

1 of Nevada" without first obtaining the appropriate license from the Nevada Real Estate
2 Division (the "Division" or "NRED").

3 Second, the Amended Complaint also claims that Mr. Kunofsky is subject to discipline
4 under NRS 645.235(1)(a), which provides that the Nevada Real Estate Commission (the
5 "Commission" or "NREC") may "impose an administrative fine against any person who
6 *knowingly . . . [e]ngages or offers to engage in any activity for which a license, permit,*
7 *certificate or registration or any type of authorization is required pursuant to this chapter, or*
8 *any regulation adopted pursuant thereto,"* without holding the required license, permit,
9 certificate or registration or has not been given the required authorization.

10 The only factual bases stated in the Amended Complaint for these alleged violations is
11 that Mr. Kunofsky signed documents entitled "Interstate Brokerage Cooperation Agreement –
12 Turf State" with respect to certain Nevada properties.¹ The Amended Complaint also states for
13 some (but not all) of the Nevada Transactions, "advertising" for the properties included Mr.
14 Kunofsky's name. The Amended Complaint does not allege that any buyer or seller was
15 harmed in any of the Nevada Transactions, and no buyer, seller, or consumer made any
16 complaint regarding Mr. Kunofsky or the Nevada Transactions.

17 II. DISCUSSION AND ANALYSIS

18 Occupational licensees like Mr. Kunofsky have a protected property interest in their
19 professional licenses.² Accordingly, the Due Process Clause of the United States Constitution
20 affords certain protections to Mr. Kunofsky in this contest case proceeding. As part of these due
21 process protections, NRED must "give notice to the defending party of 'the issues on which
22 decision will turn and . . . the factual material on which the agency relies for decision so that he
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25 ¹ The alleged transactions involve the following properties: 2341 Comstock Drive, Las
26 Vegas, Nevada (the "Academy of Excellence"); 2020 Reno Highway, Fallon, Nevada ("Walgreens"); 5015
27 Kietzke Lane, Reno, Nevada (the "Reno Red Lobster"); 2325 East Flamingo Road, Las Vegas, Nevada
28 ("Las Vegas Red Lobster"); 570 Marks Street, Henderson, Nevada ("Henderson Red Lobster"); 1625 South
Decatur Boulevard, Las Vegas, Nevada ("ARCO", and collectively, the "Nevada Transactions").

² See, e.g., Potter v. State Bd. of Med. Examiners, 101 Nev. 369, 371, 705 P.2d 132, 134 (1985).

1 may rebut it.”³ This requirement to provide sufficient notice as to the factual basis for the
2 alleged violation is also mandated by Section 233B.121 of the Nevada Revised Statutes, which
3 states that the agency must provide “a short and plain statement of the matters asserted.” The
4 due process requirements for adequate notice are satisfied “where the parties are sufficiently
5 apprised of the nature of the proceedings so that there is no unfair surprise. The crucial element
6 is adequate opportunity to prepare.”⁴

7 The Amended Complaint fails these basic due process requirements and must be
8 dismissed because it does not allege facts sufficient to constitute violations, nor does it
9 sufficiently appraise Mr. Kunofsky as to what conduct NRED believes constitutes six violations
10 of “NRS 645.230(1)(a) and/or NRS 645.235(1)(a).”⁵ Where a complaint fails to plead an essential
11 element of the alleged violation, the complaint must be dismissed.⁶ While dismissal of the
12 Amended Complaint is appropriate, at a minimum, NRED must provide a more definite
13 statement before the Amended Complaint can proceed to a contested case proceeding. Due
14 process demands that NRED apprise Mr. Kunofsky as to the grounds for the alleged violations
15 and the “factual material on which the agency relies.”

