BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF COMMERCE, COMMUNITY AND ECONOMIC DEVELOPMENT

In the Matter of	)	
	)	
LESLIE RAE YOUNG	)	OAH No. 09-0271-REC
	)	Agency Case No. 3001-09-001
	)	

DECISION

I. Introduction

In this case, Leslie Rae Young challenges a Temporary Cease and Desist Order issued by the Director of the Division of Corporations, Business and Professional Licensing ("Division"). The order alleged that she was practicing the real estate profession in Alaska without a license, and it instructed her not to do so. The cease and desist order commenced a civil enforcement action.

Leslie Rae Young holds a real estate license in California but not Alaska. She conducts a nationwide Internet-based business whereby, in return for a fee, she advertises real estate not located in California on a California Multiple Listing Service (MLS). The objective of this service is to obtain advertising exposure in the seller's home state through Realtor.com, a nationwide compilation of MLS listings. Under internal rules that apply to these private organizations, people who do not hold a real estate license cannot advertise in an MLS or Realtor.com. Ms. Young's service is designed to let individuals who are selling their properties "by owner" obtain Realtor.com exposure while avoiding the potential expense of engaging a local real estate licensee. The specific issue in this case is whether Ms. Young can offer this service to Alaska sellers without holding an Alaska license.

The case raises unresolved questions of seemingly national importance regarding the interstate advertising of real estate on Internet databases. The parties have agreed to a briefing and hearing process over the course of a year, waiving the accelerated timelines under AS 08.01.087(b) and AS 08.88.037(b).

A. Procedural History

Ms. Young initially moved to dismiss the action on both jurisdictional and substantive grounds. Proceedings on the motion to dismiss and on subsequent motions for reconsideration from both sides resulted in elimination of some, but not all, of the Division's claims.

The remaining claims went to hearing on April 27, 2010. Division Exhibits 1-18 and Young Exhibits A-Q were admitted without objection at the hearing; they may be considered without restriction in connection with the claims that went to hearing.

At the midpoint of the hearing, after the Division had rested its case but before Ms. Young had testified or otherwise presented her responsive case, Ms. Young's counsel moved orally to dismiss the remaining claims. The ALJ took the motion under advisement and allowed the remainder of the hearing to go forward. The oral motion to dismiss is now denied in favor of a decision, with respect to the claims still pending at the time of the hearing, that encompasses all the evidence heard.[1]

This decision incorporates both the matters resolved by the pre-hearing motion and those resolved by hearing.

B. Summary of Resolution

This decision begins by addressing a series of threshold defenses Ms. Young has raised, including challenges to the commissioner's jurisdiction over her. Her arguments in this regard are not frivolous and have some support in case law from other states. Nonetheless, this decision concludes that even though Ms. Young operates from California, the activity she has been engaging in is subject to Alaska regulation.

On the merits, the ultimate conclusion is that Ms. Young's business model will not work under Alaska law. This decision finds a violation of some, but not all, of the legal provisions the Division relied upon in challenging her practices.

The Division has advanced five Alaska legal provisions that it believes Ms. Young has violated. These can be broadly summarized as follows:

- That she <u>listed</u> real estate in Alaska;
- That she <u>procured</u> buyers for Alaska sellers <u>and assisted</u> in the negotiation of sales;
- That she <u>held herself out</u> as engaged in activities requiring an Alaska license;
- That she <u>attempted</u> to do the above activities;
- That she <u>accepted a fee</u> for doing any of the above activities.

The <u>attempt</u> allegation is easily discarded because there is no evidence that Ms. Young merely attempted, but did not accomplish, anything she set out to do. The Division effectively abandoned this allegation.

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[1] The motion is denied because the ALJ believes that once the hearing was convened on the two surviving claims, it made sense to compile as full a record as possible from those present to assist the commissioner in his final decision regarding those claims.

The listing allegation was rejected in extensive motion practice before the hearing. The ALJ accepted an industry-specific meaning of the word "list" that has been followed by many courts. That meaning does not cover the activities Ms. Young has been engaging in. The Division proposed broader meanings for the word "list," but it could never support them with legislative history or case law, nor satisfactorily explain how they could be accepted without forcing a large unlicensed segment of the business community (such as the owners of Craig's List and the Anchorage Daily News) to obtain real estate licenses—a result the legislature is unlikely to have intended.

The holding out allegation is well-taken. Ms. Young deliberately places advertising knowing that her name will be displayed in a manner that will lead others to believe she is performing activities for her clients that require a license. Her main answer to this allegation is that she does not control the websites where this occurs. She does, however, know how those websites work, and she does control whether she uses them.

The procuring and assisting allegation presents a closer question. This decision concludes that Ms. Young does not "procure" buyers in the sense that that term has been interpreted by the courts, but that she has been assisting in the negotiation of sales in one way. Accordingly, the allegation must be sustained.

The accepting a fee allegation is also well taken. There is no dispute that Ms. Young accepts a fee for what she does. Since some of that activity is activity requiring a license, she is in violation of this prohibition.

II. Facts

The facts below are segregated into those developed in connection with the motion practice and those added during the hearing. The segregation is necessary because counts already dismissed on motion before the hearing cannot be revived by evidence from the hearing; they must stand or fall on the evidence the parties saw fit to bring forward at the time of the motions. This restriction will play a role in consideration of the alleged violations of AS 08.88.161(2) and (11). Fortunately, there are no significant facts in dispute in this case and the evidence at the hearing is consistent with that advanced by motion; the hearing simply added more detail and context.

A. Facts Developed by Motion

1. The MLS

This case relates fundamentally to the nature of the "Multiple Listing Service" or "MLS" system. Nationally, the MLS is a group of private databases, associated by reciprocal access agreements, that are designed to allow brokerages representing sellers to advertise properties on the market to brokerages representing or seeking buyers. Although it predates the Internet, the MLS system is currently Internet-based. The individual MLS databases pertain to particular geographic areas, and they are owned and operated by private entities of various kinds, such as trade associations or local real estate companies. These entities set their own membership rules, but it is typical (and probably universal) that some sort of local real estate license be required for membership and for the associated privilege of advertising properties on the MLS. Alaska has a statewide MLS operated by a not-for-profit association.[2]

More than 800 MLS databases, including both the Alaska MLS and the MLS of which the respondent in this case is a member, are linked in a database called Realtor.com. Realtor.com is operated by a company headquartered in California, Move, Inc., in association with a private realtor trade group, the National Association of Realtors.[3] Members of the public can search the Realtor.com database on the Internet. It provides information similar to such other national real estate advertising databases as HomeFinder.com.[4] Entities without real estate licenses are permitted to arrange advertising of real estate on HomeFinder.com by the operator of that website.[5] It is not possible to place advertising on Realtor.com without being a member of an MLS.

2. Ms. Young's Activities

Leslie Rae Young is a California resident who has done business through three dba's: eList.me, eList.me Realty, and eListState.com.[6] She holds no real estate license in Alaska. She is licensed and in good standing as a broker in the state of California.[7]

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[2] Regarding all findings in this paragraph, *see generally* Young Motion Ex. 3. The observation that MLS membership and advertising commonly requires a real estate license of some kind was not directly shown in the motion record but appeared to be tacitly stipulated by the parties. It was borne out by testimony at the hearing.

[3] Young Motion Ex. 5 and 6.

[4] In a ruling dated October 27, 2009, the ALJ took official notice of the facts in the preceding two sentences, and gave the parties a procedure by which they could refute them. Neither party disputed these facts. *See* Second Scheduling Order (Oct. 30, 2009).

[5] *See* Young Motion Ex. 8.

[6] Div. Motion Ex. 1 at 1.

[7] *Id.*

On February 25, 2008, Ms. Young (through eList.me Realty) entered into a contract with Roston and Robyn Henderson, who were offering a single family home for sale at 504 West 6th Avenue, North Pole, Alaska.[8] The agreement was titled:

Property Agency Listing Agreement – Open
Non-Exclusive Authorization to Advertise through the MLS
For Realtor.com Showcase

In the agreement, Ms. Young's business was referred to as the "Broker." The agreement stated under "PURPOSE" that

> THIS AGREEMENT IS FOR AN MLS ENTRY LISTING ONLY for the sole purpose of advertising. Broker does not perform real estate services other than data entry into the MLS system. NO OTHER CONTRACT, FIDUCIARY RELATIONSHIP, AND/OR OBLIGATION IS BEING CREATED HEREIN.

It incorporated by reference a business relationship offered as "Showcase Listing" on the website of ForSaleByOwner.com.[9] ForSaleByOwner.com is a New York corporation with which Ms. Young presumably has a contractual relationship; the website lists one of her dba's, "eList.me," as the company's "partner" in the Showcase Listing arrangement.[10]

The Henderson agreement, when read in conjunction with the incorporated ForSaleByOwner.com package, provided that Ms. Young would place the North Pole property on "an out-of-town MLS system."[11] This would allow the property to appear on Realtor.com. Ms. Young also agreed to forward all telephone and e-mail messages generated by the Realtor.com listing to the seller.[12] In exchange for these services, the seller would pay a fee to ForSaleByOwner.com.[13]

The agreement provided that offers for purchase would be presented directly to the seller, and buyer's brokers would be given authority to contact the seller directly.[14] It provided that Ms. Young would not advise the seller on the merits of offers, participate in negotiations, act as

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8 REC 024-028.

9 That business relationship is described at Div. Motion Ex. 4 at 2-11.

10 *Id.* at 3.

11 *Id.*

12 REC 025.

13 REC 024. This appears to have been a flat fee of $399 or more. Div. Ex. 4 at 1. The contract and the website also envision that the seller will offer a percentage commission to any *buyer's* broker who secures a sale, an offer necessary to make the advertisement eligible for inclusion in the MLS (*see id.* at 6), but this compensation, if paid, would not benefit Ms. Young.

14 REC 025-026.

an escrowee, or "profit from" any eventual sale.[15] It provided for no assistance with closing a transaction.[16]

The agreement contained a clause in which the Hendersons promised to pay a commission of 2.5 percent to a buyer's broker who procured a buyer.[17] This provision (with a blank for the commission to be filled in) was part of the form contract provided by Ms. Young.

