

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

SKYNET CORPORATION d/b/a
ZEROBROKERFEES.COM,
204 Rantoul Street
Beverly, MA 01915,

Plaintiff,

v.

ARTHUR SLATTERY, in his official capacity
Chairman
New Hampshire Real Estate Commission
State House Annex, Room 434
25 Capitol Street
Concord, NH 03301;

BARBARA HEATH, in her official capacity
Clerk
New Hampshire Real Estate Commission
State House Annex, Room 434
25 Capitol Street
Concord, NH 03301;

ROBERT S. STEPHEN, PAULINE IKAWA, and
NANCY LEROY in their official capacities
Members
New Hampshire Real Estate Commission
State House Annex, Room 434
25 Capitol Street
Concord, NH 03301;

KELLY A. AYOTTE, in her official capacity
Attorney General of the State of New
Hampshire,
Office of the Attorney General
Department of Justice
33 Capitol Street
Concord, NH 03301,

Defendants.

Case No. _____

Judge _____

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

Introduction

1. The free flow of information is vital to American prosperity. The First Amendment to the United States Constitution guarantees the right of citizens to speak and to listen, to send and to receive information, to publish and to advertise.

2. The State of New Hampshire violates these fundamental rights by demanding that publishers who charge a fee to advertise or list real property for sale become licensed real estate brokers, regardless of whether they act as agents for buyers or sellers or become involved in the details of the real estate transaction at all. Application of the licensing requirements of New Hampshire's Real Estate Practice Act sections 331-A:2(III)(d), (h), and (j)—and the penalties attached to publishing information about properties for sale in New Hampshire without a license—constitute a prior restraint and an unlawful regulation of speech in violation of the First Amendment.

3. Plaintiff publishes advertisements, Internet websites, magazines, and lists featuring real estate for sale in New Hampshire. This action for declaratory and injunctive relief seeks to protect the First Amendment rights of companies and individuals to publish—and the concurrent right of consumers to receive—information about real estate for sale in New Hampshire without government-compelled licensing.

Jurisdiction

4. Plaintiff ZeroBrokerFees.com brings this civil rights lawsuit pursuant to the First and Fourteenth Amendments to the Constitution of the United States; the Civil Rights Act of 1871, 42 U.S.C. § 1983; and the Declaratory Judgments Act, 28 U.S.C. §§ 2201 & 2202. Plaintiff seeks injunctive and declaratory relief against the enforcement of New Hampshire's Real Estate Practice Act, N.H. Rev. Stat. Ann. § 331-A:1 *et seq.*, its implementing rules and

regulations, N.H. Code Admin. R. REA 101.01 *et seq.*, and the practices and policies of the New Hampshire Real Estate Commission that facially and as applied deny the Plaintiff the opportunity to operate a legitimate real-estate advertising and information business in the state of New Hampshire.

5. This Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1343.

6. Venue lies in this Court pursuant to 28 U.S.C. § 1391(b).

Parties

7. Plaintiff Skynet Corporation is a Massachusetts corporation with its principal place of business in Beverly, Massachusetts. It publishes and operates ZeroBrokerFees.com, an Internet website that advertises properties for sale throughout the nation, including New Hampshire. Neither ZeroBrokerFees.com nor any of its officers or employees act or hold themselves out as brokers or agents for sellers or buyers with respect to the real estate the company advertises. Neither ZeroBrokerFees.com nor any of its officers or employees purport to exercise judgment on behalf of any particular individual whose circumstances the company is directly acquainted. Neither ZeroBrokerFees.com nor any of its employees or agents hold a real estate broker's or salesperson's license in New Hampshire or any other location.

8. Defendant Arthur Slattery is the Chairman of the New Hampshire Real Estate Commission, an agency created under and existing by virtue of the laws of the State of New Hampshire. The Commission is the agency responsible for enforcing New Hampshire's real estate laws, including the provisions governing the issuance of real estate licenses. Defendant Slattery is sued in his official capacity.

9. Barbara Heath serves as the Clerk of the New Hampshire Real Estate Commission. She is sued in her official capacity.

10. Defendants Robert S. Stephen, Pauline Ikawa, and Nancy LeRoy are members of the New Hampshire Real Estate Commission. These defendants are sued in their official capacity.

11. Defendant Kelly Ayotte is the Attorney General of the State of New Hampshire. The office of the Attorney General is responsible for prosecuting violations of the New Hampshire real estate licensing laws, including the provisions at issue in this lawsuit. The Attorney General is sued in her official capacity.

12. At all times alleged herein, defendants and their agents have acted under color of state law.

Statement of Facts

13. The median house in New Hampshire now sells for over \$250,000. With a median income of only \$67,000, the high cost of homes places the dream of homeownership out of reach for many in New Hampshire.

14. Real estate commissions often run as high as six percent of the purchase price of a home. For a house sold at New Hampshire's median price, homeowners would pay \$15,000 in real estate commissions.

15. The high sticker shock is making more and more people think about the services offered by traditional real estate agents. Many homeowners and prospective purchasers are turning away from traditional real estate agents in favor of more innovative methods of selling or buying a home. Some consumers see the process of buying or selling a home a matter of common sense, requiring little specialized knowledge. Some consumers prefer to save money by eliminating fees commonly paid to brokers; others enjoy the flexibility and independence of cutting out the "middleman" and dealing directly with those interested in purchasing their home.

