative for an investor-client throughout relationships spanning 5,
19 10, and 20 years or more. Commercial brokerage firms such as Marcus & Millichap have
20 invested considerable resources developing a nationwide network of commercial property
21 owners, developers, investors, and other commercial real estate agents. That network enables
22 them to identify and market properties more efficiently and effectively than would otherwise be
23 possible by a single local firm dependent exclusively on "cold calls" and advertisements. And

1 the network allows trusted brokers and agents to manage transactions around the country with
2 the cooperation of local brokers, much like trusted lawyers licensed in their home state litigate
3 cases around the country with the cooperation of local counsel.

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

8 35. Permitting cooperation between Nevada brokers and out-of-state agents and
9 brokers benefits consumers by ensuring that they obtain the best possible advice and counsel and
10 have efficient and effective access to the national investment market. But permitting such
11 cooperation presents a competitive threat to local Nevada brokers.

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

18 **B. Nevada's Unconstitutional Statutes, Regulations, and Enforcement Efforts.**

19 37. The NRED is a Nevada administrative agency. It is controlled by a single
20 appointed Administrator. *See Nev. Rev. Stat. § 645.001.*

21 38. The NREC is a Nevada administrative commission. *Nev. Rev. Stat. § 645.050.* It
22 is controlled by five appointed Commissioners. *Id.* When appointed, each NREC Commissioner
23 must have been a Nevada resident for no less than five years and must have been actively

1 engaged in business either as a Nevada real estate broker for three years or as a Nevada
2 broker-salesperson for five years. Nev. Rev. Stat. § 645.090. While they serve, each
3 Commissioner must reside in or have a principal place of business in Nevada. *See* Nev. Rev.
4 Stat. § 645.100. All of the Defendant Commissioners met these requirements in fact.

5 39. Nevada makes it unlawful to do any business as a commercial real estate broker
6 or broker-salesperson (agent) within Nevada without first obtaining one of two things. *See* Nev.
7 Rev. Stat. § 645.230, .235. An agent or broker can do so if they first obtain a Nevada "license."
8 Nev. Rev. Stat. § 645.230. An agent or broker can also do at least some business (with
9 limitations), even if they do not first obtain a Nevada license, if they first obtain a "cooperative
10 certificate." *See* Nev. Rev. Stat. § 645.605.

11 40. The NREC and NRED regulate the Nevada commercial real estate market, control
12 both licenses and cooperative certificates, and administer all of the associated statutes,
13 regulations, and enforcement efforts. Chapter 645 of the Nevada Revised Statutes contains most
14 of the relevant state laws regarding the practice of real estate. The NRED administers Chapter
15 645. Nev. Rev. Stat. § 645.045. The NREC acts in an advisory capacity to the NRED, adopts
16 regulations, and conducts hearings about matters of enforcement. Nev. Rev. Stat. § 645.050.
17 The NRED Administrator cannot adopt regulations alone; the Administrator can propose
18 regulations, which become adopted only if the NREC approves. Nev. Rev. Stat. § 645.190(2).

19 41. The cooperative certificate means of doing business as a commercial real estate
20 agent or broker within Nevada is a creature of statute. Nevada Revised Statutes Chapter 645
21 contains several provisions governing the cooperation of out-of-state commercial real estate
22 agents and brokers that are licensed by a state other than Nevada and real estate brokers in
23 Nevada licensed by Nevada. The NREC and NRED administer these provisions.

1 42. Section 645.605 is titled "Certificate authorizing out-of-state licensed broker to
2 cooperate with broker in Nevada: issuance; fee; regulations." Nev. Rev. Stat. § 645.605. It gives
3 the NRED Administrator the "authority to issue certificates authorizing out-of-state licensed
4 brokers to cooperate with Nevada brokers." *Id.* It gives the NREC the "authority to promulgate
5 rules and regulations establishing the conditions under which such certificates shall be issued and
6 cancelled, all subject to the provisions and penalties of this chapter." *Id.* Section 645.280 works
7 in conjunction with Section 645.605 by providing that a "licensed real estate broker may pay a
8 commission to a licensed broker of another state." Nev. Rev. Stat. § 645.280(1).

9 43. Three key regulations implement the NREC and NRED's policy regarding
10 cooperative certificates: Nevada Administrative Code Sections 645.180, 645.183, and 645.185.
11 Section 645.180 addresses the cooperative certificate application process. Section 645.183
12 addresses application decisions. Section 645.185 addresses cooperative certificate uses. The
13 NREC adopted all of these regulations.

14 44. Nevada Administrative Code Section 645.185(11) addresses the subject of what
15 kind of business a cooperative certificate may be used for. The current version took effect on
16 April 4, 2016 and provides as follows:

17 An out-of-state broker may not use a cooperating broker's certificate as authority to sell
18 or attempt to sell real estate in Nevada on behalf of the owner of that real estate. Such a
19 certificate may be used only for the purpose of allowing the out-of-state broker or
20 salesperson to represent a person other than a resident of Nevada in the purchase of real
21 estate in Nevada.

