FILED
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REAL ESTATE COMMISSION
BY

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BEFORE THE REAL ESTATE COMMISSION

STATE OF NEVADA

SHARATH CHANDRA, Administrator REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS & INDUSTRY, STATE OF NEVADA. Petitioner, vs. KEVIN BOEVE, Respondent.	CASE NO. 2018-561 **ANSWER TO COMPLAINT**

ANSWER TO COMPLAINT

COMES NOW Respondent KEVIN BOEVE, by and through his counsel of record, and in answer to the Complaint would show as follows:

JURISDICTION

Respondent denies the allegations of this paragraph. Additionally, Respondent specifically refers to the Order of the First Judicial District Court for the State of Nevada in and for Carson City, Case No. 18OC000411B dated March 12, 2019, attached hereto as **Exhibit A**. In that Order,

among other things, the Court set aside the Commission's and the Division's prior efforts to discipline real estate agents for the same type of conduct alleged here against Respondent. In setting aside those prior disciplinary orders, the Court advised the Division and the Commission that "**the Commission cannot discipline Petitioners for engaging or assisting with unlicensed activity**" where, as here, "the Commission requires nonresident Petitioners to have a cooperative certificate to engage in cooperative brokering, but has unlawfully precluded the nonresident Petitioners from obtaining such certificates by limiting the types of transactions eligible for cooperative certificates." (See Paragraph 24 of the Order, emphasis added.) The Division's cease and desist letter violates this plain language from the District Court. Additionally, Respondent notes that in legal proceedings before the United States District Court, counsel for the Division and the Commission have advised the Court unequivocally that the Commission has no jurisdiction to discipline out of state agents. As a matter of law and equity, the Division and the Commission should be precluded from denying jurisdiction over out of state agents in one proceeding and asserting jurisdiction over them in another.

PROCEDURAL HISTORY

1. Respondent admits the allegations of Paragraph 1.

2. Respondent admits that he received a letter from the Division in or around late April, 2018. Respondent denies the remaining allegations of Paragraph 2.

3. Respondent admits that he received an extension and provided a sworn declaration and transaction files. Respondent lacks personal knowledge of the remaining allegations of Paragraph 3, and is therefore unable to admit or deny those allegations.

4. With respect to Paragraph 4, Respondent admits that he received a purported cease and desist letter from the Division. Respondent denies the remaining allegations of Paragraph 4. Respondent specifically refers to the Order of the First Judicial District Court for the State of Nevada in and for Carson City, Case No. 18OC000411B dated March 12, 2019, attached hereto as **Exhibit A**. In that Order, among other things, the Court set aside the Commission's and the Division's prior efforts to discipline real estate agents for the same type of conduct alleged here against Respondent. In setting aside those prior disciplinary orders, the Court advised the Division

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and the Commission that "**the Commission cannot discipline Petitioners for engaging or assisting with unlicensed activity**" where, as here, "the Commission requires nonresident Petitioners to have a cooperative certificate to engage in cooperative brokering, but has unlawfully precluded the nonresident Petitioners from obtaining such certificates by limiting the types of transactions eligible for cooperative certificates." (See Paragraph 24 of the Order, emphasis added.) The Division's cease and desist letter violates this plain language from the District Court.

5. Respondent admits Marcus and Millichap's counsel received a letter from the Division in or about early October, 2018 that requested the listed documents. Respondent denies the remaining allegations of Paragraph 5.

6. Respondent admits that on or about October 15, 2018, Marcus and Millichap's counsel responded as stated. Respondent denies the remaining allegations of Paragraph 6.

7. Respondent admits that on or about November 29, 2018, Marcus and Millichap's counsel received the identified letter. Respondent denies the remaining allegations of Paragraph 7.

8. Respondent admits his counsel received a letter in or about mid-January, 2019, that stated the Division's intent commence a disciplinary proceeding. Respondent denies the remaining allegations of Paragraph 8.

