

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA ex rel.
STATE REAL ESTATE COMMISSION
OF THE STATE OF NEBRASKA,

Plaintiff,

v.

CARL OSWALD WUESTEHUBE, an
individual, and TRI-STAR REALTY, INC.,
a California Corporation,

Defendants.

Case No. CI 11-3714

ORDER

This matter came on for hearing on March 20, 2013, upon Plaintiff's motion for summary judgment. Gregory D. Barton and Kelly Ekeler appeared on behalf of Plaintiff State of Nebraska ex rel. State Real Estate Commission of the State of Nebraska ("Commission"). Defendant Carl Oswald Wuestehube ("Wuestehube") appeared pro se by telephone. Evidence was adduced and argument was heard. The court took judicial notice of the pleadings and the court's prior orders. The court received Plaintiff's Exhibits 1, 4, 5, 6, and 7, subject to Wuestehube's objections of hearsay and relevance, which the court took under advisement. The court now finds that Wuestehube's objections should be, and hereby are, overruled. The court also received Exhibit 3 (Wuestehube's affidavit) subject to Plaintiff's objections to Paragraphs 8, 9, 10, 11, 12, 13, and 14. Plaintiff's objections are hereby overruled. Exhibits 1, 3, 4, 5, 6, and 7 are received in their entirety. Being duly advised in the premises, having reviewed the court file, exhibits, and considered briefs of the parties, the court now finds and orders as follows.

FACTS

In his Response to Plaintiff's Motion for Summary Judgment, filed on March 12, 2013, Wuestehube contends that many of the material facts contained within the Commission's brief in support of its motion for summary judgment are "in dispute." (Def. Response, p.4-5). Wuestehube does not, however, explain why such facts are in dispute or cite any supporting documents or evidence establishing such dispute. See Rules of Dist. Ct. of Third Jud. Dist. 6(B) (1995) ("The party opposing a motion for summary judgment shall set forth in its opposing brief a separate statement of each material fact as to which it is contended there exists a

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genuine issue to be tried and as to each shall identify the specific documents or discovery response or deposition testimony (by page and line) which it is claimed established the fact.”). In actuality, the evidence and argument indicates Wuestehube does not dispute the events which transpired between himself and the Commission, but rather he disputes the legal significance of those events. Bearing this in mind the court, after reviewing the pleadings and evidence, finds that the following facts are not in dispute:

At all times relevant, the Commission was and is a Nebraska state agency, charged by the Nebraska Legislature with enforcing the Nebraska Real Estate License Act, NEB. REV. STAT. §§ 81-885 to 81-885.55 (Reissue 2008 & Cum. Supp. 2012), which includes the prevention of unlicensed real estate brokerage activities in Nebraska, and granting and denying applications for Nebraska real estate licenses.

At all times relevant, Wuestehube was the sole owner of and the designated broker for Tri-Star Realty, Inc. (“Tri-Star”), a California corporation conducting real estate business. At all times relevant, Wuestehube was and is the holder of a California real estate broker’s license and is licensed in several other states, including Alaska, Arizona, Colorado, Florida, Iowa, Idaho, Nevada, South Dakota, Wisconsin, and Wyoming. Wuestehube never has held a Nebraska real estate broker’s license.

Wuestehube owns and operates the Internet website <http://showcasebyseller.com>. On this website, Wuestehube offers services to help homeowners advertise their own properties on a “for-sale-by-owner” basis on third-party websites. Wuestehube does not post advertisements for properties on the showcasebyseller.com website.

Wuestehube also owns and operates the Internet website <http://www.mlshomelisters.com>. On this website, Wuestehube offers listing services to homeowners who wish to list their homes with him on a flat-fee basis. These flat fee listing services are offered only to homeowners in the states in which Wuestehube holds a valid real estate broker’s license.

Wuestehube enlisted the services of Mr. Fred Romano to help him design his two websites—showcasebyseller.com and [mlshomelisters.com](http://www.mlshomelisters.com). Wuestehube acknowledged the assistance for website design provided by Mr. Fred Romano on his two websites. Mr. Fred Romano, a licensed real estate broker in the State of Connecticut, owns and operates the website <http://flatfeerealty.com>. Wuestehube does not own or operate flatfeerealty.com and has no control over the features of this website.

Wuestehube does not own or operate the Internet website <http://www.realtor.com> (“Realtor.com”) and does not have control over the features of this website. The website [Realtor.com](http://www.realtor.com) is the official website of the National Association of Realtors and is owned and operated by Move, Inc.

In August of 2009, the Commission’s Director, Greg Lemon, became aware Wuestehube

was listed as the broker for the sale of a number of Nebraska properties on the website Realtor.com. On or about November 4, 2009, the Director sent a Cease and Desist Order ("CD 2009-004") by Federal Express to Wuestehube at two different addresses: "24843 Del Prado #177" and "33832 Diana Drive," both in Dana Point, California. (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 28:20-32:25; E10]).¹ The Cease and Desist Order, CD 2009-004, was delivered by Federal Express to Wuestehube on November 6, 2009. In CD 2009-004, the Director demanded that Wuestehube immediately cease and desist all conduct that required a real estate broker's license in the State of Nebraska, including advertising Nebraska property for sale and negotiating listing agreements with owners of Nebraska real estate. The Cease and Desist Order specifically referred to Wuestehube's listings of Nebraska property on Realtor.com, and the Director enclosed print-outs of Wuestehube's Nebraska listings with CD 2009-004. (*Id.*)

After Wuestehube was served with CD 2009-004, advertisements for the sale of a number of Nebraska properties on the website Realtor.com continued to appear as being "presented" and "brokered" by Wuestehube and Tri-Star. (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 38:1-41:15; E7; E13]).

On or about December 2, 2010, the Commission received Wuestehube's Application for License as a Real Estate Broker ("Application"). (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 41:16-45:19; E14, Subpart A]). On April 11, 2011, the Commission Director sent Wuestehube a letter by certified mail, notifying Wuestehube his Application for a license was denied based upon NEB. REV. STAT. § 81-885.12(3) and because the Commission had issued a standing Cease and Desist Order to Wuestehube and subsequent periodic checks of the Internet consistently showed Wuestehube listed as the broker for Nebraska properties for sale. (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 73:22-78:13; E17]). In this letter, the Director further advised Wuestehube of his right to request a formal hearing before the Commission. (*Id.*)

Wuestehube confirmed his receipt of the Director's letter of April 11, 2011, and he requested a hearing before the Commission on the issue of the denial of his request for licensure in an e-mail he sent to the Director on April 15, 2011. (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 73:22-78:13; E18]).

