

**IN THE CIRCUIT COURT  
OF PLATTE COUNTY AT PLATTE CITY  
STATE OF MISSOURI**

<b>KANSAS CITY PREMIER</b>	)	
<b>APARTMENTS, INC.,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 07AE-CV01240</b>
	)	
<b>MISSOURI REAL ESTATE</b>	)	
<b>COMMISSION,</b>	)	
	)	
<b>Defendant.</b>	)	

**MREC’S TRIAL BRIEF**

Defendant Missouri Real Estate Commission submits the following Trial Brief for the Court’s reference in the hearing on the matter.

The parties have agreed that due to the legal issues raised in the pleadings, detailed posthearing briefing will be requested. The parties agree that an appropriate schedule for post hearing briefing would be:

1. KCPA principal brief: 30 days after trial transcript filed;
2. MREC brief: 30 days after KCPA principal brief;
3. KCPA reply brief: 15 days after MREC principal brief.

**I. KCPA v. MREC: The Declaratory Judgment Matter**

On April 16, 2007, Plaintiff Kansas City Premier Apartments, Inc. (“KCPA”) filed a Petition for Declaratory Judgment against the Missouri Real Estate Commission

(“MREC”) and six individual defendants. The petition sought declaratory judgment relating to two “cease and desist” letters sent by the defendant MREC to KCPA warning it to cease engaging in activities which the MREC contended were activities defined as activities of a “real estate broker” as defined by Section 339.010.1, RSMo., which require a real estate license to perform. The petition alleged three counts:

1. A count alleging that KCPA’s business activities fell within statutory exemptions under Section 339.010.5(5) and/or (9);
2. A count alleging that the MREC’s actions had violated KCPA’s due process rights;
3. A count alleging that KCPA’s activities are protected by the guarantees of free speech under the United States and Missouri Constitutions;
4. A count alleging that the MREC’s actions violate KCPA’s rights to due process under 14<sup>th</sup> Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, and its right to equal rights under the Article I, Section 2 of the Missouri Constitution.

Defendants filed an Answer on June 8, 2007, and a motion for leave to amend answer, amended answer, and motions to dismiss on August 29, 2007. A hearing on the motions was held November 16, 2007. On November 26, 2007, Judge Hull entered an order granting the Motion to Dismiss as to Count II, dismissing the individual defendants, and allowing the matter to proceed in all other respects. Judge Hull also granted the

MREC's motion to amend its answer. The matter is now before the court on Counts I, III, and IV of the Petition and the Amended Answer.

By order of March 8, 2010, the matter was scheduled for hearing on June 23, 2010.

## **II. MREC v. KCPA: The Injunction Matter**

On April 27, 2009, the MREC filed a Petition for Preliminary Injunction and Permanent Injunction against KCPA, Tiffany Lewis, and Ryan Gran. This was docketed to No. 09AE-CV01688 in this Court. The Petition for Preliminary Injunction and Permanent Injunction alleged that the KCPA and its agents have performed activities which come within the definition of a "real estate broker" set forth in Section 339.100.1(4), (7), (8), and (10). The MREC's petition alleges that because these activities fall within the definition of services for which real estate licenses are required under Section 339.020, RSMo. The MREC's petition alleges that since the activities of KCPA require licenses, and neither KCPA nor its principals are licensed, the Court may enter an injunction under the authority of Section 339.180.1(1), prohibiting KCPA and its principals from performing such activities.

The joint defendants filed a Motion to Consolidate the injunction action with the above captioned declaratory judgment action on July 14, 2009, and filed an answer with affirmative defenses on July 17, 2009.

A hearing was held July 20, 2009, at which the parties agreed to the consolidation of the two matters. The case was consolidated to the above docket number by order of August 10, 2009.

On August 24, 2009, MREC filed a response to the joint defendants' affirmative defenses.

By order of March 8, 2010, both matters were scheduled for hearing on June 23, 2010.

