

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
Charleston Division**

DEREK EISENBERG,

Plaintiff,

v.

KERI FERRO, in her official capacity as the Executive Director of the West Virginia Real Estate Commission; ROBERT D. KENNEN, in his official capacity as Chairman of the West Virginia Real Estate Commission; JAMES S. WALKER, in his official capacity as Vice President of the West Virginia Real Estate Commission; MARGIE BARTLES, in her official capacity as Secretary of the West Virginia Real Estate Commission; JOSEPH BEVIL, in his official capacity as Commissioner of the West Virginia Real Estate Commission; and PAMELA HYLBERT-EDER, in her official capacity as Commissioner of the West Virginia Real Estate Commission,

Defendants.

Civil Action No. 2:24-cv-00729

**FIRST AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiff Derek Eisenberg is an entrepreneur who seeks to introduce a new way of buying and selling homes to the real estate market. Thanks to advancements in technology, real estate brokers can offer their services virtually and à la carte rather than traditional, full-scale in-person representation. But West Virginia's newly enacted antiquated, arbitrary, and anticompetitive in-state office

requirements prevent Mr. Eisenberg from conducting his business virtually in the state in violation of the United States Constitution.

2. West Virginia requires anyone with a West Virginia broker's license to maintain a brick-and-mortar office in the state and to conduct their business there. W. Va. Code § 30-40-17; W. Va. Code R. §§ 174-1-10.3, 14.1. Those demands are not rationally related to ensuring broker competency, maintaining access to records, or otherwise protecting West Virginians. Instead, the only apparent purpose is to protect in-state real estate brokers from legitimate out-of-state competition. And the effect is to burden the interstate market for real estate services and to deprive innovative companies like Plaintiff's from thriving.

3. Mr. Eisenberg has a West Virginia broker's license but the in-state office requirements make it difficult, if not impossible, for him to pursue his online business model in the state. He therefore brings this lawsuit to vindicate his rights under the United States Constitution's Interstate Commerce Clause, Privileges & Immunities Clause of Article IV, and the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment.

JURISDICTION AND VENUE

4. Mr. Eisenberg alleges, pursuant to 42 U.S.C. § 1983, the deprivation of rights secured by the Interstate Commerce Clause (U.S. Const. art. I, § VIII), the Privileges and Immunities Clause (U.S. Const. art. IV, § II), and the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment. Jurisdiction over his claims is proper under 28 U.S.C. § 1331 (federal

question) and § 1343(a)(3) (redress for deprivation of civil rights). Declaratory relief is authorized under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.

5. Venue is proper in this Court under 28 U.S.C. § 1391(b) because a substantial part of the conduct giving rise to the claims occurred and continues to occur in the Southern District of West Virginia.

PARTIES

6. Plaintiff Derek Eisenberg is a United States citizen and resident of Maywood, New Jersey. His primary office is in Hackensack, New Jersey.

7. Mr. Eisenberg has spent his entire career, spanning over three decades, in the real estate industry. He holds a real estate broker license in the District of Columbia and 26 states, including West Virginia, and is the President of Continental Real Estate Group, Inc.

8. Defendants Robert D. Kennen, James S. Walker, Margie Bartles, Joseph Bevil, and Pamela Hylbert-Eder sit on the West Virginia Real Estate Commission (Commission). The Commission enforces and administers the West Virginia Real Estate Licensing Act. W. Va. Code § 30-40-8. This includes the enforcement of West Virginia's requirements for an in-state office and conducting business in the office. W. Va. Code § 30-40-17; W. Va. Code R. §§ 174-1-10.3, 14.1. Defendants are being sued in their official capacity.

9. Defendant Kerri Ferro is the Executive Director of the Commission. Ms. Ferro is responsible for enforcing and administering the West Virginia Real Estate Licensing Act. W. Va. Code § 30-40-7(d). Ms. Ferro is being sued in her official capacity.