Although Ms. Young did not agree to provide any advice to the sellers about particular offers or transactions, and there is no allegation that she provided such advice, the agreement itself offered a limited amount of generic advice, as follows:

> -- "Broker recommends that Seller consult with legal counsel concerning Seller's disclosure requirements or the completion of any disclosure forms."[18]
>
> -- "Broker advises Seller to inform any prospective buyer to conduct his or her own inspections of the property and to hire a licensed home inspector to inspect all aspects of the property to verify its condition before escrow closes."[19]
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> -- "Broker advises Seller to obtain buyer's acknowledgement of these disclosures in writing."[20]
>
> -- "Seller is advised to have an attorney, or title company or escrow company hold the escrow moneys subject to state law and regulations."[21]

There is some additional, very general advice on Ms. Young's eListState.com website (*e.g.,* "The home seller maximizes their chances of selling their home more quickly and at a better price when it is listed in Realtor.com"[22]) and on the ForSaleByOwner.com website. The generic advice in the contract and on these sites is of a type ubiquitously available in real estate books, on publicly-available websites, and on talk radio programs about real estate.[23]

In keeping with the contract, Ms. Young did apparently place the Henderson property in an MLS of which she was a member, and the property appeared on Realtor.com. The advertisement in that location showed the property as "presented by" Leslie Rae Young, Real

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15 REC 026.

16 *See* REC 026, ¶ 9.

17 REC 024 at ¶ 4B.

18 REC 026, ¶ 10.

19 *Id.*

20 *Id.*

21 *Id.*, ¶ 13.

22 Div. Motion Ex. 2 at 9. Though now a separate business from e-List.me (see II-B below), at the time of the Henderson and Forrester transactions e-ListState materials seem to have been used with e-List.me customers on occasion. *See* REC 045.

23 In a ruling dated October 27, 2009, the ALJ took official notice of the types of advice available in books, websites, and the media, and gave the parties a procedure by which they could refute them. Neither party disputed these facts. *See* Second Scheduling Order (Oct. 30, 2009).

Estate Advertising Services.[24] The advertisement also showed "e-List.me" as broker and Young as "Agent."[25]

On February 2, 2009, Ms. Young entered into a functionally identical contract with Tim and Nancy Forrester in connection with the sale of a single-family home at 1480 Itta Drive, North Pole, Alaska.[26] There is no evidence presently in the record as to whether Ms. Young provided an MLS listing or other services pursuant to this contract.[27]

Thirdly, Ms. Young appears to have placed a Kodiak property onto her MLS for inclusion in Realtor.com, with herself shown on the advertisement as "agent."[28] There is no evidence of the date of this activity. No party has suggested that the terms of Ms. Young's arrangement with the sellers were any different from those with the Hendersons and Forresters.

3. Division Enforcement Steps

On February 9, 2009, a Fairbanks realtor complained to the Division that Ms. Young had "listed a property in North Pole, but does not have a license in the State of Alaska."[29] Correspondence between the Division and Ms. Young ensued, in which she forthrightly admitted that she had advertised "several" properties on Realtor.com but noted that her firm did not represent the seller in the sales transaction, would not receive a commission, and would offer no real estate advice.[30] On March 3, 2009, Division investigator Michele Wall-Rood told Ms. Young by e-mail that "if you accept any type of fee, even if it is for limited services such as listing properties on MLS and advertising properties on Realtor.com, you are considered to be engaged in the practice of real estate."[31] On April 8, 2009, the Division's director issued the Temporary Cease and Desist Order at issue in this proceeding, alleging Ms. Young was engaged in the "unlicensed practice of real estate."[32]

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[24] Div. Motion Ex. 5 at 1-3.

[25] *Id.* at 2.

[26] REC 037-041.

[27] The property seems to have gone under contract only a few weeks after the Young-Forrester agreement was signed. *See* REC 045.

[28] Div. Motion Ex. 5 at 4.

[29] REC 004.

[30] REC 035.

[31] REC 033.

[32] REC 047. Evidence added at the hearing showed that the Division consulted with the Real Estate Commission before issuing the order. The commissioners were given no background details and were simply told that an out-of-state broker appeared to be "listing Alaska properties without a license." The Division was told that the commissioners "did not object" to the order. Direct exam of Wall-Rood. *Cf.* AS 08.88.037(b). Insofar as there is any tension between Ms. Wall-Rood's testimony and Div. Ex. 6, REC 049, the ALJ finds the live testimony more credible.

B. Additional Facts Developed at the Hearing

Evidence admitted at the hearing suggested that Ms. Young's involvement with Alaska real estate has gone beyond the Henderson, Forrester, and Kodiak properties mentioned above. In August of 2009, Ms. Young appeared as the "agent" for residential properties in Juneau and Gustavus in on-line advertisements with Trulia.com.[33] In other August 2009 on-line advertisements—these with Homes.com—a third North Pole property (3100 Timberbrook Drive) and a Wrangell property are shown as "offered by" Ms. Young.[34] Both of these websites operate like Realtor.com, uploading their information from the MLS.[35] The Division did not offer, or even ask about, Ms. Young's agreements, if any, with the sellers of these properties.

The most helpful information added at the hearing was additional detail regarding the mechanics of Ms. Young's Internet business.

Ms. Young currently does business through two dba's. One of them, e-ListState, is a California-only business. One cannot presently advertise an Alaska property through e-ListState,[36] and it has little ongoing relevance to this decision.[37]

Ms. Young's national business is e-List.me Realty. It is purely an Internet company. Clients cannot reach Ms. Young by telephone.[38]

To out-of-state sellers, Ms. Young offers solely an "MLS-only" service, that is, the kind of service provided under the Henderson and Forrester agreements discussed in the preceding section.[39] Currently, the portal of her business for these sellers is titled "Advertising Services," and to engage her services sellers click on the "Advertise" button.[40]

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[33] Div. Hearing Ex. 14, 16.

[34] Div. Hearing Ex. 15, 17.

[35] Cross-exam of Young.

[36] Direct exam of Young; Young Hearing Ex. G, I, J, K.

[37] For this reason, some material in the Division's exhibits should be relied on only with care to ensure that it relates to the right entity. The first 16 pages of Div. Hearing Ex. 9, which consists of screen prints compiled by the Division from e-ListState, relates only to buyers and sellers of California property. The 17th page of Div. Hearing Ex. 9 is an interactive map relating to the Bloomkey realty referral system, of which e-ListState is a part: someone clicking on California would be referred to Ms. Young; someone clicking on Alaska would be referred to a licensed Alaska broker. Direct exam of Young.

With that said, it is clear that the line between e-List.me and e-ListState was not so carefully observed in the past. *E.g.,* cross-exam of Young at 7/0:59:00ff. Thus, Alaska sellers Timothy and Nancy Forrester were given an e-ListState form on which to report the sale of their house. Div. Hearing Ex. 5 at REC 045. Ms. Young did not create a formal separation between the two businesses until sometime in the past year. Direct exam of Young.

[38] Direct exam of Young.

[39] *Id.*

[40] *See* Young Hearing Ex. N. This web page was slightly different at the time the temporary cease and desist order was issued. One difference was that in those days the public could access Ms. Young's form "listing" agreements from the page; that is no longer possible. Direct testimony of Young at 6/1:02:00ff.

When someone encounters one of the e-List.me properties on Realtor.com, the person sees no reference to the seller. Instead, the property is shown as "Presented by Leslie Rae Young."[41] There is a reference to her as "Broker," and at least five references to her as "Agent."[42] The advertisement says "This listing is brokered by e-List.me."[43]

The Realtor.com advertising pages have interactive features and telephone numbers for contacting the presenting "agent." Ms. Young performed a live demonstration on the Internet, showing what potential customers encounter and how their inquiries are handled by the system. There are essentially three contact routes a viewer can pursue:[44]

- A viewer can click on "Request More Details." This brings up a pop-up for entering an inquiry. When the person pushes "send" on the pop-up, the message goes directly to the seller's e-mail account (not to Ms. Young's account).
- A viewer can click on "Email Agent." This brings up the same pop-up, likewise yielding an e-mail to the seller.
- A viewer can call a toll-free number on the advertisement and enter one of two extensions associated with the property in the advertisement. One extension auto-forwards the live call to the seller's telephone number. The other extension leads to a recording that gives the caller two options: (a) to hang up and call a phone number given in the recording—the seller's number; or (b) to leave a voice mail. Callers choosing this last option leave a recorded message that is then automatically forwarded as an e-mail audio attachment to the seller. A caller who enters no extension does not progress; the caller reaches no live person and cannot leave a message, and there is no record of the call.[45]

When one of these contact methods generates an e-mail to the seller, Ms. Young receives in her own e-mail account a notification that says "processed message." If the system is working correctly, she receives a large number of these messages every day. If she does not see these notifications, she knows one of her servers is not functioning correctly, and she gets her IT

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[41] Div. Hearing Ex. 12; direct exam of Young.
[42] Div. Hearing Ex. 12.
[43] *Id.*
[44] Ms. Young demonstrated these three methods in her direct testimony. There seems to be a fourth contact avenue that was not demonstrated directly: an option to fill out a form at the bottom of the second page of the ad, clicking the box "Email to: Agent (Leslie Rae Young)." *See* Div. Hearing Ex. 12 at 2. One can infer from the testimony that this would generate an e-mail to the seller's in-box.
[45] Cross-exam of Young.

person to fix it. She does not read the notifications themselves. She has never responded to a buyer or broker inquiry from Alaska.[46]

Ms. Young seems to maintain between one and two thousand properties on her system at a time.[47] The percentage of this volume that pertains to Alaska was not explored.