### **III. Applicable Laws**

These matters are based on the application of the following statutes to the facts of the case.

1. Section 339.010.1, RSMo, defines the term "real estate broker" as follows:

A "real estate broker" is any person, partnership, association, or corporation, foreign or domestic who, for another, and for a compensation or valuable consideration, does, or attempts to do, any or all of the following:

- (1) Sells, exchanges, purchases, rents, or leases real estate;
- (2) Offers to sell, exchange, purchase, rent or lease real estate;
- (3) Negotiates or offers or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate;
- (4) Lists or offers or agrees to list real estate for sale, lease, rental or exchange;

(5) Buys, sells, offers to buy or sell or otherwise deals in options on real estate or improvements thereon;

(6) Advertises or holds himself or herself out as a licensed real estate broker while engaged in the business of buying, selling, exchanging, renting, or leasing real estate;

(7) Assists or directs in the procuring of prospects, calculated to result in the sale, exchange, leasing or rental of real estate;

(8) Assists or directs in the negotiation of any transaction calculated or intended to result in the sale, exchange, leasing or rental of real estate;

(9) Engages in the business of charging to an unlicensed person an advance fee in connection with any contract whereby the real estate broker undertakes to promote the sale of that person's real estate through its listing in a publication issued for such purpose intended to be circulated to the general public;

(10) Performs any of the foregoing acts on behalf of the owner of real estate, or interest therein, or improvements affixed thereon, for compensation.

2. Section 339.010.2, RSMo, defines the term “real estate salesperson” as follows:

A "real estate salesperson" is any person who for a compensation or valuable consideration becomes associated, either as an independent contractor or employee, either directly or indirectly, with a real estate broker to do any of the things above mentioned. . . .

3. Section 339.010.6, RSMo, sets forth certain exceptions to the above definitions including, in part, the following:

6. The provisions of sections 339.010 to 339.180 and sections 339.710 to 339.860 shall not apply to: . . .

(5) Any person employed or retained to manage real property by, for, or on behalf of the agent or the owner of any real estate shall be exempt from holding a license, if the person is limited to one or more of the following activities:

- (a) Delivery of a lease application, a lease, or any amendment thereof, to any person;
- (b) Receiving a lease application, lease, or amendment thereof, a security deposit, rental payment, or any related payment, for delivery to, and made payable to, a broker or owner;
- (c) Showing a rental unit to any person, as long as the employee is acting under the direct instructions of the broker or owner, including the execution of leases or rental agreements;
- (d) Conveying information prepared by a broker or owner about a rental unit, a lease, an application for lease, or the status of a security deposit, or the payment of rent, by any person;
- (e) Assisting in the performance of brokers' or owners' functions, administrative, clerical or maintenance tasks;
- (f) If the person described in this section is employed or retained by, for, or on behalf of a real estate broker, the real estate broker shall be subject to

discipline under this chapter for any conduct of the person that violates this chapter or the regulations promulgated thereunder; . . .

(9) Any newspaper, magazine, periodical, Internet site, Internet communications, or any form of communications regulated or licensed by the Federal Communications Commission or any successor agency or commission whereby the advertising of real estate is incidental to its operation . . .

4. Section 339.020, RSMo, titled “Brokers and salespersons, unlawful to act without license,” states:

It shall be unlawful for any person, partnership, association, or corporation, foreign or domestic, to act as a real estate broker or real estate salesperson, or to advertise or assume to act as such without a license first procured from the commission.

5. Section 339.180.1, RSMo, titled “Practice without a license--endangering welfare of others--injunction, procedure,” states in part:

It shall be unlawful for any person or entity not licensed under this chapter to perform any act for which a real estate license is required. Upon application by the commission, and the necessary burden having been met, a court of general jurisdiction may grant an injunction, restraining order or other order as may be appropriate to enjoin a person or entity from:

(1) Offering to engage or engaging in the performance of any acts or practices for which a permit or license is required by this chapter upon a

showing that such acts or practices were performed or offered to be performed without a permit or license . . .



