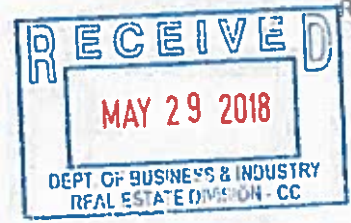


FILED

MAY 29 2018

REAL ESTATE COMMISSION
[Signature]



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

<p>9 SHARATH CHANDRA, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF 10 BUSINESS & INDUSTRY, STATE OF 11 NEVADA, 12 Petitioner, 13 vs. 14 ANTHONY D. D'AMBROSIA, 15 Respondent.</p>	<p>Case No.: 2016-2901</p>
<p>16 SHARATH CHANDRA, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF 17 BUSINESS & INDUSTRY, STATE OF 18 NEVADA, 19 Petitioner, 20 vs. 21 JOHN ANTHONY GLASS, 22 Respondent.</p>	<p>Case No.: 2017-1473</p>
<p>23 SHARATH CHANDRA, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF 24 BUSINESS & INDUSTRY, STATE OF 25 NEVADA, 26 Petitioner, 27 vs. 28 GLEN D. KUNOFSKY, Respondent.</p>	<p>Case No.: 2016-2900</p>
<p>SHARATH CHANDRA, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF</p>	<p>Case No.: 2016-2904</p>

1	BUSINESS & INDUSTRY, STATE OF NEVADA,	
2		
3	Petitioner,	
4	vs.	
5	EDWARD OTOCKA,	
6	Respondent.	
7	SHARATH CHANDRA, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS & INDUSTRY, STATE OF NEVADA,	Case No.: 2016-2903
8		
9	Petitioner,	
10	vs.	
11	GAURAB REJA,	
12	Respondent.	
13	SHARATH CHANDRA, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS & INDUSTRY, STATE OF NEVADA,	Case No.: 2016-2902
14		
15	Petitioner,	
16	vs.	
17	JAMES E. VENTURA,	
18	Respondent.	
19	SHARATH CHANDRA, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS & INDUSTRY, STATE OF NEVADA,	Case No.: 2016-1466
20		
21	Petitioner,	
22	vs.	
23	PERRY A. WHITE,	
24	Respondent.	

RESPONDENTS' MOTION TO DISQUALIFY

Respondents Anthony D. D'Ambrosia, John A. Glass, Edward Otocka, Glen D. Kunofsky Garaub Reja, James E. Ventura, and Perry A. White ("Respondents"), acting by and through their legal counsel Fennemore Craig, P.C., submit this Motion to Disqualify (the "Motion"),

1 pursuant to Section 645.840 of the Nevada Administrative Code (the "NAC").

2 I. INTRODUCTION

3 In these proceedings, the members of Nevada Real Estate Commission ("NREC" or
4 "Commission"), will act as judges in deciding contested cases. The Commissioners may not
5 adjudicate a case in which they have either a "pecuniary" or "personal interest" in the outcome
6 of the proceedings.

7 The results in the disciplinary proceedings against the Respondents will have an
8 influence upon the outcomes in the federal lawsuit pending against Commissioners Barrett,
9 Capurro, Cartinella, Opatik, Reiss and Schwartz. The Commissioners, therefore, have an
10 obvious "personal interest" in how the cases against the Respondents are resolved.

11 Similarly, each of the Commissioners has a pecuniary stake in imposing discipline upon the
12 Respondents. As real estate professionals themselves, the Commissioners will be beneficiaries
13 of the regulatory objective of the proceedings to halt out-of-state real estate professionals from
14 taking business and money from local Nevada licensees.

15 The Respondents' right to "a fair trial in a fair tribunal" cannot be achieved if the
16 Commissioners sit in judgment of these cases. The Commissioners must disqualify themselves
17 under NRS 233B.122, allowing the Governor to appoint individuals without conflicts of interest.

18 II. SUMMARY OF RELEVANT FACTS

19 On April 4, 2016, this Commission promulgated the current version of NAC 645.185.¹
20 Within days of the effective date of NAC 645.185, the Nevada Real Estate Division ("NRED" or
21 the "Division"), began efforts to apply the Commission's new regulation.² The purpose of the
22

23 ¹ See Adopted Regulation of the Real Estate Comm'n, LCB File No. R097-14 (Nev. Legis.
24 Counsel Bur. Effective Apr. 4, 2016). LCB File No. R097-14 is a public record, and pursuant to Section
25 233B.123(5) of the Nevada Revised Statute ("NRS"), the Respondents request that the Commission take
official administrative notice of this public record and its contents, the relevance of which is
demonstrated in this Motion. See *infra* text at 8-9.

