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I, Michael Scott Maclay, Pro Se as the Petitioner in the above titled matter submit this as Petitioner's initial Brief:

**A.**

**ASSINGNMENT OF ERROR**

1. The reviewing court erred in entering an order upholding the Director of the Washington Department of Licensing Final Order dated May 17, 2012.
2. The reviewing court erred in failing to look at the totality of the Administrative Record and show any causal relationship between the initial complaint against Maclay and the BAP's subsequent decision of April 9, 2012.
3. The reviewing court erred by its own admission it had not reviewed the case submissions and the case file allowing for an inadequate judicial review of the Director's Order.
4. The reviewing court erred in failing to overturn the Director's Final Order by the Department failing to show that the action done by Maclay was a violation of RCW 18.235.130(4) and RCW 18.86.030(1).
5. The reviewing court failed to recognize Maclay was mislead and in doing so the reviewing court should have remanded the matter to a full administrative law hearing.

The issues allegedly asserted and subsequently and allegedly found throughout this case are incomplete, incongruent and the reviewing court failed to take the totality of the evidence with the investigation performed by

the Department and the Decision of the BAP. The reviewing court was shown that based on the Administrative Record, exhibits and argument that there is sufficient basis under RCW 34.05.570 to grant relief to Maclay.

**B.**

**STATEMENT OF THE CASE**

A Real Estate Programs Complaint was filed with the Department of Licensing, hereinafter called the Department by Nick Petrilli against Michael Scott Maclay on September 15, 2010. The complaint alleged filing a false and erroneous lien and harassment for collecting an earned "transaction fee" along with was a provided form from the Department with a six page single spaced typed written attachment which purportedly contained, accordingly to Petrilli, information to support his complaint. (Administrative Record Pages 74-79) Also accompanying the complaint were numerous emails again purportedly to support Petrilli's Complaint. A notice that a complaint had been filed by Petrilli was sent to Maclay on October 25, 2010. The letter was from Vennessia Johnson, Investigator, Department of Licensing (Administrative Record Page 113). In that notice Johnson asked for a response from Maclay to the complaint to respond to the following questions:

- What date did you release the Petrilli's listing from you local MLS?
- How much were you paid – TOTAL – for the listing with the Petrilli's?
- What services did you contractually promise to perform for the Petrilli's?
- Who is neighbor Dave?

Maclay filed his response on October 28, 2010 (Administrative Record Pages 93-100). In this notice of complaint from the Investigator there is **NO** actual request or demand for an explanation of the lien or the harassment Petrilli asserts. After Maclay's response, there was NO further contact from the Department until the receipt of the "Statement of Charges Regarding Your License" dated January 17, 2012 – well over a year after the last contact from the Department (Administrative Record Page 1). In the Statement of Charges the Department asserts and alleges:

“On August 12, 2010 you filed a lien against the proceeds of the Petrilli transaction.

By doing so you did create a reasonable risk of harm to another in violation of RCW 18.86.030(1)(a). This attempt to cloud or slow the process of the title created a reasonable risk of harm to the Petrilli's caused by incompetence, negligence, or malpractice in violation of RCW 18.235.130 (4). Lastly, filing the lien caused failure to deal honestly and in good faith in violation of RCW 18.86.030 (1)(b).”

Maclay responded to the Statement and based on the ONLY option provided to him by the Department and subsequently requested a BAP (Brief Adjudicative Proceeding). Maclay received a copy of the Department's investigative file and found because of the ineptness of the investigation the file was incomplete. In his response to the BAP he noticed voids in the emails submitted by Petrilli as well as incomplete representations by Delaney, Petrilli's attorney. It should be noted Delaney was also the closing agent/attorney for the sale (Administrative Record Page 107) and represented both the buyer and seller. Maclay submitted a Position Statement to the BAP,