The Director's letter of April 11, 2011, also included copies of an Affidavit and Application for Order to Show Cause dated April 7, 2011, as well as an Order to Show Cause dated April 8, 2011. (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 73:22-78:13; E17]). On April 7, 2011, the Director filed with the Commission an Affidavit and

¹ The record of the show cause hearing, including all of the exhibits received at the hearing, in *State of Nebraska ex rel. State Real Estate Commission of the State of Nebraska v. Wuestehube*, Case No. SC 2011-001, is contained in two volumes attached as Exhibit A to the Affidavit of Greg Lemon, Exhibit 4. Citations to the record shall appear as "SC 2011-001 Transcript" followed by the corresponding page and line number and/or exhibit number.

Application for Order to Show Cause as to why Wuestehube should not be subject to sanctions for failing to abide by the terms of CD 2009-004. (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 55:8-57:25; E1; E2]). On April 8, 2011, the Commission Chairperson, John Gale, issued an Order to Show Cause directing Wuestehube to appear before the Commission on May 19, 2011, to show cause as to why he should not be subject to sanctions for failing to abide by the provisions of CD 2009-004. (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 56:12-57:25; E3]).

In confirming his receipt of the Director's letter of April 11, 2011, Wuestehube also confirmed receipt of the Affidavit, Application for Order to Show Cause, and the Order to Show Cause. (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 73:22-78:13; E17; E18]). Hearing on both the Order to Show Cause and the denial of Wuestehube's Application for a Nebraska real estate license were set for May 19, 2011.

At the show cause hearing held before the Commission on May 19, 2011, Wuestehube appeared via telephone conference call and raised objections to the Commission's exercise of jurisdiction over himself and Tri-Star. (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 5:16-19, 6:7-9, 12:17-19]). The Chairperson explained to Wuestehube the procedures to be followed during the hearing, including the order of presentation of evidence, and confirmed that Wuestehube understood he had a right to have counsel represent him in the case and that Wuestehube knowingly chose to proceed without representation. Each party then presented an opening statement and the Commission commenced the presentation of its evidence. (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 3:4-14:6]). During a discussion between the Chairperson and Wuestehube regarding the Commission's offer of an exhibit, Wuestehube stated that he was "going to terminate the hearing, as it seems to be biased," and disconnected himself from the telephone conference. (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 31:1-34:22]). Thereafter, the Commission completed the presentation of its evidence and rested. Counsel for the Commission then presented an oral closing argument and the matter was submitted to the Commission. (*Id.*)

After the conclusion of the Order to Show Cause hearing, a Petition for Review Hearing on the denial of Wuestehube's Application for a license was held, also on May 19, 2011. (Ex. 4, Aff. of Lemon, ¶ 5 and Ex. B [P 2011-001 Transcript]).² The Commission contacted Wuestehube via telephone and explained that, "[e]ven though you hung up and didn't wish to participate in the last hearing, we need to give you the opportunity to participate in this hearing with regard to the—your Petition for Review of the denial of your license . . ." (Ex. 4, Aff. of Lemon, ¶ 5 and Ex. B [P 2011-001 Transcript, 1:20-25]). Wuestehube agreed to make a short statement during which he withdrew his application for licensing. (Ex. 4, Aff. of Lemon, ¶ 5 and Ex. B [P 2011-001 Transcript 4:13-5:17, 7:2-4]). The Commission treated Wuestehube's withdrawal of his

² The record of the petition for review hearing in *In the Matter of Carl Oswald Wuestehube*, Case No. P 2011-001, is contained in Exhibit B attached to the Affidavit of Greg Lemon, Exhibit 4. Citations to the record shall appear as "P 2011-001 Transcript" followed by the corresponding page and line number.

Application as a withdrawal of his petition for review and dismissed the petition for review. (Ex. 4, Aff. of Lemon, ¶5 and Ex. B [P 2011-001 Transcript, 8:3-18]).

On May 24, 2011, the Commission entered its Final Order in Case No. SC 2011-001, finding:

- (a). Respondent Carl Oswald Wuestehube has not shown cause as to why he should not be subject to sanctions for failing to abide by the provisions of the Commission's Cease and Desist Order, CD2009-004, dated November 4, 2009, and properly served upon Wuestehube by Federal Express delivery on November 6, 2009, because Wuestehube did knowingly and repeatedly violate the provisions of such Commission Cease and Desist Order by listing Nebraska real estate for sale on the website Realtor.com, without having obtained a Nebraska real estate license, on March 3, 2010, March 9, 2010, April 29, 2010, July 7, 2010, August 30, 2010, January 4, 2011, January 6, 2011, January 19, 2011 and May 18, 2011.
- (b). As to the five (5) separate dates upon which Wuestehube continued to list Nebraska real estate for sale on the website Realtor.com, without having obtained a Nebraska real estate license (August 30, 2010, January 4, 2011, January 6, 2011, January 19, 2011, and May 18, 2011), after the statutory amendments to NEB. REV. STAT. § 81-885.03 of the Act became effective on July 15, 2010, Wuestehube should be fined in the amount of \$1,000.00 per such date, for a total fine in the amount of \$5,000.00, pursuant to NEB. REV. STAT. § 81-885.03 (Cum. Supp. 2010) (if "the commission makes a finding of guilt, the commission may impose a fine not to exceed (a) one thousand dollars for each day that any action is performed without the appropriate license following the issuance of the [cease and desist] order").

(Ex. 1, Aff. of Lemon, ¶4, Ex. A).

Also on May 24, 2011, the Commission entered its Final Order in Case No. P 2011-001, finding that the Petition for Review filed by Wuestehube should be dismissed based on Wuestehube's statement at the May 19, 2011 hearing that he was withdrawing his Application for a license. In light of Wuestehube's withdrawal of his Application, the Commission Chairperson determined the issues raised by Wuestehube's Petition for Review had been rendered moot. (Ex. 4, Aff. of Lemon, ¶¶ 5 and 9, and Ex. B [P 2011-01 Transcript, 5:5-8:18]; Ex. 6, Supp. Aff. of Barton, ¶2 and Ex. A).