When she advertises Alaska properties by placing them on a California MLS so that they will appear on Realtor.com, Ms. Young knows the context in which her name will appear in the advertisement; she knows that she will be described as "broker" and "agent" for the property.[48] She cannot change this text in the ad.[49]

When she advertises Alaska properties by placing them on a California MLS so that they will appear on Realtor.com, Ms. Young knows the advertisements will attract Alaska buyers.[50] That is why her service is valuable to Alaska sellers. A subsidiary objective is to attract buyers' brokers[51] (who would necessarily be Alaska licensees). Ms. Young's advertisements of Alaska properties are targeted to buyers and their representatives in Alaska.[52]

III. <u>Threshold Defenses</u>

A. Personal Jurisdiction over Ms. Young

Ms. Young argues that the Commissioner of Commerce, Community and Economic Development lacks personal jurisdiction over her to adjudicate this case. The nature of this kind of jurisdictional issue can be summarized as follows:

> Jurisdiction is composed of two parts: subject matter jurisdiction and personal jurisdiction. Subject matter jurisdiction is the right and abstract power of the tribunal to exercise power over cases of the kind and character of the one pending. Personal jurisdiction is the tribunal's power over the person before it.[53]

Ms. Young challenges the latter type of jurisdiction. She contends that personal jurisdiction is governed by Alaska's civil "long arm" statute, AS 09.05.015, and that the "acts asserted . . . in

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46 Direct and cross-exam of Young.

47 Cross-exam of Young (business uses two toll-free numbers since each one can only handle one thousand property extensions at a time).

48 Cross-exam of Young.

49 Direct exam of Young.

50 Cross-exam of Young at 7/0:35:30) ("I knew it would attract Alaska buyers").

51 *Id.* at 7/0:36:00ff.

52 This finding is inferred both from the testimony cited in the preceding footnotes and from the overall business model. While the advertisements can be viewed by, for example, California or Connecticut buyers, that is not their essential usefulness to the market to which the advertising is sold.

53 *Knight v. Department of Ins.,* 862 P.2d 337, 341 (Idaho App. 1993) (citations omitted).

[the Division's] investigation file do not satisfy any specific provision of [AS] 09.05.015(a) or (b)."[54]

Alaska Statute 09.05.015 does not directly apply to this administrative action, since it is, by its own terms, only addressed to whether a "court of this state" has jurisdiction over the person of a defendant. Nonetheless, the provision would certainly govern any follow-up proceeding in Alaska courts to enforce the cease and desist order or any order growing out of this proceeding, and thus it may be useful to undertake a brief review of jurisdiction under the long arm statute.

Ms. Young is mistaken that personal jurisdiction is only present when an allegation fits a "specific provision of [AS] 09.05.015(a) or (b)." The long arm statute also contains a subsection (c), which provides: "The jurisdictional grounds stated in (a)(2) – (a)(10) of this section are cumulative and in addition to any other grounds provided by the common law." Thus, if there is an uncodified common-law basis for personal jurisdiction, it remains a basis to sustain a civil action. In fact, the Alaska Supreme Court has held on several occasions that Alaska's long arm statute extends jurisdiction to the maximum extent permitted by constitutional due process.[55]

Although the long arm statute does not directly apply here, it is the same maximum extent of due process that likewise appears to govern the personal jurisdiction of an administrative tribunal.[56] Tribunals can exercise personal jurisdiction over individuals or entities that have "certain minimum contacts" with the jurisdiction in which the tribunal sits "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[57] If the contacts are truly pervasive, there can be "general jurisdiction," such that the person or entity "can be called to answer any claim," even if it is unrelated to the contacts.[58] In cases such as this one, however, where only a few contacts with the forum state have been established, the analysis is one of "specific jurisdiction:" there needs to be a sufficient nexus

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54 Memorandum of Points and Authorities Supporting Motion to Dismiss at 10.

55 *E.g., Morrow v. New Moon Homes, Inc.,* 548 P.2d 279 (Alaska 1976).

56 Although the issue is rarely litigated, administrative tribunals that are not subject to a statutory standard for personal jurisdiction appear universally to fall back on the constitutional minimum. *See, e.g., In re Cipolla,* No. 818919 (N.Y. Div. Tax Appeals 2003), op. at 3-4 (constitutional minimum contacts applied as test for personal jurisdiction over taxpayer); *In re Certain Window Shades and Components Thereof,* No. 337-TA-83 (U.S. Int'l Trade Comm. 1981), op. at 3 (ALJ applied minimum contacts standard for personal jurisdiction in administrative enforcement proceeding); *In re Bucknam*, No. OS 2006-0009 (Colo. Sec. of State 2006) (same).

57 *International Shoe Co. v. Washington,* 326 U.S. 310 (1945) (quoting prior authority).

58 *Machulsky v. Hall,* 210 F. Supp. 2d 531, 538 (D.N.J. 2002) (quoting prior authority).

between the respondent's activities, the state asserting jurisdiction, and the claims at issue that the respondent should "reasonably anticipate being haled into court there."[59]

The courts have held that merely maintaining a passive advertising website in one state, which potential buyers in a second state can access as potential customers, does not—by itself—create enough of a contact with the second state to give it personal jurisdiction.[60] On the other hand, "a web site targeted at a particular jurisdiction is likely to give rise to personal jurisdiction."[61] The question is whether the prospective defendant did "something more" than merely posting a generalized advertisement on the Internet "to indicate that the defendant purposely (albeit electronically) directed his [or her] activity in a substantial way to the forum state."[62] It is this directing or targeting of activity that makes it fair to make the person answer in the target state for the consequences of that activity.[63]

In this case, it is undisputed that Ms. Young did not merely advertise products on the Internet where Alaska customers might see them. She deliberately reached out to multiple Alaska residents and signed real property "listing agreements" with them, the purpose of which was to market items—parcels of real estate—that are located in Alaska. The claim at issue in this case arises directly from those contacts: it is a claim solely about whether entering into and carrying out such contracts to advertise Alaska real estate constituted practicing the real estate profession in Alaska. Thus, Ms. Young targeted the activity at issue at Alaska, and she may be required to answer in the target state for the consequences of that particular activity.[64]

B. Extraterritoriality

In her written closing argument, Ms. Young has made a vigorous and plausible argument that Alaska's licensing statutes do not apply to "broker activities [that] occur completely out of

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59 *World Wide Volkswagen v. Woodson,* 444 U.S. 286, 297 (1980).

60 *E.g., Machulsky,* 210 F. Supp. 2d at 539 ("When a defendant merely posts information or advertisements on a Web site . . . personal jurisdiction over such defendant is not proper"); *Mark Hanby Ministries v. Lubet,* 2007 WL 1004169 (E.D. Tenn. 2007), at *7.

61 *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.,* 79 F. Supp. 2d 537, 540 (E.D. Pa. 1999).

62 *Id.* (quoting prior authority).

63 *Id.; see also Calder v. Jones,* 465 U.S. 783, 788-9 (1984).

64 Ms. Young's heavy reliance on *Helicopteros Nacionales de Colombia v. Hall,* 466 U.S. 408 (1985), is completely inapposite. *Helicopteros* was a general jurisdiction case in which "[a]ll parties . . . concede[d] that [the] claims against Helicol did not 'arise out of,' and [were] not related to, Helicol's activities within [the forum state]." *Id*. at 415.

When professional services are rendered remotely, there can be specific jurisdiction where the services are received, even without the added ties to the forum state (real property, a formal contract) that exist in this case. Thus, if Ms. Young rendered professional services to her Alaska clients, that act alone may be enough to support specific jurisdiction. *See, e.g., McGee v. Riekhof,* 442 F. Supp. 1276 (D. Mont. 1976) (Montana had personal jurisdiction over Utah physician, not licensed in Montana, who rendered a telephonic diagnosis to a Montana resident).

[state]."[65] Her counsel has brought a number of cases from other jurisdictions to the table in support of this argument. The argument is best addressed by analyzing those cases one by one.

1. Matthews v. Greiner

Ms. Young's first case is a 1974 Georgia Court of Appeals decision captioned *Matthews v. Greiner*.[66] The case was a suit to enforce the payment of a commission under a brokerage contract. The property at issue was a commercial tract in Georgia, but the brokers seeking to require payment of the commission were not licensed there; instead, they were licensed in Virginia. A trial court had dismissed the suit on the ground that the lack of a Georgia license made the brokerage contract illegal and void. The appellate court disagreed.

The *Matthews v. Greiner* appellate court pointed out that the contract was made in Virginia for the solicitation of a potential Virginia purchaser of the Georgia land. The court then applied three principles to determine that Georgia licensing laws did not apply to the contract.

The first principle applied was that of "choice of law"—when a court is asked to enforce a contract, it must determine what jurisdiction's law governs the contract's terms. The appellate court determined that the contract in question was a Virginia contract governed by Virginia law, and since the contract was not illegal under *Virginia* law, it was not unenforceable as an illegal contract. This application of choice of law rules was an example of something peculiar to contract cases—in general, one has to pick the law of just one jurisdiction that governs a particular contract. Ms. Young's case is not a contract case. Ms. Young is not seeking to enforce one of her "Listing Agreements."[67] Instead, her business activities are being evaluated to see if they comply with Alaska law. In Ms. Young's case, choice of law is simply not an issue because we do not need to choose one set of laws to apply to her conduct. Interstate or international business activities can be subject to the laws of several jurisdictions at once. The *contracts* involved in those activities must be enforced under just one set of laws, but from a regulatory standpoint the *conduct* of a person can be subject to laws of several states, counties, municipalities, federal law, and even laws of other countries all at once. Contractual choice of law cases are irrelevant to the matter presently before the Commissioner.

The second principle applied in *Matthews v. Greiner* was that "[a] contract should not be held unenforceable as being in contravention of public policy except in cases free from

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[65] Leslie Rae Young's Closing Arguments at 7.

[66] 204 S.E.2d 749 (Ga. App. 1974).

[67] For this reason, Ms. Young's argument at pages 10-11 of her closing argument (about the Alaska "choice of law" rules that would apply to "[t]hese contracts") is entirely irrelevant to this case.

substantial doubt where the prejudice to the public interest clearly appears."[68] Again, this is a contract principle that has no crossover to the regulatory context.

The third principle applied in *Matthews v. Greiner* is of more interest to the present proceeding. The Georgia real estate statute, by its own express language, requires a license only when a person performs services "within any county in this state." As the court observed, the Georgia law "deals with services" and "does not focus on the situs of the real property."[69] The court concluded that since the Virginia brokers rendered their services in Virginia, they were beyond the coverage of Georgia's regulatory statute.