22 Nev. Admin. Code § 645.185(11) (2016). The previous version applied from 2004 to April 4,
23 2016 and provided as follows:

24 An out-of-state broker may not use a cooperating broker's certificate as authority to sell
25 or attempt to sell real estate in Nevada to a resident of Nevada. Such a certificate may be
26 used only for the purpose of allowing the out-of-state broker or salesperson to offer real
27 estate in Nevada for sale to a person other than a resident of Nevada.

1 Nev. Admin. Code § 645.185(11) (2004). Both of these cooperative certificate use restrictions
2 are illegally discriminatory and protectionist.

3 45. The current version of Nevada Administrative Code Section 645.185(11) restricts
4 the use of cooperative certificates clearly and unambiguously. Its restrictions apply even where a
5 broker in Nevada licensed by Nevada *within the same national firm* as the out-of-state agent or
6 broker supplies cooperation and supervision of the transaction to ensure compliance with Nevada
7 law. They apply even where the seller does not reside in Nevada. They apply where a Nevada
8 seller has an established relationship with an out-of-state agent or broker and desires that
9 person's participation in the transaction. And they apply when a Nevada buyer has a
10 longstanding relationship with an out-of-state agent and desires that agent's participation in the
11 transaction.

12 46. Because of the use restrictions imposed by these regulations, out-of-state agents
13 and brokers cannot, by way of a cooperative certificate, supply the full panoply of services that
14 the market demands. Under both versions of the restriction, even if a national brokerage firm
15 maintains an office and a broker in Nevada licensed by Nevada (as Marcus & Millichap does),
16 the firm's out-of-state brokers and agents cannot use their firm's resources to promote Nevada
17 properties and assist clients in the vast majority of transactions.

18 47. The cooperative certificate use restrictions put out-of-state businesses at an
19 extraordinary competitive disadvantage. For example, under the NREC and NRED's current
20 restrictive policy, a California real estate agent or broker who attempts to help his California
21 client in the sale of Nevada commercial property would be engaging in banned activity. A local
22 Nevada office of a regional or national commercial broker that is operated by a licensed Nevada
23 broker is, under the policy, prohibited from collaborating with the firm's out-of-state agents and

1 | brokers to promote Nevada properties, prohibited from providing value-added consulting
2 | services, and prohibited from sharing expertise.

3 | 48. The NREC and NRED adopted this restrictive policy for the protectionist purpose
4 | of limiting out-of-state agent's and brokers' participation in the Nevada marketplace. The
5 | purpose was to advantage Nevada's in-state brokers by limiting the ability of regional and
6 | national brokerage firms to offer integrated services to their clients.

7 | 49. The NREC and NRED's restrictive policy achieves its protectionist purpose. In
8 | effect, it unfairly protects the business interests of in-state brokers, who enjoy a virtually captive
9 | market without the competitive forces of a national marketplace. Out-of-state brokers and
10 | brokerage firms are injured by the inability to do business as they wish and supply superior
11 | service and expertise for business involving interstate transactions.

12 | 50. The NREC's and NRED's policy harms the very consumers that the NREC and
13 | NRED are charged with protecting. The consumers—buyers and sellers of Nevada commercial
14 | property—are injured because the policy reduces the pool of qualified investors for Nevada
15 | properties, deters capital investment in Nevada, prevents consumers from utilizing real estate
16 | professionals with whom they have established relationships, and limits consumers in their
17 | ability to obtain specialized knowledge and expertise.

18 | 51. The license means of doing business as a commercial real estate agent or broker
19 | within Nevada is also creature of statute. Nevada Revised Statutes Chapter 645 contains the
20 | provisions governing qualifications, issuance, and uses of Nevada brokering licenses. The
21 | NREC and NRED administer these provisions.

22 | 52. Nevada Revised Statutes Section 645.550 requires all real estate brokers that hold
23 | a Nevada license to (1) have and maintain an office in Nevada, and (2) conduct all of their

1 Nevada real estate business from the office in Nevada. This requirement renders a Nevada
2 license useless for the vast majority of out-of-state agents and brokers. Even if a Nevada license
3 is obtained, the Section 645.550 in-state presence requirement stops out-of-state commercial real
4 estate agents and brokers from having full access to Nevada's part of the national market. This
5 imposes a substantial burden on out-of-state agents and brokers that works to the advantage of
6 in-state competitors.

7 53. Nevada license holders must comply with continuing education requirements
8 unique to Nevada. *See Nev. Admin. Code* § 645.575. This requirement imposes a substantial
9 burden on out-of-state agents and brokers that works to the advantage of in-state competitors.

10 **B. The NREC and NRED Policy Violates Nevada Law.**

11 54. Nevada statutes do not authorize Nevada Administrative Code Section
12 645.185(11). The NREC and NRED policy of restricting cooperative certificate uses by way of
13 this regulation exercises a power that statute does not supply.