#### **IV. Evidence Expected to Be Offered**

##### **1. KCPA Evidence Expected to Be Offered**

Based upon the pleadings, pretrial discovery, and consultation of counsel, it is expected that KCPA will offer the testimony of one or both of its principals, Tiffany Lewis and Ryan Gran, as to the nature of the company's business. The testimony is expected to show that KCPA's business, while centered on its website, [www.kcpremierapts.com](http://www.kcpremierapts.com), includes elements going far beyond the listings available on the website. The evidence will show that:

- a. KCPA maintains on its website searchable listings and descriptions of apartments available for rent the content of which is prepared by the owners, and for which the owners are not charged an advanced fee;
- b. KCPA also offers prospective tenants using the website the option of requesting contact with a "rental advisor" for interactive assistance;
- c. The "rental advisors" are unlicensed persons hired as independent contractors by KCPA who retrieve and respond to requests for assistance from prospects from the KCPA website, and respond to them by telephone or email about the particular facts of the prospects' needs;
- d. The "rental advisors" actively communicate with prospects and owners, individually select apartments from the listings to recommend to the prospect's attention, answer questions the prospects have both about the apartment search process in general and specific possible rentals in particular;

- e. KCPA's principals do not routinely supervise the rental advisors' handling of these matters and do not even have access to much of the information generated by the rental advisors;
- f. KCPA has agreements with property owners that KCPA will receive a payment consisting of 65% of one month's rent if a prospective tenant rents from the property owner and identifies KCPA as the source of the referral; and
- g. KCPA offers a \$100 Visa debit card to tenants who identify the company as the source of their referral, as an incentive to the tenants to so identify KCPA.

Counsel for KCPA has notified counsel for MREC of their intent to call tenants who have used KCPA services to rent apartments to testify as to their satisfaction with the service. MREC will object to such testimonials, as they are irrelevant to the issue of whether KCPA's activities are ones which require licensure under the terms of Section 339.010.1 and 339.020, RSMo.

KCPA has also notified counsel that it will call Janet Carder, Executive Director of the MREC, as a witness. Counsel for MREC does not know the purpose of KCPA's doing so.

## **2. MREC Evidence Expected to Be Offered**

The MREC will also call Ms. Carder to testify as to the process that led to the writing of the "cease and desist" letters and also as to the categories of licensure, requirements of MREC regulations, and treatment of similar issues generally. MREC

will also ask Ms. Carder to review printouts of representations on the KCPA website to identify issues of concern to MREC. MREC will offer representations of the website in both printed and electronic form.

KCPA will also call Lee Jaegers, Investigator for the MREC, who will testify as to the preparation of his investigative report on the case, and who will also review KCPA records produced on discovery to discuss their content.

KCPA will produce the testimony of Steven D. Banks as an expert witness. Mr. Banks, a licensed real estate broker who manages both a real estate sales brokerage and a brokerage which handles rental listings, will testify as to what aspects of these businesses require the attention of licensed professionals and which may appropriately be handled by nonlicensees. He will testify about what he learned in the process of acquiring education and training necessary for licensure, and why such qualifications are important in performing the kind of work at issue. Finally, he will review some of the practices of KCPA and identify issues and problems which licensure and supervision would address.