26 ² See Marcus & Millichap Real Estate Invest. Serv of Nevada, et al. v. Joseph Decker, et al.,
27 Case No. 2:16-cv-1299, *Plaintiffs' Complaint and Request for Declaratory and Injunctive Relief*, ¶¶ 22 & 53, at
28 8 & 18 (D. Nev. Jun. 10, 2016)(the "Federal Action"). The Federal Action is a public record, and
pursuant to NRS 233B.123(5) the Respondents request that the Commission take official administrative
notice of this public record and its contents, the relevance of which is demonstrated in this Motion. See

1 amended regulation was to further a regulatory scheme devised by the Commission to protect
2 in-state brokers and their fees by disadvantaging their out-of-state competitors, in violation of
3 Nevada law and the Constitution of the United States.³

4 Among the targets of the Division and the Commission are real estate professionals
5 licensed in Nevada and elsewhere all of whom are affiliated with Marcus & Millichap (the
6 "Company"). The Division pursued investigations of these real estate professionals, including
7 the Respondents, with the specific encouragement of the leadership of the Commission,⁴ rapidly
8 followed by NRED's issuance of cease and desist orders and commencement of disciplinary
9 proceedings.⁵

10 On June 10, 2016, the Company and its agents and brokers who were then threatened
11 with prosecution by NRED commenced a declaratory and injunctive relief action in the United
12 States District Court for the District of Nevada.⁶ From inception of Federal Action,
13 Commissioners Barrett, Cartinella, Opatik, Reiss and Schwartz have been and are named parties
14 in the Federal Action.⁷ Once appointed to the Commission, Commissioner Capurro was
15 automatically substituted in the place of his predecessor as a party to the Federal Action.⁸ The
16 Federal Action challenges as unconstitutional the prohibition against cooperation between

17
18

infra text at 8-9.

19 ³ See Chandra, et al. v. D'Ambrosia, Glass, Kunofsky, Otocka, Reja, Ventura, and White, Case
20 No. 2016-2901, 2017-1473, 2016-2900, 2016-2904, 2016-2903, 2106-2902 & 2016-1466, Respondents'
21 Motion to Dismiss at 10-13 (Nev. Real Estate Comm'n filed May 29, 2018)(the "Dismissal Motion").
22 The Dismissal Motion is a public record, and pursuant to NRS 233B.123(5) the Respondents request that
23 the Commission take official administrative notice of this public record and its contents, the relevance of
24 which is demonstrated in this Motion. See *infra* text at 8-9.

25 ⁴ See Dismissal Motion at 10-13.

26 ⁵ See *id.* ¶¶ 56 (a) - (c), at 19-21.

27 ⁶ See *supra* note 2.

28 ⁷ See *id.*

⁸ FED. R. CIV. PROC. 25(d); see Federal Action, Document No. 136 at 13, n. 2. Document No.
136 is a public record, and pursuant to NRS 233B.123(5) the Respondents request that the Commission
take official administrative notice of this public record and its contents, the relevance of which is
demonstrated in this Motion. See *infra* text at 8-9.

1 Nevada real estate brokers and real estate agents licensed by other states found in the
2 regulations by the Commission and the efforts by the Division to prosecute real estate
3 professionals on the basis of these unlawful administrative rules.⁹ The Federal Action also
4 challenges these Commission regulations as contrary to the enabling statute enacted by the
5 Nevada Legislature. The plaintiffs in the Federal Action request monetary relief in the form of
6 recovery of attorney's fees and costs from the Division and Commissioners as well.¹⁰

7 The Federal Action was filed before the complaints were commenced against any of the
8 Company's real estate professionals, including the Respondents.¹¹ Respondents D'Ambrosia,
9 Glass, Otocka, Kunofsky, Reja, and Ventura (the "Nonresident Brokers"),¹² are each accused of
10 violating the unlicensed activity provisions of NRS 645.230(1)(a) and NRS 645.235(1)(a). The
11 amended complaint filed against Respondent White alleges five violations of the assistance of
12 unlicensed activity provision of NRS 645.235(1)(b).¹³ The violations alleged against Mr. White
13 are premised alone upon the proposition that the Nonresident Brokers engaged in unlawful
14 conduct and that Mr. White "knowingly . . . assist[ed]" the conduct.

15 The sole factual basis for all the alleged violations is that the Nonresident Brokers
16 cooperated with Mr. White, a Nevada-licensed broker affiliated with the Company's Las Vegas

17 ⁹ See *id.* See, e.g., River Oaks Mgmt. v. Brown, No. 3:06-CV-00451-S, 2007 WL 2571909 (W.D.
18 Ky. Sept. 4, 2007); Marcus & Millichap Real Estate Inv. Brokerage Co. v. Skeeters, 395 F. Supp. 2d 541
19 (W.D. Ky. 2005). This ruling has now been acknowledged by Kentucky's appellate court. LexCin
20 Partners, Ltd. v. Newmark S. Region, LLC, No. 2008-CA-001170, 2009 WL 2341553, at *1 (Ky. Ct.
21 App. 2009). The decisions in the *Brown*, *Skeeters* and *LexCin Partners* are public records and pursuant to
22 NRS 233B.123(5) the Respondents request that the Commission take official administrative notice of this
23 public record and its contents, the relevance of which is demonstrated in this Motion. See *infra* 8-9.