14 55. Nevada Revised Statutes Section 645.605 gives the NRED Administrator the
15 "authority to issue certificates authorizing out-of-state licensed brokers to cooperate with Nevada
16 brokers." *Id.* It also gives the NREC the "authority to promulgate rules and regulations
17 establishing the conditions under which such certificates shall be issued and cancelled, all subject
18 to the provisions and penalties of this chapter." *Id.* NREC regulations that go beyond "the
19 conditions under which such certificates shall be issued and cancelled" are not authorized.

20 56. Some of NREC's regulations validly address "the conditions under which such
21 certificates shall be issued and cancelled." For example, the policy NREC adopted in Nevada
22 Administrative Code Section 645.180 says that an applicant must provide a copy of his or her

1 current license issued in another state and detail his or her employment and disciplinary history.
2 Nev. Admin. Code § 645.180.

3 57. Nevada regulations must be backed by statutory authority, and no statute
4 authorizes regulations that limit the kind of cooperation a cooperative certificate can authorize.
5 The policy NREC adopted in Nevada Administrative Code Section 645.185(11) is not a
6 regulation about “the conditions under which such certificates shall be issued and cancelled.” It
7 goes beyond setting a “condition” by limiting the nature of “cooperation” itself. This makes
8 Nevada Administrative Code Section 645.185(11) a violation of Nevada law.

9 **C. Administrative Enforcement Actions and Investigations.**

10 58. The NREC and NRED are actively enforcing their restrictive cooperative
11 certificate and licensing policies against out-of-state and in-state agents and brokers affiliated
12 with Marcus & Millichap. They have imminently threatened to, and are in fact, directing
13 investigations, issuing cease-and-desist letters, and conducting administrative enforcement
14 proceedings to issue fines and other penalties.¹ Marcus & Millichap and the Individual Plaintiffs
15 are being prosecuted and penalized for engaging in constitutionally protected activity.

16 59. With respect to the prosecuted matters, to Plaintiffs’ knowledge no complaint has
17 been made by the buyer, the seller, or any other participant in the property transactions at issue.
18 Rather, the investigations are being brought on the NRED’s own initiative for the purpose of
19 restricting the ability of out-of-state agents and brokers to compete with Nevada licensees. If the
20 NREC and NRED are successful in their continued efforts to prosecute and penalize Marcus &
21 Millichap’s agents and brokers for engaging in the interstate commerce at issue, their restrictive
22 policies will have eliminated national competition from this market.

¹ The administrative proceedings took place after this litigation passed its embryonic stage and substantial proceedings on the merits had occurred.

1 60. The status of the NREC and NRED's investigations and disciplinary actions with
2 regard to Marcus and Millichap's agents and brokers is as follows:

3 a. Plaintiff Gordon Allred – Mr. Allred is First Vice President of Investments with
4 Marcus & Millichap. Mr. Allred holds a California broker's license and works out of
5 Marcus & Millichap's Ontario, California office. He resides in California. On April 5,
6 2016, the NRED notified Mr. Allred that it has "received information against" him and
7 had opened a case for investigation—styled *NRED v. Allred* Case No. 2016-1734—based
8 on his listing and/or selling certain properties in Nevada. On December 6, 2017 the
9 NREC held a hearing concerning these matters and Mr. Allred was fined \$301,639.89.

10 b. Plaintiff Alvin Najib Mansour – Mr. Mansour is Executive Vice President of
11 Investments with Marcus & Millichap. He is also President for the Mansour Group,
12 which is an entity affiliated with Marcus & Millichap. Mr. Mansour holds a California
13 broker's license as well as a Texas broker's license, and works out of Marcus &
14 Millichap's San Diego, California office. He resides in California. On May 31, 2016, the
15 NRED notified Mr. Mansour that it has "received information against" him and had
16 opened a case for investigation—styled *NRED v. Mansour, A* Case No. 2016-2402—
17 based on his listing and/or selling certain properties in Nevada. On December 6, 2017
18 the NREC held a hearing concerning these matters and Mr. Mansour was fined
19 \$30,811.79.

20 c. Plaintiff Kevin Najib Mansour – Mr. Mansour is Managing Partner for the
21 Mansour Group, which is an entity affiliated with Marcus & Millichap. Mr. Mansour
22 holds a California salesperson's license and works out of the Mansour Group's San
23 Diego, California office. He resides in California. On May 31, 2016, the NRED notified

1 Mr. Mansour that it has “received information against” him and had opened a case for
2 investigation—styled *NRED v. Mansour, K* Case No. 2016-2403—based on his listing
3 and/or selling certain properties in Nevada. On December 6, 2017 the NREC held a
4 hearing concerning these matters and Mr. Mansour was fined \$5,811.79.

5 d. Plaintiff Perry White – Mr. White is Vice President of Investments with Marcus
6 & Millichap. Mr. White holds a Nevada broker’s license and works out of Marcus &
7 Millichap’s Las Vegas, Nevada office. He resides in Nevada. On April 28, 2016, the
8 NRED notified Mr. White that he had been added to the investigation involving Nevada
9 properties brokered by certain other Plaintiffs. The investigations against Mr. White are
10 styled *NRED v. White* Case Nos. 2016-2032 and 2016-2405. On December 5 and 6, 2017
11 the NREC held hearings concerning these matters and Mr. White was fined a total of
12 \$22,436.12 .