his Affidavit and Additional Documents. (Administrative Record Pages 130-161) Maclay highlighted the incompleteness of the Department's investigative file. Highlights of the void and incompleteness of the Department's Administrative Record submitted to the BAP include: The discussion between Maclay and Delaney regarding the suggestion and filing of a lien regarding the transaction fee; how Petilli misrepresented many elements in his six page single spaced "whiney" complaint letter and the FACT that the closing of the sale occurred before Maclay learned that Delaney, unilaterally dismissed from the closing the lien and any discussion of the fee due Maclay. With this additional material submitted a BAP was held and the officer amended the original statement of disciplinary action. The original disciplinary action was to be: "Suspend your Real Estate Managing Broker's license for one (1) year, (90) days actual, 275 to be stayed for five (5) years pending no further violations during the five year stay." The Findings of Fact and Conclusions from the Presiding Officer are found in Section 3 of the Decision (Administrative Administrative Record Page 170). In general terms the license suspension for one year was stayed for five years provided Maclay refrain from engaging in negligent acts associated with fee agreements with his clients and imposed a fine of \$3,040 (not included in the initial discipline).

**C.**

## **ARGUMENT**

Under the Administrative Procedures Act there are certain factors which the Court may grant relief of an adjudicative proceeding order which include:

- (b) The agency is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole Administrative Record before the court, which included the agency Administrative Record for judicial review, supplemented by any additional evidence received by the court under this chapter;
- (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by state facts and reasons to demonstrate a rational basis for inconsistency; or,
- (i) The order is arbitrary and capricious.

It is clear when the Administrative Record is reviewed and the actions and inactions of the Department and BAP that each of the above elements have been met to grant relief from the Departments Disciplinary Order against Maclay. These elements which meet the above standards include but are not limited to:

1. The reviewing court failed to see the Department from the commencement of the Petrilli Complaint engaged in an arbitrary and capricious investigation. The initial investigative officer, pursued an investigative path which does not support the conclusion Petitioner engaged in activity which is violate of the statute. This has been highlighted above.
2. The reviewing court failed to see the Department denied the Petitioner the opportunity to engage in discovery prior to the BAP hearing and also denied the Petitioner the opportunity to cross examination of witness that provided statements to the investigative official. This is an abuse of the administrative process as outlined above.
3. The reviewing court failed to see the Department controlled the hearing process to the detriment of the Petitioner. In the initial letter of allegation of violations the Petitioner was allowed only one venue for adjudication of the allegations, the BAP process. This action by the Department was highly prejudicial to the Petitioner and did not allow Petitioner nor inform Petitioner of other legal and available options and remedies to pursue to adjudicate the Complaint against him. This is unlawful interpretation of the adjudicative procedures under the law.
4. The reviewing court failed to see throughout the investigation,

there are no sworn statements or Affidavits from Complainant or the Complaint's attorney, two key witnesses relied upon by the Department and the BAP. The only sworn Affidavit in the file is from the Petitioner. This action is arbitrary and capricious.

5. The reviewing court failed to see the Petitioner was denied the opportunity to have his case heard – not reviewed – by a formal Hearing Officer. This prejudiced the Petitioner by not allowing the Hearing Officer the opportunity to resolve any credibility issues from the witnesses. This is abuse of the Department's authority and as highlighted above and abuse of Maclay's due process.

6. The reviewing court failed to see the Department as well as the BAP **failed** to identify how the act of filing a lien is a violation of the statutes allegedly violated by the Petitioner. This is a major error of law. Also this is where the Department unlawfully determined a conclusion and fact outside its authority and constitutional provisions.

7. The reviewing court failed to see a lien is an appropriate legal basis to raise a valid and legitimate question of whether the contractual transaction fee should have been paid. The reviewing court failed to see the BAP drew an inappropriate conclusion otherwise and failed to justify and explain the rationale. See the Washington Association of Realtor's legal opinion.

(Administrative Record Pages 157-158)

8. The reviewing court failed to see the Department's action and or inactions are contrary to the Washington Administrative Procedures Act and cannot be supported at law. This is highlighted throughout this initial brief from Petitioner. Especially this is the case when the Department, BAP can not show that the filing of lien is in fact a violation of the law – rather than a mere interpretation – unlawful interpretation of the facts.