Wuestehube was personally served with copies of the Commission's Final Orders in Case No. SC 2011-001 and Case No. P 2011-001 on June 22, 2011. (Ex. 1, Aff. of Lemon, ¶5 and Ex. B; Ex. 6, Supp. Aff. of Barton, ¶2 and Ex. B). There is no evidence that Wuestehube ever

perfected an appeal from the Final Orders of the Commission in Case No. SC 2011-001 and Case No. P 2011-001.

The Commission filed the instant Complaint for Injunctive and Monetary Relief and Praecipe on or about September 1, 2011. Defendants Wuestehube and Tri-Star were served with Summons and a copy of the Commission's Complaint by special process server on October 31, 2011. Wuestehube was given leave to file a responsive pleading out of time and subsequently filed an Answer on July 23, 2012. In his Answer, Wuestehube sought dismissal of this case based on lack of personal jurisdiction and, without waiving his objection to lack of personal jurisdiction, denied the allegations in the Complaint and asserted two counterclaims: (1) NEB. REV. STAT. § 81-885.03 violates his federal constitutional rights, and (2) the Commission violates United States antitrust laws by enforcing rules that unreasonably restrain competition.

On December 21, 2012 the Commission filed the present motion for summary judgment, seeking judgment as a matter of law in favor of the Plaintiff and against the Defendant on all asserted claims. Thereafter, on February 26, 2013, the Commission filed a motion for leave to file a Reply to Defendants' counterclaims. Hearing on both motions was held March 20, 2013. The court granted the Commission leave to file a reply to Defendants' counterclaims. The Commission filed its Reply instanter, denying the allegations of Defendants' counterclaims and affirmatively asserting that Defendants' counterclaims failed to state a claim for relief and were barred by the doctrines of res judicata, waiver, and/or collateral estoppel. Based on the pleadings as they existed at the time the Motion for Summary Judgment was heard, argued and submitted, as well as the briefing of the parties, it is clear the Commission seeks summary judgment not only on the claims asserted in its Complaint, but also on Defendants' counterclaims.

STANDARD OF REVIEW

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose there is no genuine issue as to any material fact or the ultimate interferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Copple Const., L.L.C. v. Columbia Nat. Ins. Co.*, 279 Neb. 60, 63 (2009); *Rickerl v. Farmers Ins. Exch.*, 277 Neb. 446, 449 (2009).

A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to judgment in its favor if the evidence were uncontroverted at trial. *Corona de Camargo v. Schon*, 278 Neb. 1045, 1056-57 (2009) (citing *Kline v. Farmers Ins. Exch.*, 277 Neb. 874 (2009)). After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.*

In reviewing a motion for summary judgment, the court views the evidence in the light

most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence. *County of Hitchcock v. Barger*, 275 Neb. 872, 875, 750 N.W.2d 357, 360 (2008).

ANALYSIS

The Commission argues it is entitled to summary judgment because there is no dispute that the Commission acted within its scope of authority under the Nebraska Real Estate Act (the "Act"), NEB. REV. STAT. §§ 81-885 to 81-885.55 (Reissue 2008 & Cum. Supp. 2012), when it entered its Order finding Wuestehube violated the Act and imposed a \$5,000.00 fine against him. Accordingly, the Commission seeks entry of judgment in its favor for the amount of the fine plus attorney's fees, costs, and interest, as well as a permanent injunction enjoining Wuestehube and Tri-Star from engaging in unlicensed real estate brokerage activities in Nebraska. The Commission also argues that it is entitled to dismissal of Defendants' counterclaims as a matter of law based on the doctrines of res judicata, waiver, and/or collateral estoppel. Wuestehube claims summary judgment is inappropriate because the Commission has failed to establish it properly exercised personal jurisdiction over Defendants. Wuestehube also argues that questions of fact exist as to whether he violated the Act, and with respect to his constitutional challenges to the Act.

I. Authority of Commission to Enter Final Order Imposing a Civil Fine

The Act grants the Commission authority to "impose sanctions . . . for the protection of the public health, safety, or welfare[.] . . . issue cease and desist orders to violators of section 81-885.03[.] . . . [and] impose a civil fine on violators of section 81-885.03 subject to the limits in such section." NEB. REV. STAT. § 81-885.10 (Cum. Supp. 2012). The enforcement provision of the Act, section 81-885.03, provides:

(1) Any person who, directly or indirectly for another, with the intention or upon the promise of receiving any form of compensation or consideration, offers, attempts, or agrees to perform or performs any single act described in subdivision (2) of section 81-885.01, whether as a part of a transaction, or as an entire transaction, shall be deemed a broker, associate broker, or salesperson within the meaning of the Nebraska Real Estate License Act, and such action shall constitute sufficient contact with the state for the exercise of personal jurisdiction over such person in any action arising out of such action. Committing a single act described in such subdivision by a person required to be licensed under the Nebraska Real Estate License Act and not so licensed shall constitute a violation of the act for which the commission may impose sanctions pursuant to this section for the protection of the public health, safety, or welfare.

(2) Notwithstanding any other provision of the law to the contrary, the director may issue a cease and desist order against any person who violates this section by

performing any action described in subsection (1) of this section without the appropriate license. Such order shall be final ten days after issuance unless the violator requests a hearing pursuant to section 81-885.25.

(3) If such person violates a cease and desist order issued pursuant to this section, he or she shall be subject to further proceedings before the commission. If, during such proceedings, the commission makes a finding of guilt, the commission may impose a fine not to exceed (a) one thousand dollars for each day that any action is performed without the appropriate license following the issuance of the order or (b) the amount of all money earned as commission by the violator, whichever is greater. Judgments for the collection of any fine imposed under this section may be filed in the district court of any county in this state.

(4) Notice and hearing requirements under this section shall be in accordance with the Administrative Procedure Act.

NEB. REV. STAT. § 81-885.03. The provisions deeming a single act as a broker as sufficient activity for the State of Nebraska to exercise personal jurisdiction and enhancing the Commission's enforcement authority by authorizing fines became effective on July 15, 2010. See 101st Leg., 2d Sess., LB 691, § 1 (Neb. 2010) (amending NEB. REV. STAT. § 81-885.03).