FACTUAL ALLEGATIONS
PLAINTIFF DEREK EISENBERG

10. Derek Eisenberg is the founder and President of Continental Real Estate Group, Inc. (Continental). Mr. Eisenberg started Continental in 1995 with the dream of offering a nationwide real estate brokerage firm that empowers consumers by providing access to real estate services in a cost-effective and flexible manner.

11. Continental is an online brokerage firm that allows customers to choose from a fee-for-service model rather than the conventional suite of services offered by traditional brokers.

12. While traditional brokers force consumers to accept full-scale representation and demand a set percentage in return, Continental allows consumers to select only the specific services they want. Customers tailor their experience to match their needs.

13. For example, buyers can choose between listing their home in the Multiple Listing Service (MLS), downloading digital forms, purchasing brochure tubes or lawn signs, renting lockboxes, using computer telephony to route calls from interested parties to sellers, setting up lockbox monitoring with text notification, and having Continental agents engage in different levels of closing assistance on a fee-for-service basis.

14. Like many discount brokerage firms, Continental leverages technology to lower its expenses. It then passes those savings to its clients. And like many businesses across all industries, Continental uses the internet and other technologies to operate online and across state lines.

15. Continental employees are licensed as brokers in 42 states, including West Virginia. Continental has pending applications in four additional states.

16. Mr. Eisenberg is personally licensed as a broker in 26 states and D.C. and has been a real estate broker in West Virginia since 2009. Neither Mr. Eisenberg nor Continental has been subject to any disciplinary action under West Virginia's real estate brokerage licensing laws.

17. In order to keep his West Virginia license, Mr. Eisenberg is forced to maintain a "definite place of business" in West Virginia. This requirement is expensive; it includes rent, administration, delivery, inspections, and other associated costs.

18. West Virginia regulations also require brokers to conduct all brokerage transactions at their "principal place of business." This, too, comes at a considerable cost, including staffing, travel, and logistical expenses.

19. Mr. Eisenberg is capable of doing everything required of a real estate broker without a brick-and-mortar office. That is, he can send forms, secure signatures, offer regulators access to his records, and communicate with clients virtually. In fact, before the law was passed last year, he operated in the state for 13 years without an office. The in-state office requirements therefore impose costs solely for anti-competitive purposes without offering any real benefit to West Virginians.

20. If not for the in-state office and work requirements, Mr. Eisenberg would not maintain an office in West Virginia.

THE CHALLENGED LAWS

21. W. Va. Code § 30-40-3 forbids any person from engaging in business or acting in the capacity of a real estate broker within the State of West Virginia without a broker's license.

22. W. Va. Code § 30-40-4 defines a real estate "broker" as any person who:

"(1) Lists, sells, purchases, exchanges, options, rents, manages, leases, or auctions any interest in real estate; or

(2) Directs or assists in the procuring of a prospect calculated or intended to result in a real estate transaction; or

(3) Advertises or holds himself or herself out as engaged in, negotiates, or attempts to negotiate, or offers to engage in any [such] activity...."

23. W. Va. Code § 30-40-17(a) requires every real estate broker to maintain a definite place of business within the State that will be "used for the transaction of real estate business" under the authority of the broker's license.

24. W. Va. Code R. § 174-1-10.3 requires brokers to maintain all records relating to their brokerage transactions "at the broker's usual place of business and at all times during regular business hours" and to "provide sufficient space to permit the Commission's inspection of the records without interference by other users of the property."

25. Any person who does not comply with the provisions of the licensing laws can be charged with a misdemeanor, fined \$1,000-\$2,000, and given up to 90 days in jail. W. Va. Code § 30-40-22(a).

26. Any subsequent violation can result in a fine of \$2,000-\$5,000 and up to 1 year in jail. W. Va. Code § 30-40-22(b).

27. Any corporation, association, or partnership convicted of a first violation of the provisions of the licensing laws is subject to a fine of \$2,000-\$5,000. W. Va. Code § 30-40-22(c).

28. Any corporation, association, or partnership convicted of a subsequent violation of the provisions of the licensing laws is subject to a fine of \$5,000-\$10,000. W. Va. Code § 30-40-22(d).