FACTUAL ALLEGATIONS

1. Respondent admits the factual allegations of Paragraph 1, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 1 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

2. Respondent admits the factual allegations of Paragraph 2, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 2 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

3. Respondent lacks personal knowledge regarding the allegations of Paragraph 3, and is therefore unable to admit or deny them. Respondent further denies that such allegations can

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form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 3 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

4. Respondent lacks personal knowledge regarding the allegations of Paragraph 4, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 4 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

5. Respondent admits the factual allegations of Paragraph 5, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 5 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

6. Respondent lacks personal knowledge regarding the factual allegations of Paragraph 6, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 6 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

7. Respondent denies the factual allegations of Paragraph 7, and further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 7 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

8. Respondent lacks personal knowledge regarding the allegations of Paragraph 8, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 8 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

9. Respondent admits the factual allegations of Paragraph 9, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary

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finding on the basis of the allegations of Paragraph 9 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

10. Respondent admits the factual allegations of Paragraph 10, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 10 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

11. Respondent admits the factual allegations of Paragraph 11, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 11 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

12. Respondent admits the factual allegations of Paragraph 12, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 12 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

13. Respondent admits that in or about late November, 2018, his counsel received a request from the Division for a copy of a purported Representation Agreement. Respondent denies the remaining factual allegations of Paragraph 13. Respondent further denies that any such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 13 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

14. Respondent admits that on or about December 4, 2018, Marcus and Millichap's counsel received the identified letter. Respondent denies the remaining allegations of Paragraph 14, and further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 14 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

15. Respondent admits the factual allegations of Paragraph 15, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary

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finding on the basis of the allegations of Paragraph 15 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

16. Respondent lacks personal knowledge regarding the allegations of Paragraph 16, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 16 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

17. Respondent lacks personal knowledge regarding the allegations of Paragraph 17, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 17 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

18. Respondent lacks personal knowledge regarding the allegations of Paragraph 18, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 18 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

19. Respondent lacks personal knowledge regarding the allegations of Paragraph 19, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 19 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

20. Respondent lacks personal knowledge regarding the allegations of Paragraph 20, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 20 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

21. Respondent lacks personal knowledge regarding the allegations of Paragraph 21,

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and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 21 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

22. Respondent lacks personal knowledge regarding the allegations of Paragraph 22 and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 22 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

23. Respondent lacks personal knowledge regarding the allegations of Paragraph 23, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 23 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

24. Respondent admits the factual allegations of Paragraph 24, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 24 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

25. Respondent admits the factual allegations of Paragraph 25, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 25 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

26. Respondent admits the factual allegations of Paragraph 26, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 26 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

27. Respondent admits the factual allegations of Paragraph 27, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary

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finding on the basis of the allegations of Paragraph 27 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

28. Respondent lacks personal knowledge regarding the allegations of Paragraph 28, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 28 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

29. Respondent lacks personal knowledge regarding the allegations of Paragraph 29, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 29 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

30. Respondent lacks personal knowledge regarding the allegations of Paragraph 30, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 30 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

31. Respondent lacks personal knowledge regarding the allegations of Paragraph 31, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 31 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

32. Respondent lacks personal knowledge regarding the allegations of Paragraph 32, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 32 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

33. Respondent lacks personal knowledge regarding the allegations of Paragraph 33,

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and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 33 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

34. Respondent lacks personal knowledge regarding the allegations of Paragraph 34, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 34 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

35. Respondent denies the factual allegations of Paragraph 35, and further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 35 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

36. Respondent admits that he received a net commission of $19,800. Respondent denies the remaining allegations of Paragraph 36, and further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 34 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

37. Respondent admits the factual allegations of Paragraph 37, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 37 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

38. Respondent denies the factual allegations of Paragraph 38, and further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 38 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

39. Respondent admits the factual allegations of Paragraph 39, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary

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finding on the basis of the allegations of Paragraph 39 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

40. Respondent admits the factual allegations of Paragraph 40, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 40 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

41. Respondent lacks personal knowledge regarding the allegations of Paragraph 41, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 41 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

42. Respondent lacks personal knowledge regarding the allegations of Paragraph 42, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 42 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

43. Respondent lacks personal knowledge regarding the allegations of Paragraph 43, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 43 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

44. Respondent lacks personal knowledge regarding the allegations of Paragraph 44, and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 44 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

45. Respondent lacks personal knowledge regarding the allegations of Paragraph 45, and is therefore unable to admit or deny them. Respondent further denies that such allegations can

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form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 45 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

46. Respondent lacks personal knowledge regarding the allegations of Paragraph 46 and is therefore unable to admit or deny them. Respondent further denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 46 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

47. Respondent admits the factual allegations of Paragraph 47, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 47 would exceed the Commission's authority for the reasons stated by the District Court in Exhibit A.