Under section 81-885.03, any person who performs an act of a real estate "broker" (as that term is defined in section 81-885.01(2)) without a license is subject to sanctions. A "broker" is defined as follows:

Broker means any person who, for any form of compensation or consideration or with the intent or expectation of receiving the same from another, negotiates or attempts to negotiate the listing, sale, purchase, exchange, rent, lease, or option for any real estate or improvements thereon, or assists in procuring prospects or holds himself or herself out as a referral agent for the purpose of securing prospects for the listing, sale, purchase, exchange, renting, leasing, or optioning of any real estate or collects rents or attempts to collect rents, gives a broker's price opinion or comparative market analysis, or holds himself or herself out as engaged in any of the foregoing. Broker also includes any person: (a) Employed, by or on behalf of the owner or owners of lots or other parcels of real estate, for any form of compensation or consideration to sell such real estate or any part thereof in lots or parcels or make other disposition thereof; (b) who auctions, offers, attempts, or agrees to auction real estate; or (c) who buys or offers to buy or sell or otherwise deals in options to buy real estate.

NEB. REV. STAT. § 81-885.01(2).

Under this authority, the Commission Director issued CD 2009-004, informing

Wuestehube the Commission considered his activities to constitute acting as an unlicensed "broker" under the Act, and directing Wuestehube to immediately cease and desist from engaging in such activities. As provided in section 81-885.03(2), Wuestehube had ten days after its issuance to challenge the Cease and Desist Order, but there is no evidence he did so. The undisputed evidence establishes that advertisements for Nebraska properties continued to appear on Realtor.com after the issuance of CD 2009-004 listed as being "presented" or "brokered" by Wuestehube and Tri-Star. Based on such evidence, the Commission concluded Wuestehube had violated the Cease and Desist Order by continuing to engage in "broker" activities in the State of Nebraska without being licensed under the Act, and entered its Order to that effect and imposed a fine pursuant to section 81-885.03.

The Nebraska Legislature has given the Commission the power to determine whether someone is acting as a "broker," as that term is defined by NEB. REV. STAT. § 81-885.01(2), and to enforce the Act's regulatory framework by imposing fines upon violators of the Act. See NEB. REV. STAT. §§ 81-885.02, 81-885.03, 81-885.10, and 81-885.24. The Commission's finding that Wuestehube's online real estate brokerage activities for Nebraska properties required a Nebraska broker's license is supported by the statutory language of the Act as well as case law from other jurisdictions. See *Gruwell v. Illinois Dep't of Fin. & Prof'l Reg.*, 943 N.E.2d 658 (Ill. App. Ct. 2010) (unlicensed seller of online "for-sale-by-owner" advertisements engaged in real estate brokerage activities when she used language resembling that of licensed brokers and held herself out as listing homes for sale). The Commission asserts that its May 24, 2011 Order is enforceable as a matter of law because the Commission acted within its authority under the Act, the Order is a final order, and the Act expressly provides that the Commission may enforce its judgment and collect the fine it imposed against Wuestehube through the present action in this court. See NEB. REV. STAT. § 81-885.03(3).

Wuestehube challenges the Commission's conclusion that he engaged in "broker" activities in the State of Nebraska, alleging the evidence fails to establish he violated the Act. Wuestehube also challenges the Commission's Order on the basis of lack of personal jurisdiction, the unconstitutionality of NEB. REV. STAT. § 81-885.03, and alleged federal antitrust law violations. The Commission argues, however, that Wuestehube's challenges constitute an impermissible collateral attack and are barred based on the doctrine of res judicata and/or collateral estoppel.

II. Impermissible Collateral Attack

The undisputed evidence shows Wuestehube did not file an appeal of the Commission's Order in Case No. SC 2011-001. It is a well-established principal of Nebraska law that the right of appeal is statutory, and unless the statute provides for appeal from the decision of a quasi-judicial tribunal, such right does not exist. *Gage County Bd. of Equalization v. Nebraska Tax Equalization and Rev. Comm'n*, 260 Neb. 750, 751-52 (2000). The Act provides an opportunity to request a hearing on a cease and desist order issued by the Director within ten days of being served with the order. NEB. REV. STAT. § 81-885.03(2). Further, NEB. REV. STAT. § 81-885.30

of the Act provides that “[a]n order of the commission which has become final may be appealed, and the appeal shall be in accordance with the Administrative Procedure Act.” Thus, if a violator is dissatisfied with the Commission’s determination following an evidentiary hearing, the violator is entitled to “judicial review under the Administrative Procedure Act” and may have the Commission’s decision reviewed by a state district court. NEB. REV. STAT. § 84-917(1), (2)(a).

The Nebraska Supreme Court has recognized that “[a]n unreviewed administrative hearing can preclude later litigation of the same issues.” *Scott v. Mattingly*, 241 Neb. 276, 281 (1992). Specifically, “[j]udgments rendered by administrative agencies acting in a quasi-judicial capacity are not subject to collateral attack if the agency had jurisdiction over the parties and the subject matter.” *Neb. Pub. Power Dist. v. Department of Natural Res.*, 268 Neb. 620, 624 (2004) (emphasis added). See also *Neb. Pub. Advocate v. Nebraska Pub. Serv. Comm’n*, 279 Neb. 543, 548 (2010) (“When the court has jurisdiction over the person and subject matter, a party to the proceeding will be bound by the judgment in the case when collaterally attacking it, even though the judgment was irregularly or erroneously entered.”).

As the law indicates, Wuestehube’s counterclaims and challenges to the Commission’s Order would be barred as impermissible collateral attacks as long as the Commission properly exercised personal jurisdiction over Wuestehube. In his Answer, Wuestehube alleges the court lacks personal jurisdiction over Defendants, and his constitutional challenges to NEB. REV. STAT. § 81-885.03 are also premised on the assertion that the statute violates the constitutional limits imposed on the extension of personal jurisdiction. Wuestehube’s Response to Plaintiff’s Motion for Summary Judgment argues extensively that the Commission lacked personal jurisdiction over him. Wuestehube has raised the personal jurisdiction issue here and is permitted under the law to challenge the Commission’s final Order on that basis. See *Johnson v. Johnson*, 282 Neb. 42, 45 (2011) (“[A] judgment entered without personal jurisdiction is void. . . . and a void judgment may be attacked at any time in any proceeding.”).

Thus, the issue becomes whether the Commission had personal jurisdiction over Wuestehube for purposes of the Order to Show Cause hearing in order to enforce the provisions of NEB. REV. STAT. § 81-885.03 against him.