13 e. Plaintiff Nenad Zivkovic – Mr. Zivkovic is an Associate with Marcus &
14 Millichap. He is also a Senior Associate for the Mansour Group, which is an entity
15 affiliated with Marcus & Millichap. Mr. Zivkovic holds a Nevada salesperson’s license
16 and works out of Marcus & Millichap’s San Diego, California office. He resides in
17 California. On May 31, 2016, the NRED notified Mr. Zivkovic that he had been added to
18 the investigation involving Nevada properties brokered by certain other Plaintiffs. The
19 investigation against Mr. Zivkovic is styled *NRED v. Zivkovic* Case No. 2016-2404. On
20 December 6, 2017 the NREC held a hearing concerning these matters and Mr. Zivkovic
21 was fined \$30,811.79 and further ordered to attend six hours of continuing education.

22 61. Each of these enforcement actions concerns an alleged violation of the Nevada
23 license requirement and/or the policy forbidding most cooperation between in-state brokers and

1 out-of-state agents and brokers regarding the sale of Nevada property. Each of these
2 enforcement violated Plaintiffs' substantive right to engage in interstate commerce free from
3 discrimination, and also violated Plaintiffs' right to procedural due process.

4 **E. The NREC and NRED's actions violate the Commerce Clause.**

5 62. The NREC and NRED's restrictive legal policy regarding cooperative certificates
6 and licenses violates the Commerce Clause of the United States Constitution. It discriminates
7 against and excessively burdens interstate commerce. It intends to and does in fact protect the
8 economic interests of in-state Nevada agents and brokers by seriously disadvantaging
9 out-of-state agents and brokers. The policy effectively assures that all substantive activity in
10 connection with Nevada brokering may be performed by local brokers only.

11 63. Dormant Commerce Clause challenges to state action entail two kinds of analysis.
12 *E.g., S.D. Myers, Inc. v. City and Cty. of S.F.*, 253 F.3d 461, 466 (9th Cir. 2001). Strict
13 scrutiny's virtually *per se* rule of invalidity applies if a state law directly regulates interstate
14 commerce or if a state law discriminates against interstate commerce on its face, in its purpose,
15 or in its practical effect. *Id.* Otherwise—if an evenhanded law has only indirect and incidental
16 effects on interstate commerce—the state action is unconstitutional if its burden on interstate
17 commerce is clearly excessive in relation to the putative local benefits. *Id.*

18 64. Under both types of analysis, the NREC and NRED's discriminatory and
19 protectionist statutes, regulations, and enforcement efforts are unconstitutional. Standing alone,
20 the cooperative certificate restrictions are unconstitutional. Standing alone, the license
21 restrictions are unconstitutional. And in conjunction, the cooperative certificate and license
22 restrictions together are unconstitutional.

23

1 1. **The challenged NREC and NRED policies directly regulate and**
2 **discriminate against interstate commerce.**

3 65. The NREC and NRED's enactment and enforcement of Nevada Administrative
4 Code Sections 645.185(11) directly regulates interstate commerce and discriminates against
5 interstate commerce. By enacting and enforcing this policy, NREC and NRED prevent the
6 involvement of out-of-state agents and brokers in transactions involving the sale of Nevada
7 property and in the representation of a Nevada buyer, even when such agents and brokers
8 cooperate with a licensed Nevada broker. The policy stops an out-of-state broker or agent from
9 forming a commercial relationship with: (1) a Nevada buyer; (2) a Nevada seller; or (3) a non-
10 Nevada seller for transactions involving Nevada properties.

11 66. The policy's discrimination against out-of-state economic interests and in favor
12 local Nevada brokers appears on the face of the regulation, is the policy's purpose, and is its
13 practical effect. The cooperative certificate policy's discrimination is felt most acutely by
14 national brokerage firms and their clients. It harms all buyers and sellers of Nevada commercial
15 property by denying them the services, networks, expertise, and access to national markets that
16 national commercial brokerage firms can provide. The result is that licensed out-of-state agents
17 and brokers are precluded from participating in interstate commerce with regard to the vast
18 majority of Nevada property transactions.

19 67. At the same time, the NREC and NRED's enforcement of Nevada's restrictive
20 licensing policy directly regulates interstate commerce and discriminates against interstate
21 commerce. Out-of-state brokers and agents cannot avoid the cooperative certificate policy's
22 limitations by obtaining a license because, by virtue of the licensing policy, license holders must
23 have and maintain a definite place of business in Nevada and use that office for the transaction of
24 all Nevada business. Nev. Rev. Stat. § 645.550(1). Nevada license holders are forbidden from

1 transacting business from anywhere but Nevada. Nev. Rev. Stat. § 645.550(3). Discrimination
2 against out-of-state economic interests appears on the face of the statute, is the statute's purpose,
3 and is its practical effect.

4 68. The NREC and NRED's efforts to enforce the in-state presence requirement
5 constitute direct discrimination against out-of-state economic interests.

