

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

LESLIE RAE YOUNG,

Plaintiff,

vs.

DAVE HEINEMAN, Governor of the  
State of Nebraska, in his official capacity  
JON BRUNING, Attorney General of  
Nebraska, in his official capacity; JOHN  
A. GALE, Secretary of State &  
Chairperson of the Nebraska Real Estate  
Commission and GREG LEMON,  
Director of the Nebraska Real Estate  
Commission, in their official capacities,

Defendants.

Case No. 4:10-CV-3147

**SUPPLEMENTAL BRIEF IN  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

Defendants Dave Heineman, in his official capacity as Governor of Nebraska; Jon Bruning, in his official capacity as Nebraska Attorney General; John A. Gale, in his official capacity as Secretary of State & Chairperson of the Nebraska Real Estate Commission and Greg Lemon, in his official capacity as Director of the Nebraska Real Estate Commission (collectively, "Defendants"), by and through counsel and pursuant to the Court's August 4, 2004 Order (Doc. No. 34), submits the following Supplement Brief in further opposition to the Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction Order (Doc. No. 7) ("Motion for Preliminary Injunction").

**1. NEB. REV. STAT. § 81-885.03 Is Not Facially Unconstitutional Because The State Has An Interest In Regulating Real Estate Activities Within Its Territory.**

Plaintiff has made a facial challenge to the constitutionality of the personal jurisdiction provision of NEB. REV. STAT. § 81-885.03(1). See Complaint, ¶¶ 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58 (Doc. 1). Plaintiff made clear during oral arguments

before this Court on August 3, 2010, that she is not asking this Court to determine whether she is actually subject to personal jurisdiction.

This Court could accept Plaintiff's invitation to look at the constitutionality of the personal jurisdiction provision in a vacuum without regard to whether there is actually personal jurisdiction over Plaintiff. However, a litigant should have a stake in the outcome in the Court's ruling to justify the Court's involvement. In other words, Plaintiff should have standing or an injury consisting of "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Young Am. Corp. v. Affiliated Computer Servs.*, 424 F.3d 840, 843 (8th Cir. 2005) (citing *Lujan*, 504 U.S. 555, 560 (1992)); see also *Burton v. Cent. Interstate Low-Level Radioactive Waste Compact Comm'n*, 23 F.3d 208, 209 (8th Cir. 1994) (holding the plaintiffs failed to allege injury, for purposes of standing, where the plaintiffs did not explain how the challenged tax affected the plaintiffs' rights).

In this case, at a minimum the Nebraska Real Estate Commission (the "Commission") has personal jurisdiction over Plaintiff under NEB. REV. STAT. § 25-236 (Nebraska's Long-Arm Statute). Plaintiff has entered into agreements with Nebraska residents to list (or "advertise," in Plaintiff's words) Nebraska properties. See Declaration of Leslie Rae Young, Exhibit 1, ¶ 6 (Doc. No. 12-1). Entering into any one of those agreements is sufficient to confer personal jurisdiction. Because personal jurisdiction exists under Nebraska's Long Arm Statute, there is no threat of an "invasion of [Plaintiff's] legally protected interest." *Young Am. Corp.*, 424 F.3d at 843. Any decision by this Court on the constitutionality of the new personal jurisdiction provision would be "conjectural or hypothetical." *Id.*

If the Court does, however, decide to analyze the constitutionality of the personal jurisdiction provision of NEB. REV. STAT. § 81-885.03, it should be emphasized that Plaintiff has made a facial challenge – one that is disfavored by federal courts. In this regard, the Eighth Circuit Court of Appeals has stated:

We note that the Supreme Court has expressed disfavor with facial challenges as they often rest on speculation and raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges may also run contrary to the doctrine of judicial restraint and may short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. At the same time, the Court continues to recognize the validity of facial challenges under the appropriate circumstances. . . . A facial challenge should be applied only when there is a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.

*Roach v. Stouffer*, 560 F.3d 860, 870, fn. 5 (8th Cir. 2009) (internal citations and quotations omitted). Under a facial challenge, a factual examination is unnecessary since Plaintiff “must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Stephens*, 594 F.3d 1033, 1037 (8th Cir. 2010). Accordingly, the focus should not be on whether Plaintiff is “listing” or “advertising” properties, but rather on the plain language of the statute.