22 ¹⁰ See *supra* note 2.

23 ¹¹ The Federal Action was filed on June 10, 2106, see *supra* note 2, which predated by ten
24 months the first Complaint and Notice of Hearing filed on April 20, 2017, by the Division in *Chandra v.*
25 *White*, Case No. 2016-2032.

26 ¹² Anthony D. D'Ambrosia, Complaint, Case No. 2016-2901 (Feb. 15, 2018); John A. Glass,
27 Complaint, Case No. 2017-1473 (Nov. 1, 2017); Edward Otocka, Complaint, Case No. 2016-2904 (Feb. 15,
28 2018); Glen D. Kunofsky, Amended Complaint, Case No. 2016-2900 (May 7, 2018); Garaub Reja,
Complaint, Case No. 2016-2903 (Feb. 15, 2018); and James E. Ventura, Complaint, Case No. 2016-2902
(Feb. 15, 2018), the ("Nonresident Complaints")

¹³ See Perry A. White, Amended Complaint, Case No. 2016-1466 (May 7, 2018) (the "Resident
Complaint" and together with the Nonresident Complaints, the "Complaints").

1 office, with respect to the marketing and sale of Nevada property. As part of this cooperation,
2 the Complaints assert that the Nonresident Brokers' names appeared on "advertising" for
3 Nevada properties without the Nonresident Brokers obtaining a license, certificate or other
4 authorization from NRED or NREC.¹⁴

5 III. DISCUSSION AND ANALYSIS

6 A. DUE PROCESS REQUIRES THE COMMISSIONERS' DISQUALIFICATION.

7 The Supreme Court of Nevada has ruled that occupational licensees like the
8 Respondents have a protected property interest in their professional licenses.¹⁵ As such, the
9 Due Process Clause prevents the Division and the Commission from depriving any of the
10 Respondents of a protected property interest without "a fair trial in a fair tribunal."¹⁶

11 A fair trial in a fair tribunal is a basic requirement of due process. Fairness of
12 course requires an absence of actual bias in the trial of cases. But our system of
13 law has always endeavored to prevent even the probability of unfairness. To this
14 end no man can be a judge in his own case and *no man is permitted to try cases
where he has an interest in the outcome.*¹⁷

15 This fundamental requirement applies not only to courts, but also to state administrative
16 agencies charged with applying eligibility and discipline criteria for licenses.¹⁸

17 This constitutional right to a fair hearing before an impartial tribunal is violated not only
18 when the tribunal demonstrates actual bias, but also where an adjudicator's "pecuniary or
19 personal interest in the outcome of the proceedings may create an appearance of partiality that
20 violates due process, even without any showing of actual bias."¹⁹ Although there is a
21

22 ¹⁴ There is no license or certificate available from NRED allowing the Nonresident Brokers to
23 cooperate with the Mr. White to sell Nevada property. Accordingly, the Division's entire case apparently
rests upon the theory that the Nonresident Brokers must be licensed as brokers or agents in Nevada.

24 ¹⁵ See, e.g., Potter v. State Bd. of Med. Examiners, 101 Nev. 369, 371, 705 P.2d 132, 134 (1985).

25 ¹⁶ In re Murchison, 349 U.S. 133, 136 (1955).

26 ¹⁷ *Id.* at 136 (emphasis added); see also Marshall v. Ierrico, Inc., 446 U.S. 238, 242 (1980) ("the Due
Process Clause entitles a person to an impartial and disinterested tribunal").

27 ¹⁸ Withrow v. Larkin, 421 U.S. 35, 46 (1975); see, e.g., In re Ross, 99 Nev. 1, 7, 656 P.2d 832 (1983).

28 ¹⁹ Stivers v. Pierce, 71 F.3d 732, 741 (9th Cir. 1995).

1 "presumption of honesty and integrity" on the part of decision-maker,²⁰ this presumption is
2 overcome where the adjudicator's situation is one "which would offer a possible temptation to
3 the average man as a judge to forget the burden of proof required to convict the defendant, or
4 which might lead him not to hold the balance nice, clear and true between the State and the
5 accused."²¹

6 A due process violation occurs where an adjudicator, like the Commissioners here, has a
7 direct and substantial pecuniary interest in the outcome of the case before him.²² As the
8 Supreme Court of the United States has observed, "[i]n such cases, the adjudicator's
9 participation constitutes a *per se* violation of due process—the appearance of partiality in itself
10 renders the proceedings objectionable, without any showing that the adjudicator was actually
11 biased."²³ Thus, that one or more of the Commissioners intellectually believes they can be fair is
12 completely unimportant. Under the *Lavoie* decision the Commissioners are disabled as a matter
13 of law.