6 69. By directly regulating interstate commerce and/or discriminating against interstate
7 commerce, the NREC and NRED's actions trigger strict scrutiny's virtual "per se" rule of
8 invalidity. See *Granholm v. Heald*, 125 S.Ct. 1885, 1897 (2005); *Nationwide Biweekly Admin.,*
9 *Inc. v. Owen*, 873 F.3d 716, 736 (9th Cir. 2017). They fail to satisfy strict scrutiny because
10 neither policy is the least restrictive means of accomplishing a compelling state interest.

11 70. The NREC and NRED can achieve the goal of competent broker representation
12 through less burdensome means. Requiring that out-of-state agents and brokers be licensed in
13 their home state and work in cooperation with a licensed Nevada broker who is responsible for
14 insuring compliance with Nevada law would serve to protect Nevada property owners without
15 unduly burdening interstate commerce or discriminating against out-of-state agents and brokers.
16 *Skeeters*, 395 F. Supp. 2d at 549. Any legitimate concern the NREC and NRED might have with
17 the activities of out-of-state agents or brokers would be adequately addressed by the Nevada
18 licensee's cooperation. By making the cooperating local broker legally and professionally
19 responsible for the acts of the out-of-state agent or broker, the state can "make certain that the
20 guidelines, regulations and laws of [Nevada] are observed while the out-of-state broker can
21 advise the foreign investor on matters critical to its overall interests." *Id.* at 549–50 (quoting
22 *Furr v. Fonville Morisey Realty, Inc.*, 503 S.E.2d 401, 406 (N.C. Ct. App. 1998)). "[W]hen, as
23 happens with increasing frequency in our state, the buyer/lessee is an out-of-state investor or

1 corporation with complex interests and concerns best known to its regular brokers in its home
2 state, the interests of the parties are better served if the out-of-state party is allowed to rely on the
3 combined efforts of a local broker and a broker familiar with its particular situation.” *Id.* at 549.
4 “[I]ndeed, the complete exclusion of its regular broker from a transaction may well render the
5 foreign buyer/lessee more vulnerable to fraud.” *Id.* at 550 (quoting *Furr*, 503 S.E.2d at 406).

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

8 71. The NREC and NRED’s enactment and enforcement of these restrictive policies
9 also violates the second tier of the Commerce Clause analysis because the resulting burden on
10 interstate commerce is clearly excessive in relation to the putative local benefits. *See River Oaks*
11 *Mgmt.*, 2007 WL 2571909 at *8. The burden imposed is very heavy and the NREC and NRED
12 have no legitimate interest in forbidding licensed out-of-state agents and brokers from doing
13 business by cooperating with in-state brokers licensed by Nevada.

14 72. No legitimate public interest is served by the NREC and NRED’s policy of
15 prohibiting cooperation between out-of-state agents and brokers licensed by a state other than
16 Nevada and brokers licensed by Nevada. Indeed, only in-state Nevada brokers and agents
17 benefit from such restrictions, as they are able to reap the financial rewards of no national
18 competition and enjoy a virtual monopoly on Nevada real estate transactions. Everyone else,
19 including Nevada property owners, out-of-state agents and brokers, and national brokerage firms
20 suffers at the hands of the NREC’s and NRED’s protectionist policies.

21 73. If all states were to adopt restrictions similar to Nevada’s, it would be virtually
22 impossible for consumers of real estate brokerage services to obtain consistent investment
23 advice, maintain a diverse portfolio of properties, engage in multi-state transactions, and
24 maximize property values or identify investment opportunities without expending substantial

1 additional resources. Buyers and sellers would be unable to work with a single national broker
2 analyzing and consulting on their whole portfolio. They would instead have to employ scores of
3 local brokers focused only on properties in their individual states; and each of those local brokers
4 would be unable to discuss other properties the client owns or might have interest in with
5 potential buyers or sellers, for fear of transgressing the protectionist policies in the state where
6 the client's other properties or possible acquisition targets may be located.

7 74. If all fifty states adopted Nevada's approach, true market gridlock would occur.
8 A seller with properties in ten states would have to retain ten separate brokers, one in every state,
9 each of whom would be negotiating contracts and closing deals for that state alone. These
10 separate brokers would be unable to effectively work together to effectuate the seller's overall
11 business objectives because any involvement by any other broker would violate the protectionist
12 policies in a broker's local jurisdiction. Likewise, each buyer, at significant financial and
13 transaction costs, would have to retain a broker licensed in the state of each property's location
14 and segregate communications between them. A purchaser who desires to buy property in ten
15 states would have to retain ten brokers, all working independently. A deal that could have been
16 completed principally by two brokers in a single transaction (with appropriate cooperative
17 supervision) would thus require twenty brokers and ten transactions. This obstruction of
18 interstate commerce is precisely what the Commerce Clause forbids.

19 75. Taken together, or singularly, NREC and NRED's cooperative certificate and
20 licensing policies violate the United States Constitution's Commerce Clause by impermissibly
21 restricting interstate commerce to the benefit of Nevada licensees and the detriment of property
22 owners, investors, out-of-state licensees, and national brokerage firms. Both together and
23 singularly, the Defendants' efforts to enforce these laws against Plaintiffs are unconstitutional.