With the passage of LB 691, the Legislature essentially said that if a person acts like a “broker, without a broker’s license,” then they (the “violator”) are subject to the personal jurisdiction of Nebraska courts. LB 691 did not alter or amend the definition of a “broker.” A “broker” has always included those persons who perform “any single act described in subdivision (2) of section 81-885.01.” NEB. REV. STAT. § 81-885.03(1). The only change was the inclusion of language which states that if a person does an act

which falls within the definition of a “broker,” then “such action shall constitute sufficient contact with the state for the exercise of personal jurisdiction over such person in any action arising out of such action.” NEB. REV. STAT. § 81-885.03(1).

The personal jurisdictional provision is codifying what should be clear – that the State has a legitimate interest in regulating broker-related activities occurring within its borders, and if a person engages in a broker activity without a license, then the State has personal jurisdiction over that person. Is Plaintiff acting like a “broker” without a license in this case or is she simply engaging in unregulated advertising? This is the question and the subject matter to be determined by the Commission.

The fact that the definition of “broker” is tied into the jurisdictional provision does not mean that this Court needs to or should determine whether, in fact, Plaintiff was acting as a “broker.” In fact, this Court should avoid this sort of fact-finding so it does not become a parallel body for determining whether a violator has engaged in a “broker” activity. A parallel body may encourage forum-shopping by violators. The regulation of brokers is a legitimate interest of the State and the enforcement of these licensure and regulatory provisions are better left to the Commission.

During the hearing on Plaintiff’s Motion for Preliminary Injunction, the Court requested that Defendants provide research on the extent to which other states make a broker or violator subject to the liability for any “single act,” similar to NEB. REV. STAT. § 81-885.03(1). A summary of Defendants’ research is filed contemporaneously with this Brief as Defendants’ Supplemental Evidence Index, Exhibit 102. In researching this matter, Defendants located a decision wherein the Nebraska Supreme Court had previously validated a jurisdictional statute that utilized similar “single act” language.

See *Norwest Corp. v. State of Nebraska, Dept. of Insur.*, 253 Neb. 574, 571 N.W.2d 628 (1997). *Norwest* involved NEB. REV. STAT. § 44-2002, which was interpreted to mean:

Any act of transacting an insurance business as set forth in *section 44-2002* by any unauthorized insurer shall constitute sufficient contact with this state for the exercise of personal jurisdiction over such insurer in any action, suit, or proceeding in any court by the Director of Insurance or by the state or in any proceeding before the director and which arises out of transacting an insurance business in this state by such insurer.

*Norwest*, 253 Neb. at 581 (emphasis added). Applying NEB. REV. STAT. § 44-2002, the Nebraska Supreme Court ultimately held that the appellants engaged in activities which create jurisdiction over them in Nebraska. *Norwest*, 253 Neb. at 583.

The 50-state survey (including the District of Columbia) indicates that a large majority of jurisdictions allow their respective real estate commissions to issue administrative penalties against unlicensed brokers. See Exhibit 102. At least twenty-seven (27) states have similar “any act” or “single act” language as found in NEB. REV. STAT. § 81-885.03(1).

Of the nine states (which includes Nebraska) that have “any act” or “single act” language in their statutes, Idaho, like Nebraska, combines the definition of broker-related activity with a specific reference to personal jurisdiction. See NEB. REV. STAT. § 81-885.03 (“Any person who...performs any single act described in subdivision (2) of section 81-885.01...shall be deemed a broker...and such action shall constitute sufficient contact with the state for the exercise of personal jurisdiction over such person in any action arising out of such action...[and] shall constitute a violation of the act for which the commission may impose sanctions . . . .”); IDAHO CODE ANN. § 54-2002 (“Any person who engages in the business or acts in the capacity of a real estate

broker...without an Idaho real estate license, has thereby submitted to the jurisdiction of the state of Idaho and to the administrative jurisdiction of the Idaho real estate commission, and shall be subject to all penalties and remedies available under Idaho law . . . .”).<sup>1</sup>

