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MAY 29 2010

REAL ESTATE COMMISSION  
BY *[Signature]*

1 Dan R. Reaser  
Nevada State Bar No. 1170  
2 Allen J. Wilt  
Nevada State Bar No. 4798  
3 Katherine L. Hoffman  
Nevada State Bar No. 11991  
4 FENNEMORE CRAIG, P.C.  
300 E. Second Street, Suite 1510  
5 Reno, Nevada 89501  
(775) 788-2200  
6 *Attorneys for Respondents*



7 BEFORE THE REAL ESTATE COMMISSION  
8 STATE OF NEVADA

<p>9 SHARATH CHANDRA, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF 10 BUSINESS &amp; INDUSTRY, STATE OF NEVADA,  11 12 Petitioner,  13 vs. 14 PERRY A. WHITE,  15 Respondent.</p>	<p>Case No.: 2016-1466</p>
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16 **RESPONDENT WHITE'S MOTION TO DISMISS**  
17 **AND/OR MOTION FOR A MORE DEFINITE STATEMENT**

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

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

22 Mr. White is licensed by the Nevada Real Estate Division ("NRED" or the "Division") as a  
23 Real Estate Broker and Real Estate Broker Salesperson. Both licenses are currently on inactive  
24 status. The Amended Complaint and Notice of Hearing filed against Mr. White on May 7, 2018,  
25 (the "Amended Complaint"), alleges five violations of NRS 645.235(1)(b),<sup>1</sup> which provides that  
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27 <sup>1</sup> The properties referenced in the Amended Complaint are: 2341 Comstock Drive, Las  
Vegas, Nevada (the "Academy of Excellence"); 2020 Reno Highway, Fallon, Nevada ("Walgreens"); 5015  
28 Kietzke Lane, Reno, Nevada (the "Reno Red Lobster"); 2325 East Flamingo Road, Las Vegas, Nevada

1 the Commission may "impose an administrative fine against any person who knowingly . . .  
2 assists or offers to assist another person" to engage "in any activity for which a license, permit,  
3 certificate or registration or any type of authorization is required pursuant to this chapter, or  
4 any regulation adopted pursuant thereto," where the person being assisted "does not hold the  
5 required license, permit, certificate or registration or has not been given the required  
6 authorization." Thus, each of the five alleged violations is premised upon a determination that  
7 the agents affiliated with Millichap Real Estate Investment Services Inc. (the "Company") and  
8 referenced in the Amended Complaint<sup>2</sup> engaged in the activities of a Nevada real estate broker-  
9 salesperson, real estate salesperson, or real estate broker and that Mr. White "knowingly . . .  
10 assist[ed]" the unlawful conduct.

11 Because the Division fails to establish any violation with respect to the Academy of  
12 Excellence and the Reno Red Lobster transactions, the Amended Complaint's claims that Mr.  
13 White assisted Agents Kunofsky, Otocka and Reja in committing such violations also fails as a  
14 matter of law and must be dismissed. Claims relating to the Reno Red Lobster transaction  
15 similarly fail. Moreover, the remaining claims relating to the Nevada Transactions lack  
16 particularity and do not adequately advise Mr. White as to what actions by the Company's out-  
17 of-state agents constitute activities requiring licensure.

## 18 II. DISCUSSION AND ANALYSIS

19 Occupational licensees like Mr. White have a protected property interest in their  
20 professional licenses.<sup>3</sup> Accordingly, the Due Process Clause of the United States Constitution  
21 affords certain protections to Mr. White in this contested case proceeding. As part of these due  
22 process protections, NRED must "give notice to the defending party of 'the issues on which  
23 decision will turn and . . . the factual material on which the agency relies for decision so that he  
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25 ("Las Vegas Red Lobster"); 570 Marks Street, Henderson, Nevada ("Henderson Red Lobster" and  
26 collectively, the "Nevada Transactions").

27 <sup>2</sup> These agents are Glen D. Kunofsky, Edward Otocka, Gaurab Reja, Anthony D.  
D'Ambrosia, and James E. Ventura.

28 <sup>3</sup> See, e.g., Potter v. State Bd. of Med. Examiners, 101 Nev. 369, 371, 705 P.2d 132, 134 (1985).

