

FILED

MAY 29 2018

REAL ESTATE COMMISSION
BY *[Signature]*

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7 **BEFORE THE REAL ESTATE COMMISSION**
8 **STATE OF NEVADA**

SHARATH CHANDRA, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS & INDUSTRY, STATE OF NEVADA,	Case No.: 2016-2904
Petitioner,	
vs.	
EDWARD OTOCKA,	
Respondent.	

16 **RESPONDENT OTOCKA'S MOTION TO DISMISS**

17 Respondent Edward Otocka, ("Respondent"), acting by and through his legal counsel
18 Fennemore Craig, P.C., submits this motion to dismiss pursuant to Section 645.840 of the
19 Nevada Administrative Code.

20 **I. INTRODUCTION AND SUMMARY OF RELEVANT FACTS**

21 Mr. Otocka is a New York-licensed Salesperson affiliated with Marcus & Millichap Real
22 Estate Investment Services Inc. (the "Company") in New York, New York. The Complaint and
23 Notice of Hearing filed against Mr. Otocka on February 15, 2018, (the "Complaint"), asserts two
24 potential grounds for disciplinary action. First, the Complaint alleges a violation of NRS
25 645.230(1)(a), which makes it unlawful "for any person . . . to engage in the business of, act in
26 the capacity of, advertise or assume to act as, a . . . (a) Real estate broker, real estate broker-
27 salesperson or real estate salesperson within the State of Nevada" without first obtaining the

1 appropriate license from the Nevada Real Estate Division (the "Division" or "NRED").

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

9 The only factual bases stated in the Complaint are that Mr. Otocka signed documents
10 entitled "Interstate Brokerage Cooperation Agreement – Turf State" and "Representation
11 Agreement (Exclusive Right to Sell or Exchange)," with respect to property located at 2341
12 Comstock Drive, Las Vegas, Nevada (the "Academy of Excellence"). The Complaint also states
13 that "advertising" for the Academy of Excellence included Mr. Otocka's name. The Complaint
14 does not allege that any buyer or seller was harmed in the Academy of Excellence transaction,
15 and no buyer, seller, or consumer made any complaint regarding Mr. Otocka or the Academy of
16 Excellence transaction.

17 II. DISCUSSION AND ANALYSIS

18 A. THE COMPLAINT FAILS TO ALLEGE FACTS SUFFICIENT TO FIND 19 THAT OTOCKA ACTED AS A BROKER-SALESPERSON OR SALESPERSON

20 The Complaint fails to allege facts sufficient to support the allegations that Mr. Otocka
21 "engag[ed] in the business of, act[ed] in the capacity of, or advertis[ed] or assum[ed] to act" as a
22 real estate broker-salesperson or real estate salesperson within the State of Nevada without first
23 obtaining the appropriate license. Where a complaint fails to plead an essential element of the
24 alleged violation, the complaint must be dismissed.¹ The definitions of a real estate broker-
25 salesperson or real estate salesperson both require that the individuals be performing the
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27

28 ¹ See Edgar v. Wagner, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985).

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

11 **B. THE COMPLAINT FAILS TO ALLEGE FACTS**
12 **SUFFICIENT TO FIND THAT OTOCKA ACTED AS A REAL ESTATE BROKER**

13 The Complaint also fails to assert sufficient facts to find that Mr. Otocka violated NRS
14 645.230(1)(a) and/or NRS 645.235(1)(a) by “engaging in the business of, acting in the capacity of,
15 or advertising or assuming to act as a real estate broker . . .”³ Because the Complaint does not
16 plead each of the necessary elements for acting as a real estate broker, the Complaint must be
17 dismissed and this matter cannot proceed to hearing.⁴

18 NRS 645.030 defines a “real estate broker” as, a “person who, for another and *for*
19 *compensation or with the intention or expectation of receiving compensation*” performs certain
20 specified duties relating to the sale, purchase, lease, or management of real property.⁵
21 Receiving or expecting to receive compensation is a fundamental element of this definition;
22 unless the activities listed in NRS 645.030 are undertaken for compensation (or the expectation
23 of it), the individual cannot be found to have acted as a real estate broker.

24 There is absolutely no allegation in the Complaint that Mr. Otocka received, or expected
25

26 ² NEV. REV. STAT. §§ 645.035 & .040.

27 ³ Edward Otocka, Complaint, Case No. 2016-2904 (Feb. 15, 2018) at para. 15.

28 ⁴ See Edgar, 101 Nev. at 228.