During oral arguments on Plaintiff’s Motion for Preliminary Injunction, this Court also requested that Defendants provide research on any case law interpreting the “single act” or personal jurisdiction statutes of the other states. Defendants’ research indicates no successful challenges on either personal jurisdiction or due process grounds in implementing the “single act” provisions. The Georgia Court of Appeals captured the likely reason for the lack of successful challenges in this area—the statutory authority of real estate commissions to review due process challenges is constitutionally sufficient. In holding that the “single act” provision applied to deny an unlicensed broker from seeking a commission, the court noted: “It is not the name one gives to the transaction, but the substance, which is material and which must be inspected and analyzed.... Regardless of what the transaction is called, it cannot be upheld if it is prohibited by statute.” *Everett v. Goodloe et al.*, 268 Ga. App. 536, 540, 602 S.E.2d 284, 289 (Ga. Ct. App. 2004); *see also Smith v. Real Estate Agency*, 148 Ore. App. 62, 939 P.2d 77 (Ore. Ct. App. 1997) (deferring to commission judgment and upholding administrative penalties issued by Oregon Real Estate Commission against an unlicensed broker conducting transactions in the state under the “one act” provision of Oregon’s licensing law, OR. REV. STAT. § 696.040).

Though not directly on point factually, *Everett* exemplifies the Commission’s position in this case. As in *Everett*, the Commission is certainly suited to look at each

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<sup>1</sup> Defendants have located no successful challenges to the Idaho statute.

“single” transaction to determine when and whether personal jurisdiction exists under both Nebraska’s Long-Arm Statute and the United States Constitution. This comports with the Commission’s position that the “sufficient contact” language in § 81-885.03 is merely an extension of Nebraska’s long-arm statute, rather than any attempt to usurp constitutional due process guarantees. Further, Nebraska’s statutory authority is consistent with the seemingly active and unchallenged enforcement in each of the other states with the “single act” provisions.

It is also important to note that the considerations proposed here are no different than those used by the commissions of any other state which allow their respective commissions to issue administrative penalties. Personal jurisdiction via state long-arm statutes *and* constitutional due process are a part of *every* exercise of commission jurisdiction. The only difference between most states which allow administrative penalties and the “single act” states is the “single act” language. The only difference between the other states using the “single act” language and Nebraska and Idaho is the use of a long-arm provision allowing one of the statutorily enumerated acts to establish sufficient contact with the state to assert long-arm jurisdiction. In other words, like the other states using the “single act” language, once § 81-885.03 is invoked, the Commission still must find specific or general personal jurisdiction.

**2. Personal Jurisdiction Exists Under Neb. Rev. Stat. § 81-885.03(1).**

Even if this Court decides to engage in a factual analysis under the new personal jurisdiction provision (NEB. REV. STAT. § 81-885.03(1)), personal jurisdiction exists. Plaintiff’s Nebraska listings appear on “www.realtor.com” which advertises itself as “Official Site of the National Association of REALTORS.” See Affidavit of Lemon,

Exhibit 101, Exhibits A and B thereto (Doc. 30). Plaintiff's listings specifically refer to Plaintiff and Plaintiff's company, eList.me, as the "Advertising Broker" and the "listing broker" and further encourage viewers to "Email Agent" and view "Agent's Other Listings." *Id.* Plaintiff's listings looks like a broker's listings because Plaintiff is taking her customer information and inputting it into the California multiple-listing service (MLS) (see Supplemental Declaration of Plaintiff, Exhibit 6, ¶ 10 (Doc. 31)), which can only be accessed by licensed brokers (as acknowledged by Plaintiff's counsel at oral arguments).

The fact that MLS is only open to licensed brokers could by itself make Plaintiff's activities a broker activity. More importantly, it is the appearance to the public that Plaintiff is listing the properties in the capacity as a broker which subjects her to the broker statute. See NEB. REV. STAT. § 81-885.01(2) ("Broker means any person who . . . negotiates or attempts to negotiate the listing [or] sale . . . for any real estate . . . or assists in procuring prospects or holds himself or herself out as a referral agent for the purpose of securing prospects for the listing [or] sale . . ."). Not only is the *listing of the properties* unlawful, but Plaintiff is prohibited from *advertising herself or her company* as a licensed broker. See NEB. REV. STAT. § 81-885.02 ("...it shall be unlawful for any person, directly or indirectly, to *advertise or hold himself or herself out* as engaging in or conducting the business, or acting in the capacity, or a real estate broker, associate broker, or real estate salesperson within this state without first obtaining a license as such broker, associate broker, or real estate salesperson ... .") (emphasis added).