1 may rebut it.”<sup>4</sup> 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.”<sup>5</sup>

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. White as to what conduct NRED believes constitutes five violations of  
10 NRS 645.235(1)(b).<sup>6</sup> Where a complaint fails to plead an essential element of the alleged  
11 violation, the complaint must be dismissed.<sup>7</sup> While dismissal of the Amended Complaint is  
12 appropriate, at a minimum, NRED must provide a more definite statement before the Amended  
13 Complaint can proceed to a contested case proceeding. Due process demands that NRED  
14 apprise Mr. White as to the grounds for the alleged violations and the “factual material on  
15 which the agency relies.”

16 **A. NRED FAILS TO ALLEGE FACTS SUFFICIENT TO FIND THAT**  
17 **MR. WHITE ASSISTED UNLICENSED ACTIVITY IN THE ACADEMY OF EXCELLENCE TRANSACTION**

18 Central to the allegations against Mr. White in the Academy of Excellence transaction are  
19 the charges levied on Company Agents Kunofsky, Otocka and Reja.<sup>8</sup> Without predicate  
20 violations by these individuals with respect to the Academy of Excellence, there can be no  
21 finding that Mr. White is liable under 645.235(1)(b) for assisting conduct which requires a

22 <sup>4</sup> Dutchess Bus. Servs., Inc. v. Nevada State Bd. of Pharmacy, 124 Nev. 701, 711, 191 P.3d  
23 1159, 1166 (2008) citing Bowman Transp. v. Ark.-Best Freight System, 419 U.S. 281, 288–89 n. 4 (1974); see  
24 also NRS 233B.121 (requiring the agency to provide “a short and plain statement of the matters asserted”).

25 <sup>5</sup> Nevada State Apprenticeship Council v. Joint Apprenticeship & Training Comm. for  
Elec. Indus., 94 Nev. 763, 765, 587 P.2d 1315, 1317 (1978)

26 <sup>6</sup> Glen D. Kunofsky, Amended Complaint, Case No. 2016-2900 (May 7, 2018) at para. 57.

27 <sup>7</sup> See Edgar v. Wagner, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985).

28 <sup>8</sup> See Glen D. Kunofsky, Amended Complaint, Case No. 2016-2900 (May 7, 2018); Edward  
Otocka, Complaint, Case No. 2016-2904 (Feb. 15, 2018); Garaub Reja, Complaint, Case No. 2016-2903 (Feb.  
15, 2018) (collectively, the “Nonresident Complaints”).

1 license or permit.

2 As set forth in the contemporaneously-filed Kunofsky Motion to Dismiss and/or Motion  
3 for a More Definite Statement (the "Kunofsky Motion"), the Otocka Motion to Dismiss (the  
4 "Otocka Motion"), and the Reja Motion to Dismiss (the "Reja Motion"), the Division failed to  
5 allege the elements necessary to establish that Agents Kunofsky, Otocka and Reja violated NRS  
6 645.230(1)(a) and/or NRS 645.235(1)(a) by "engaging in the business of, acting in the capacity of,  
7 or advertising or assuming to act" as a real estate broker-salesperson, real estate salesperson, or  
8 real estate broker.<sup>9</sup> Specifically, NRED did not plead that Agents Kunofsky, Otocka and Reja  
9 associated with a licensed Nevada broker, which is an element of the definition of both broker-  
10 salespersons and real estate salespersons.<sup>10</sup> Moreover, NRED did not plead that Agents  
11 Kunofsky, Otocka, and Reja received compensation or expected to receive compensation for the  
12 Academy of Excellence transaction, which is a required element of engaging in the activities of a  
13 real estate broker under NRS 645.030.

14 For these reasons, the allegations against Agents Kunofsky, Otocka and Reja are  
15 fundamentally defective and cannot support disciplinary action for engaging in activities  
16 requiring licensure. Accordingly, without any violations by these individuals during the  
17 Academy of Excellence transaction, there is no basis for finding that Mr. White "knowingly  
18 assist[ed] or offer[ed] to assist another person or persons to engage in any activity for which a  
19 license, permit, certificate or registration or any type of authorization is required . . ."  
20 Consequently, this alleged violation must be dismissed.

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23 <sup>9</sup> See Chandra, et al. v. Kunofsky, Case No. 2016-2900 Respondent Kunofsky's Motion to  
24 Dismiss and/or Motion for a More Definite Statement at 3:16 to 5:8 (Nev. Real Estate Comm'n filed May  
25 29, 2018); Chandra, et al. v. Otocka, Case No. 2016-2904 Respondent Otocka's Motion to Dismiss at 2:18  
26 to 4:6 (Nev. Real Estate Comm'n filed May 29, 2018); Chandra, et al. v. Reja, Case No. 2016-2903  
27 Respondent Reja's Motion to Dismiss at 2:17 to 4:3 (Nev. Real Estate Comm'n filed May 29, 2018). The  
28 Kunofsky, Otocka, and Reja Motions are public records and pursuant to NRS 233B.123(5), the  
Respondent requests that the Commission take official administrative notice of this public record and its  
contents, the relevance of which is demonstrated in this Motion.