48. Respondent admits the factual allegations of Paragraph 48, but denies that such allegations can form the basis of any disciplinary finding. Among other grounds, any disciplinary finding on the basis of the allegations of Paragraph 48 would exceed the Commission's statutory authority for the reasons stated by the District Court in Exhibit A.

VIOLATIONS ALLEGED

1. Respondent denies the allegations in Paragraph 1.

DISCIPLINE AUTHORIZED

2. Paragraph 2 states legal conclusions and does not require a response from the Respondent; however, to the extent a response is required by rule, Respondent denies the allegations of Paragraph 2.

3. Paragraph 3 states legal conclusions and does not require a response from the Respondent; however, to the extent a response is required by rule, Respondent denies the allegations of Paragraph 3.

4. Paragraph 4 states legal conclusions and do not require a response from the Respondent; however, to the extent a response is required by rule, Respondent denies the allegations of Paragraph 4.

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5. Paragraph 5 states the Division's request and does not require a response from Respondent; however, to the extent a response is required by rule, Respondent denies that the Commission is authorized to take any disciplinary action against Respondent.

DEFENSES & AFFIRMATIVE DEFENSES

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

2. The Division has not and cannot meet its burden of proving that Respondent engaged in any conduct for which the Commission could impose any discipline against Respondent.

3. The Division has brought this action against Respondent for an improper purpose, and the action must therefore be dismissed.

4. The Division is improperly engaging in selective prosecution of Marcus & Millichap agents including Respondent, and the action must therefore be dismissed.

5. Respondent is not guilty of violating any Order of the Nevada Real Estate Commission (the "Commission"), any agreement with the Nevada Real Estate Division (the "Division"), or any provision of NRS 645 or any regulation adopted pursuant thereto.

6. The Division has failed to produce all communications, reports, affidavits, and depositions in its possession which are relevant to the Complaint, and the Division's claims should therefore be barred. The Division is legally required, by Nevada statute and under principles of due process, to produce to Respondent all of its investigatory files. The Division has failed and refused to do so, instead taking the position that it can produce only those portions of the files it wishes to disclose, while withholding those portions that are helpful to Respondent's defense. In withholding documents and information relevant to Respondent's defense, the Division has violated its statutory obligations and deprived Respondent of his due process rights.

7. To the extent the Division intends to present evidence at the hearing obtained after notice to Respondent, it must show that the evidence was not available after diligent investigation before the time notice was given and the evidence was given or communicated to Respondent immediately after it was obtained.

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8. Respondent is not guilty of any violation because the licensing and cooperative certificate scheme promulgated by the Commission and/or the Division, including NAC 645.180, 645.183, and 645.185, violates the United States Constitution's Commerce Clause.

9. Respondent is not guilty of any violation because the Commission and/or the Division promulgated their licensing and cooperative certificate scheme, including NAC 645.180, 645.183, and 645.185, without following the required statutes, rules and regulations, including without limitation:

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

b. The Commission and the Division failed to comply with the requirements for Regulation Workshops pursuant to a duly posted agenda with sufficient opportunity for informed and meaningful participation by the public, and with public discussion of the true purpose and true effect of a proposed regulation.

c. The Commission and the Division failed to comply with the requirements for a Notice of Intent to Act Upon a Regulation that includes the true purpose and need of a proposed regulation, the true estimated economic effect of a proposed regulation, and the true effect on federal law including the United States Constitution.

d. The Commission failed to comply with the requirements for written minutes of meetings accurately reflecting the basis for actions taken by the Commission.

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

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

g. The Division failed to comply with the requirement that its Administrator provide an advisory opinion in appropriate circumstances.

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h. The Commission and the Division failed to comply with the requirement that a regulatory scheme be preceded by and supported by a duly issued and considered Small Business Impact Statement.

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

j. Respondent is not guilty of any violation because the Commission and/or the Division promulgated their licensing and cooperative certificate scheme, including NAC 645.180, 645.183, and 645.185, without statutory authority and in violation of the NRS 645.605.

10. The Division failed to comply with the requirement under NAC 645.680 that the complaint against Respondent be made on a standard form or affidavit or, in the alternative, the Division failed to produce such form or affidavit to Respondent, in violation of the Division's statutory duties and in violation of Respondent's due process rights.

11. The Division failed to adequately investigate the charges against Respondent. For instance, the Division either failed to make any attempt to contact any consumers or any of the parties to the transactions identified in the Complaint, or it contacted such consumers and parties but wrongfully withheld that information from Respondent.