Documentary evidence to be offered by MREC may include some or all of the following exhibits:

1. The investigative report prepared by MREC in its consideration of the complaint against KCPA;
2. A letter from the KCPA principals to the MREC dated 6/30/2004;
3. The first cease and desist letter written by Janet Carder on 12/20/2007;
4. A letter from KCPA Counsel to the MREC dated 1/25/2007;

5. The second “cease and desist” letter from Kimberly Grinston, counsel to the Division on Professional Registration, on 3/22/2007;
6. Electronic and paper copies of the information posted by KCPA on its website;
7. Printouts of file notes on 35 KCPA cases, provided by KCPA per agreement in discovery;
8. The deposition of Tiffany Lewis;
9. The deposition of Ryan Gran;
10. KCPA Answers to Respondent’s First Set of Interrogatories, 4/1/2008;
11. KCPA Answers to Respondent’s Second Set of Interrogatories, 9/19/2008;
12. KCPA Responses to Requests for Admissions, 4/24/09; and
13. Electronic copy of a video prepared by KCPA and posted on the Internet on or about 6/12/2010.

Depending on information offered by KCPA, MREC may offer other exhibits as well.

## **V. Issues to Be Determined**

1. **Are KCPA’s business activities within the definition of the role of a “real estate broker” under Section 339.010.1, RSMo?**

The central issue to be determined by the Court is whether the activities that form the business model and practice of KCPA, individually and collectively, constitute activities which are within the definition of roles performed by a real estate broker under the terms of Section 339.101.1, RSMo, and which therefore can only be performed by a

licensed individual or entity under the terms of Section 339.020, RSMo. MREC specifically alleges that the activities of KCPA fall under the following subsections of that definition:

(3) Negotiates or offers or agrees to negotiate the . . . rental or leasing of real estate; . . .

(4) Lists or offers or agrees to list real estate for . . . lease, [or] rental; . . .

(7) Assists or directs in the procuring of prospects, calculated to result in the . . . leasing or rental of real estate;

(8) Assists or directs in the negotiation of any transaction calculated or intended to result in the . . . leasing or rental of real estate; [and/or] . . .

(10) Performs any of the foregoing acts on behalf of the owner of real estate, or interest therein, or improvements affixed thereon, for compensation.

MREC contends that when the activities performed by KCPA, its principals, and the independent contractors it employs as “rental advisors,” are disclosed to the Court, it will be apparent that the activities of KCPA and its agents do constitute real estate brokerage under several of these sections, and most conspicuously under Subsection 7, “assists or directs in the procuring of prospects, calculated to result in the . . . leasing or rental of real estate.”

**2. If KCPA’s activities come under the definition of Section 339.010.1, RSMo, are they within the exceptions of Section 339.010.6, RSMo?**

If the Court finds that the activities of KCPA come within these definitions, it must then determine, in order to resolve Count I of the declaratory judgment action, whether either of the exceptions to this statutory definition are applicable. Count I of the declaratory judgment petition alleges that two exceptions apply: Section 339.010.6(5), which deals with property management employees, and 339.010.6(9), which deals with publications offering advertising.

MREC contends that neither exception applies. KCPA admits in its petition, Paragraph 27(a) and (b), that it does not perform property management duties. KCPA alleges in Paragraph 47 that it is “‘employed’ or ‘retained’ by an owner to manage the advertising of real property.” KCPA further avers that it only conveys information that is prepared by the owner or the owner’s representative. In so doing, KCPA urges an expansion of the clear intention of the “property management” exception which swallows the entire content of Section 339.010.1. The exception of Section 339.010.6(5) is clearly inapplicable, as KCPA concedes it is not a “property management” agency.

KCPA also contends that as an Internet-based concern it falls within the exception of Section 339.010.6(9). However, the proof will show that KCPA’s activities go far beyond the offering of advertising on its website, with its employees performing active and personal contact with prospects, selecting and recommending particular units for prospects, and serving as an active information conduit between prospects and owners, all with a goal of getting a transaction consummated. None of these activities even arguably come within the coverage of Section 339.010.6(9). Even to the extent that exception can be invoked for a small subset of KCPA’s activities, it is clear that KCPA’s listing

services are not “incidental to its operation,” as the statute requires, but central to its structure.

Because KCPA cannot show that it qualifies under either of the statutory exceptions it invokes, Count I of the KCPA’s petition for declaratory judgment should be dismissed.