III. Personal Jurisdiction

The Commission first argues that Wuestehube waived any defense of lack of personal jurisdiction and submitted to the Commission’s jurisdiction in Case No. SC 2011-011 by: applying to the Commission for a Nebraska real estate broker’s license; invoking the right under the Act to an evidentiary hearing to review the Commission Director’s denial of his Application for a non-resident broker’s license; and by voluntarily appearing before the Commission in Case No. SC 2011-001 and raising issues unrelated to the issue of the Commission’s personal jurisdiction.

Regarding Wuestehube’s Application for a Nebraska real estate license, the Commission

cites to a form included with the Application, signed by Wuestehube, entitled "Acknowledgement of Personal Jurisdiction." (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 41:19-23, 45:13-19, E14(E)]). This form, however, was not received by the Commission at the May 19, 2011 hearing. (*Id.*) Also, the form explicitly states that only "by obtaining a nonresident real estate license" is sufficient contact with the State established for the exercise of personal jurisdiction. (*Id.*) It is undisputed Wuestehube was denied a Nebraska real estate license. Wuestehube did request a hearing on the denial of his Application, but the petition for review of the denial of his Application was treated as a separate matter from the Order to Show Cause hearing. The fact that Wuestehube submitted himself to the jurisdiction of the Commission for purposes of his license Application does not necessarily mean he waived his right to object to the Commission's exercise of jurisdiction over him with respect to the Order to Show Cause. Thus, the court finds no waiver of personal jurisdiction based on Wuestehube's Application for a license for the purposes of the order to show cause proceedings in Case No. SC 2011-001.

The Commission asserts the evidence is undisputed that Wuestehube appeared in Case No. SC 2011-001 without filing a special appearance and asserted claims unrelated to the Commission's exercise of personal jurisdiction over him. See *Quality Pork Int'l v. Rupari Food Servs.*, 267 Neb. 474, 479 (2004) ("Before filing any other pleading or motion, one may file a special appearance for the sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the objector."); see also *Young v. Heineman*, 2012 U.S. Dist. LEXIS 44502, 22 (D. Neb. Mar. 30, 2012) (unreported) ("[A] nonresident defendant is free to challenge jurisdiction by entering a special appearance. . . . Nothing precludes the entry of a special appearance at the administrative level."). The Commission contends that Wuestehube challenged the Commission's authority to impose a civil fine, alleged impropriety on the part of a Commission member also serving as president of a real estate association, and challenged the Commission's authority to regulate purported "for-sale-by-owner" transactions.

As this is a motion for summary judgment, the court views the evidence in the light most favorable to Wuestehube. The record clearly shows Wuestehube objected to the Commission's exercise of jurisdiction over him and maintained he was "not under [the] jurisdiction of Nebraska." (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 5:16-19, 6:7-9, 12:17-19]). Based on this evidence, the court finds there is a factual dispute about whether Wuestehube's objections to the Commission's exercise of jurisdiction amounted to a special appearance. This factual dispute is immaterial, however, because even if Wuestehube properly objected to the Commission's jurisdiction over him, the Commission had personal jurisdiction over Wuestehube.

Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *S.L. v. Steven L.*, 274 Neb. 646, 742 N.W.2d 734 (2007). Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state such that the exercise of personal

jurisdiction would not offend due process. *Brunkhardt v. Mountain West Farm Bureau Mut. Ins. Co.*, 269 Neb. 222, 225 (2005).

A. Long-Arm Statute

Nebraska's long-arm statute, NEB. REV. STAT. § 25-536 (Reissue 2008), provides: "A court may exercise personal jurisdiction over a person . . . [w]ho has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States." By this, the Legislature intended to extend Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits. *Abdouch v. Lopez*, 285 Neb. 718, 725 (2013). "[W]hen a state construes its long-arm statute to confer jurisdiction to the fullest extent permitted by the due process clause, . . . the inquiry collapses into the single question of whether exercise of personal jurisdiction comports with due process." *Id.* (quoting *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 818 (8th Cir. 1994)). Therefore, the issue is whether Wuestehube had sufficient contacts with Nebraska so that the Commission's exercise of personal jurisdiction would not offend federal principles of due process.

B. Minimum Contacts

In order to exercise personal jurisdiction over a nonresident defendant, due process requires the defendant to have minimum contacts with the forum "so as not to offend traditional notions of fair play and substantial justice." *Erickson v. U-Haul Int'l, Inc.*, 274 Neb. 236, 248 (2007). The benchmark of this analysis is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably have anticipated being haled into court there. *Id.* The forum court must look at the quality and type of the defendant's activities and determine whether he purposefully availed himself of the privilege of conducting activity within the state, thereby invoking the benefits and protections of its laws. *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 512 (2003). "This requirement ensures that a defendant will not be subject to litigation in a jurisdiction solely due to random, fortuitous, or attenuated contacts." *Id.*

Due process, however, does not require a defendant's physical presence in the forum before personal jurisdiction is exercised. *Quill Corp. v. North Dakota*, 504 U.S. 298, 308 (1992); *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 329 (1998). Also, the existence of a contract with a party in a forum state or the mere use of interstate facilities, such as telephones and mail, does not, in and of itself, provide the necessary contacts for personal jurisdiction. *Crete Carrier Corp.*, 254 Neb. at 329-30. This does not mean, though, that the existence of a contract and the use of interstate communications may not be considered in the overall analysis. *Kugler Co.*, 265 Neb. at 512. Courts will also consider the prior negotiations between the parties and contemplated consequences. *Id.* "Further, if a substantial connection is created, even a single contact can support jurisdiction." *Id.* at 512-13. "Parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities."

McGowan Grain v. Sanburg, 225 Neb. 129, 138 (1987) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)).

A court may exercise two types of personal jurisdiction depending on the facts and circumstances of the case: general personal jurisdiction and specific personal jurisdiction. *Erickson*, 274 Neb. at 249. To exercise general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state if the defendant has engaged in "continuous and systematic general business contacts" with the forum state. *Id.* (quoting *Brunkhardt*, 269 Neb. at 226). When the defendant's contacts are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert specific jurisdiction over the defendant, depending on the quality and nature of such contact. *S.L. v. Steven L.*, 274 Neb. at 652. The Commission argues that the undisputed evidence establishes that it possessed both general and specific personal jurisdiction over Defendants.