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

13. The Division and the Commission have historically interpreted and enforced NAC 645.185 in a manner that was contradictory to the plain language of the regulation. Namely, they have always precluded out of state brokers from offering real estate for sale in Nevada to a person

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other than a resident of Nevada, even though NAC 645.185 expressly allowed out of state brokers to offer real estate in Nevada for sale to a person other than a resident of Nevada.

14. As historically and currently interpreted by the Commission and the Division, the statutes and regulations relating to out of state brokerage activities are so ambiguous as to be unenforceable.

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

16. The Commission denied Respondent his due process rights by failing to comply with NRS 233B.121(4), 233B.127(3) and 645.235(4).

17. The Commission should be barred from adjudicating this proceeding because it has demonstrated that it has not been and cannot be impartial as to current and former Marcus & Millichap agents such as Respondent.

18. The Commission has a conflict of interest with respect to this proceeding. Among other things, the Commissioners are defendants in a related lawsuit pending before the Ninth Circuit Court of Appeal, and are directly adverse to Marcus & Millichap in that proceeding.

19. The Commission has a conflict of interest with respect to this proceeding because, among other things, the Commissioners have a personal financial interest in the outcome of the proceeding. To the extent the Commission and the Division succeed in their effort to exclude out-of-state agents from sharing commissions for Nevada real estate transactions, the Commissioners as in-state agents will and/or anticipate that they will derive personal financial gains.

20. The Commission should be barred from adjudicating this proceeding because it has demonstrated its inability to exercise its duty of discretion and instead merely rubber stamps the decisions of the Division.

21. The Commission should be barred from adjudicating these proceedings because it is being legally advised by attorneys who have a conflict of interest. The Commission's counsel, the Nevada Attorney General, represents the Commission and the Division in this proceeding, and in the related state and federal court proceedings. As such, the Commission's counsel acts as

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counsel for both the prosecution and the adjudicative body simultaneously, thereby depriving Respondent of a fair and impartial proceeding.

DATED this 17th day of September 2019.

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CERTIFICATE OF SERVICE

The undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 17th day of September 2019, he caused a copy of the foregoing **ANSWER TO COMPLAINT** to be transmitted via hand delivery addressed to:

REAL ESTATE DIVISION
STATE OF NEVADA
Attn: Evelyn Pattee, Commission Coordinator
3300 W. Sahara Avenue, Suite 350
Las Vegas, Nevada 89102

And a copy placed in the U.S. Mail, postage prepaid and via email addressed to:

Peter K. Keegan
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701
Email: pkeegan@ag.nv.gov
Attorney for Real Estate Division

An Employee of Dickinson Wright PLLC

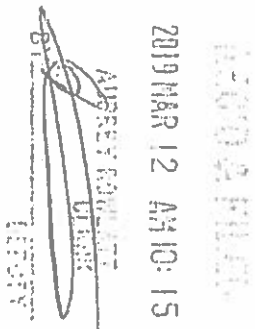
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EXHIBIT A

IN THE FIRST JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR CARSON CITY

ALVIN MANSOUR, Petitioner and Plaintiff, vs. SHARATH CHANDRA, ADMINISTRATOR, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA; and NEVADA REAL ESTATE COMMISSION, STATE OF NEVADA, Respondents and Defendants.	Case No.: 18OC000411B (Consolidated) Dept. No.: 1



ORDER DENYING RESPONDENT'S MOTION TO DISMISS AND MOTION FOR PARTIAL DISMISSAL AND SETTING ASIDE AND REMANDING PETITIONERS' DISCIPLINARY DECISIONS

THIS MATTER came before the Court on February 14, 2019, for hearing on the Motion to Dismiss and the Motion for Partial Dismissal (the "**Dismissal Motions**") filed on June 29, 2018 and October 26, 2018, respectively, by the Respondents, NEVADA REAL ESTATE DIVISION and Administrator SHARATH CHANDRA, of the NEVADA REAL ESTATE DIVISION, (collectively, the "**Division**").[1] The Division was represented by Brandee Mooneyhan and Melissa Flatley, Deputy Attorneys General for the State of Nevada. The consolidated Petitioners and Plaintiffs, ALVIN MANSOUR, KEVIN MANSOUR, GORDON ROBERT ALLRED, PERRY WHITE and NENAD ZIVKOVIC (the "**Mansour Petitioners**"), TODD MANNING ("**Manning**"), ANTHONY D'AMBROSIA, JOHN GLASS, GLEN KUNOFSKY, EDWARD OTOCKA, GAURAB REJA, JAMES VENTURA, and PERRY WHITE (the "**D'Ambrosia Petitioners**" and collectively with Manning and the Mansour Petitioners the "**Petitioners**"), were represented by Katherine Hoffman of Fennemore Craig, P.C. and Jill Rowe of Cooper White & Cooper, *pro hac vice*.