29. Any officer, member, employee, or agent of a corporation, association, or partnership is subject to the penalties prescribed for individuals. W. Va. Code § 30-40-22(e).

30. Each day that a person violates the licensing laws constitutes a separate offense. W. Va. Code § 30-40-22(f).

CLAIMS FOR RELIEF

First Cause of Action

(Commerce Clause—U.S. Const. art. I, § 8)

31. Mr. Eisenberg incorporates and re-alleges each and every allegation contained in the preceding paragraphs of this Complaint.

32. The Interstate Commerce Clause of the U.S. Constitution, Article I, Section 8, delegates to Congress the exclusive power to regulate interstate commerce. This power operates as a restraint on the legislative power of the states even when Congress has not expressly exercised that power, a doctrine known as the “dormant” Commerce Clause.

33. Any law that discriminates against interstate commerce in purpose or effect is *per se* unconstitutional. Even non-discriminatory burdens on interstate

commerce are unconstitutional where the burdens imposed on interstate commerce are excessive in relation to the putative local benefits.

34. W. Va. Code § 30-40-17(a) has a discriminatory effect on interstate commerce and out-of-state real estate brokers wishing to do business in West Virginia. Resident brokers may designate their home or first office as their definite place of business, while non-resident brokers must incur additional costs to establish an in-state office to do business in the state.

35. W. Va. Code R. § 174-1-14.1 has an additional discriminatory effect: it requires non-residents to travel to their definite place of business in West Virginia to do business there, subjecting them to substantially higher costs and putting them on an unequal playing field.

36. This discrimination serves no legitimate local purpose, and even if it did, those purposes could be served by nondiscriminatory means.

37. These requirements also unduly burden interstate commerce. They impose significant burdens on non-resident West Virginia real estate brokers, including paying for additional rent, utilities, maintenance, and travel. They force real estate brokers to perform services in West Virginia even if they can be done more efficiently in another state.

38. This gives resident brokers a competitive advantage over non-resident brokers and dissuades non-residents from doing business in the state.

39. The burden on interstate commerce is not justified by any putative local benefit.

40. The requirements bear no relationship to ensuring real estate brokers are fit for the trade, to regulating the profession, to accessing records, or to otherwise protecting consumer welfare. Instead, it serves only to protect resident brokers from legitimate out-of-state competition and economic protectionism is not a constitutionally legitimate local benefit.

41. The burdens imposed by the in-state office requirements are excessive in relation to the local benefits.

42. Plaintiff has suffered and will continue to suffer substantial and irreparable harm unless West Virginia's in-state office requirements are declared unlawful and enjoined by this Court.

Second Cause of Action

(Privileges and Immunities Clause—U.S. Const. art. IV, § 2)

43. Mr. Eisenberg incorporates and re-alleges each and every allegation contained in the preceding paragraphs of this Complaint.

44. Mr. Eisenberg incorporates and re-alleges each and every allegation contained in the preceding paragraphs of this Complaint.

45. Under the Privileges and Immunities Clause, states may not discriminate against citizens from another state in their ability to exercise their privileges or immunities, including their right to pursue a common calling within the state.

46. West Virginia's in-state office requirements put non-resident brokers and resident brokers on substantially unequal terms in their ability to conduct

business in West Virginia because they force non-residents to shoulder increased costs, including the costs of maintaining an office in, and traveling to, West Virginia.

47. Neither non-resident real estate brokers—nor the proximity of their office—threaten the public health, safety, or welfare of West Virginians. Nor do they significantly limit the state’s ability to regulate the profession.

48. West Virginia’s discrimination against non-residents does not further any substantial or even legitimate government interest. It operates solely to protect West Virginia’s brokers from legitimate out-of-state competition. Whatever interest the government has in forcing real estate brokers to maintain and work from an office in West Virginia can be served by less restrictive means.

49. By enforcing West Virginia’s discriminatory, restrictive, and arbitrary in-state office and work requirements, Defendants, acting under color of state law, are depriving Plaintiff of his fundamental right to engage in business on equal terms with residents of West Virginia.