14 A federal case involving a Nevada occupational licensing board is instructive. In the
15 *Stivers* case, the Court considered that the biased board member was himself a licensed private
16 investigator conducting business in the same geographic area as the applicant, and competed
17 with the applicant for business. Other facts the Court noted as relevant included the effect of
18 eliminating the particular competitors would have on the remaining licensees' businesses in the
19 relevant market.²⁴ The Court also concluded that "irregularities" in how the administrative
20 board handled proceedings or treats licensees is "directly relevant to the question of whether
21 the decision-making process was affected by impermissible bias on the part of one of its
22

23 ²⁰ City Plan Dev. v. State, Labor Comm'r, 121 Nev. 419, 117 P.3d 182, 189 (2005).

24 ²¹ Gilman v. Nevada State Bd. of Veterinary Med. Examiners, 120 Nev. 263, 269, 89 P.3d 1000,
25 1004 (2004) *disapproved of on other grounds by Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. Adv. Op. 27,
327 P.3d 487 (2014); Cf. NEV. REV. STAT. § 1.230(2)(a) (The Nevada Legislature has declared that implied
26 bias exists and a judicial officer must be disqualified if the judge is "interested in the action or
27 proceeding.").

28 ²² Withrow, 421 U.S. at 47.

²³ Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 825 (1986).

²⁴ Stivers, 71 F.3d at 743.

1 members."²⁵ Such irregularities include harassment by the board or its members and attempts
2 by the agency to damage the licensee or license applicant's existing customer relationships.²⁶
3 Similar "irregularities" are that board members have prejudged the merits of the case before the
4 evidence and argument of the parties have been presented,²⁷ or where the adjudicator fails to
5 decide the case only upon the "substantial evidence" of the administrative record limited to the
6 specific proceeding.²⁸

7 The facts and circumstances here demonstrate that the conflicts of interest of
8 Commissioners Barrett, Capurro, Cartinella, Opatik, Reiss and Schwartz in this proceeding
9 render them collectively unable to participate in a fair and impartial matter. The Federal Action
10 was filed before the disciplinary actions were brought against the Respondents. The
11 Commissioners are parties in that Federal Action. The Federal Action seeks to have the
12 Commissioners individually and collectively found to have violated the constitutional and civil
13 rights of the real estate professionals affiliated with the Company, and ordered to pay the
14 federal plaintiffs' fees and costs.

15 Separate and apart from that "personal interest" disability, each of the Commissioners
16 has a stake in imposing discipline upon the Respondents because as real estate professionals
17 themselves, the Commissioners may be "pecuniary" beneficiaries of the regulatory objective of
18 the proceedings to stop "business" and "money" from going to out-of-state real estate
19 professionals to the economic disadvantage of "local Nevada licensees."²⁹

20 Additionally, under the standard announced in the *Stivers* opinion, there are facts here
21 demonstrating "irregularities" in how the Commission is handling the proceedings which are

22 ²⁵ *Id.* at 745.

23 ²⁶ *Id.* at 746.

24 ²⁷ *See, e.g., 1616 Second Avenue Restaurant v. N.Y. State Liquor Authority*, 550 N.E. 2d 910
25 (N.Y. Ct. App. 1990).

26 ²⁸ *See, e.g., Carson City v. Lepire*, 112 Nev. 363, 365, 914 P2d 631 (1996)(validity of agency
27 decision determined by evidence of record); *City Council of Reno v. Travelers Hotel*, 100 Nev. 436, 438-
439, 683 P.2d 960 (1984)(statements of interested parties and opinions of members of the public body are
not evidence).

28 ²⁹ *See supra* note 3.

1 directly relevant and show a decision-making process infected with impermissible bias. The
2 refusal of the Commission to consider the evidence and argument presented by similarly
3 situated respondents on the pretext of irrelevance followed by deliberation speculating what
4 that evidence might have shown,³⁰ and the reliance by Commissioners upon extra-record
5 matters heard in other proceedings or a desire to punish a professional's employer when the
6 professional concededly did nothing unlawful,³¹ are among the examples of such
7 abnormalities.