<sup>10</sup> See NRS 645.035 (defining "real estate broker-salesperson") and NRS 645.040 (defining  
"real estate salesperson").

1                                    **B. NRED FAILS TO ALLEGE FACTS SUFFICIENT TO FIND THAT**  
2                                    **MR. WHITE ASSISTED UNLICENSED ACTIVITY IN THE RENO RED LOBSTER TRANSACTION**

3                                    Similarly, because NRED failed to plead the facts necessary to established that Mr.  
4 Kunofsky engaged in the activities of a real estate broker with respect to the Reno Red Lobster  
5 transaction, the allegations that Mr. White assisted this violation must also be dismissed. As set  
6 forth in the Kunofsky Motion, NRED's sparse allegations regarding Mr. Kunofsky's role in this  
7 transaction fail to establish that Mr. Kunofsky knowingly engaged in any activities requiring  
8 licensure.<sup>11</sup> Indeed, the Complaint asserts actions undertaken by the *Company* with respect to  
9 this transaction, but NRED but does not claim Mr. Kunofsky engaged in these actions, or knew  
10 of or approved of the Company's actions. Accordingly, because NRED has not alleged any  
11 specific activities by Mr. Kunofsky that fall within the scope a real estate broker as defined in  
12 NRS 645.030, the Amended Complaint similarly fails to state a claim against Mr. White with  
13 respect to the Reno Red Lobster transaction.

14                                    **C. NRED FAILS TO ALLEGE FACTS SUFFICIENT TO SHOW VIOLATIONS OF**  
15                                    **NRS 645.235(1)(A) DURING THE LAS VEGAS RED LOBSTER AND HENDERSON TRANSACTIONS**

16                                    NRED's allegations against Mr. Kunofsky and Mr. White with respect to the Las Vegas  
17 Red Lobster and Henderson Red Lobster transactions are likewise thin and do not establish a  
18 basis for disciplining by Mr. Kunofsky, or by extension, Mr. White.

19                                    As further explained in the Kunofsky Motion, the simple assertion that Mr. Kunofsky  
20 executed a "Brokerage Cooperation Agreement – Turf State", without any additional details or  
21 information about this agreement or its terms, is not sufficient to establish any violation of NRS  
22 645.230(1)(a) and/or NRS 645.235(1)(a).<sup>12</sup> As such, Mr. Kunofsky's alleged violations for these  
23 transactions appear to be wholly premised on the claims that certain "advertising" stated that

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24                                    <sup>11</sup>                                    See Chandra, et al. v. Kunofsky, Case No. 2016-2900 Respondent Kunofsky's Motion to  
25 Dismiss and/or Motion for a More Definite Statement at 5:9 to 6:5 (Nev. Real Estate Comm'n filed May  
26 29, 2018).

27                                    <sup>12</sup>                                    See *id.* at 6:6 to 7:14. To the extent that NRED believes this action alone is grounds for  
28 discipline, it has utterly 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 statement as to the basis for discipline.

1 the Las Vegas Red Lobster and Henderson Red Lobster properties were listed by Mr. Kunofsky.  
2 NRED, however, makes *no* claim that Mr. Kunofsky requested the advertising, supervised the  
3 creation of advertising, or even knew the advertising existed. Without any allegations as to Mr.  
4 Kunofsky's knowledge about the purported advertising, the Division failed to allege a  
5 necessary element of NRS 645.235(1)(a), which requires that a person have "knowingly"  
6 engaged in activities requiring a license. These allegations, therefore, do not establish a basis for  
7 disciplining Mr. Kunofsky under 645.235(1)(a) and any associated allegations against Mr. White  
8 must also be dismissed.