Third Cause of Action

(Equal Protection Clause—U.S. Const. amend. XIV)

50. Mr. Eisenberg incorporates and re-alleges each and every allegation contained in the preceding paragraphs of this Complaint.

51. West Virginia’s in-state office requirements treat similarly situated real estate brokers differently. Non-resident brokers must incur additional costs, such as duplicating expenses to maintain offices in their home state and West Virginia, while

resident brokers can use their first office or even their homes to satisfy the statutory requirement.

52. Non-resident brokers are forced to pass these unequal expenses onto consumers. This puts them at a considerable disadvantage in terms of competing, let alone entering, the market in West Virginia.

53. West Virginia's in-state office requirements are not tailored to any legitimate state interest. They have no relation to public health, safety, or the regulation of the profession and instead serve only to insulate resident brokers from competition at the expense of West Virginian consumers.

54. By enforcing these discriminatory, unequal, and arbitrary requirements, Defendants, acting under color of state law, are depriving Plaintiff of equal treatment before the law.

Fourth Cause of Action

(Due Process and Privileges or Immunities Clauses— U.S. Const. amend. XIV)

55. Mr. Eisenberg incorporates and re-alleges each and every allegation contained in the preceding paragraphs of this Complaint.

56. The Fourteenth Amendment protects the right to pursue a lawful calling without arbitrary government interference.

57. West Virginia's in-state office requirements burden Mr. Eisenberg's right to pursue the lawful calling of his choice, yet they serve no legitimate government interest. Instead, they arbitrarily restrict the entrance of non-resident

real estate brokers into the market and serve the unconstitutional end of protecting resident brokers from competition.

58. By artificially limiting the ability of non-resident real estate brokers to enter the market, the in-state office requirements decrease competition, increase costs, and reduce consumer choice.

59. By enforcing these irrational and protectionist requirements, Defendants are arbitrarily depriving Plaintiff of his Fourteenth Amendment right to earn a living.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

1. A declaration that W. Va. Code § 30-40-17(a) and W. Va. Code R. §§ 174-1-10.3 & 174-1-14.1 violate the Commerce Clause of the United States Constitution;
2. A declaration that W. Va. Code § 30-40-17(a) and W. Va. Code R. §§ 174-1-10.3 & 174-1-14.1 violate the Privileges and Immunities Clause;
3. A declaration that W. Va. Code § 30-40-17(a) and W. Va. Code R. §§ 174-1-10.3 & 174-1-14.1 violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;
4. A declaration that W. Va. Code § 30-40-17(a) and W. Va. Code R. §§ 174-1-10.3 & 174-1-14.1 violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution;

5. A declaration that W. Va. Code § 30-40-17(a) and W. Va. Code R. §§ 174-1-10.3 & 174-1-14.1 violate the Privileges or Immunities Clause of the Fourteenth Amendment of the United States Constitution;
6. A permanent injunction prohibiting Defendants, their agents, representatives, and employees from enforcing W. Va. Code § 30-40-17(a) and W. Va. Code R. §§ 174-1-10.3 & 174-1-14.1;
7. An award for the cost of this suit;
8. An award of reasonable attorneys' fees, costs, and expenses in this action pursuant to 42 U.S.C. § 1988; and
9. Such other relief the Court deems just and proper.

Respectfully submitted,

PACIFIC LEGAL FOUNDATION

ANASTASIA BODEN
Cal. Bar No. 281911*
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
ABoden@pacificlegal.org

BRANDON BEYER
Minn. Bar. No. 0403249*
3100 Clarendon Boulevard,
Suite 1000
Arlington, VA 22201
Telephone: (202) 888-6881
BBeyer@pacificlegal.org

* *Visiting Attorney*

/s/ J. Zak Ritchie
J. ZAK RITCHIE (WVSB #11705)
HISSAM FORMAN DONOVAN
RITCHIE PLLC
P.O. Box 3983
Charleston, WV 25339
Telephone: (681) 265-3802
FAX: (304) 982-8056
zritchie@hfdrlaw.com

Attorneys for Plaintiff