8 The Commissioners, therefore, have both a "pecuniary" and "personal interest" in the
9 outcome of these disciplinary cases creating "an appearance of partiality that violates due
10 process, even without any showing of actual bias." Either of these disabilities requires
11 disqualification. To the extent these disciplinary proceedings chill the commercial conduct of
12 the Respondents and injure their reputations, the Commissioners have a pecuniary interest
13 shared by all local Nevada licensees competing with non-resident real estate professionals. The
14 Commissioners, as defendants in the Federal Action, likewise have a "personal interest" in the
15 these regulatory proceedings against the Respondents. The record the Commission allows to be
16 made and the outcomes of the disciplinary actions will be *relevant evidence in the Federal*
17 *Action*. That *relevant evidence*, the contours of which the Commissioners can shape to their
18 advantage, will impact their civil liability in the Federal Action. Consequently, the
19 Commissioners' participation in adjudicating this contested case violates Respondents' due
20 process rights and would render void any decision reached by the NREC.³²

21 **B. THE RULE OF NECESSITY DOES NOT EXCUSE THE COMMISSIONERS' RECUSAL.**

22 A disqualification of the Commissioners cannot be excused under the rule of necessity.
23 The rule of necessity provides that a rule of disqualification will not be applied if the effect is to

24
25 ³⁰ See In re Allred and White, Job No. 441886, *Excerpts of Transcript of Proceedings* at 5-6, 17-20 &
28-29 (Nev. Real Estate Comm'n Dec. 6, 2017)(Exhibit 1, *infra*).

26 ³¹ See Chandra v. Manning, Case No. 2017-2079, *Excerpts of Transcript of Proceedings* at 78-79, 93
27 & 101 (Nev. Real Estate Comm'n Mar. 21, 2018) (Exhibit 2, *infra*).

28 ³² See Stivers, 71 F.3d at 747 ("the participation of one biased member would require that the
tribunal's decision be vacated regardless of whether that member's vote was decisive").

1 deprive the parties of a forum or effectively eliminates an important adjudicative function, such
2 as here the enforcement of a professional or occupational oversight scheme.³³ The Nevada
3 Legislature provided by statute a method to address just such a situation. The statute states
4 that:

5 If an officer of an agency . . . is disqualified from participating in the
6 adjudication of any contested case in which a decision will be rendered
7 which is subject to judicial review, the officer shall send within 3 working
8 days after the disqualification a notice of it to the authority which appointed
9 him or her to the agency. The appointing authority shall within 5 working
10 days after receiving the notice appoint a person to serve in the place of the
11 disqualified officer only for the purpose of participating in the adjudication
12 of the contested case.³⁴

13 Accordingly, that the entire Commission is disqualified here does not allow the Commissioners
14 to claim "necessity" as a justification to sit in judgment despite doing so would deprive the
15 Respondents of due process. The Commissioners may notify the Governor that they are
16 collectively disqualified and Governor Sandoval can appoint temporary commissioners to hear
17 the contested cases.

18 V. CONCLUSION

19 The United States Supreme Court has admonished regulatory bodies that "no man is
20 permitted to try cases where he has an interest in the outcome." The Commissioners have
21 prohibited pecuniary and personal interests in how the Respondents will fair in the pending

22 //

23 //

24 //

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26
27 ³³ See In re Ross, 99 Nev. at 10, 656 P.2d 832.

28 ³⁴ NEV. REV. STAT. § 233B.122(2).

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disciplinary proceedings. The Commissioners must disqualify themselves and allow Governor Sandoval to appoint individuals that can deliver due process for the Respondents.

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

FENNEMORE CRAIG, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT'S MOTION TO DISQUALIFY** was submitted for filing with the Nevada Real Estate Commission on the 29th day of May, 2018. I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid to the following:

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DATED this 29th day of May, 2018.


An Employee of Fennemore Craig, P.C.

EXHIBIT 1

EXHIBIT 1



COPY

**In the Matter Of:
Nevada Real Estate Commission**

AMENDED

GORDON ALLRED AND PERRY WHITE

December 06, 2017

Job Number: 441886



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2 DEPARTMENT OF BUSINESS AND INDUSTRY
3 REAL ESTATE DIVISION
4 -oOo-
5 =====

6 NEVADA REAL ESTATE COMMISSION
7 ALLRED AND WHITE HEARING
8 December 6, 2017
9 Las Vegas, Nevada
10 Job No.: 441886
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12 Reported By: GAIL R. WILLSEY, CSR #359, CA CSR
13 #9748
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GORDON ALLRED AND PERRY WHITE - 12/06/2017

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1 rulings, but I need to establish my record and one of
2 the ways that's typically done is I do what's called
3 an "offer of proof" in which I tell the commission the
4 types of questions that I would like to ask him and
5 what I expect is his anticipated testimony would be
6 without going through all the testimony. Then you can
7 rule on whether I'm going to be permitted to introduce
8 that examination. If you rule no, then I don't ask the
9 questions.

10 COMMISSION PRESIDENT: I'm pretty sure I was
11 clear on what I said. Do you have a question?

12 MS. ROWE: What I would like to do is make an
13 offer of proof.

14 COMMISSION PRESIDENT: No.

15 MS. ROWE: If you're denying me to make an offer
16 of proof --

17 COMMISSION PRESIDENT: I'm asking you to ask a
18 question.

19 MS. ROWE: May I make an offer of proof?

20 COMMISSION PRESIDENT: No, ask a question. I'll
21 determine if you have any relevant testimony to give
22 and if you don't, we'll go to closing statements.