Alaska's real estate laws lack the express limitation to activities "within . . . this state" that appears in Georgia law, and thus the precise reasoning of the Georgia case does not transfer. Nonetheless, there is surely an implicit territorial limitation of some kind that must be read into Alaska law. For example, AS 08.88.161(5), if read absolutely literally, makes it illegal under all circumstances to "collect fees for community association management"—even if the people doing the work, the community association, and the property being managed are located in Mongolia, and the services and the payments for those services all take place in Mongolia. Yet this cannot really be the intent of the statute; the Division does not ask the Commissioner for cease and desist orders against Mongolian property managers. Because Georgia's territorial limitation is written right into the statutory language, the *Matthews v. Greiner* court did not address the more difficult question of how this implicit territorial limitation might be applied to a statute lacking such language.

One must bear in mind, however, that the conduct of which Ms. Young is accused has a closer connection to Alaska than the conduct the Georgia court found beyond the reach of Georgia's licensing requirement had to Georgia. In *Matthews v. Greiner*, the Virginia brokers aimed their activities at securing a particular Virginia buyer. In our case, by contrast, the main point of Ms. Young's services was to get the seller's property into an advertising website where Alaska buyers would see it. She was, as a matter of practical fact, deliberately advertising the property to Alaskans.

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68 *Id*. at 752.

69 *Id.* at 754.

2. Consul Ltd. v. Solide Enterprises, Inc.

Ms. Young next relies on a United States Court of Appeals case, *Consul Ltd. v. Solide Enterprises, Inc*.[70] *Consul* was another suit to enforce a contract for a commission by an out-of-state broker with respect to property located in the state where the court was sitting, in this case California. As in the Georgia case, the court looked to express language in California's licensing statute, which had an express limitation to acts "within this state."[71] The court interpreted that language to mean that out-of-state activities were not covered, even if they related to California land. The facts of *Consul* are not rendered in sufficient detail to be sure whether any of those out-of-state activities were directed toward California buyers, but one suspects from the context that they were not, since the agreement in question covered a group of properties in various jurisdictions, including one in the state where the broker was licensed.

3. James v. Hiller

Ms. Young also relies on *James v. Hiller*,[72] an Arizona case from 1958. Again, this was a contract suit to enforce payment of a commission. The court enforced the contract notwithstanding that the plaintiff broker had only a New Mexico license and the property sold was located in Arizona. A closer look, however, shows key distinctions from Ms. Young's situation. First, *James v. Hiller* involved a commercial land exchange of New Mexico and Arizona land, so that the broker arranging the trade was involved in a truly multistate transaction. Second, the New Mexico broker was hired on the very day that the exchange was agreed upon.[73] Thus, the broker seems to have targeted his activity only at a particular buyer, and that buyer was in the state in which he was licensed.[74]

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70 802 F.2d 1143 (9th Cir. 1986).

71 *Id.* at 1148.

72 330 P.2d 999 (Ariz. 1958).

73 *Id.* at 1000.

74 The targeting of the out-of-state broker's out-of-state activities to out-of-state buyers has been a key factor in many cases where an in-state license has been deemed unnecessary, including some not cited by the parties to this case. *E.g., Pokress v. Tisch Florida Properties, Inc*., 153 So. 2d 346 (Fla. App. 1963); *In re Stoddard's Estate,* 373 P.2d 116 (Wash. 1962); *Richland Dev. Co. v. Staples*, 295 F.2d 122 (5th Cir. 1961) (Alabama commercial property, Missouri broker targeted Missouri investor); *Cochran v. Ellsworth,* 272 P.2d 904, 905 (Cal. App. 1954) (California broker interested California buyer in Arizona property); *Paulson v. Shapiro,* 490 F.2d 1, 4 (7th Cir. 1973) (finding a local license unnecessary but expressly distinguishing a prior case that found otherwise, on the basis that the case at bar did not involve targeting a purchaser in the state); *cf. Coldwell Banker & Co. v. Karlock,* 686 F.2d 596 (7th Cir. 1982) (all parties out of state). There is also a line of cases, even less favorable to multistate practitioners like Ms. Young, that requires a local license where the property is located even when the work is targeted to non-local buyers. *See, e.g., Dow and Condon, Inc. v. Brookfield Dev. Corp.,* 833 A.2d 908 (Conn. 2003) (out-of-state broker's role illegal even though he targeted only an out-of-state buyer).

4. Targeting buyers in a state where one is not licensed

In contrast to the cases relied on by Ms. Young, the outcome has been different when an out-of-state broker targets activities toward buyers *within* the state where he or she lacks a license, so that both the subject property and the targeted buyers are located in that state. Thus in *Marina Management Corp. v. Brewer*,[75] a United States Court of Appeals case, a New York broker had marketed a Connecticut marina to a Connecticut buyer without the benefit of a Connecticut real estate license. The court found this brokerage arrangement illegal. The court noted that the Connecticut licensing requirement is a consumer protection provision, designed to supervise real estate practitioners lest consumers be victimized by an "incompetent and unscrupulous agent."[76]

Alaska's real estate licensing statute is likewise a consumer protection law.[77] Its fundamental aim is the protection of Alaska citizens who consume real estate services.[78] While it is plausible to contend that the Alaska Legislature did not intend, in AS 08.88.161, to regulate activities that occur out of state and that are targeted to out-of-state consumers, even if they relate to Alaska real estate, Ms. Young has pointed to no basis—whether in statutory text or legislative history—to suppose that activities designed to sell Alaska property *to Alaskans*, even if conducted from long distance, are outside the intended scope of the statute. Alaska is the only jurisdiction with an interest in regulating such activity and protecting the consumers involved. It would be anomalous, in this age of easy long distance communication and instantaneous document transmission, if one could escape all consumer protection oversight simply by moving one's physical location to another state, while continuing to target Alaska consumers in connection with Alaska transactions.

The upshot of this discussion is not that Ms. Young has violated Alaska law. That remains to be determined in Part IV below. The upshot is simply that, when she engages in activities relating to Alaska real estate targeted to Alaska consumers, she is *subject* to Alaska regulation. If those activities require an Alaska license, she is not exempt from that requirement.

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[75] 572 F.2d 43 (2d Cir. 1978) (Henry Friendly, *et al.*, JJ).

[76] *Id.* at 47.

[77] *See, e.g.,* remarks of Chairman Rokeberg re HB 33 [the most recent bill rewriting § 161], House Labor & Commerce Committee, March 14, 1997 ("The primary reason for this bill was the interest of consumer protection."); remarks of Commissioner Clair Ramsey re HB 33, Senate Labor & Commerce Committee, March 19, 1998 ("truly a consumer bill").

[78] *See, e.g.,* remarks of Jerry Royse (Alaska Ass'n of Realtors) and Chairman Leman re HB 33, Senate Labor & Commerce Committee, April 18, 1998.

D. Defect in Cease and Desist Order

Ms. Young contended in her original motion to dismiss that the temporary cease and desist order is defective because it cites AS 08.80.460(a), which applies to pharmacists. She apparently sought dismissal of the entire case on that basis. This argument was not mentioned in later proceedings on the motion.

A provision from a pharmacy order does appear to have been left in the template used to create this order. It is in a separate paragraph warning about potential criminal penalties. The stray provision does not render the operative provisions of the cease and desist order unclear: the parts of the order that make factual findings, order conduct to cease, and prescribe the duration of the order are all correctly rendered. Ms. Young cites no authority for dismissal on the basis of a mistaken advisory provision, and the ALJ is aware of none.

Alaska Statute 08.88.037 authorizes "a final order . . . modifying . . . the temporary order." Among the modifications that will need to be made is elimination of the erroneous statutory reference.

E. The Enforcement Action Against Ms. Young Is Not Moot

Ms. Young argues that this dispute is moot because the contracts she entered into have terminated. While those contracts are evidence of the alleged violation at issue in this matter, the fact that any violation may not currently be occurring does not make this matter moot. The Division is seeking to make a Temporary Cease and Desist Order permanent. This relief would not be moot unless there were factual or legal circumstances ensuring that Ms. Young would not do again what she has already done a number of times.

F. Alleged Lack of Evidence of Listing on MLS or Realtor.com

Ms. Young's motion for dismissal before the hearing alleged that no evidence in the record filed up to that time supplied proof that she actually placed advertising on an MLS and Realtor.com. Some evidence on this issue was submitted with the Division's opposition brief, and Ms. Young had admitted in a general way to placing such advertising; there was no basis for dismissal on this ground. Ms. Young was advised that if she contended that no advertisements appeared in these databases with respect to particular properties at issue, she could argue the sufficiency of the evidence at the hearing. She did not do so.

IV. Whether the Statute Prohibits the Conduct of Which Ms. Young is Accused

The Division presently alleges that Ms. Young's activities violate various provisions of AS 08.88.161, which defines the activities for which an Alaska real estate license is required. The cease and desist order also references alleged violations of AS 08.88.167 and 12 AAC 64.095, but in subsequent proceedings the Division has not contended that these provisions would support freestanding violations under the facts as presently understood.[79] Ms. Young argues that her conduct does not violate any of the provisions relied upon.

The various provisions of section 161 that the Division contends have been violated are addressed individually below. Part IV-A below covers those that were fully addressed on summary adjudication[80] prior to the hearing based on the evidence in the record in Part II-A above. Two core allegations remained pending for the hearing, and these are addressed in Part IV-B below based on evidence from both Parts II-A and II-B above.

A. Alleged Violations Addressed by Motion Prior to Hearing

1. AS 08.88.161(2)

One of the Division's primary allegations at the time of the motion practice appeared to be that Ms. Young's activities violated AS 08.88.161(2), which provides:

> Unless licensed as a real estate broker, associate real estate broker, or real estate salesperson in this state, a person may not, except as otherwise provided in this chapter . . . (2) list real estate for sale, exchange, rent, lease, auction, or purchase.

The first question in evaluating this allegation is whether the word "list" in the statute encompasses what Ms. Young did. There is no statutory or regulatory definition of "list" as it

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[79] AS 08.88.167 is a statute setting civil penalties for violations of AS 08.88.161; an individual cannot "violate" this penalty provision. 12 AAC 64.095 is a regulation prohibiting real estate licensees from employing unlicensed persons to perform certain tasks. Since Ms. Young is not a real estate licensee as that term is defined in AS 08.88.990(12), even if she did employ someone else to perform these tasks (and there does not seem to be any evidence that she did), 12 AAC 64.095 is not the provision of law that she would thereby violate.