16 As a threshold matter, the Amended Complaint fails to allege facts sufficient to support
17 the allegations that Mr. Kunofsky “engag[ed] in the business of, act[ed] in the capacity of, or
18 advertis[ed] or assum[ed] to act” as real estate broker-salesperson or real estate salesperson
19 within the State of Nevada without first obtaining the appropriate license. The definitions of a
20 real estate broker-salesperson or real estate salesperson both require that the individuals be
21 performing the activities of a real estate broker *while associating with a licensed Nevada*

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24 ³ Dutchess Bus. Servs., Inc. v. Nevada State Bd. of Pharmacy, 124 Nev. 701, 711, 191 P.3d
25 1159, 1166 (2008) *citing* Bowman Transp. v. Ark.-Best Freight System, 419 U.S. 281, 288–89 n. 4 (1974); see
also NRS 233B.121 (requiring the agency to provide “a short and plain statement of the matters
asserted”).

26 ⁴ Nevada State Apprenticeship Council v. Joint Apprenticeship & Training Comm. for
27 Elec. Indus., 94 Nev. 763, 765, 587 P.2d 1315, 1317 (1978)

28 ⁵ Glen D. Kunofsky, Amended Complaint, Case No. 2016-2900 (May 7, 2018) at para. 57.

⁶ See Edgar v. Wagner, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985).

1 *broker.*⁷ The Amended Complaint does not include any statements or allegations that Mr.
2 Kunofsky ever associated or attempted to associate with a licensed Nevada real estate broker.
3 Thus, without any allegations as to this required element of the definitions of a real estate
4 broker-salesperson or real estate salesperson, the Amended Complaint fails as a matter of law
5 with respect to any allegations that Mr. Kunofsky violated NRS 645.230(1)(a) and/or NRS
6 645.235(1)(a) by “engaging in the business of, acting in the capacity of, or advertising or
7 assuming” to act as a real estate broker-salesperson or real estate salesperson. Consequently,
8 the only remaining potential basis for discipline is that with respect to the six Nevada
9 Transactions, Mr. Kunofsky engaged in the activities of a real estate broker, as defined in NRS
10 645.030.

11 **A. ALL VIOLATIONS RELATED TO THE ACADEMY**
12 **OF EXCELLENCE AND THE ARCO TRANSACTIONS MUST BE DISMISSED**

13 Any alleged violations relating to the Academy of Excellence and ARCO transactions
14 must be dismissed because the Amended Complaint fails to assert sufficient facts to find that
15 Mr. Kunofsky violated NRS 645.230(1)(a) and/or NRS 645.235(1)(a) by “engaging in the business
16 of, acting in the capacity of, or advertising or assuming to act as a real estate broker . . .”⁸
17 Moreover, proceeding to a hearing on the Amended Complaint would violate Mr. Kunofsky’s
18 due process rights because it lacks sufficient detail to establish the basic elements of a violation
19 of these statutes.

20 NRS 645.030 defines a “real estate broker” as, a “person who, for another and *for*
21 *compensation or with the intention or expectation of receiving compensation*” performs certain
22 specified duties relating to the sale, purchase, lease, or management of real property.⁹
23 Receiving or expecting to receive compensation is a fundamental element of this definition;
24 unless one or more of the activities listed in NRS 645.030 are undertaken for compensation (or
25 the expectation of it), the individual cannot be found to have acted as a real estate broker.

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27 ⁷ NEV. REV. STAT. §§ 645.035 & .040.

⁸ Glen D. Kunofsky, Amended Complaint, Case No. 2016-2900 (May 7, 2018) at para. 57.

28 ⁹ NEV. REV. STAT. § 645.030 (emphasis added).

1 As regarding the Academy of Excellence and ARCO transactions, there is absolutely no
2 allegation in the Amended Complaint that Mr. Kunofsky received, or expected to receive any
3 commission or other compensation in connection with these property sales. The alleged
4 violations relating to these properties fail as a matter of law because a real estate broker is, by
5 definition, someone who engages in the statutory activities "for compensation or with the
6 intention or expectation of receiving compensation." Absent such factual allegations, the
7 Amended Complaint is facially defective and the alleged violations of NRS 645.230(1)(a) and/or
8 NRS 645.235(1)(a) relating to these transactions must be dismissed.