23 MS. ROWE: May I ask questions regarding the harm
24 to consumers from this?

25 COMMISSION PRESIDENT: No.

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1 MS. ROWE: May I ask questions regarding the
2 constitutionality of this?

3 COMMISSION PRESIDENT: I told you what you can
4 ask questions about and in about 30 seconds, maybe 15,
5 I'm going to closing statements.

6 MS. ROWE: I understand and I would like you to
7 have a moment if I may have a moment to ask counsel to
8 give his opinion on the offer of proof process because
9 this is an important matter for my clients and if I'm
10 denied the right to make an offer of proof, I hope
11 your counsel will weigh in --

12 COMMISSION PRESIDENT: Okay. We're going to go
13 ahead. In that case, we're going to move to closing
14 statements. You apparently don't have any testimony
15 relevant for us to hear. You're excused, Thank you.

16 Seeing as how I'm concerned about how this is
17 going to go, I'm going to go ahead and put a time
18 limit to closing statements. So I think four minutes
19 should be more than sufficient. I'm going to ask --
20 will four minutes be sufficient, I think so.

21 MS. ROWE: I want to be clear for the record.

22 COMMISSION PRESIDENT: And, no.

23 MS. ROWE: I have numerous witnesses.

24 COMMISSION PRESIDENT: This is. I thought I made
25 myself clear. So Mr. Barrett, will you set a timer

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GORDON ALLRED AND PERRY WHITE - 12/06/2017

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1 rules and procedures we have for out-of-state brokers
2 to follow are aimed at allowing that to happen, to
3 allowing free trade across state lines and for us to
4 do nothing about violations of the procedures and
5 rules that we put in place for that would be to throw
6 it wide open and let anybody come in without any
7 regulation or responsibility whatever.

8 I don't think it's right to use this hearing to
9 build a case for some other court somewhere else.. So I
10 want to thank our president for handling this the way
11 he has and getting us through this and getting us to
12 the point where we can make a ruling on this case and
13 that's all I have for now.

14 COMMISSION PRESIDENT: Thank you.

15 Other comments, discussion regarding factual
16 allegations and therefore between both cases?

17 Yes, Commissioner Opatik?

18 COMMISSIONER OPATIK: I would echo the comments
19 that have been made by Commissioner Capurro.

20 If Nevada State law can be interpreted by anybody
21 to read anything, I would never have a speeding
22 ticket. The fact that I have had speeding tickets
23 indicate that the laws are there to be enforced.

24 We're here to see that the NRS and the NAC is adhered

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1 to by all parties fairly and in this particular case,
2 it was blatantly ignored for whatever reason.

3 And to infer that Nevada has no commercial
4 expertise in our own area regarding casinos or
5 shopping malls, have you looked around -- or
6 restaurants is ludicrous, it's absolutely ludicrous. I
7 happen to work in the field. I understand and I know
8 that we have expertise that's here that is very
9 beneficial to all of the people that would like to
10 come in and work and build in our fair state. So to
11 infer that we don't have the expertise and only out-
12 of state brokers have that expertise is arrogant.

13 So I would -- I see clearly that the Certificate
14 of Cooperation was not adhered to, it's a very simple
15 process. If you want to work in this state, get a
16 license or work with somebody in the state that has a
17 license just as the Bar does. You work with somebody
18 in the state that you can work with and you're fine.
19 Your consumer and your clients are not being
20 misrepresented because they feel they cannot work with
21 their broker, that's another ludicrous statement.

22 So I see that the violations that have been set
23 forth have been proven, and I believe it's our
24 responsibility to adhere to those and that's what I've
25 got.

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1 COMMISSION PRESIDENT: Comments, anything
2 pertaining to factual allegations?

3 Commissioner Barrett?

4 COMMISSIONER BARRETT: I'm just disappointed. I'm
5 disappointed in that I hoped today after reading three
6 quarters of the book, that I was going to -- that we
7 were going to actually hear how the response to the
8 allegations was going to be handled.

9 I think it's a big concern of mine that when we
10 look at the way the allegations were laid out, that
11 the defense should have addressed the allegations one
12 item at a time and got us through that and then if
13 there was issues that they wanted to instill, that
14 they move through those issues that they were going to
15 plan on other litigation -- inaudible -- from this
16 hearing but I was -- I'm a little disappointed that I
17 expected, based on the comments yesterday, that we
18 would have more of a -- more of a hearing that would
19 actually address the allegations so thank you.

20 COMMISSION PRESIDENT: Okay.

21 Commissioner Schwartz?

22 COMMISSIONER SCHWARTZ: Not to repeat my fellow
23 commissioner's comments which I agree wholeheartedly
24 with, I would have said the same thing, for me, the
25 bottom line is the process was very simple, it could

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1 have simply been done either with a certificate or a
2 license and for them to ignore that and ignore our
3 rules and our statutes is dishcartening to me.