1 F. The NREC and NRED's restrictions violate the First Amendment.

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

7 77. The cooperative certificate use restrictions in Nevada Administrative Code
8 Section 645.185(11), along with statutory in-state presence requirement that effectively
9 eliminates the ability of out-of-state agents and brokers to become Nevada brokers, restricts
10 Plaintiffs' speech proposing a commercial transaction to buyers or sellers of Nevada real estate.
11 The Defendants' have ordered that the out-of-state agents and brokers refrain from "any form of
12 advertisement" as a real estate agent or licensee. Second, the Defendants' cease-and-desist
13 orders more broadly prohibits the out-of-state agents and brokers from "engaging in the business
14 of" real estate, "acting in the capacity of" a real estate agent, "any form of . . . sale of property,"
15 or "assum[ing] to act" as a real estate agent. But a critical part of being a real estate agent or
16 broker, as Nevada statutory law recognizes, includes spoken deal negotiation. Therefore, when
17 Plaintiffs propose and negotiate commercial transactions, communicate with market participants,
18 and market properties, they are engaging in commercial speech.

19 78. The restricted commercial speech neither relates to unlawful activity nor is it
20 misleading. Thus, Plaintiffs' commercial speech is subject to protection and, at a minimum, the
21 NREC and NRED must justify the restrictions as consistent with the First Amendment. *See*
22 *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 565
23 (1980). To be consistent with the First Amendment, the NREC and NRED must demonstrate:

1 (1) the asserted governmental interest is substantial; (2) the regulation advances the
2 governmental interest asserted in a direct and material way; and (3) the regulation is not more
3 extensive than is necessary to serve that interest.

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

12 80. The Nevada statutes, regulations, and enforcement efforts at issue are also more
13 extensive than is necessary to regulate any substantial interest. Again, any legitimate concern the
14 Nevada regulatory agencies might have with the activities of out-of-state agents and brokers
15 could be adequately addressed by the involvement and supervision of the cooperating Nevada
16 broker. *Skeeters*, 395 F. Supp. 2d at 549-50. Such a proposal, used by states across the United
17 States, adequately addresses any legitimate concern without Nevada's draconian restrictions,
18 which silence out-of-state brokers in connection with Nevada real property transactions.

19 81. Legislation or government regulation which imposes a specific, content-based ban
20 is subject to heightened judicial scrutiny. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 131 S. Ct.
21 2653, 2664 (2011). The NRED's prohibition on advertising is a content-based ban, specifically
22 regulating speech based on the content.

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

8 **G. Irreparable Harm.**

9 83. The NREC and NRED's actions pose a threat of irreparably harming both Marcus
10 & Millichap and the Individual Plaintiffs. Without intervention from this Court, the NREC and
11 NRED's enforcement of the restrictive cooperative certificate and license policies will deprive
12 Plaintiffs of their constitutional right to engage in interstate commerce free from protectionist,
13 discriminatory, and/or unnecessarily burdensome state economic restraints. In light of the
14 enforcement actions that have already taken place, the threatened harm is both imminent and
15 actual.

16 84. The NREC and NRED's actions threaten to injure the financial livelihoods of
17 out-of-state brokers and agents and national brokerage companies. They deny non-Nevada
18 licensees, including licensees affiliated with Marcus & Millichap, access to Nevada markets and
19 prevent them from servicing their long-standing clients and competing on equal footing.

20 85. The NREC and NRED's actions threaten to injure owners of Nevada commercial
21 property by preventing them from engaging the agents or brokers of their choice, by preventing
22 them from obtaining valuable investment and marketing services provided by out-of-state

1 national brokerage firms, and by potentially depressing the value of their property by segregating
2 Nevada commercial property from the national marketplace.

3 86. The NREC and NRED's actions threaten to injure Nevada-based investors and
4 potential investors in Nevada property by preventing them from openly accessing the interstate
5 market for valuable investment services with respect to their potential Nevada property.

6 87. The NREC and NRED's actions also violate Plaintiffs' First Amendment free
7 speech rights, made applicable to the states through the Fourteenth Amendment. They restrict
8 the free flow of truthful, factual information relevant to commercial real estate transactions based
9 on the content of the message and the speaker. Without intervention from this Court, Plaintiffs
10 face irreparable harm from this continued suppression of First Amendment rights.

11 **COUNT I**

12 ***42 U.S.C. § 1983, Violation of the Commerce Clause***

13 88. Plaintiffs restate and reallege the allegations set forth above.