9 **B. ALL VIOLATIONS RELATING TO THE RENO RED LOBSTER MUST BE DISMISSED**

10 The Amended Complaint's alleged violations of NRS 645.230(1)(a) and/or NRS
11 645.235(1)(a) with respect to the Reno Red Lobster must also be dismissed because the
12 Amended Complaint fails to allege facts necessary to support a determination that Mr.
13 Kunofsky "engag[ed] in the business of, act[ed] in the capacity of, or advertis[ed] or assum[ed]
14 to act" as a real estate broker with respect to this transaction.

15 The Amended Complaint sets out only the barest of allegations relating to Mr.
16 Kunofsky's involvement with the Reno Red Lobster property. NRED has proffered no facts
17 indicating that Mr. Kunofsky engaged in any of the activities of a real estate broker as specified
18 in NRS 645.030.¹⁰ Rather, the Amended Complaint merely claims that Mr. Kunofsky signed a
19 document entitled "Brokerage Cooperation Agreement - Turf State" and received
20 compensation. The Amended Complaint makes no assertions whatsoever regarding what this
21 document is, what it means, who else signed the document, or what Mr. Kunofsky agreed to by
22 signing it.¹¹ Put another way, the act of signing this document, without more, does not violate
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24 ¹⁰ See NEV. REV. STAT. § 645.030 ("Real estate broker" means a person who, for another and
25 for compensation or with the intention or expectation of receiving compensation . . . (a) Sells, exchanges,
26 options, purchases, rents or leases, or negotiates or offers, attempts or agrees to negotiate the sale,
27 exchange, option, purchase, rental or lease of, or lists or solicits prospective purchasers, lessees or renters
of, any real estate or the improvements thereon or any modular homes, used manufactured homes, used
mobile homes or other housing offered or conveyed with any interest in real estate).

28 ¹¹ The only detail from the document included in the Amended Complaint is that the
agreement states that Mr. Kunofsky should not put his name on marketing materials for Nevada

1 Nevada law, and the Amended Complaint fails to allege any other details or specific actions by
2 Mr. Kunofsky that would constitute the activities of a real estate broker.¹² Because the
3 Amended Complaint lacks any factual allegations that would support a determination that Mr.
4 Kunofsky acted as a real estate broker for the Reno Red Lobster transaction, this alleged
5 violation must be dismissed and cannot proceed to hearing.

6 **C. THE VIOLATIONS RELATING TO THE REMAINING NEVADA TRANSACTIONS**
7 **MUST BE DISMISSED OR DESCRIBED WITH PARTICULARITY IN A MORE DEFINITE STATEMENT**

8 NRED also provides very few details about Mr. Kunofsky's activities in the Walgreens,
9 Las Vegas Red Lobster, and Henderson Red Lobster Transactions. The only factual claims set
10 forth in the Amended Complaint about Mr. Kunofsky's role in these transactions are that he
11 signed a document entitled "Brokerage Cooperation Agreement – Turf State," received
12 compensation, and that "advertising for the offering of the sale" of each property "stated that
13 was being listed by" Mr. Kunofsky.¹³

14 As explained in Section B above, the simple assertion that Mr. Kunofsky executed a
15 "Brokerage Cooperation Agreement – Turf State", without any additional details or
16 information, is not sufficient to establish any violation of NRS 645.230(1)(a) and/or NRS
17 645.235(1)(a).¹⁴ As such, it appears that these alleged violations are wholly premised on the

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19 properties. This directive complies with NRED and NREC's apparent interpretation of statutes and
20 regulations, and certainly does not suggest that signing this agreement constitutes unlawfully acting as a
21 Nevada broker.

22 ¹² The Amended Complaint's remaining allegations relating to this property do not allege
23 any actions Mr. Kunofsky, let alone "knowing" actions as required by 645.235(1)(a). For example, while
24 the Amended Complaint claims that the *Company* entered into a Representation Agreement and that the
Company's New York office information (not Mr. Kunofsky's name or contact information) appeared on
"advertising" for the Reno Red Lobster. *The Amended Complaint does not claim that Mr. Kunofsky*
participated in or engaged in any of those actions. Indeed, the Complaint does not even claim Mr.
Kunofsky had knowledge of those actions.