4 The other thing I want to make sure of and
5 support is the fact of the matter is this state has
6 every expert that anybody needs to do any kind of
7 business in. This state has people who have been here
8 and spent their lives here building this state and
9 building the commercial industry. I don't think you
10 can find anything in any other state that hasn't been
11 accomplished here by our local brokers and real estate
12 agents,

13 So I'm disheartened that you feel that this is
14 going to be such a terrible thing to happen. It's not
15 going to be a terrible thing to happen. They will
16 still want to come here because Nevada is Nevada. We
17 are one of the leading states in construction and
18 growth and I'm not worried about anybody having a
19 problem coming here and finding expertise to help
20 them.

21 COMMISSION PRESIDENT: Okay.

22 We do have in front of us the factual allegations
23 on both respondents. If you want to take one at a
24 time, I would suggest so why don't we start with
25 Allred and we have the factual allegations, many of

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1 we want to keep out-of-state brokers out, we want out-
2 of-state brokers to do what we would have to do if we
3 went into their markets and that is follow the rules
4 that are laid out by the legislature in their
5 particular states.

6 So we're not being malicious to anybody. We're
7 just saying, "Look you have rules. You knew the
8 rules. You have a local broker that knew what the
9 rules were and he should have enforced them more and
10 said, "Look we can't do this because Nevada is not
11 going to allow this. You're advertising properties in
12 periodicals all around the country as if you're the
13 listing agent and you're not in the State of Nevada,"
14 and I think there's some issues with it. So I would
15 support the \$497,760 and the \$1,684.33.

16 COMMISSION PRESIDENT: Anyone care to make a
17 motion at least a starting point?

18 COMMISSIONER SCHWARTZ: I'll make a motion as a
19 starting point.

20 COMMISSION PRESIDENT: Okay. Commissioner
21 Schwartz?

22 COMMISSIONER SCHWARTZ: Thank you.

23 In Case Number 2016-1734, Nevada Real Estate
24 Division versus Gordon Robert Allred, I move the

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1 respondent to pay a fine of \$497,760 to be paid within
2 30 days of the effective date of the order.

3 COMMISSION PRESIDENT: Thirty days?

4 COMMISSIONER SCHWARTZ: Sixty days?

5 COMMISSION PRESIDENT: I'm just asking.

6 COMMISSIONER SCHWARTZ: Yeah, 30 days of the
7 effective date of the order. I mean, they got their
8 commission within 30 days so they can pay us back
9 within 30 days.

10 So 30 days of the effective date of the order
11 with all standard collection language, plus
12 administrative costs of \$1,684.33.

13 COMMISSIONER OPATIK: Second.

14 COMMISSION PRESIDENT: There's a motion and a
15 second. Any discussion? I'm looking at you, Mr.
16 Capurro, I'm just curious?

17 COMMISSIONER CAPURRO: I think it's excessive. I
18 think we want to send a message. I think that's a
19 message that we don't want them here at all and I
20 think that's too far.

21 COMMISSIONER OPATIK: Sorry but I really disagree
22 with that. I think it's sending a message that we
23 have rules and regulations in the State of Nevada,
24 it's not the Wild West. So those rules and
25 regulations if they're quote-unquote

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1 "unconstitutional," talk to our legislators. They're Page 29
2 the ones who create them. We're the ones who to
3 enforce them.

4 So I don't think it's sending a message that we
5 don't want you here, I think it's sending a message
6 that we want you here but we want you here rightfully.
7 We want you here legally and lawfully and that's what
8 we're looking for. So I agree with the motion.

9 COMMISSIONER CAPURRO: President Reiss?

10 COMMISSION PRESIDENT: Yes, Commissioner Capurro?

11 COMMISSIONER CAPURRO: If somebody from the
12 public had been harmed, I could see that but I never
13 saw any testimony from either side that that happened
14 and we have the discretion to either go \$5,000 per
15 violation or all the way up to 500-- \$497,000.

16 I think given the fact that no one was harmed and
17 that the violation of putting their name and picture
18 on the advertisement, yes, it was blatant, yes, it was
19 in violation of our rules but given that no one was
20 harmed, I think we're overreaching. I think we're
21 asking for this litigation to go perhaps all the way
22 to the State Supreme Court or further by not being
23 more tempered in our judgment.

24 COMMISSION PRESIDENT: And I agree with you,
25 Commissioner Capurro, that I do think \$497,000 is

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EXHIBIT 2

EXHIBIT 2

1 NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY
2 REAL ESTATE DIVISION
3 BEFORE THE COMMISSION FOR COMMON-INTEREST
4 COMMUNITIES AND CONDOMINIUM HOTELS
5

6 SHARATH CHANDRA,)
Administrator, REAL ESTATE)
7 DIVISION, DEPARTMENT OF)
BUSINESS & INDUSTRY, STATE)
8 OF NEVADA,)

9 Petitioner,)

10 vs.)