1 to receive any commission or other compensation in connection with the Academy of Excellence
2 transaction. The alleged violations relating to this property fail as a matter of law because a real
3 estate broker is, by definition, someone who engages in the statutory activities “for
4 compensation or with the intention or expectation of receiving compensation.” Absent such
5 factual allegations, the Complaint is facially defective and the alleged violations of NRS
6 645.230(1)(a) and/or NRS 645.235(1)(a) must be dismissed.

7
8 **C. THE COMPLAINT FAILS TO ALLEGE
A REQUIRED ELEMENT OF NRS 645.235(1)(A)**

9 In addition to failing to plead necessary elements of the definitions of a real estate
10 broker-salesperson, real estate salesperson, and real estate broker, the Complaint also fails to
11 allege an essential element of NRS 645.235(1)(a), which requires that the person “knowingly”
12 engaging in activities requiring a license. This additional defect further necessitates dismissal of
13 the Complaint.⁶

14 The Complaint sets out only a handful of factual allegations relating to Mr. Otocka’s
15 involvement with the Academy of Excellence property. With respect to the allegations that Mr.
16 Otocka executed documents entitled “Brokerage Cooperation Agreement – Turf State” and
17 “Representation Agreement (Exclusive Right to Sell or Exchange)”, the Complaint makes no
18 assertions whatsoever regarding what these documents are, what they mean, or what Mr.
19 Otocka agreed to by signing them.⁷ The act of signing these documents, without more, does not
20 violate Nevada law, and the Complaint fails to allege any other details or specific information
21 about this document or Mr. Otocka’s activities which would establish that executing this
22 document is a violation of NRS 645.230(1)(a) and/or NRS 645.235(1)(a).⁸

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24 ⁵ NEV. REV. STAT. § 645.030 (emphasis added).

25 ⁶ See Edgar, 101 Nev. at 228.

26 ⁷ The only detail from the document included in the Complaint is that the agreement states
27 that Mr. Otocka should not put his name on marketing materials for Nevada properties. This directive
complies with NRED and NREC’s apparent interpretation of statutes and regulations, and certainly does
not suggest that signing this agreement constitutes unlawfully acting as a Nevada broker.

28 ⁸ To the extent that NRED believes that executing these documents alone constitutes
grounds for discipline, it has utterly failed to allege with particularity the connection between these

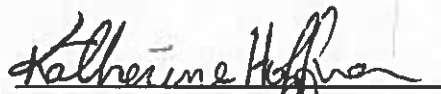
1 As such, it appears that the alleged violations are premised on the claim in paragraph 11
2 that certain "advertising" stated that the properties were listed by Mr. Otocka. Notably, the
3 Complaint makes *no* claim that Mr. Otocka requested the advertising, supervised the creation of
4 advertising, or even knew the advertising existed. Without any allegations as to Mr. Otocka's
5 knowledge about the purported advertising, the Complaint fails to allege a necessary element of
6 NRS 645.235(1)(a), which imposes liability only where the person "knowingly" engages in
7 activities requiring a license. Without such an allegation, the Complaint fails to state a cause of
8 action under NRS 645.235(1)(a) and these claims must be dismissed.

9 **III. CONCLUSION**

10 The Complaint's sparse factual allegations, even if presumed true, are insufficient to
11 establish any violations of NRS 645.230(1)(a) and/or NRS 645.235(1)(a) because NRED has failed
12 to plead the necessary elements to establish that Mr. Otocka engaged in conduct that satisfies
13 the definitions of a real estate broker-salesperson, real estate salesperson, or real estate broker.
14 Additionally, the Complaint does not allege that Mr. Otocka had any knowledge of the
15 "advertising" for the Academy of Excellence, which is a required element of any violation
16 under NRS 645.235(1)(a). For these reasons, the Complaint must be dismissed.

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

18 FENNEMORE CRAIG, P.C.

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28 agreements and NRS 645.230(1)(a) and/or NRS 645.235(1)(a), and due process requires a more definite
statement as to the basis for discipline.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the foregoing **RESPONDENT OTACKA'S MOTION TO DISMISS**
3 was submitted for filing with the Nevada Real Estate Commission on the 29th day of May, 2018.

4 I further certify that I served a copy of this document by mailing a true and correct copy thereof,
5 postage prepaid to the following:

6 Sharath Chandra, Administrator
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21 DATED this 29th day of May, 2018.

22 
23 Mana S. Wheeler
24 An Employee of Fennemore Craig, P.C.