[1] Respondent and Defendant Nevada Real Estate Commission (the "**Commission**") joined in the Motion to Dismiss filed June 29, 2018, but did not join in the Motion for Partial Dismissal filed October 26, 2018.

The Petitioners filed Responses and Oppositions to the Dismissal Motions on July 16, 2018 and November 13, 2018 (the "**Oppositions**"). The Division filed Replies in Support of the Dismissal Motions on July 27, 2018 and November 27, 2018 (the "**Replies**").

The Court, after considering the papers and pleadings on file, including the Petitioners' Petitions for Judicial Review (the "**Petitions**"),[2] the Complaints for Declaratory Relief filed by Manning and D'Ambrosia Petitioners (the "**Complaints**"), the Dismissal Motions, the Oppositions, the Replies, and the oral argument of counsel at the hearing, and good cause appearing therefore, makes and enters the following decision and order:

1. Petitioners White and Manning are Nevada real estate professionals licensed by the Division. The remaining Petitioners are real estate professionals licensed in other United States jurisdictions.

2. The Division commenced disciplinary proceedings against each of the Mansour Petitioners, which were the subject of contested case hearings before the Commission on December 5-6, 2017. Following the hearings, the Commission served decisions on January 26, 2018, finding each of the Mansour Petitioners violated NRS 645.230 and/or NRS 645.235 and imposing professional discipline (the "**Mansour Decisions**").

3. The Division commenced a disciplinary proceeding against Manning, which was the subject of a contested case hearing before the Commission on March 20-21, 2018. Following the hearing, the Commission served a decision on April 12, 2018, finding Manning violated NRS 645.235(1)(b) and imposing professional discipline (the "**Manning Decision**").

4. The Division commenced disciplinary proceedings against each of the D'Ambrosia Petitioners, which was the subject of a contested case hearing before the Commission on June 12-14, 2018. Following the contested case, the Commission served decisions on July 30, 2018, finding each of the D'Ambrosia Petitioners violated NRS 645.230 and/or NRS 645.235 and imposing professional discipline (together with the Mansour Decisions and the Manning Decision, the "**Decisions**").

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[2] The Commission did not file a notice of intent to participate in the Petitions under NRS 233B.130(3).

5. During the contested case proceedings before the Commission, Petitioners each raised as a defense to the alleged violations of NRS 645.230 and/or NRS 645.235 that the method and mode of concurrent application and administration of NRS 645.230 and/or NRS 645.235(1)(a) in conjunction with the application and administration of the regulatory system prescribed by NAC 645.180, NAC 645.183 and NAC 645.185 (the "Cooperative Certification Regulatory Framework") exceeds the Commission's statutory authority and violates the Petitioners' Constitutional rights.

6. Specifically, the Petitioners asserted that imposing discipline for unlicensed brokering activities or assisting unlicensed brokering activities under NRS 645.230 and/or 645.235 was unlawful where the Commission's regulations prohibited the Petitioners from obtaining a cooperative certificate in violation of the United States Constitution and Nevada statutes. *See, e.g.*, Sharath Chandra Adm'r Real Estate Div., et al. v. Gordon Robert Allred, Case No. 2016-1734, *Transcript of Proceedings* at 38:11-20, 67:20-68:2 (Nev. Real Estate Comm'n December 5, 2017); Sharath Chandra Adm'r Real Estate Div., et al. v. Todd R. Manning, Case No. 2017-2079, *Transcript of Proceedings* at 11:11-18, 41:2-5 (Nev. Real Estate Comm'n March 20, 2018); Sharath Chandra Adm'r Real Estate Div., et al. v. Anthony D. D'Ambrosia, Case No. 2016-2901, *Motion to Dismiss* at pp. 8-13 (Nev. Real Estate Comm'n filed May 29, 2018).