(a) General Jurisdiction

The Commission argues that Wuestehube's contacts with the State of Nebraska are such that the Commission properly could exert general jurisdiction over Wuestehube. In support of this argument, the Commission cites to the Realtor.com advertisements listing Wuestehube and Tri-Star as the broker for Nebraska properties as evidence that Wuestehube continuously conducted real estate activities in Nebraska since August 2009. The Commission also points out that Wuestehube solicits business through his Internet website and offers to contract with Nebraska real property owners for the listing of real estate located in Nebraska. The court finds these facts do not, as a matter of law, qualify as continuous and systematic or substantial for purposes of asserting general personal jurisdiction over Wuestehube. These same facts are also cited by the Commission as the basis for its assertion of specific personal jurisdiction, and the court will now focus its analysis there.

(b) Specific Jurisdiction

Determination of whether specific jurisdiction exists requires a court to engage in the following analysis:

"(1) The nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable."

Robinson v. NABCO, Inc., 10 Neb. App. 968, 976 (2002) (quoting *Higgins v. Rausch Herefords*,

9 Neb. App. 212, 220 (2000)).

“Purposeful availment” means the defendant’s connection with the forum state must be deliberate and substantial, involving significant activities or continuing obligations. *Higgins v. Rausch Herefords*, 9 Neb. App. at 220. A single act of availment can, in some circumstances, suffice to establish specific personal jurisdiction over a nonresident defendant. *Burger King v. Rudzewicz*, 471 U.S. 462, 476 n.18 (1985) (holding even a “single act” by the defendant can support jurisdiction, but only if that act creates a “substantial connection” with the forum). Other Nebraska statutes utilize similar “single-act” jurisdictional language like that in section 81-885.03. See, e.g., NEB. REV. STAT. § 44-2004 (“[a]ny act of transacting an insurance business”). Several other states base violations of licensing statutes and premise personal jurisdiction on “single acts” performed without a license. See, e.g., IDAHO CODE ANN. § 54-2002; 225 ILL. COMP. STAT. §§ 407/20-10, 454/20-15.

Very recently, the Nebraska Supreme Court addressed the issue of the “Internet and its interaction with personal jurisdiction over a nonresident” as an issue of first impression in the case of *Abdouch v. Lopez*, 285 Neb. 718, 726 (2013). The Court noted “technological advances do not render impotent our longstanding principles on personal jurisdiction.” *Id.* at 726–27. With this in mind, the Court recognized the “sliding scale” analytical framework set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), for internet jurisdiction cases “as a starting point.” *Abdouch*, 285 Neb. at 728. The “sliding scale” test “considers a Web site’s interactivity and the nature of the commercial activities conducted over the Internet to determine whether the courts have personal jurisdiction over nonresident defendants.” *Id.*

“At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. . . . At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. . . . The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”

Id. (quoting *Zippo Mfg. Co.*, 952 F. Supp. at 1124).

The *Abdouch* Court was mindful that the *Zippo Mfg. Co.* sliding scale test “does not amount to a separate framework for analyzing internet-based jurisdiction”; instead, “traditional statutory and constitutional principles remain the touchstone of the inquiry.” *Id.* at 728–29.

(quoting *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 252 (2d Cir. 2007)). The Court advised caution “in resolving questions about personal jurisdiction involving online contacts to ensure that a defendant is not haled into court simply because the defendant owns or operates a website that is accessible in the forum state, even if that site is “interactive.”” *Id.* at 729 (quoting *be2 LLC v. Ivanov*, 642 F.3d 555, 558 (7th Cir. 2011)). The Court emphasized its precedent “that for there to be specific personal jurisdiction, the cause of action must arise out of or be related to the defendant’s contacts with the forum state.” *Id.*

Utilizing the foregoing standard, the *Abdouch* Court considered whether specific personal jurisdiction existed over the defendant owner of a rare book business based in Massachusetts, who had used the plaintiff’s name in an advertisement on his website of a rare book that had been stolen from the plaintiff. After learning of the advertisement, the plaintiff filed suit against the defendant for violating her right of privacy. The defendant filed a motion to dismiss for lack of personal jurisdiction, which the trial court granted. The Nebraska Supreme Court affirmed and reasoned:

[I]t is evident that the Web site is interactive under the *Zippo Mfg. Co.* sliding scale test. In his affidavit, Lopez admits that customers can browse and purchase books from the online inventory. Lopez admits that he has two customers in Nebraska who are on the mailing list for KLB’s catalogs. He admits that from 2009 through 2011, a total of \$614,87 in sales from the Web site was made to Nebraska residents out of an estimated \$3.9 million in total sales.

But, beyond the minimal Web site sales to Nebraska residents and mailing catalogs to two Nebraska residents, Lopez’ and KLB’s contacts with Nebraska are nonexistent. Lopez and KLB do not own, lease, or rent land in Nebraska. They have never advertised directly in Nebraska, participated in bookfairs in Nebraska, or attended meetings in Nebraska, and neither has paid sales tax in Nebraska.

Furthermore, . . . [t]here is no evidence . . . that Lopez and KLB purposefully directed the advertisement at Nebraska. Further, there is no evidence that Lopez and KLB intended to invade Abdouch’s privacy in the State of Nebraska. Rather, the limited Internet sales appear to be random, fortuitous, and attenuated contacts with Nebraska.

Id. at 729–30.

Using the analytical framework of *Abdouch*, the court turns to the question of whether Wuestehube’s contacts with the State of Nebraska are such that the Commission properly could exercise specific personal jurisdiction over him. Like the website in *Abdouch*, the undisputed evidence shows that Wuestehube’s showcasebyseller.com website is interactive under the *Zippo Mfg. Co.* sliding scale test. In his affidavit, Wuestehube states he offers services through this website to help homeowners advertise their properties on third-party websites. Additionally, in

his Response to Plaintiff's Motion for Summary Judgment, filed with the court on March 12, 2013, Wuestehube admits that homeowners utilizing the showcasebyseller.com website "prepare their own advertisements by submitting information about their properties, including photos" for use on third-party websites. (Def. Response, p.2). The showcasebyseller.com website includes links to sign up for the advertising services offered, as well as forms which users can fill out with information regarding their home in order to purchase services such as "Open House Advertising." (Ex. 7, Aff. of Ekeler, ¶ 3 and Ex. A).