[80] Although the motion was styled as a motion to dismiss, both parties relied heavily on evidence outside the pleadings themselves, and therefore the motion was handled as one for summary adjudication. Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding. *See, e.g., Schikora v. State, Dept. of Revenue,* 7 P.3d 938, 940-41, 946 (Alaska 2000). It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. If facts that are undisputed establish that the moving party must prevail, the evidentiary hearing is not required. *See Smith v. State of Alaska,* 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994). A dispute of material fact is not created by a party merely asserting, in argument, that one exists; if the moving party has laid out a set of facts and supported them with evidence, the party resisting summary adjudication must likewise support any competing version of the facts with evidence. *See* 2 AAC 64.250(b). In this case, the parties identified no material factual disputes.

appears in section 161. No party has pointed to any prior official interpretation by the agency administering the statute.

This issue is rendered slightly more confusing than it might otherwise be by the fact that Ms. Young's agreements call themselves "listing agreements." The fact that she used a variant of the word "list" in her agreements, however, does not establish that she was using the word in the same sense as the word is used in AS 08.88.161. "List" is a word with many meanings.

The central question with regard to this allegation is to determine what the Alaska Legislature meant by the word "list." In briefing the motion to dismiss, the Division initially assumed that a broad definition of the word must apply, such as the dictionary definition "to put on a list."[81] A difficulty with so broad a definition is that it sweeps in usages such as "to list in the classified ads," "to list on Craig's List," or "to list on HomeFinder.com." Apparently sensing that so broad a reading would force far too wide a segment of the public and the media to obtain a real estate license, the Division attempted at oral argument to suggest that "list" encompasses advertising on a website, but only if it is a "realtor-only website."[82] Apart from the issue that there is no textual support for the distinction, however, the attempt to draw a fine definitional line in this manner leads to further problems. The capacity to post on most websites, including individual MLS websites in other states, is a matter of private rules, not law. The Division's reading of the statute would, in effect, elevate the rules of a private club to the status of law. Moreover, the Division is attempting to transport this concept beyond the realm of Alaska licensing—the Division is not referring only to websites for which posters must have an *Alaska* real estate license—and it seeks to characterize websites for which posters may need some sort of license from some other jurisdiction as being among these "realtor-only" websites. Alaska has no control over how other states arrange their licensing systems, and a real estate license in another state may mean something very different from a license in Alaska.

Courts have offered a more limited and reasonable definition of the word "list" when it is seen in real estate licensing statutes. In *State v. Rentex*, *Inc*,[83] for example, the Ohio Court of Appeals rejected an attempt by that state's real estate board to require a real estate license of a firm that was merely advertising rental properties in a specialized directory, observing:

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[81] Webster's New Riverside Dictionary (1988), at 697.

[82] Although the materials submitted for summary adjudication did not expressly define "realtor," at the hearing, it was confirmed that a "realtor" is someone who has joined the National Association of Realtors, a private trade group. The term is not synonymous with "licensee." ALJ exam of Kowalczuk.

[83] 365 N.E.2d 1274 (Ohio App. 1977).

> The real estate brokerage business is specialized. The legislation designed to regulate it employs the technical language developed in the specialty. Language so deployed in the statute requires a technical interpretation in the light of the statutory purpose.
>
> * * *
>
> The term[] "listing" . . . [is a] word[] of art in the real estate business. [It] impl[ies] an agency relationship between the seller and broker with the purpose of effecting a juncture between buyers and sellers of real property with an ultimate pecuniary reward to the broker for his part in bringing the parties together.[84]

The court went on to make it clear that the agency relationship—the authorization to act on behalf of the seller—is the key to a real estate listing. A federal court in Oklahoma rejected a similar effort by that state's real estate commission in *National Business & Property Exchange v. Oklahoma Real Estate Commission,*[85] holding that "[t]he solicitation for and publication of advertisements . . . does not constitute a 'listing' of real estate."[86] In the same vein is the Arizona case of *Leo Eisenberg & Co. v. Payson,*[87] holding that "a listing agreement is a form of agency agreement and employment . . . in consideration of payment of [a] commission if a sale or lease is made." Likewise, a real estate dictionary defines "list" as "to secure a listing," and in turn defines "listing" as a "[l]egal contract with a property owner empowering a real estate agent in selling, leasing, or mortgaging the principal's property."[88] The common thread of these definitions of "list" and "listing" as terms of art in the real estate field is the power to act as an agent of the seller in marketing the property.[89]

One Alaska case suggests a similar assumption by the Alaska Supreme Court. In *Black v. Dahl,* [90] the court held that a "listing" created a fiduciary duty for the licensee. This case has

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[84] *Id.* at 1276-77 (footnotes omitted).

[85] 170 F. Supp. 904 (D. Okla. 1955).

[86] *Id.* at 908.

[87] 732 P.2d 1128, 1130 (Ariz. App. 1987). *See also Bowen v. Wyoming Real Est. Com'n,* 900 P.2d 1140 (Wyo. 1995) (no "listing agreement" needed for broker to advertise property).

[88] Shim, Siegel & Hartman, *Dictionary of Real Estate* (1996), at 168.

[89] The ALJ has been able to find only one published case that included a broader reading of the word "list" in an actual holding: *People v. Biss*, 365 N.Y.S.2d 983 (N.Y. City Criminal Ct. 1975). The case has no discussion of the various definitions of "list" and relies only on a 1933 attorney general opinion. Notably, the court had before it individuals who had only advertised rentals in the manner of Craig's list, and the court convicted them of criminal unlicensed practice. In the ensuing 35 years, this case has never been followed by any other court in any published opinion, which suggests that it has not been considered persuasive.

In closing argument after the hearing (and thus long after resolution of the motion), the Division brought forward *Skynet Corp. v. Slattery,* 2008 WL 924531 (D.N.H. 2008), a case that seems to attach a very broad reading to the word "list" in *dicta* that are not essential to its final outcome. *Skynet* is discussed in footnote 118 below.

[90] 625 P.2d 876, 880 (Alaska 1981).

been superseded by statutory changes to some degree, but it remains relevant as an indication that the court viewed "listing" as something that set up a principal-agent relationship.

The word "listing" appears elsewhere in Alaska's statutory chapter on real estate, and its use there is consistent with the narrow, industry-specific definition above. Alaska Statute 08.88.341 requires that "real estate listings . . . must be in writing and must be signed by the broker or associated licensee of the broker and the client or an authorized representative of the client for whose benefit the real estate licensee will act." This language plainly implies an agency relationship[91] in which the licensee will act "for . . . benefit" of the client in a relationship of a type that requires a written contract. A mere placement of an advertisement on a website is not such a relationship.

It is the meaning of "list" as a term of art in the real estate industry that seems most likely as the meaning the legislature intended when it used that word in AS 08.88.161. Based on the evidence the Division placed in the record prior to the motion ruling, Ms. Young's limited relationship with her Alaskan clients was not such a listing. The contracts she entered into were limited to the placement of advertising on a website using information supplied by the sellers. She received no authority to act for the sellers in subsequent efforts to arrange or consummate a sale.

In the motion briefing, the Division challenged this conclusion on three grounds. First, the Division stated that while "listing" may be a term of art, it is a term of art that, in Alaska, "includes a contract between a broker and a client."[92] It appears the Division is arguing that because Ms. Young is a broker in California, the contracts she signed with her clients in Alaska are, by this definition, listings.

Nowhere in the Alaska Statutes is there a provision that says that all contracts between a broker and a client are listings. In fact, the statutes indicate just the contrary: In AS 08.88.695(5), the term "personal services contract" is defined to include both "a listing" and "any other agreement by which a broker agrees to perform a duty with respect to real estate for an agreed upon fee or commission." If every agreement between a broker and a client were a "listing," the legislature would not have needed to mention "other" agreements because there

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[91] The legislature has abrogated the common law of agency insofar as it may be inconsistent with the statutory relationships defined in AS 08.88.600 – 695. *See* AS 08.88.675. That some elements of the common law have been abrogated does not, however, prevent the relationship between licensees and their clients from being an agency relationship. It is simply an agency relationship that is partly defined by statute.

[92] Division's Motion for Reconsideration at 5.

would be no "other" agreements. The implication is that some broker-client contracts are not "listings."[93]

For purposes of this enforcement action, moreover, it is important to focus on what Ms. Young did or did not do, and not on her status under California law. It is undisputed that Ms. Young is not a licensee under Alaska law. It is also beyond dispute that there are certain actions related to real estate transactions that one cannot do in Alaska without being a licensee. The fact that Ms. Young has a license to sell real estate in California is irrelevant to the question of whether her actions in Alaska were proper under Alaska law.

Under Alaska law, a real estate licensee "is a person who holds a license under this chapter; the term includes a broker unless the context clearly excludes brokers."[94] Ms. Young does not hold a license under "this chapter," that is, under AS 08.88. The lack of a license is the basis of this enforcement action. Thus, any contract she signed is not a contract "between a broker and a client" *under Alaska law*. A person can be a broker – or a doctor, lawyer, teacher, or engineer – in one state and act in an entirely different capacity in Alaska. Even if the Division were correct that contracts between licensed brokers and clients are always "listings," proving that Ms. Young entered into a written contract with a client does not establish that she "listed" property for sale in Alaska.

The Division's next point concerned whether an agency relationship existed between Ms. Young and individuals in Alaska who contracted with her. In support, the Division cited portions of Ms. Young's form contract. Those portions need to be read in context. The relevant contract language is quoted below with the portions cited by the Division underlined.

> <u>Property Agency Listing Agreement – OPEN</u>
> Non-Exclusive Authorization to Advertise through the MLS for Realtor.com Showcase.
>
> <u>PURPOSE</u> OF THIS CONTRACT: Seller is hiring Broker to submit the property (with its full address information when available) to an out-of-area MLS for the purpose of advertising as a showcase listing on the national website Realtor.com. Seller <u>AGREES THAT A LIMITED AGENCY RELATIONSHIP IS BEING CREATED IN THIS AGREEMENT</u>: THIS AGREEMENT IS FOR AN MLS ENTRY LISTING ONLY for the sole purpose of advertising. Broker does not perform real estate services other than data entry into the MLS system.[95]

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[93] "'A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous . . . .'" *Alascom, Inc. v. North Slope Borough Bd. of Equalization*, 659 P.2d 1175, 1178 n.5 (Alaska 1983) (quoting treatise).