7. The Commission refused to hear evidence and arguments offered by Petitioners regarding the alleged invalidity of the Cooperative Certification Regulatory Framework and declined to evaluate or consider Petitioners' defense that the Cooperative Certification Regulatory Framework exceeds the Commission's statutory authority and violates their Constitutional rights. *See, e.g.*, Sharath Chandra Adm'r Real Estate Div., et al. v. Gordon Robert Allred, Case No. 2016-1734, *Transcript of Proceedings* at 5:19-6:15 (Nev. Real Estate Comm'n December 6, 2017); Sharath Chandra Adm'r Real Estate Div., et al. v. Todd R. Manning, Case No. 2017-2079, *Transcript of Proceedings* at 41:2-5 (Nev. Real Estate Comm'n March 20, 2018); Sharath Chandra Adm'r Real Estate Div., et al. v. Anthony D. D'Ambrosia, Case No. 2016-2901, *Transcript of Proceedings* at 118:18-119:5 (Nev. Real Estate Comm'n June 13, 2018) (denying Motion to Dismiss).

8. Each Petitioner timely filed with this Court a Petition pursuant to NRS 233B.130 and NRS 645.760 challenging the Commission's Decisions. The Petitions were timely served.

9. In addition to their Petitions, Manning and each of the D'Ambrosia Petitioners filed Complaints pursuant to NRS 233B.110 requesting judgments declaring that:

(a) Subsection 11 of NAC 645.185 is void and *ultra vires* as a matter of Nevada law because it is contrary to, in conflict with and in excess of the jurisdiction and authority of the Division and Commission to implement by administrative regulations the provisions of NRS 645.280(1) and 645.605, which the Nevada Legislature restricted to "the conditions under which . . . [cooperative] certificates shall be issued and cancelled"; and,

(b) Subsection 11 of NAC 645.185 is facially unlawful and in conflict with the Petitioner's rights under the Commerce Clause, and the method and mode of concurrent application and administration of NRS 645.235(1)(a) in conjunction with the Cooperative Certification Regulatory Framework as adopted and enforced by the Commission, Division and Administrator is unlawful and violates the Petitioner's rights under the Commerce Clause; and,

(c) The Cooperative Certification Regulatory Framework adopted and enforced by the Commission, Division and Administrator is unlawful and in conflict with the commercial association and speech rights of [the plaintiff] under the First and Fourteenth Amendments to the Constitution of the United States.

THE DISMISSAL MOTIONS

10. The Dismissal Motions ask this Court to dismiss each of the Complaints on the grounds that the Petitions are the exclusive remedy for challenging the Commission's Decisions, that the Petitions and Complaints may not be brought together in the same proceeding, and that Manning and the D'Ambrosia Petitioners failed to request that the Commission "pass upon the validity" of the Cooperative Certification Regulatory Framework as required by NRS 233B.110 because they did not file a petition to adopt, file, amend, or repeal a regulation pursuant to NAC 645.875. These arguments fail for three reasons, as described below:

11. First, the availability of a petition for judicial review does not preclude a plaintiff

from filing a declaratory relief complaint under NRS 233B.110 to challenge regulations as exceeding an agency's authority or violating Nevada statutes. Nevada Attorney for Injured Workers v. Nevada Self-Insurers Ass'n, 126 Nev. 74, 83 n.7, 225 P.3d 1265, 1270 (2010). Consequently, that Petitioners have challenged the Commission's Decisions by filing the Petitions under NRS 233B.130 does not bar them from challenging the validity of the Cooperative Certification Regulatory Framework through the Complaints filed pursuant to NRS 233B.110.

12. Second, the Nevada Administrative Procedure Act (the "Act") does not prohibit this Court from considering the Petitions and Complaints together. The Nevada Rules of Civil Procedure ("NRCP") apply to the adjudication of the Complaints, *see* NRS 233B.110(3), and to the Petitions to the extent the NRCP do not conflict with the Act, *see* NRCP 81(a). The Division has not identified any authority in the Act or the NRCP which precludes Petitioners from filing the Petitions and Complaints together.