The record before the Commission in Case No. SC 2011-001 included at least seventeen (17) different Nebraska properties listed on Realtor.com with Wuestehube and Tri-Star identified as the broker and/or agent. (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, B6; E7; E8; E10; E13; E21]). The advertisements appeared at various times on Realtor.com between August 2009 and May 2011. The advertisements further indicate the length of time the property had been listed on Realtor.com, and some Nebraska properties "presented by" Wuestehube had been listed on the website over 100 days. (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, 67:7-68:13, 70:8-13, 71:4-14; E6; E7; E8; E10; E13; E21]). The fact that Wuestehube was identified as the broker on seventeen different Nebraska properties for a period extending over almost two years evidences continuing business contacts with the State of Nebraska, and not merely "random, fortuitous, or attenuated contacts with the forum state." *Abdouch*, 285 Neb. at 730 (internal quotation omitted).

Wuestehube asserts he has no control over the content of Realtor.com or the content of its advertisements. The evidence is undisputed, however, that the services offered by Wuestehube on his showcasebyseller.com website include advertisements on Realtor.com. Wuestehube's showcasebyseller.com website clearly states that homeowners utilizing his site can list on Realtor.com. (Ex. 4, Aff. of Lemon, ¶ 4 and Ex. A [SC 2011-001 Transcript, E15, p.1]; Ex. 7, Aff. of Ekeler, ¶ 3 and Ex. A). Wuestehube's claim that the Commission has failed to show the advertisements of Nebraska properties on Realtor.com are connected in any way to Wuestehube's activities belies Wuestehube's explanation of the services he provides to homeowners through his website. The undisputed evidence establishes Wuestehube was instrumental in listing Nebraska properties on Realtor.com. While Wuestehube may not control the content of Realtor.com, he did nothing to change the advertisements or dispute the Commission's charges that he was listing Nebraska properties on Realtor.com upon receiving the Commission's Cease and Desist Order, CD 2009-004.

Most importantly, unlike the action in *Abdouch*, the present action arises out of Wuestehube's contacts with Nebraska; namely, the various Nebraska properties listed for sale on Realtor.com "presented" and "brokered" by Wuestehube and Tri-Star serve as the basis for the Commission's action against Wuestehube. Wuestehube is a licensed real estate broker in California, and he holds licenses in several other states as well. He is, thus, familiar with the requirement of a broker's license in order to engage in brokerage activities in another state. Based on the undisputed evidence, it was reasonable for Wuestehube to anticipate being haled into the State Real Estate Commission of the State of Nebraska for listing Nebraska properties

for sale without having a Nebraska license. Accordingly, the court finds the Commission properly exercised specific personal jurisdiction over Wuestehube.

IV. Defendants' Counterclaims Barred as an Impermissible Collateral Attack

The Commission has moved for summary judgment on "all claims asserted by the Commission," which includes the claims asserted in the Commission's Reply that Defendants' counterclaims are barred as an impermissible collateral attack. The undisputed evidence establishes the Commission properly exercised jurisdiction over Wuestehube in Case No. SC 2011-001. As a result, Wuestehube's counterclaims challenging the constitutionality of NEB. REV. STAT. § 81-885.03 and the Commission's alleged violations of federal antitrust laws are barred by the doctrine of res judicata. The Commission has met its burden and established it is entitled to judgment as a matter of law on Defendants' counterclaims challenging the underlying administrative action taken by the Commission.

The doctrine of res judicata:

"is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which could properly have been raised and determined therein. The rule applies to every question relevant to and falling within the purview of the original action, in respect to matters of both claim or grounds of recovery, and defense, which could have been presented by the exercise of diligence."

Neb. Pub. Advocate v. Neb. Pub. Serv. Comm'n, 279 Neb. 543, 551 (2010) (quoting *State v. Keen*, 272 Neb. 123, 129-30 (2006)).

Wuestehube did not follow the appeal procedure provided under the Act and the Administrative Procedures Act after the Commission entered its Order in Case No. SC 2011-001 on May 24, 2011. The Commission's Order is a final order, and Wuestehube cannot collaterally attack the Order in these proceedings.

Just as Wuestehube's counterclaims are barred under the doctrine of res judicata, so too are the purported counterclaims asserted by Tri-Star. Wuestehube was, at all relevant times, the sole owner of and designated broker for Tri-Star. Thus, the court finds that Wuestehube and Tri-Star were in privity for purposes of the application of res judicata. See *Risor v. Nebraska Boiler*, 274 Neb. 906, 914-15 (2008) (finding that, where two companies had "substantially" the same interests, there was no violation of the right to procedural due process where one company was not made a party to the proceedings before the administrative agency). See also *Kiplinger v. Nebraska Dep't of Natural Res.*, 282 Neb. 237, 248 (2011) ("In the context of whether a prior judgment has preclusive effect with respect to a subsequent action, privity requires, at a minimum, a substantial identity between the issues in controversy and a showing that the parties

in the two actions are really and substantially in interest the same.”).

Additionally, the court notes the Commission’s Order in Case No. P 2011-001 is also a Final Order. To the extent Wuestehube has raised an issue regarding the denial of his Application for a Nebraska real estate license, such issue is not properly before the court and would be barred as an impermissible collateral attack as well.

V. Monetary and Injunctive Relief

The Commission properly exercised jurisdiction over Wuestehube in Case No. SC 2011-001. The Commission acted within its authority when it issued an order requiring Wuestehube to appear before the Commission and show cause why he should not be subject to sanctions for failing to abide by terms of the Cease and Desist Order dated November 4, 2009. *See* NEB. REV. STAT. §§ 81-885.03 and 81-885.10; NEB. ADMIN. CODE, Title 305, Ch. 4, Sec. 008.07A. Upon due consideration of the evidence, the Commission found that Wuestehube had violated NEB. REV. STAT. § 81-885.03, and the Act specifically authorized the Commission to impose sanctions for such violations. NEB. REV. STAT. §§ 81-885.03 and 81-885.10. *See also Clark v. Tyrrell*, 16 Neb. App. 692, 704 (2008) (affirming level of discipline imposed by Commission where “[t]he sanction imposed was well within the [Commission’s] authority”).

Accordingly, under the express language of the Act, the Commission properly filed its Complaint in this court to enforce its judgment and is entitled to collect the fine it imposed against Wuestehube. The Commission is also entitled to recover its attorney’s fees and costs as a matter of law. The Act provides:

Any civil fine imposed pursuant to the act which remains unpaid for more than sixty days shall constitute a debt to the State of Nebraska which may be recovered by the Attorney General, along with reasonable attorney’s fees and court costs, in a proper form of action in the name of the state in the district court of the county in which the violator resides.