Plaintiff claims that she has no control over the "template language" of the websites she utilizes such as www.realtor.com. See Supplemental Declaration of

Plaintiff, ¶ 7 (Doc. 31). She further claims no ownership of www.realtor.com. Presumably, based on her affidavit, we are to believe that she has no relationship or agreement with this website. At the very least, she benefits greatly from the listings of her customer's properties on this website. Furthermore, she is very aware of the fact that these website are listing her as the "agent" and "broker" with respect to these Nebraska properties. At the very least, she can control whether her customers' information is utilized by this website and if it cannot be displayed in a lawful manner, she should discontinue the relationship with the website. Despite the clearly erroneous information published on these websites regarding her broker/agent status (if she is not, in fact, acting as the broker as she claims), Plaintiff has chosen to ignore the Commission's March 11 Order and now seeks to avoid having to answer to the Commission through this lawsuit.

Plaintiff cannot have it both ways. She must conduct herself either as a licensed broker or as an advertiser without the appearance or inference of a broker relationship. If Plaintiff cannot find a way to advertise her customer's properties without labeling herself and her company as the "agent" and the "broker" on the affiliated websites, then she will have to become licensed in this State.

In addition to satisfying the personal jurisdiction requirement of NEB. REV. STAT. § 81-885.03(1), the minimum contacts are met and specific and general jurisdiction exist for the reasons articulated in Defendants' Brief in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction, p. 14-20 (Doc. 29).

**3. Plaintiff Has The Opportunity To Contest Personal Jurisdiction And The Constitutionality Of The Statute Both Before the Commission and In State Court**

Requiring Plaintiff to assert her claim before the Commission does not foreclose judicial review nor does it preclude her from raising personal jurisdiction as an affirmative defense. Section 81-885.25 provides a violator “full authority to be heard in person or by counsel before the commission in reference to such charges” and § 81-885.26 allows a violator to file an answer asserting “all defenses he or she intends to assert.” These defenses could include one based on personal jurisdiction. See NEB. REV. STAT. § 81-885.25; NEB. COURT RULE § 6-1112 (b); see also, e.g., *Norwest Corp. v. State of Nebraska, Dept. of Insur.*, 253 Neb. 574, 571 N.W.2d 628 (1997) (involving a jurisdictional challenge of an insurance business during the judicial review stage of the APA); *Nebraska Methodist Health Sys. v. Dep't of Health*, 249 Neb. 405, 410, 543 N.W.2d 466, 469 (1996) (holding that a voluntary appearance may be filed, thereby waiving personal jurisdiction in actions brought under the APA).

The remaining real estate statutes further define the extent of a violator's protections, including the issuance of subpoenas, allowance of witness fees, and use of depositions similar to state district courts. See NEB. REV. STAT. § 81-885.27. The administrative hearing would also be subject to the rules of evidence, if elected by either party. See NEB. REV. STAT. § 84-914; see also *Kimball v. Nebraska Dept. of Motor Vehicles*, 255 Neb. 430, 586 N.W.2d 439 (1998) (providing that the applicable rules are the Nebraska Rules of Evidence). In short, personal jurisdiction may be raised at the administrative hearing and due process safeguards are in place for the protection of both the violator and the Commission.

If the violator is unsatisfied with the Commission's determination on the personal jurisdiction (or any other) issue, she is entitled to "judicial review under the Administrative Procedure Act" and may have the Commission's decision reviewed by the state district court. See NEB. REV. STAT. § 84-917(2)(a); see also NEB. ADMIN. CODE, Title 305, Ch. 4, Sec. 011.02; *Glass v. Nebraska Dep't of Motor Vehicles*, 248 Neb. 501, 506, 536 N.W.2d 344, 347 (1995) (holding that it is technically not "appellate jurisdiction" in the strict sense but rather judicial-branch review of a nonjudicial-branch decision) (citing *Broughton's Est. v. Central Or. Irr. Dist.*, 165 Ore. 435, 108 P.2d 276, 101 P.2d 425 (1940) (which provides that "appeal" as contemplated by statute is to be regarded as an original proceeding)).