### **3. Are KCPA’s activities constitutionally protected free speech?**

KCPA argues in Count III that its activities are constitutionally protected free speech. It has cited and relied upon certain court decisions from other jurisdictions which deal with advertising-only services. However, KCPA’s activities go far beyond mere advertising. The proof will show that KCPA’s “rental advisors” actively communicate one-on-one with prospective tenants about their individual needs, select properties out of those available to recommend to the prospects, counsel and advise them as to how they should proceed and what choices they should make, and serve as communication conduits between owners and prospects, all intended to facilitate the rental of units, for compensation.

While state regulation of advertising has presented a variety of issues, KCPA advances a vast and far-reaching concept of freedom of speech which has never been accepted by any court anywhere. They urge just because their work involves speech, guarantees of freedom of speech insulate them from licensing laws which prevent unlicensed people from counseling and advising members of the public in fields which the General Assembly has determined require professional expertise. Under KCPA’s

theory of freedom of speech, unlicensed persons could counsel clients in the law, advise medical patients as to the significance of their symptoms, and provide therapy to clients in need of personal or marital counseling, all because these activities involve speech. This is not the law in any jurisdiction in the land, and it is certainly not the law of Missouri.

The Supreme Court of Missouri has held that the intention of the Real Estate Practice Act, now embodied in Chapter 339, RSMo, is an exercise of the police power, intended to protect the public against fraud and incompetency by unqualified persons. The Court of Appeals stated in *Gilbert v. Edwards*, 276 S.W.2d 611 (Mo.App. 1955):

It was the evident intention of the Legislature to protect the public against fraud and incompetency in real estate transactions. It has also been held that laws such as we are considering, in addition to giving protection to the public, give protection to the ethical members of the profession under scrutiny, who, having complied with the law in letter and spirit, would, under any other interpretation, be subjected to compensation by persons who had violated the law, both in letter and in spirit. This is merely an incidental protection. 276 S.W.2d at 616.

The Supreme Court of Missouri quoted and reinforced this language in *Miller Nationwide Real Estate Corp. v. Sikeston Motel Corp.*, 418 S.W.2d 173 Mo. 1967):

One purpose of Chapter 339 was to set apart the business of the real estate broker or salesman as distinct from occupations which by general acquiescence are pursued of common right without regulation or restriction, and to make illegal acts of the unlicensed in the real estate broker's field. In our judgment the legislative objective in closing the courts of this state to unlicensed brokers was to establish a policy so strong that neither a contract nor the unlawful efforts in its pursuit, nor its fruits, could provide the basis of pecuniary benefit to such broker. 418 S.W. 2d at 177.



The licensure process requires applicants to show that they are (1) are persons of good moral character; (2) bear a good reputation for honesty, integrity, and fair dealing; and (3) are competent to transact the business of a broker or salesperson in such a manner as to safeguard the interest of the public. Section 339.040.1, RSMo. Licensees must complete an educational curriculum and pass a test demonstrating their competence, and for a broker's license, must demonstrate appropriate experience. Section 339.040, RSMo. These are state interests which justify the General Assembly in imposing restrictions on who may transact the business of real estate brokers and salespersons. The fact that the activities of this profession necessarily entail speech does not invalidate this entire regulatory structure.

The State of Missouri has a legitimate interest in preventing individuals who have not met the qualifications set forth in Section 339.040.1, RSMo, from performing activities the General Assembly has defined as the practice of real estate brokerage. Count III of KCPA's petition for declaratory judgment should be dismissed.

**4. Does Missouri's Real Estate Practice Act violate KCPA's right to equal protection and/or equal rights?**

KCPA's equal protection/equal rights claims, to the extent they are apparent from the petition or explained in discovery, seem to be a selective prosecution theory. KCPA

has alleged that the MREC has taken action against KCPA but not against similarly situated businesses.