NEB. REV. STAT. § 81-885.31(2).

While NEB. REV. STAT. § 81-885.31(2) includes a provision that the action be brought in the district court of the county in which the violator resides, such provision pre-dates Nebraska LB 691 § 1, which amended section 81-885.03 to allow the Commission to bring an action for enforcement against non-resident violators of the Act “in the district court of any county in the state.” NEB. REV. STAT. § 81-885.03(3); *see also Introducer’s Statement of Intent*, 101st Leg., 2d Sess., LB 691, § 1 (Neb. 2010) (explaining the bill authorizes the Commission to assess fines against unlicensed persons conducting activity requiring a license and that the “use of the internet in listing and advertising Nebraska real property has led to an increase in such unlicensed activity”). Reading the provisions in *pari materia*, the legislative intent of the Act, as a whole, is that the Commission be reimbursed attorney’s fees incurred in the collection of a civil fine

imposed against a non-resident violator. See *Blaser v. County of Madison*, 285 Neb. 290, 302-03 (2013) (“Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.”).

Based on the undisputed evidence, the court finds the Commission is entitled to recover the civil fine imposed against Wuestehube in the amount of \$5,000.00, along with the costs imposed in the amount of \$280.00, as stated in the May 24, 2011 Order in Case No. SC 2011-001. The Commission also is entitled to recover legal fees and expenses pursuant to NEB. REV. STAT. § 81-885.31(2). The court finds the undisputed evidence establishes that the Commission is entitled to recover fees and expenses in the amount of \$15,675.59.³ See *Pepitone v. Winn*, 272 Neb. 443 (2006) (where statute provided that a successful plaintiff “may” recover costs and reasonable attorney’s fees, the award of attorney’s fees was mandatory for the trial court, not discretionary, and the trial court erred in not awarding fees in an amount substantiated by the evidence).

In addition to the foregoing monetary relief, the Commission seeks entry of a permanent injunction enjoining Defendants from engaging in unlicensed real estate brokerage activities in Nebraska concerning Nebraska property. Pursuant to section 81-885.43 of the Act, the Commission is entitled to seek such an order. NEB. REV. STAT. § 81-885.43; accord *State ex rel. City of Alma v. Furnas County Farms*, 266 Neb. 558, 577-78 (2003) (“[W]e have consistently regarded evidence of a violation of a valid statute or ordinance as sufficient to warrant the issuance of a permanent injunction to a municipality or public entity seeking to prevent further violations” as “[i]rreparable harm to public rights, property, or welfare is presumed to result from actions which by municipal ordinance have been declared unlawful.”).

Here, the record shows that Defendants engaged in a continuous course of violating the Act by listing Nebraska properties for sale without having obtained a Nebraska real estate license. Such violations continued well after the Commission issued a Cease and Desist Order on November 4, 2009. While the Commission does not dispute Defendants currently do not advertise Nebraska real estate on Realtor.com, (Pl. Reply Brief, p.2-3), the repeated violations of the Commission’s Cease and Desist Order and the Act warrant issuance of a permanent injunction. *Furnas County Farms*, 266 Neb. at 578 (“[A] municipality or public entity which

³ This amount reflects \$15,176.50 in attorney’s fees and \$499.09 in expenses and reimbursable costs identified in Exhibit 5. (Ex. 5, Aff. of Barton, ¶¶ 6, 9 and Ex. A, Ex. B). In its brief, the Commission seeks a total of \$16,575.88 in legal fees and expenses. (Pl. Brief in Support, p.31). This amount consists of: (a) Filing Fee - \$82.00; (b) Service of Process Fees - \$220.00; (c) Court Reporter Fee for Transcript and Bill of Exceptions - \$598.29; (d) Other Administrative Expenses - \$499.09; and (e) Attorney’s Fees - \$15,176.50. (Pl. Brief in Support, p.10). However, as reflected in Exhibit 5, the costs of the filing fee (\$82.00) and service of process fees (\$220.00) are included in the \$499.09 total for expenses. (Ex. 5, Aff. of Barton, ¶ 9 and Ex. B). While the Commission states it incurred a \$598.29 cost for “Court Reporter Fee for Transcript and Bill of Exceptions,” (Pl. Brief in Support, p.10), the court could find no evidence of this cost in the record, as it appears the invoices for such costs were not attached to Exhibit 5. (Ex. 5, Aff. of Barton, ¶ 9 and Ex. B). The court could not determine how the total expense cost stated in Paragraph 9 of Exhibit 5 was calculated and, thus, has only permitted the substantiated expense cost of \$499.09.

shows a violation of a valid statute or ordinance need not show irreparable harm in order to obtain a permanent injunction to prevent further violations.”); *State ex rel. Meyer v. Weiner*, 190 Neb. 30, 33–34 (1973) (“[A] court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the real estate law even though these acts may be subject to criminal prosecution” or “punishable by fine.”).

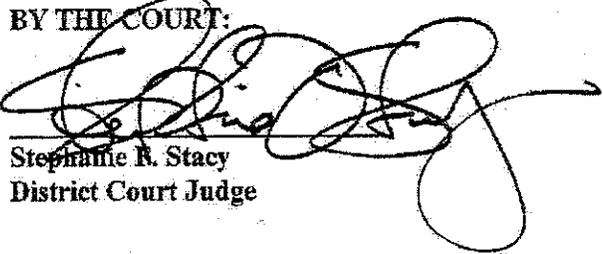
IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that:

- 1) Plaintiff’s motion for summary judgment is sustained and granted, and Defendant’s counterclaims are dismissed;
- 2) Judgment is entered in favor of Plaintiff and against Defendants in the amount of \$5,280.00 for the fine and costs ordered in Case No. SC 2011-001, and in the amount of \$15,675.59 for costs, legal fees, and expenses incurred by Plaintiff in bringing this action, along with post-judgment interest at the current rate of 2.08%.
- 3) Defendants are permanently enjoined from violating the Nebraska Real Estate License Act by engaging in any unlicensed real estate brokerage activities in the State of Nebraska.

A copy of this order is sent to counsel and parties of record.

DATED this 29th day of August, 2013.

BY THE COURT:


Stephanie R. Stacy
District Court Judge

cc: Gregory D. Barton, Attorney for Plaintiff
Carl Oswald Wuestehube, Pro Se Defendant