14 89. Defendants, under color of state law, have imposed and continue to impose
15 unconstitutional statutes, regulations, and enforcement efforts on Plaintiffs. Defendants have
16 prohibited and continue to prohibit almost all cooperation between out-of-state commercial real
17 estate agents and brokers that are licensed by a state other than Nevada and in-state real estate
18 brokers licensed by Nevada. Defendants have prohibited and continue to prohibit out-of-state
19 agents and brokers from utilizing Nevada brokerage licenses by requiring that all license holders
20 maintain an office in Nevada and conduct all of their Nevada real estate business from the office
21 in Nevada. These statutes, regulations, and enforcement efforts create a protectionist,
22 discriminatory, and/or unreasonably burdensome restraint on interstate commerce in violation of
23 the Commerce Clause of the United States Constitution.

COUNT II

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

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

91. Defendants, under color of state law, have imposed and continue to impose unconstitutional statutes, regulations, and enforcement efforts on Plaintiffs. Defendants have deprived 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.

COUNT III

28 U.S.C. § 2201, Declaratory Relief

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

93. Plaintiffs seek a declaration that Nevada Administrative Code Section 645.185(11) violates Nevada law.

94. Plaintiffs seek a declaration that Nevada Administrative Code Section 645.185(11) violates the Commerce Clause of the United States Constitution by impermissibly restricting interstate commerce in Nevada's part of the national market for commercial real estate brokering services.

95. Plaintiffs seek a declaration that Nevada Revised Statutes Section 645.550 violates the Commerce Clause of the United States Constitution by impermissibly restricting interstate commerce in Nevada's part of the national market for commercial real estate brokering services.

96. Plaintiffs seek a declaration that, collectively, Nevada Administrative Code Section 645.185(11) and Nevada Revised Statutes Section 645.550 violate the Commerce Clause

1 of the United States Constitution by impermissibly restricting interstate commerce in Nevada's
2 part of the national market for commercial real estate brokering services.

3 97. Plaintiffs seek a declaration that, to the extent Nevada Administrative Code
4 Section 645.185(11) is authorized by Nevada Revised Statutes Section 645.605, Nevada Revised
5 Statutes Section 645.605 violates the Commerce Clause of the United States Constitution by
6 impermissibly restricting interstate commerce in Nevada's part of the national market for
7 commercial real estate brokering services.

8 98. Plaintiffs seek a declaration that, to the extent Nevada Administrative Code
9 Section 645.185(11) is authorized by Nevada Revised Statutes Section 645.605, Nevada Revised
10 Statutes Section 645.605 and Nevada Revised Statutes Section 645.550 collectively violate the
11 Commerce Clause of the United States Constitution by impermissibly restricting interstate
12 commerce in Nevada's part of the national market for commercial real estate brokering services.

13 99. Plaintiffs seek a declaration that the NREC and NRED's efforts to enforce their
14 restrictive cooperative certificate and license policies against Plaintiffs violate the Commerce
15 Clause of the United States Constitution by impermissibly punishing or seeking to punish
16 Plaintiffs for engaging in constitutionally protected activity.

17 100. Plaintiffs seek a declaration that Nevada Administrative Code Section
18 645.185(11) violates the First Amendment to the United States Constitution as made applicable
19 through the Fourteenth Amendment to the United States Constitution.

20 101. Plaintiffs seek a declaration that Nevada Revised Statutes Section 645.550
21 violates the First Amendment to the United States Constitution as made applicable through the
22 Fourteenth Amendment to the United States Constitution.

1 102. Plaintiffs seek a declaration that, to the extent Nevada Administrative Code
2 Section 645.185(11) is authorized by Nevada Revised Statutes Section 645.605, Nevada Revised
3 Statutes Section 645.605 violates the First Amendment to the United States Constitution as made
4 applicable through the Fourteenth Amendment to the United States Constitution.

5 103. Plaintiffs seek a declaration that, to the extent Nevada Administrative Code
6 Section 645.185(11) is authorized by Nevada Revised Statutes Section 645.605, Nevada Revised
7 Statutes Section 645.605 and Nevada Revised Statutes Section 645.550 collectively violate the
8 First Amendment to the United States Constitution as made applicable through the Fourteenth
9 Amendment to the United States Constitution.

10 104. Plaintiffs seek a declaration that the NREC and NRED's efforts to enforce their
11 restrictive cooperative certificate and license policies against Plaintiffs violate the First
12 Amendment to the United States Constitution as made applicable through the Fourteenth
13 Amendment to the United States Constitution.

14 **COUNT III**

15 *42 U.S.C. § 1988, Attorneys' Fees*

16 105. Plaintiffs restate and reallege the allegations set forth above.

17 106. Plaintiffs bring this action to vindicate their civil rights under the United States
18 Constitution and enforce the provisions of 42 U.S.C. § 1983.