13. Third, a declaratory judgment under NRS 233B.110 cannot be rendered until after Petitioners "request the agency to pass upon the validity" of the Cooperative Certification Regulatory Framework. NRS 233B.110(1). This statute does not specify a required method or process for making such a request, nor does NRS 233B.110 obligate a plaintiff to file a petition to amend or repeal the regulation at issue. During their disciplinary hearings, Manning and the D'Ambrosia Petitioners requested that the Commission hear arguments and evidence that the Cooperative Certification Regulatory Framework exceeded the Commission's statutory authority and violated the Constitution, and find that the Cooperative Certification Regulatory Framework was invalid. Sharath Chandra Adm'r Real Estate Div., et al. v. Todd R. Manning, Case No. 2017-2079, *Transcript of Proceedings* at 11:11-18 (Nev. Real Estate Comm'n March 20, 2018); Sharath Chandra Adm'r Real Estate Div., et al. v. Anthony D. D'Ambrosia, Case No. 2016-2901, *Motion to Dismiss* at pp. 8-13 (Nev. Real Estate Comm'n filed May 29, 2018). Accordingly, Manning and the D'Ambrosia Petitioners have satisfied the requirement the Commission be asked to "pass upon the validity" of the Cooperative Certification Regulatory Framework.

14. For the foregoing reasons, the Dismissal Motions are denied.

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THE PETITIONS FOR JUDICIAL REVIEW

15. NRS 645.289 is a broad statute providing that: "A licensed real estate broker may pay a commission to a licensed broker of another State." This statute authorizes Nevada real estate licensees to cooperate with out-of-state real estate licensees on Nevada real estate transactions, and vice versa. It does not place any restrictions on the types of transactions for which such cooperation is permitted.

16. NRS 645.605 gives the Administrator of the Nevada Real Estate Division "authority to issue certificates authorizing out-of-state licensed brokers to cooperate with Nevada brokers," and it gives the Commission "authority to promulgate rules and regulations establishing the conditions under which such certificates shall be issued and cancelled, all subject to the provisions and penalties of this chapter [645]," NRS 645.605 does not by its terms give the Administrator or the Commission authority to limit the types of real estate transactions for which cooperative certificates are issued.

17. The Act requires that in contested case proceedings, all parties must be afforded the opportunity to "respond and present evidence and argument on all issues involved." NRS 233B.121(4).

18. Nevada statutes authorize the Commission to review its regulations and determine whether those regulations exceed the Commission's statutory authority or otherwise violate or conflict with Nevada statutes or the United States Constitution. *See* NRS 233B.110; *see also* Deja Vu Showgirls v. State, Dep't of Tax., 130 Nev. 719, 725–26, 334 P.3d 392, 397 (2014).

19. NRS 233B.131(2)-(3) provides that this Court may order the agency to take additional evidence "upon such conditions as the court determines" if that evidence is "material" and if there were "good reasons" that such evidence was not presented in the proceedings before the agency. After receipt of such evidence, the agency may modify its findings and decisions and shall file the evidence and any modifications, new findings or decisions with Court.

20. During their contested case hearings, the Commission deprived the Petitioners of the opportunity to present arguments and evidence related to their claims that the Cooperative Certification Regulatory Framework is unconstitutional, and/or exceeds the Commission's authority and violates Nevada statutes. *See, e.g.*, Sharath Chandra Adm'r Real Estate Div., et al. v. Gordon Robert Allred, Case No. 2016-1734, *Transcript of Proceedings* at 5:19-6:15 (Nev. Real Estate Comm'n December 6, 2017); Sharath Chandra Adm'r Real Estate Div., et al. v. Todd R. Manning, Case No. 2017-2079, *Transcript of Proceedings* at 41:2-5 (Nev. Real Estate Comm'n March 20, 2018); Sharath Chandra Adm'r Real Estate Div., et al. v. John Glass, Case No. 2017-1473, *Transcript of Proceedings* at 60:5-63:11 (Nev. Real Estate Comm'n June 12, 2018).

21. The Commission did not evaluate or consider this alleged invalidity of the Cooperative Certification Regulatory Framework in rendering the Decisions because the Commission incorrectly concluded that such arguments are irrelevant to the disciplinary proceedings for unlicensed brokering activities or assisting unlicensed brokering activities in violation of NRS 645.230 and/or 645.235. *See*, Todd R. Manning v. Sharath Chandra, Adm'r Real Estate Div., et al., Case No. 18OC000411B (Consolidated), *Division Reply in Support of Motion to Dismiss* (Nev. First Jud. Dist. Ct. filed July 27, 2018), at p. 2; Anthony D. D'Ambrosia v. Sharath Chandra, Adm'r Real Estate Div., et al., Case No. 18OC000411B (Consolidated), *Division Reply in Support of Motion for Partial Dismissal* (Nev. First Jud. Dist. Ct. filed November 27, 2018), at p. 3.