[94] AS 08.88.990(12).

[95] REC 024.

> Broker agrees to enter the property information provided by Seller with the MLS Realtor System. The MLS has an agreement to furnish limited data on listed properties to affiliated websites such as Realtor.com during the term provided herein. This Agreement creates a Non-Exclusive Agency Agreement to Market Seller's Property and limits the performance requirements of Broker as set forth herein. **Broker is not representing Seller as a full-service Real Estate Agency but rather has limited obligations to Seller. This is an MLS Entry Only Listing agreement for the purposes of Advertising.**[96]

As can be seen, the Division omitted important parts of this language from its quotation. When viewed in context—that is, with reference to whole text, not just the underlined portions—the portions cited by the Division do not establish the type of agency relationship regulated by AS 08.88. Specifically, this language does not create a situation where Ms. Young would have authority to act on behalf of the seller to bring buyer and seller together in exchange for compensation.[97] Instead, this language indicates that the only service being provided is entry of data into the MLS system so it can be displayed on various advertising websites.

The Division also submitted an unsworn statement from an associate broker, Kathleen Kowalczuk.[98] The statements the Division has relied on from that statement, however, are simply conclusions about what the evidence demonstrates, which is the province of the adjudicator, not Ms. Kowalczuk, or are conclusions of law, which are likewise outside her province.[99] Assuming for a moment that Ms. Kowalczuk was a qualified expert and that her unsworn testimony could be considered,[100] her report still does not create a genuine issue of material fact as to what Ms. Young did as a factual matter, nor preclude the tribunal from applying AS 08.88.161(2) to those facts. Moreover, the report states conclusions without explaining how those conclusions were reached. The report does not explain why a person who places an advertisement in the MLS *is involved* in marketing, but a person who places an advertisement in a newspaper or another advertising venue *is not involved* in marketing the property. The fact that the MLS owners have privately restricted their service so that only

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96 REC 026 (bold typeface in original).

97 *See* Order on Motion to Dismiss at 11.

98 REC 59 – 64.

99 *See, e.g., Hagen Insurance, Inc. v. Roller*, 139 P.3d 1216, 1222 – 23 (Alaska 2006).

100 The Division's use of unsworn testimony does not square with 2 AAC 64.250(b) and 2 AAC 64.290(d). It is not clear why the Division chose to offer unsworn testimony in opposing summary adjudication. The unsworn statement is inadmissible.

The Division did later qualify Ms. Kowalczuk, for strictly limited purposes, at the hearing, and obtained some sworn testimony from her. That testimony may not be considered in connection with the summary adjudication motion, however. It was offered too late. It can only be considered in connection with the claims that went to hearing.

people holding various kinds of licenses in various states can place advertisements is not sufficient, without more, to turn this advertising into a listing.

The Division's third point in opposing dismissal also related to agency. The Division argued that licensees in Alaska are allowed to enter into limited agency agreements that waive the requirement of making continuous efforts to find a buyer for the property.[101] In other words, the Division contended that licensees could sign contracts like Ms. Young's without violating any statute or regulation.[102] It is a non-sequitur, however, to argue from this purely permissive language that *only* licensees can enter into these contracts without being in violation of AS 08.88.161(2).

In its reply brief in support of its closing argument, the Division has revisited this issue yet again, advocating a new definition of the word "list." The definition the Division would now apparently ascribe to the legislature is that a "listing agreement" is "a contract for employment for personal services," and thus if one enters into a contract for personal services one "list[s] real estate for sale."[103] Under this definition, if someone puts a house on the market and make a contract with the teenager next door to keep the grass cut while the house is on the market, the teenager needs to have a real estate license because he has just "listed real estate for sale." Neither the cases cited in the Division's brief, nor common sense, supports this alternative definition.

In sum, the Division's proposed definitions of "list" are implausibly broad. The definition of "list" that must be ascribed to AS 08.88.161 is that of the specific term of art in the real estate industry, involving the power to act as the agent of the seller in dealing with potential buyers. This is the meaning the courts have assigned to equivalent language in other states' licensing statutes.

Ms. Young's agreements bind her to place advertisements and to forward e-mails and phone calls. This is not sufficient to support finding that Ms. Young violated AS 08.88.161(2) or created an agency relationship of the type regulated by 08.88.

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[101] Division's Motion for Reconsideration at 8.

[102] This may or may not be true. While a client can waive the requirement of continuous effort, there may be other requirements not included in Ms. Young's contracts that cannot be waived. *See* AS 08.88.615 & 620.

[103] The argument can be found in the Division's Response to Young's Closing Argument at 2. The Division asserts that Ms. Young has adopted this definition, but that claim is supported only by a convoluted and disingenuous twisting of passages from Ms. Young's closing argument.

2. AS 08.88.161(11)

The Division raised—by way of a conclusory suggestion in the motion briefing that was not pursued in oral argument—a contention that Ms. Young's activities violated AS 08.88.161(11), which provides:

> Unless licensed as a real estate broker, associate real estate broker, or real estate salesperson in this state, a person may not, except as otherwise provided in this chapter . . . (11) attempt to or offer to do any of the things listed in this section.

The Division did not explain how any of the activities demonstrated by the evidence in the record represent unconsummated attempts or offers to do any of the things requiring a license, and the ALJ could not develop this theory on his own. Instead, it appears that Ms. Young accomplished the things she set out to do, and therefore this is not an appropriate case to pursue under the attempt provision in the statute.

3. AS 08.88.161(9)

The Division also alleged that Ms. Young's activities violated AS 08.88.161(9), which provides:

> Unless licensed as a real estate broker, associate real estate broker, or real estate salesperson in this state, a person may not, except as otherwise provided in this chapter . . . (9) accept or pay a fee for the performance of any of the activities listed in this section, except as otherwise provided in this chapter.

This is not a freestanding provision; it comes into play only if a person engages in one of the other ten activities listed in section 161 that require a license. The motion ruling prior to the hearing so noted, and hence this provision was laid to one side as an independent basis for a cease and desist order.

Since Ms. Young did accept a fee for her limited services, the provision is relevant insofar as other activities requiring a license are demonstrated. As will be seen, it was shown at the hearing that Ms. Young did engage in one of those ten other activities requiring a license. Accordingly, this provision, though incapable of serving as an independent basis for a cease and desist order, will reappear in the final order below.

B. Alleged Violations Addressed at the Hearing

1. AS 08.88.161(10)

The Division has alleged that Ms. Young's activities violated AS 08.88.161(10), which provides:

> Unless licensed as a real estate broker, associate real estate broker, or real estate salesperson in this state, a person may not, except as otherwise provided in this chapter . . . (10) hold out to the public as being engaged n the business of doing any of the things listed in this section.

This claim was left unresolved by the pre-hearing motions, and therefore went to hearing. The hearing testimony and exhibits may be used in resolving it.

Ms. Young argues that "to 'hold out' a person must purposefully represent that they have a certain legal status."[104] She goes on to assert:

> In the present case, the only legal status at issue is an Alaska licensed real estate broker, associate real estate broker or real estate [sales]person. If a person's presented representation is not one of these three areas, then there would be no "holding out" within the meaning of the statute. . . . Nowhere on [her Realtor.com advertising] does the advertisement state that Ms. Young or e-List.me is an Alaska real estate broker.[105]

Ms. Young is mistaken in contending that she can only violate the AS 08.88.161(10), the holding out provision, by claiming a particular "legal status," specifically by holding out to be the possessor of an Alaska license. Holding out is simply creating an impression; it is not limited to creating an impression that one has a particular legal status. Thus, in *Polar Supply Co., Inc. v. Steelmaster Industries, Inc.*,[106] the Alaska Supreme Court used the phrase "held itself out" to describe a company's claim that it offered service throughout North America. Offering service is not a legal status. Section 161's coverage is much broader than creating a misimpression that one has a license: it covers holding out as being in the business of *doing* any of the things that require a license. Thus, for example, if one holds out to the public that one is in the business of auctioning real estate—an activity that requires a license in this state under subdivision (1) of § 161—one is in violation, even if one makes no misstatement about one's licensing status.

The central purpose of Ms. Young's business model is to get her clients' advertisements into an MLS so that they will appear on Realtor.com and similar MLS-affiliated websites.[107] When she places the advertisements, the websites control how her name appears—that is, the text that will appear next to the field she has filled with her name. She cannot change the template. However, Ms. Young knows what that text will be.

The text of the Realtor.com advertisements describes the subject properties as being "brokered by" Ms. Young's dba, e-List.me, and lists Ms. Young as the "broker." To the general

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[104] Leslie Rae Young's Closing Arguments at 23.

[105] *Id.*

[106] 127 P.3d 52, 57 (Alaska 2005).

[107] *See, e.g.,* Div. Hearing Ex. 11 at 1 (describing MLS Listings service provided through Ms. Young).

public reading the advertisements, these terms would have their ordinary meaning. A "broker" is "one that acts as an agent for others in negotiating contracts, purchases, or sales."[108] In Alaska, to act on behalf of others in negotiating contracts, purchases, or sales of real estate, one must have a real estate license.[109] Thus, if an advertisement holds a person out to be a "broker" of Alaska real estate, it holds that person out to be engaged in the business of doing things that require an Alaska license.

Ms. Young's answer to this difficulty is to say that the use of the word "broker" is accurate—and innocuous—because she is an "advertising broker."[110] But the subject of the phrase "brokered by" in these ads is clearly the property, not the advertisement. Realtor.com is not where one would shop for advertising, it is where one would shop for real estate, and the items being "brokered" there are real estate. There is no question that the ads hold her out to be a broker of real estate, and to be brokering the property featured in the ad.