The evidence will show that KCPA has not shown that it was subject to discriminatory treatment. It will be shown that the MREC has not been presented with any other case in which an apartment location service used unlicensed personnel, not supervised by any licensed real estate professional, to engage in interactive communications with prospective tenants and property owners in order to assist in and achieve rental or leasing transactions. The MREC has not been presented with or adjudicated any case in which an internet-based company supplemented its listings with live personnel interactions, engaged in a personalized, active selection from listings to match a prospect's individual needs, and paid a cash-equivalent incentive to prospects for having used its services. Because the MREC has not been presented with any comparable case, KCPA cannot show that identically situated parties have been treated differently, much less that the MREC engaged in such actions with discriminatory intent. KCPA cannot meet its burden of proof for showing a violation of equal protection/equal rights, and therefore Count IV of the petition for declaratory judgment must be dismissed.

**5. If KCPA is engaging in activities which require a real estate license, should an injunction be issued against KCPA?**

MREC's request for an injunction is not based on general equity principles, but on the specific authority of Section 339.180.1, RSMo, which states:

Upon application by the commission, and the necessary burden having been met, a court of general jurisdiction may grant an injunction, restraining order or other order as may be appropriate to enjoin a person or entity from:

(1) Offering to engage or engaging in the performance of any acts or practices for which a permit or license is required by this chapter upon a showing that such acts or practices were performed or offered to be performed without a permit or license . . .

Thus it is not necessary for MREC to show irreparable harm to the MREC or to any member of the public, or to refute the existence of an adequate remedy at law. The defendants' joint response to the petition for injunction attempts to invoke standard equity defenses, but they are inapplicable. The language of the statute is simple. If the defendant is shown to be unlicensed (which is admitted) and is engaging in activities which require licensure, the Court has authority to enter the injunction enjoining the defendants from those activities it finds to be in violation of the statute. The relief MREC has requested is an injunction as follows:

a. Issue preliminary and permanent injunctive relief prohibiting KCPA, the individual partners/owners Tiffany Lewis and Ryan Gran, and anyone employed by, contracting with, or otherwise affiliated with or working on behalf of KCPA, from operating a web site purporting to match prospective tenants to properties available for rent;

b. Issue preliminary and permanent injunctive relief prohibiting KCPA, the individual partners/owners Tiffany Lewis and Ryan Gran, and anyone employed by, contracting with, or otherwise affiliated with or working on behalf of KCPA, from referring or facilitating the referral for assistance of persons interested in renting properties to unlicensed “Rental Advisors” or unlicensed persons performing duties which require a real estate license;

c. Issue preliminary and permanent injunctive relief prohibiting KCPA, the individual partners/owners Tiffany Lewis and Ryan Gran, and anyone employed by, contracting with, or otherwise affiliated with or working on behalf of KCPA, from otherwise offering to the public services which require a real estate license under the terms of Chapter 339, RSMo;

d. Assess against KCPA all costs, fees, and expenses of these proceedings, including, but not limited to, the MREC’s investigative costs, attorney’s fees, and costs incurred in prosecuting this action; and

e. Such other and further relief as this Court deems just and proper in these circumstances.

The court may enjoin such other or different practices as it finds in violation of the law.

## **VI. CONCLUSION**

If the Court concludes that the evidence shows that KCPA has engaged in and continues to engage in activities which constitute the actions of a real estate broker within the definition of Section 339.010.1, RSMo, the court should enter judgment denying the

declaratory relief sought by KCPA, or alternatively enter declaratory judgment that the activities of KCPA do require licensure. The court should also, under the authority of Section 339.020, enter an injunction barring KCPA and its principals from performing activities which require licensure.

Respectfully submitted,

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## Certificate of Service

I certify that today, June 22, 2010, I served an electronic copy of the foregoing MREC Trial Brief, in Word format, upon Timothy J. Thompson and David Roland, counsel for KCPA, by sending it as an email attachment to them at the following email addresses, which have been used by the parties for communications previously in this litigation:

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