9. Petitioner reasserts each and every pleading, correspondence and memorandum submitted to the Department in this investigation as exhibited in the Official Administrative Record. With the evidence submitted to the Department and BAP, the Department should **have upon its own authority** submitted this to an Office of Administrative Hearing Administrative Law Judge to get evidence, allow cross examination and to resolve any credibility issues. The reviewing court failed to see the Department's action is arbitrary and capricious. The Department **failed** to tell Maclay of this option.

10. The reviewing court failed to see the Final Order and the process that led to the Final Order is in violation of the constitutional provisions of the Agency enabling statute. The Department and the BAP had to create an interpretation of the facts

outside its constitutional construct to support its conclusions.

11. The reviewing court failed to see the Agency exceeding its statutory authority and had to go outside its scope to reach the conclusions in the Final Order and preliminary Findings of Fact, Conclusions of Law of the Brief Adjudicative Proceeding. The Order is not supported by the evidence on the Administrative Record when the Administrative Record in its totality is taken into account.

12. The reviewing court failed to see the Agency action in drawing the conclusion of the Final Order is arbitrary and capricious and contrary to law.

13. The reviewing court failed to see the Final Order is inconsistent with the rules of the Agency.

14. The reviewing court failed to see the Final Order which has adopted the BAP's Finding of Fact and Conclusions of Law is not supported by the evidence in the Administrative Record which was the basis of the Final Order.

#### **D.**

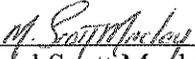
### **CONCLUSION**

It is clear when applying the standard for review of an administrative order and in this case the disciplinary order against Maclay. The magnitude of the discipline and actions taken toward Maclay should have been a "red flag" to

the reviewing court, Department and the BAP officer that there are credibility issues to be resolved. Also, the reviewing court failed to recognize the abuse of Department failing to identify the actual interpretations of the statutes allegedly violated along with it violative protocol of handling complaints the adjudication of the complains shows the outlined element of RCW 34.05.50 have been satisfied to grant relief from the Order against Maclay.

It is respectfully requested that the reviewing court's Order be vacated and or in the alternative the matter be remanded to the reviewing court to issue a formal hearing before an administrative law judge to allow examination and cross examination of the charging party, the closing and his counsel and the investigator.

Respectfully resubmitted this 14th day of June, 2013.

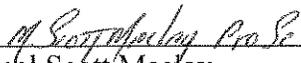
  
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Michael Scott Maclay, Petitioner Pro Se

**CERTIFICATE OF SERVICE**

I Michael Scott Maclay deposited a conformed filed copy postage prepaid this Petitioner's Initial Brief this day to:

Elizabeth Thompson-Lagerberg  
Assistant Attorney General  
Licensing & Administrative Law Division  
P.O. Box 40110  
Olympia, Washington 98504-0110

This 14<sup>th</sup> of June, 2013

  
\_\_\_\_\_  
Michael Scott Maclay

# APPENDIX

## **Objections to brief adjudicative proceedings and conversion to formal adjudicative hearings.**

(1) At least five days before the scheduled brief adjudicative proceeding, any party, including the department, may file a written objection to resolution of a matter by a brief adjudicative proceeding and may request that a matter be converted to a formal adjudicative hearing. Upon receiving a timely written objection, the presiding officer shall determine whether the matter should be converted. Regardless of whether any party files a timely objection, the presiding officer may convert any brief adjudicative proceeding to a formal adjudicative hearing whenever it appears that a brief adjudicative proceeding is insufficient to determine the issues pending before the agency.

(2) In determining whether to convert a proceeding, the presiding officer may consider the following factors:

(a) Whether witness testimony will aid the presiding officer in resolving contested issues of fact;

(b) Whether the legal or factual issues are sufficiently complex to warrant a formal adjudicative proceeding, including whether there are multiple issues of fact or law;

(c) Whether a brief adjudicative proceeding will establish an adequate Administrative Record for further agency or judicial review;

(d) Whether the legal issues involved in the proceeding present questions of legal significance or are being raised for the first time before the agency;

(e) Whether conversion of the proceeding will cause unnecessary delay in resolving the issues; and

(f) Any other factors that the presiding officer deems relevant in reaching a determination.

[Statutory Authority: RCW 18.235.030 and chapter 34.05 RCW. 05-02-006, § 308-08-515, filed 12/22/04, effective 1/22/05.]