The Realtor.com ads likewise characterize Ms. Young repeatedly as the "agent" for the property. The ordinary meaning of "agent" is "one that acts as the representative of another."[111] Using this word in the advertisement conveys the impression that Ms. Young can communicate for and work on behalf of the seller to bring about a sale. If she in fact were empowered to do these things (under her agreements with her clients, she is not), she would need a license.[112] Thus, by calling herself the seller's "agent," she holds herself out to be engaged in the business of doing things that require a license.

Ms. Young admits that the limited nature of her relationship with seller is not reflected on the website ads.[113] Any misimpression, she observes, is dispelled upon further inquiry by telephone or by means of the website links. It is true that the real nature of Ms. Young's role—that she will not act as intermediary in any way and will not represent the seller in the transaction—will likely become apparent to a prospect upon reaching the seller through the message-forwarding system, assuming the seller accurately describes the relationship to the person making the inquiry. But Alaska's prohibition on holding oneself out as doing work

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108 Webster's II New Riverside Dictionary (1984). *See also, e.g., French v. City of Toledo,* 90 N.E. 160, 161 (Ohio 1909) ("A broker is an agent to effect bargains and contracts as a middleman . . . ."); *Franklin Park Lincoln-Mercury, Inc. v. First Fed. S & L Ass'n,* 597 N.E.2d 1120, 1122-3 (Ohio App. 1991).

109 AS 08.88.161(1), (2), (8).

110 Cross-exam of Young at 7/17:30 & 27:00.

111 Webster's II New Riverside Dictionary (1984). *See also, e.g., AT&T Corp. v. Beehive Tel. Co.,* 2010 WL 376668, *18 (D. Utah 2010) (essence of being agent is power to act on behalf of another).

112 AS 08.88.161(8).

113 Cross-exam of Young at 7/24:00ff.

requiring a license has no exception for situations where an initial holding out is corrected by later information hopefully to be delivered by a third party.

Ms. Young puts heavy reliance on a "holding out" case involving the engineering profession, *Missouri Bd. for Architecture, Professional Engineers and Land Surveyors v. Earth Resources Engineering, Inc.*[114] That case involved an issue that has often been controversial in that profession: whether calling yourself an "engineer," or your company an "engineering" company, constitutes holding yourself out to be a licensed professional engineer. Earth Resources Engineering was a firm with such a word in its name, but the firm did not have professional engineers on staff. The trial court had dismissed the Missouri board's enforcement action against Earth Resources Engineering because the board lacked proof that anyone had actually been misled by the word "engineering" in its name. The appellate court reversed, however. It decided that "holding out" does not require a showing that people have actually been misled, but only that, under the circumstances, a "'reasonable person' would find that the use of the term 'engineer' indicates or implies that one holds oneself out to be a professional engineer."[115] The appellate court sent the case back to the trial court to determine, after examining the full context, whether a reasonable person would find that indication.

The *Earth Resources* case is not helpful to Ms. Young. It confirms that, to sustain the cease and desist order, the Division need not find individuals who recall a particular ad and can say they were misled.[116] Instead, if the ad objectively implies that Ms. Young is engaged in the business of doing things that require a real estate license, she is "holding out." The context into which Ms. Young has placed her name and her dba in the Realtor.com ads conveys exactly that implication.

For these reasons, Ms. Young's advertisements have placed her in violation of AS 08.88.161(10).

2. AS 08.88.161(8)

The Division has also alleged that Ms. Young's activities violated AS 08.88.161(8), which provides:

> Unless licensed as a real estate broker, associate real estate broker, or real estate salesperson in this state, a person may not, except as otherwise

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[114] 820 S.W.2d 505 (Mo. App. 1991).

[115] *Id.* at 510.

[116] The Division does arguably have such an individual, however. Stacy Risner, a Fairbanks licensee, saw one of Ms. Young's ads and assumed that Ms. Young was listing the property, not merely advertising it. Direct and cross-exam of Risner. Listing requires a license.

> provided in this chapter . . . (8) assist in or direct the procuring of prospective buyers and sellers of real estate, or assist in the negotiation of a transaction that results or is calculated to result in the sale, exchange, rent, lease, auction, or purchase of real estate.

There are two main parts of this provision, the "procuring" part and the "assist in the negotiation" part. The will be analyzed separately.

a. Procuring

With respect to procuring, Ms. Young's contracts have limited her obligations to the advertisement of the property in an out-of-state MLS, an advertising database.[117] Although this function does attract buyers in the broadest sense, it cannot be construed as the "procuring" of buyers in this context. An interpretation of the word "procuring" that encompassed mere advertising would lead to the implausible result that all media and others involved in the advertising of real estate would have to obtain real estate licenses.[118] As in the case of the words "list" and "listing," the courts have treated "procuring" as a narrower term of art in the real estate business. Thus in the *Rentex* case, discussed above, the court rejected the Ohio Real Estate Commission's contention that mere advertising in a special publication could be deemed "procuring" of prospects so as to require a license. The court explained that in the real estate field a "procuring" of buyers or renters only occurs when there is an agency relationship.[119]

Also not within the plausible interpretation of the word "procuring" is Ms. Young's role in fielding messages from prospective buyers. Ms. Young provides, in effect, a telephone

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[117] *See* Div. Hearing Ex. 4 at REC 024, ¶ 3.

[118] Regrettably, the exact definition to be assigned to "procuring" has not been fully explored in this case though briefing. At the end of the hearing, the Division asked the ALJ to supply questions he needed help with in final argument. In response, the ALJ specifically asked the Division to address, in its final brief, "[h]ow exactly [the phrase 'assist in . . . procuring of prospective buyers'] is . . . to be distinguished from advertising." Inexplicably, the Division elected to offer no answer at all to this question.

Instead, on the "procuring" issue the Division relied entirely on *Skynet Corp. v. Slattery,* 2008 WL 924531 (D.N.H. 2008), a motion decision by a federal court in New Hampshire. The federal court rejected the application of New Hampshire's real estate licensing statute to a real estate website (ZeroBrokerFees.com), but along the way it assumed, by way of *dicta*, that the website was assisting in the "procuring of prospects." *Id.* at *2. The court went on to hold that the New Hampshire licensing statute did not apply because the website was purely an advertising venue and it fell within an explicit exclusion in the New Hampshire law for "newspaper[s] and other publication[s] of general circulation." *Id.* at *11. Alaska has no such express exclusion for newspapers and other publications, and so the Division advocates that the commissioner should follow *Skynet's* dicta and find that Ms. Young is "procuring." The trouble with following the Division down this path is that the commissioner would thereby effectively hold that all Alaska newspapers, real estate advertising pamphlets, and community advertising websites are likewise "procuring" and are in need of real estate licenses, a result Alaska's legislature is unlikely to have intended. For this reason, cases like *Rentex* are more persuasive than *Skynet* in this context.

It should lastly be noted that the Division's own expert conceded that Ms. Young's advertising on Realtor.com did not constitute "procuring." The expert viewed only the passing on of e-mails and phone calls (discussed below) as "procuring." Cross-exam of Kowalczuk at 4/1:51:00.

[119] 365 N.E.2d at 1275-77.

exchange that automatically forwards these messages. So far as the record in this case has been established, she never responds to, advises about, or even reads or listens to these messages. To interpret such a limited role as "procuring" could lead to the implausible result that operators of telephone utilities, voicemail systems, and answering services would need to get real estate licenses.

In general, "procuring" would appear to be about the sort of role played by the brokers in the *James v. Hiller* and *Matthews v. Greiner* cases discussed earlier in this decision, where brokers identified and targeted particular prospects and brought them to the table. There is no evidence that Ms. Young did any of this kind of work for her Alaska clients.

b. Assisting in Negotiation of Transaction

The second aspect of AS 08.88.161(8) is assistance "in the negotiation of a transaction." In general, Ms. Young has stayed well clear of this role, but there is a troubling exception.

In her contracts, Ms. Young includes a clause 4B that reads:

> Buyer Broker Fee: If a cooperating broker procures the buyer, Seller will pay Buyer Broker at close of escrow either □ __ percent of the purchase price, or □ $____. If the buyer is not represented by a real estate broker, the Seller is not obligated to pay a commission.[120]

This provision certainly purports to create an obligation to pay a commission to a buyer's broker. In fact, it goes out of its way to indicate the circumstances in which there is no obligation, which further implies that when those circumstances do not exist, there is indeed an obligation. Further cementing the impression of a binding legal obligation is a clause 22A at the end of the agreement, providing:

> Seller may not cancel this Contract if the Property is under contract (Sales Agreement). . . . The intent of this Paragraph is to prevent claims from cooperating brokers for a due commission not being paid.[121]

Ms. Young argues strenuously that clause 4B is unenforceable by buyer's brokers, because they are not signatories to the contract and, in her view, they are not third-party beneficiaries to the contract. She may well be mistaken about this: courts in other states, including the state where Ms. Young is based, have found buyer's brokers to be third-party beneficiaries of buyer's broker clauses in listing agreements, and have enforced those clauses

[120] Div. Hearing Ex. 4 and 5 at ¶ 4B.

[121] *Id.* at ¶ 22A.

against the seller.[122] It is not necessary to resolve that issue here, however. What is important for this case is that Ms. Young entered into formal contracts with sellers in which the sellers either did, or might reasonably suppose that they did, legally obligate themselves to pay a specified fee to buyer's brokers who procure buyers. By committing her sellers to an important aspect of the terms under which they will sell their property, Ms. Young embroils herself in the transaction to a degree beyond that of a mere advertiser. She effectively "assist[s] in the negotiation" of the transaction.

As an aside, the very uncertainty about legal enforceability of this California buyer's broker clause shows why Alaska has a legitimate interest in regulating this relationship. Ms. Young has had her Alaska clients sign an elaborate legal agreement in which they commit to pay thousands of dollars to a potential third party. She now asserts that this promise is a nullity. It does not appear, however, that her clients have been so informed; nothing in her e-List.me website tells the sellers that they can ignore this commitment,[123] and the website is the only means by which she advises clients. Thus, if Ms. Young's legal assertions are to be taken at face value, there is the potential for her clients to be seriously misled into thinking they have a large, fixed financial obligation to buyer's brokers that in fact they do not have. The state whose consumers are at risk in this arrangement, and the state with a potential interest in regulating it through the licensing process, is Alaska.