Any person aggrieved by a final decision in a contested case is entitled to judicial review under the Administrative Procedures Act ("APA"). See NEB. ADMIN. CODE, Title 305, Ch. 4, Sec. 011.01. Under § 84-917(5)(a) of the APA, when a petition instituting proceedings for review under the APA is filed in the district court, the review is conducted "without a jury de novo on the record of the agency." See NEB. REV. STAT. § 84-917(5)(a). In this regard, the Nebraska Supreme Court has held:

The record consists of the transcripts and bill of exceptions of the proceedings before the agency and facts capable of being judicially noticed pursuant to NEB. EVID. R. 201. In a true de novo review, the district court's decision is to be made independently of the agency's prior disposition, and the district court is not required to give deference to the findings of fact and the decision of the agency hearing officer.

*Langvardt v. Horton*, 254 Neb. 878, 889, 581 N.W.2d 60, 67 (1998) (internal citations omitted). The Nebraska Supreme Court has also specifically recognized that on judicial

review, a state district court has the authority to determine both whether a statute is constitutional and whether personal jurisdiction exists:

In an appeal taken under the act, the district court's review is limited to determining whether an agency's action is (1) in violation of constitutional provisions, (2) in excess of the statutory authority or jurisdiction of the agency, (3) made upon unlawful procedure, (4) affected by other errors of law, (5) unsupported by competent, material, and substantial evidence in view of the entire record as made on review, or (6) arbitrary or capricious; however, this court reviews the district court's decision de novo on the record made before the agency.

*Meier v. State, Dep't of Social Services*, 227 Neb. 376, 378-379, 417 N.W.2d 771, 774 (1988) (emphasis added);

A state district court may “affirm, reverse, or modify the decision” of the Commission or “remand the case for further proceedings.” See NEB. REV. STAT. § 84-917(6)(b). If the violator is unsatisfied with the decision of the state district court, the case is further appealable to the state court of appeals in the same manner as appeals in civil cases. See NEB. REV. STAT. § 84-919 (1) and (3).

Not only does Plaintiff have an *opportunity* to contest personal jurisdiction and assert constitutional claims at the state level, but Plaintiff may be *required* to exhaust her administrative remedies, namely her right to an administrative hearing with the Commission. See NEB. REV. STAT. § 81-885.03 (2) (providing that a violator may request a hearing pursuant to § 81-885.25); *see also Madsen v. Dept. of Ag.*, 866 F.2d 1035, 1038 (8th Cir. 1989) (holding that the “rule requiring a litigant to exhaust administrative remedies before seeking judicial review of agency action is based on principles of sound judicial administration”). The Commission is the proper forum because the Nebraska Real Estate License Act provides the Commission with the sole

power to regulate real estate license related activities in the State. NEB. REV. STAT. § 81-885.10.

**4. If This Court Issues A Temporary Injunction, The Bond Should Be Not Less than \$2,786.**

Federal Rule of Civil Procedure 65 provides:

The Court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

FED. R. CIV. P. 65 (c). Under NEB. REV. STAT. § 81-885.03 (3), the Commission may impose a fine on Plaintiff “not to exceed (a) one thousand dollars for each day that any action is performed without the appropriate license following the issuance of the order or (b) the amount of all money earned as commission by the violator, whichever is greater.” Applying § 81-885.03 (3), Plaintiff could be fined by the Commission the greater of \$1,000 per day or the amount of money earned. Because it would be difficult to foresee or calculate a \$1,000 per day fine under the current circumstances, Defendants believe reasonable and sufficient security could be based on the number of Plaintiff’s existing contracts multiplied by the amount of commissions or profit earned from each of those contracts. The Second Declaration of Leslie Rae Young reveals that Plaintiff currently has 14 Nebraska clients who have each paid her \$199.00. See Second Declaration of Leslie Rae Young (Doc. No. 36), ¶¶ 3, 5, and 6. Simple multiplication suggests a bond in an amount of not less than \$2,786.00, if this Court decides to issue a Preliminary Injunction.

Dated this 6<sup>th</sup> day of August, 2010.

DAVE HEINEMAN, in his official capacity as Governor of Nebraska; JON BRUNING, in his official capacity as Nebraska Attorney General; JOHN A. GALE, in his official capacity as Secretary of State & Chairperson of the Nebraska Real Estate Commission and GREG LEMON, in his official capacity as Director of the Nebraska Real Estate Commission, Defendants.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the above and forgoing Supplemental Brief in Opposition to Plaintiff's Motion for Preliminary Injunction was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the Plaintiff's attorneys of record on this 6<sup>th</sup> day of August, 2010.

BY: /s/ Christopher R. Heinrich  
Special Assistant Attorney General

Doc. 004.5