9 **D. THE VIOLATIONS RELATING TO THE REMAINING NEVADA TRANSACTIONS**  
10 **MUST BE DISMISSED OR DESCRIBED WITH PARTICULARITY IN A MORE DEFINITE STATEMENT**

11 NRED's remaining allegations, including allegations against Mr. White relating to the  
12 Walgreen's transaction, do not adequately appraise Mr. White as to the basis for the alleged  
13 violations. The Amended Complaint makes several claims (including that Mr. White was the  
14 broker of record for this transaction and that he received a resulting commission), but fails to  
15 advise Mr. White what actions constitute the unlicensed activity he is alleged to have  
16 knowingly assisted. Does NRED believe Agents D'Ambrosia and Ventura engaged in  
17 unlicensed activity by authoring a Market Positioning and Price Analysis study? Is the basis for  
18 Mr. White's violation that "advertising" purportedly included the names of Agents Kunofsky,  
19 D'Ambrosia, and Ventura?<sup>13</sup> Does NRED object to unspecified portions of the various  
20 agreements listed (but not explained) in the Amended Complaint? Without an understanding  
21 as to the "factual material on which the agency relies," Mr. White cannot understand the  
22 foundation of the allegations against him. In short, the Division has not provided Mr. White  
23 with the due process the United State Constitution requires and for these reasons, NRED must  
24 file a more definite statement as to the bases for these remaining alleged violations.

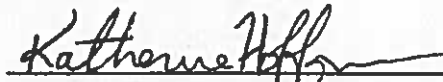
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26  
27 <sup>13</sup> Furthermore, as noted in the Kunofsky Motion, the Amended Complaint's allegations as  
28 to "advertising" are wholly devoid of any details relating to the advertising medium, when or where the  
advertising occurred, and whether any Nevada residents viewed the Advertising. *See id.* at 7:9 to 7:14.

1 III. CONCLUSION

2 The majority of the violations alleged in the Amended Complaint must be dismissed  
3 because NRED has failed to plead essential elements necessary to find that unlicensed  
4 individuals engaged in activities requiring licensure under the definitions in NRS 645.030, NRS  
5 645.035, or NRS 645.040. As to the Academy of Excellence and Reno Red Lobster transactions,  
6 the scant assertions in the Amended Complaint, even if presumed true, are insufficient to  
7 establish that Mr. White knowingly assisted unlicensed individuals to act as a real estate broker-  
8 salesperson, real estate salesperson, or real estate broker as those terms are defined in Nevada's  
9 statutes. Moreover, by not addressing the requisite knowledge requirement, the Division failed  
10 to allege the facts necessary to state a claim that Mr. Kunofsky violated NRS 645.235(1)(a)  
11 regarding the Las Vegas Red Lobster and Henderson Red Lobster transactions. Consequently,  
12 there is no basis for finding Mr. White assisted such a violation. The remaining allegations  
13 against Mr. White lack particularity and due process requires NRED to supplement those  
14 claims with a more definite statement.

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

16 FENNEMORE CRAIG, P.C.

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18 Dan R. Reaser (Bar No. 1170)  
19 Allen J. Wilt (Bar No. 4798)  
20 Katherine L. Hoffman (Bar No. 11991)  
21 300 E. Second Street, Suite 1510  
22 Reno, Nevada 89501  
(775) 788-2200

23 *Attorneys for Respondent*

1 **CERTIFICATE OF SERVICE**

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

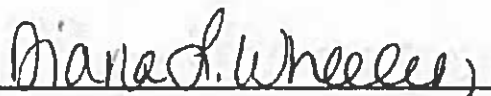
7  
8 **Sharath Chandra, Administrator**  
9 **Department of Business and Industry**  
10 **Nevada Real Estate Division**  
11 **3300 W. Sahara Avenue, Suite 350**  
12 **Las Vegas, Nevada 89102**  
13 *For the Nevada Real Estate Division*

14  
15 **Keith E. Kizer**  
16 **Senior Deputy Attorney General**  
17 **State of Nevada**  
18 **555 E. Washington Avenue, Suite 3900**  
19 **Las Vegas, Nevada 89101**  
20 *Counsel for the Nevada Real Estate Division*

21  
22 **Administration Section Manager**  
23 **Department of Business and Industry**  
24 **Nevada Real Estate Division**  
25 **3300 W. Sahara Avenue, Suite 350**  
26 **Las Vegas, Nevada 89102**  
27 *For the Nevada Real Estate Commission*

28  
29 **Asheesh Bhalla**  
30 **Deputy Attorney General**  
31 **State of Nevada**  
32 **555 E. Washington Avenue, Suite 3900**  
33 **Las Vegas, Nevada 89101**  
34 *Counsel for the Nevada Real Estate Commission*

DATED this 29<sup>th</sup> day of May, 2018.

  
An Employee of Fennemore Craig, P.C.