For purposes of the cease and desist order, the net result is that Ms. Young has sufficiently entangled herself with the property sale itself that she is assisting with the transaction within the meaning of AS 08.88.161(8).

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[122] *See, e.g., Menasco v. Nagel,* 2009 WL 583584 (Cal. App. 2009) (in collateral aspect of case that was not on appeal, trial judge had allowed buyer's broker to enforce commission clause in listing agreement between seller and seller's broker); *Steve Schmidt & Co. v. Berry,* 228 Cal. Rptr. 689, 697 (Cal. App. 1986) (buyer's brokerage "has enforceable rights against [seller] under [a third-party beneficiary] theory . . . . It is not necessary that the contract identify the third party by name . . . . ");*cf. Earnest & Stewart, Inc. v. Codina*, 732 So.2d 364, 365 n.2 (Fla. App. 1999) (noting controversy over third party beneficiary status; resolving case on other grounds), *overruled on unrelated issue,* 932 So.2d 1067 (Fla. 2006).

In general, one is a third-party beneficiary with rights to enforce a contract if one is an "intended" rather than "incidental" beneficiary of the contract. Intent in this context is the intent of the signatories to the contract. The signatories do not have to have a particular person in mind as a beneficiary—enforcement rights go to anyone in the class of potential beneficiaries. *See generally Howell v. Ketchikan Pulp Co.,* 943 P.2d 1205, 1207 (Alaska 1997).

[123] Div. Hearing Ex. 10. The e-ListState website tells clients just the opposite: "If you accept an offer brought to you by a real estate agent, then you will need to pay a commission to the buyer's agent." Div. Ex. 9 at 11.

C. Constitutional Defenses

1. Free Speech

Ms. Young has contended that if Alaska's licensing statute were applied to her advertising on behalf of clients, it would violate her First Amendment freedom to engage in informational speech. Although some constitutional issues are reserved for the courts and are outside the scope of a proceeding such as this one, Ms. Young's as-applied constitutional argument is of a variety that may be evaluated at this level.[124] She relies on *ForSaleByOwner.com Corp. v. Zinnemann,*[125] a California case that turned on unsupportable discrimination in the application of that state's law between different kinds of advertisers, specifically discrimination between real estate websites and newspapers. The *Zinnemann* court observed that "California cannot make arbitrary distinctions based on the manner of speech or the media used for publication."[126]

As Alaska law has been interpreted and applied earlier in this decision, however, Ms. Young is to be treated the same as any other advertiser. The law has not been interpreted to prevent her from doing what newspapers and Craig's List do. It prevents her only from doing things they do not do, such as characterizing themselves as brokers for Alaska property. Accordingly, the *Zinnemann* decision has no application to this case in light of the holdings already reached.

Relatedly, insofar as Ms. Young's speech is commercial speech, it should be noted that there is no First Amendment protection for commercial speech that is misleading.[127] The advertising violation found above relates to speech in which Ms. Young held herself out, incorrectly, to be a "broker" and "agent" for real property in Alaska (Ms. Young's arguments that the use of these terms was factually accurate is addressed in Part IV-B-1 above).

With respect to the First Amendment issue, this case is most similar to a recent Vermont Supreme Court case, *Office of Professional Regulation v. McElroy.*[128] In that case, a broker not licensed in Vermont was taken to task by Vermont authorities for advertising Vermont real estate in a national publication in such a way that he was holding himself out to be "a broker engaged

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[124] *See, e.g., In re Holiday Alaska, Inc.,* OAH No. 08-0245-TOB (Commissioner of Commerce, Community & Economic Development, adopted Sept. 4, 2009), at 4-9.

[125] 347 F. Supp. 2d 868 (E.D. Cal. 2004).

[126] *Id.* at 877.

[127] *See, e.g., Wang v. Pataki,* 396 F. Supp. 2d 446, 456 (S.D.N.Y. 2005).

[128] 824 A.2d 567 (Vermont 2003).

in the business of real estate" in Vermont.[129] McElroy claimed that the authorities were unconstitutionally infringing his free speech rights. The Vermont court rejected the First Amendment defense out of hand, observing that the defendant "is not being restrained from publishing advertisements; he is being restrained from publishing misleading statements about his own status as a broker."[130]

2. Discriminatory Enforcement

Ms. Young contends that AS 08.88.161 and the associated regulations may not be enforced against her because they are being applied in a discriminatory manner. Her argument is that the Anchorage Daily News does what she believes to be the same thing that she does ("listing" property on a national real estate website for a fee), and the Division is not pursuing enforcement against the Daily News.

A discriminatory enforcement claim is a type of constitutional claim that agency decisionmakers can evaluate and rule upon.[131] Ms. Young has failed to establish the defense, however.

Selective enforcement of a statute violates the equal protection clauses of the Alaska and United States constitutions only if it is part of a deliberate and intentional plan to discriminate based on an arbitrary and unjustifiable classification.[132] To prevail on a selective enforcement defense, a defendant must establish

> first, that other persons similarly situated to the defendant and equally subject to prosecution were not proceeded against; second, that the defendant was singled out as a result of a conscious, deliberate, and purposeful decision; and, third, that the discriminatory selection of the defendant was based upon an arbitrary, invidious, or impermissible consideration.[133]

It is not enough to show that there was disparate treatment; the defendant must prove that the disparity was "motivated by some personal or extra-statutory end" and bears no rational relation to a legitimate state interest.[134]

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[129] *Id.* at 570.
[130] *Id.* at 571.
[131] See *In re Holiday Alaska, Inc., supra*, at 6-7.
[132] *Barber v. Municipality of Anchorage,* 776 P.2d 1035, 1040 (Alaska 1989).
[133] *Closson v. State,* 784 P.2d 661, 669-70 (Alaska App. 1989) (quoting criminal procedure texts and federal case law), *rev'd on other grounds,* 812 P.2d 966 (Alaska 1991).
[134] *Squaw Valley Dev. Co. v. Goldberg,* 375 F.3d 936, 944-5 (9th Cir. 2004), *overruled on other grounds,* 544 U.S. 528 (2005).

Ms. Young has not met any of these three elements. For the counts on which a violation has been found, she has not shown that the Daily News is "equally subject to prosecution;" earlier sections of this decision discuss how her conduct is different from that of an ordinary advertiser. She has not shown that she was "singled out as a result of a conscious, deliberate, and purposeful decision." Instead, the only evidence in the record indicates that the Division either has simply never given the matter much thought, or else that it did not think the Daily News had violated the statute because it did not think the Daily News had done the same things Ms. Young had done.[135] Further, Ms. Young has not shown the lack of prosecution against the Daily News to be motivated by a personal or extra-statutory end, with no rational relation to a legitimate state interest. Instead, the limited evidence she has relied on suggests that any disparity is rooted in a different factual understanding of what the Daily News actually does.

Because Ms. Young has not met its burden of proving the three elements of the defense of selective prosecution, she has not established that the civil prosecution in this case under AS 08.88.161 represents an unconstitutional administration of the statute by the Division of Corporations, Business and Professional Licensing.

3. Vagueness and Overbreadth

Ms. Young has attempted to articulate as-applied constitutional arguments based on the principles of vagueness and overbreadth.[136] To the extent that she has done so, her arguments apply only to the alleged violation of AS 08.88.161(2), the "listing" allegation. Since the listing provision has already been found inapplicable to what Ms. Young was doing, it is unnecessary to reach these constitutional arguments.

V. Conclusion

The sheer number of arguments raised by both sides in this case give it an appearance of complexity. At its core, however, the case is simple.

Ms. Young gets her clients onto a realtor-only database by, in essence, pretending to be their realtor. In nearly all respects she is not, in fact, their realtor: the references in the advertisement to her as "broker" and "agent" for the properties concerned are not accurate. But by assuming the mantle of a broker and agent in the advertising she places, Ms. Young violates the Alaska prohibition on holding herself out to be in the business of doing activities requiring an

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[135] REC 061 (analysis of Division's expert). This is the only evidence Ms. Young has cited on this issue.
[136] Memorandum of Points and Authorities Supporting Motion to Dismiss at 23-24; Reply to Division's Opposition to Motion to Dismiss at 14-15.

Alaska license when she does not in fact hold one. Because of the way Realtor.com and other similar websites operate, there does not appear to be a way around this problem. It seems unlikely that she can pursue her business model with respect to Alaska properties without becoming licensed here.

Ms. Young has also strayed in one respect into the actual practice of real estate in this state, by including a buyer's broker fee provision in her contracts that purports to bind sellers as to a term of the ultimate transaction. This practice is less central to her business model, and she could likely solve the problem by deleting the offending clause from her contracts.

Finally, by accepting a fee for work that involves both "holding out" and the actual practice of real estate, Ms. Young violates a third provision of Alaska law.

The temporary cease and desist order issued April 8, 2009 should be sustained and made permanent, with modifications to reflect the specific violations found and to correct a citation error in the temporary order.

VI. Final Cease and Desist Order

The temporary cease and desist order issued in Case No. 3001-09-001 on April 8, 2009 is modified and made permanent as set forth below.

Based upon evidence presented at a hearing, Leslie Rae Young is determined to have violated AS 08.88.161(8), (9), and (10).

Pursuant to AS 08.88.037(b)(1) and AS 08.01.087(b)(1), Leslie Rae Young is ordered to cease and desist from performing activities requiring a license under AS 08.88.161 unless she first becomes a real estate licensee in the State of Alaska.

If Leslie Rae Young fails to comply with this order, the Alaska Department of Commerce, Community and Economic Development may seek an injunction in Superior Court to enforce this cease and desist order pursuant to AS 08.88.037(b)(2) and AS 08.01.087(b)(2). Pursuant to AS 08.88.401(g), violation of AS 08.88.161 may be prosecuted as a class A misdemeanor.

Dated this 24th day of June, 2010.

*Signed*____________________________
Christopher Kennedy
Administrative Law Judge

Adoption

The Commissioner of Commerce, Community & Economic Development or his delegee adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 11th day of August, 2010.

By: *Signed*
Signature
Susan K. Bell
Name
Commissioner, DCCED
Title

[This document has been modified to conform to technical standards for publication.]