25 ¹³ See Glen D. Kunofsky, Amended Complaint, Case No. 2016-2900 (May 7, 2018) at para.
26 16, 18, 38, 40, 46 and 48. Again, while the Amended Complaint claims that the *Company* entered into
certain agreements regarding these properties, the Complaint does not even allege that Mr. Kunofsky had
knowledge of those agreements.

27 ¹⁴ To the extent that NRED believes this action alone is grounds for discipline, it has utterly
28 failed to allege with particularity the connection between the Brokerage Cooperation Agreement – Turf
State document and NRS 645.230(1)(a) and/or NRS 645.235(1)(a), and due process requires a more definite

1 claims in paragraphs 18, 40, and 48 that certain "advertising" stated that the properties were
2 listed by Mr. Kunofsky. Notably, the Amended Complaint makes *no* claim that Mr. Kunofsky
3 requested the advertising, supervised the creation of advertising, or even knew the advertising
4 existed. Without any allegations as to Mr. Kunofsky's knowledge about the purported
5 advertising, the Amended Complaint fails to allege a necessary element of NRS 645.235(1)(a),
6 which requires that the person "knowingly" engaged in activities requiring a license. Without
7 such an allegation, the Amended Complaint fails to state a cause of action under NRS
8 645.235(1)(a) and these claims must be dismissed.¹⁵

9 Additionally, the NRS 645.230(1)(a) claims lack the particularity required to afford Mr.
10 Kunofsky adequate notice and the opportunity to prepare and respond. The allegations as to
11 "advertising" are wholly devoid of any details relating to the advertising medium, when or
12 where the advertising occurred, and whether any Nevada residents viewed the Advertising.
13 For these reasons, NRED must file a more definite statement as to the bases for these remaining
14 alleged violations.

15 III. CONCLUSION

16 The Amended Complaint fails to provide Mr. Kunofsky with sufficient notice as to the
17 factual grounds for the alleged violations and therefore does not comply with minimum due
18 process standards. Indeed, the sparse factual allegations in the Amended Complaint, even if
19 presumed true, are insufficient to establish any violations of NRS 645.230(1)(a) and/or NRS
20 645.235(1)(a) with respect to the Academy of Excellence, ARCO, and Reno Red Lobster
21 transactions. Moreover, by not addressing the requisite knowledge requirement, the Complaint
22 fails to allege the facts necessary to make out any violation of NRS 645.235(1)(a) regarding the
23 Walgreens, Las Vegas Red Lobster and Henderson Red Lobster transactions. Accordingly,
24 those portions of the Amended Complaint must be dismissed. At most, the only alleged

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statement as to the basis for discipline.

26 ¹⁵ The Amended Complaint similarly fails to make any allegations as to Mr. Kunofsky's
27 knowledge about the purported advertising for the Academy of Excellence, ARCO and Reno Red Lobster
28 transactions. The violations of NRS 645.235(1)(a) with respect to those transactions could also be
dismissed for this reason.

1 violations that do not fail as a matter of law relate to NRS 645.230(1)(a) and the Walgreens, Las
2 Vegas Red Lobster and Henderson Red Lobster transactions. However, those allegations lack
3 particularity and due process requires NRED to supplement those claims with a more definite
4 statement.

5 DATED and respectfully submitted this 29th day of May, 2018.

6 FENNEMORE CRAIG, P.C.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the foregoing **RESPONDENT KUNOFSKY'S MOTION TO**
3 **DISMISS AND/OR MOTION FOR MORE DEFINITIVE STATEMENT** was submitted for
4 filing with the Nevada Real Estate Commission on the 29th day of May, 2018. I further certify
5 that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid
6 to the following:


7
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37 
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