22. The Commission's determination that the validity of the Cooperative Certification Regulatory Framework is irrelevant to Petitioners' disciplinary proceedings is clearly erroneous, and for the reasons discussed below, such evidence is material to the Decisions.

23. Each of the nonresident Petitioners was disciplined for engaging in the activities of a broker "without first obtaining the appropriate license or certificate" by cooperating with a Nevada-licensed Petitioner to offer Nevada property for sale. *See, e.g.*, Sharath Chandra Adm'r Real Estate Div., et al. v. John Glass, Case No. 2017-1473, Decision at pp. 1-2 (Nev. Real Estate Comm'n July 31, 2018). The Nevada-licensed Petitioners were correspondingly disciplined for assisting this conduct. *See, e.g.*, Sharath Chandra Adm'r Real Estate Div., et al. v. Todd R.

Manning, Case No. 2017-2079, Decision at pp. 2-3 (Nev. Real Estate Comm'n April 12, 2018). The Cooperative Certification Regulatory Framework precludes the nonresident Petitioners from obtaining cooperative certificates allowing them to cooperate with the Nevada-licensed Petitioners to sell Nevada property. *See* NAC 645.185(11).

24. Whether the Cooperative Certification Regulatory Framework's limitation on cooperative certificates unlawfully prohibits the nonresident Petitioners from obtaining "the appropriate license or certificate" is relevant to determining if the Commission may discipline Petitioners under NRS 645.230 and/or NRS 645.235. Put another way, if the Commission determines that the Cooperative Certification Regulatory Framework improperly denied the nonresident Petitioners the ability to obtain a certificate authorizing them to engage in cooperative brokering with the Nevada-licensed Petitioners, this determination must be considered in administering discipline for engaging in broker activities without the appropriate license or certificate, or for assisting such activities. It appears to this Court that if the Commission requires the nonresident Petitioners to have a cooperative certificate to engage in cooperative brokering, but has unlawfully precluded the nonresident Petitioners from obtaining such certificates by limiting the types of transactions eligible for cooperative certificates, then the Commission cannot discipline Petitioners for engaging in or assisting with unlicensed activity.

25. Based on the Commission's clearly erroneous determination as to the relevancy of the alleged invalidity of the Cooperative Certification Regulatory Framework, the Commission wrongfully denied Petitioners the opportunity to present arguments and evidence on this issue during their contested case hearings. *See, e.g.*, Sharath Chandra Adm'r Real Estate Div., et al. v. Gordon Robert Allred, Case No. 2016-1734, *Transcript of Proceedings* at 5:19-6:15 (Nev. Real Estate Comm'n December 6, 2017); Sharath Chandra Adm'r Real Estate Div., et al. v. Todd R. Manning, Case No. 2017-2079, *Transcript of Proceedings* at 60:5-64:23 (Nev. Real Estate Comm'n March 21, 2018); Sharath Chandra Adm'r Real Estate Div., et al. v. John Glass, Case No. 2017-1473, *Transcript of Proceedings* at 60:5-63:11 (Nev. Real Estate Comm'n June 12,

2018). Consequently, there were "good reasons" for Petitioner's failure to present this evidence to the Commission. *See* NRS 233B.131(2).

26. For the forgoing reasons, Decisions are set aside and remanded to the Commission for further proceedings in accordance with NRS 233B.131(2)-(3).

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IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

27. The Division's Dismissal Motions are DENIED.

28. The Decisions are set aside and remanded to the Commission with instructions to (i) hear Petitioners' evidence and arguments with respect to whether the Cooperative Certification Regulatory Framework exceeds the Commission's statutory authority, and/or violates the United States Constitution's dormant commerce clause and/or Petitioners' rights of association and free speech under the First and Fourteenth Amendments; (ii) determine the validity of the Cooperative Certification Regulatory Framework; and (iii) apply that determination to the Decisions consistent with this Order. Pending such remand, the Petitions are stayed.

29. The Complaints are stayed pending completion of the Commission proceedings required by paragraph 28.

IT IS SO ORDERED this 12th of March, 2019.

DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and that on this 12th day of March, 2019, I deposited for mailing, postage paid, at Carson City, Nevada, a true and correct copy of the foregoing Order addressed as follows:

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