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

21 **PRAYER FOR RELIEF**

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

- 1 (a) Nevada Administrative Code 645.185(11) violates Nevada law;
- 2 (b) Nevada Administrative Code 645.185(11) violates the Commerce Clause of the
3 United States Constitution;
- 4 (c) Nevada Revised Statutes Section 645.550 violates the Commerce Clause of the
5 United States Constitution;
- 6 (d) Collectively, Nevada Administrative Code 645.185(11) and Nevada Revised
7 Statutes Section 645.550 violate the Commerce Clause of the United States
8 Constitution;
- 9 (e) To the extent Nevada Administrative Code 645.185(11) is authorized by Nevada
10 Revised Statutes Section 645.605, Nevada Revised Statutes Section 645.605
11 violates the Commerce Clause of the United States Constitution;
- 12 (f) To the extent Nevada Administrative Code 645.185(11) is authorized by Nevada
13 Revised Statutes Section 645.605, Nevada Revised Statutes § 645.605 and
14 Nevada Revised Statutes Section 645.550 collectively violate the Commerce
15 Clause of the United States Constitution;
- 16 (g) The NREC and NRED's efforts to enforce their restrictive cooperative certificate
17 and license policies against Plaintiffs violate the Commerce Clause of the United
18 States Constitution;
- 19 (h) Nevada Administrative Code Section 645.185(11) violates the First Amendment
20 to the United States Constitution as made applicable through the Fourteenth
21 Amendment to the United States Constitution

1 (i) Nevada Revised Statutes Section 645.550 violates the First Amendment to the
2 United States Constitution as made applicable through the Fourteenth
3 Amendment to the United States Constitution.

4 (j) To the extent Nevada Administrative Code Section 645.185(11) is authorized by
5 Nevada Revised Statutes Section 645.605, Nevada Revised Statutes
6 Section 645.605 violates the First Amendment to the United States Constitution as
7 made applicable through the Fourteenth Amendment to the United States
8 Constitution.

9 (k) To the extent Nevada Administrative Code Section 645.185(11) is authorized by
10 Nevada Revised Statutes Section 645.605, Nevada Revised Statutes
11 Section 645.605 and Nevada Revised Statutes Section 645.550 collectively
12 violate the First Amendment to the United States Constitution.

13 (l) The NREC and NRED's efforts to enforce their restrictive cooperative certificate
14 and license policies against Plaintiffs violate the First Amendment to the United
15 States Constitution as made applicable through the Fourteenth Amendment to the
16 United States Constitution.

17 (m) Defendants be enjoined from:

18 i. Enforcing or continuing to enforce the NREC's and NRED's
19 unconstitutional policies regarding cooperative certificates and licenses,
20 and

21 ii. Initiating or continuing to prosecute any disciplinary investigations,
22 prosecutions, or other actions that arise from such enforcement, and

23 iii. Assessing or collecting penalties that arise from such enforcement;

1 (n) Defendants be enjoined from:

2 i. Enforcing a ban on brokerage activities that involve cooperation between
3 out-of-state commercial real estate agents and brokers that are licensed by
4 a state other than Nevada and real estate brokers in Nevada licensed by
5 Nevada.

6 ii. Enforcing a ban on advertising brokerage activities that involve
7 cooperation between out-of-state commercial real estate agents and
8 brokers that are licensed by a state other than Nevada and real estate
9 brokers in Nevada licensed by Nevada;

10 iii. Enforcing a ban on proposing commercial transactions that involve
11 cooperation between out-of-state commercial real estate agents and
12 brokers that are licensed by a state other than Nevada and real estate
13 brokers in Nevada licensed by Nevada;

14 iv. Enforcing a ban on communication, whether written or oral, that may be
15 construed as "negotiation" of activities that involve cooperation between
16 out-of-state commercial real estate agents and brokers that are licensed by
17 a state other than Nevada and real estate brokers in Nevada licensed by
18 Nevada;

19 v. Assessing or collecting penalties that arise from such enforcement;

20 (o) Defendants be enjoined to dismiss the following administrative investigations and
21 disciplinary actions, and to extinguish all resulting orders of punishment
22 concerning Plaintiffs' conduct that is protected by the Commerce Clause of the
23 United States Constitution:

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- i. Nevada Department of Business and Industry Real Estate Division Case Number 2016-1734, styled NRED v. Gordon Robert Allred.
 - ii. Nevada Department of Business and Industry Real Estate Division Case Number 2016-2402, styled NRED v. Alvin Mansour.
 - iii. Nevada Department of Business and Industry Real Estate Division Case Number 2016-2403, styled NRED v. Kevin Mansour.
 - iv. Nevada Department of Business and Industry Real Estate Division Case Number 2016-2032, styled NRED v. Perry White.
 - v. Nevada Department of Business and Industry Real Estate Division Case Number 2016-2405, styled NRED v. Perry White.
 - vi. Nevada Department of Business and Industry Real Estate Division Case Number 2016-2404, styled NRED v. Nenad Zivkovic.
- (p) Defendants be enjoined to dismiss all other pending and/or completed administrative investigations and disciplinary actions, and to extinguish all orders of punishment concerning Plaintiffs' conduct that is protected by the Commerce Clause of the United States Constitution;
- (q) Plaintiffs be awarded all costs and attorneys' fees to which they are entitled; and
- (r) Such further relief as the Court may deem just and reasonable.

Respectfully submitted,

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Certificate of service

I hereby certify that on February ____, 2018 a true and correct copy of the foregoing instrument was served via electronic filing in compliance with the Federal Rules of Civil Procedure on Defendants' counsel of record.

Fields Alexander

/s/ Fields Alexander