CASE NO.: 2017-2079

11 TODD R. MANNING,)

12 Respondent.)

13

14

15 HEARING OF TODD R. MANNING - DAY 2

16

17 Taken at Nevada State Business Center

18 on Wednesday, March 21, 2018

19

at 9:12 a.m.

20

at 3300 West Sahara Avenue, Fourth Floor

21

Las Vegas, Nevada 89102

22

23

24 Reported by: Trina K. Sanchez, CCR No. 933, RPR

25 Job No.: 452535

1 move on to the next broker.

2 It's going to harm his livelihood. It's
3 going to harm his kids' livelihood. It's going to
4 harm his ability to support his wife and children.
5 And under these facts, I don't think that's
6 necessary.

7 Thank you.

8 MR. REISS: Thank you.

9 Okay. At this point, we will open it up
10 for commissioners' conversation, discussions,
11 motions.

12 Commissioner Capurro?

13 MR. CAPURRO: I'd just like to make a few
14 comments regarding this case. It's hard for me to
15 do it, you know, without thinking about the other
16 cases that we've dealt with regarding Marcus &
17 Millichap prior to this one.

18 I think Ms. Rowe is a very talented
19 attorney, but I think her thrust of this defense is
20 misplaced. She raises a myriad of legal arguments
21 that I don't think is within the purview of this
22 commission. It's certainly not within mine, and I
23 don't intend to rule on it.

24 I look at the factual allegations that
25 were brought here. I believe they were proven. I

1 look at the violation before us. I believe it was
2 proven. With regard to Mr. Manning, I don't believe
3 this is so much about Mr. Manning as it's about
4 Marcus & Millichap. I don't believe Todd Manning
5 knowingly violated the rules. And he is probably
6 one of the most compelling witnesses we've seen come
7 before us since I've been on this commission. I
8 think he's the kind of commercial real estate broker
9 we want to see in our state. So I will be pushing
10 for the minimal discipline with regard to this.

11 But I have, you know -- I think our job
12 just for -- for Ms. Rowe, our job is to look at the
13 Division and what they bring forward to us, what the
14 Attorney General's office, Mr. Kizer, brings before
15 us. We don't always agree with them. We usually
16 do. They're very good at what they do, and we
17 appreciate what they do because they're trying to
18 protect our industry. They're not trying to put
19 money in our pockets or keep it out of the pockets
20 of other brokers and other states. They're trying
21 to make sure that we comply with our own laws. And
22 I am happy that they're doing that for us.

23 I don't think there's anything wrong with
24 other brokers and agents bringing to their attention
25 that there are violations on LoopNet. I do think

1 MR. REISS: Any opposed, Nay.

2 Chair votes aye. That motion passes.

3 So let's just look now at 13. Violation
4 No. 13. And any additional discussion?

5 MR. CAPURRO: I would just say this, I'm
6 going to vote that the violations have been proven
7 because I think the Real Estate Division did the
8 right thing by bringing this forward. I think the
9 Attorney General's office did as well. And even
10 though I think that the discipline should be minimal
11 against Mr. Manning, I would not want the Division
12 or the Attorney General's office to not do this in
13 the future. So I'm going to -- I believe it was
14 proven, and I'm going to vote that way.

15 MR. REISS: Thank you.

16 MR. SCHWARTZ: Are we going to take them
17 separately?

18 MR. REISS: We can do them however you
19 want. In fact, we can -- it can be modified. We
20 can make a motion. We don't have to make that a
21 motion in its entirety. We can just make a motion
22 on a part of and then you can scratch, amend,
23 however you want. It's what we decide to do. So
24 I'll --

25 MS. OPATIK: I have a question. Before a

1 MR. SCHWARTZ: Was the payment 30 days,
2 you said?

3 MR. HOLLE: Within 30 days.

4 MR. REISS: And, Ms. Hardin, do we have
5 costs?

6 MS. HARDIN: Yes. The cost is \$1,947.52.
7 \$1,947.52.

8 MR. REISS: Looking at you, Commissioner
9 Capurro.

10 MR. CAPURRO: I would go along with the
11 Division's recommendation for costs of \$1,947.52,
12 plus six hours of broker management live -- live
13 education not included in the annual renewal, but I
14 cannot favor the \$2,500 fine. I think that's too
15 much given the veracity of the witness, Mr. Manning,
16 and what he did try to do. Hopefully Marcus &
17 Millichap will help him out with these costs, but --
18 so I do think something needs to be done because the
19 Division did the right thing by bringing this
20 forward, but I don't see where Todd Manning deserves
21 to be fined.

22 MR. REISS: Thank you.

23 MR. SCHWARTZ: Do you have a suggestion?

24 MR. REISS: His suggestion was basically
25 everything except for the \$2,500 in the fine.