In any event, many homeowners and buyers are deciding to navigate the home selling and buying process on their own.

16. Advances in information technology—and in particular, the Internet—have facilitated these developments. Today’s homeowners and potential buyers can find a wealth of information and services on the Internet to aid them in selling or buying a home. Consumers can research prices, neighborhoods, and schools; calculate tax rates and mortgage costs; apply for mortgages; find title and home insurance; locate home inspectors; and discover volumes of general information on how to buy or sell homes.

17. There are also a growing number of companies that publish websites allowing homeowners to advertise and potential buyers to search for homes online. Plaintiff Skynet Corporation—with its website www.ZeroBrokerFees.com—is one example.

[ZeroBrokerFees.com](http://www.ZeroBrokerFees.com)

18. [ZeroBrokerFees.com](http://www.ZeroBrokerFees.com) is an online classified advertising and information service. The company charges a flat fee to property owners who wish to advertise their property on the company’s website, www.ZeroBrokerFees.com.

19. Like newspaper classified advertisements, the fee varies depending on the prominence of the advertisement and its size. Unlike newspaper classified advertisements, the database can be quickly searched by various criteria such as price, location, size, and amenities; the advertisement can be changed or updated at any time; and use is free to anyone with access to the Internet.

20. Property owners who list their homes for sale on ZeroBrokerFees.com control the content of their advertisements. They decide what information to include and write the description. They can include pictures of their homes, explanations of amenities, information on the neighborhood, and even virtual or aerial tours.

21. In addition to advertising, ZeroBrokerFees.com publishes a wealth of information and resources that empower individuals to buy or sell their home on their own. The website includes basic how-to information on the buying and selling process, mortgage calculators, and crime statistics, as well as a host of other real estate news and information. Users of the website will also find links to other Internet websites of interest to homeowners and buyers, including websites offering credit reports, appraisals, and legal forms. Through ZeroBrokerFees.com's directory of service providers, consumers can find contact information for mortgage lenders, attorneys, housing inspectors, and title companies—everyone that a do-it-yourselfer would need to complete a real estate transaction.

22. Neither ZeroBrokerFees.com nor its employees act or hold themselves out as brokers or agents for buyers or sellers of property in New Hampshire or anywhere else. Their philosophy is clearly disclosed by their tagline: "You sell your home. You keep the broker fee!" ZeroBrokerFees.com does not provide advice about particular property transactions to buyers or sellers, nor do they purport to exercise judgment on behalf of particular individuals as to the purchase or sale of properties. Neither the Plaintiff nor its employees charge or receive a commission when properties are successfully sold.

New Hampshire Real Estate Licensing Requirements

23. New Hampshire's Real Estate Practice Act § 331-A:34 makes it unlawful for any person to act as a real estate broker or real estate salesperson without first obtaining a license from the New Hampshire Real Estate Commission.

24. Section 331-A:2(III)(d) defines a "broker" as any person who acts for another on commission or any other compensation who "[l]ists, offers, attempts or agrees to list real estate for sale, lease or exchange."

25. Section 331-A:2(III)(h) also defines a "broker" as any person who acts for another on commission or any other compensation who "[a]ssists or directs in the procuring of prospects, calculated to result in the sale, exchange, lease, or rental of real estate."

26. Finally, section 331-A:2(III)(j) further defines a "broker" as any person who "[e]ngages in the business of charging an advance fee in connection with any contract whereby the person undertakes to promote the sale or lease of real estate, through its listing in a publication or data base issued for such purpose, through referral of information concerning such real estate to brokers, or both."

27. Under 331-A:2(I), the term "advance fees" includes "any fees charged for services including, without limitation, any fees charged for listing, advertising, or offering for sale or lease any real property. Advance fees shall not include fees paid solely for advertisement in a newspaper or other publication of general circulation."

28. The definitions contained in Section 331-A:2(III) make it unlawful for ZeroBrokerFees.com and similar businesses to operate in New Hampshire without first obtaining a real estate broker's license. ZeroBrokerFees.com "lists" real estate for sale and/or charges an

“advance fee” for listing property in a publication or database and “assists ... in the procuring of prospects, calculated to result in the sale ... of real estate.”

29. On information and belief, ZeroBrokerFees.com is not a “newspaper or other publication of general circulation” as that term has been interpreted by the New Hampshire Real Estate Commission and New Hampshire courts.

30. On information and belief, the New Hampshire Real Estate Commission interprets sections 331-A:2(III) of New Hampshire’s statutes to require companies like ZeroBrokerFees.com to obtain a broker’s license.

31. ZeroBrokerFees.com engages in conduct that is facially proscribed by the statute and has a reasonable fear that it will be the subject to enforcement and disciplinary sanctions. Furthermore, ZeroBrokerFees.com’s speech and further business development in New Hampshire has already been chilled.

32. Under §§ 331-A:28 and :34, violations of the Real Estate Practice Act are misdemeanors, subject to fines of up to \$2,000 per violation.

33. Obtaining a real estate broker’s license is both time-consuming and expensive. An applicant must first earn a real estate salesperson license by completing a 40-hour course and an examination. To then qualify for a broker’s license, the applicant must complete an additional 20-hour course, demonstrate either one year of full-time salesperson experience or 2,000 hours of part-time experience, and pass an examination.

34. Neither ZeroBrokerFees.com nor any of its respective officers or employees have completed the requirements for a real estate license in New Hampshire nor do they meet any of the statutory exemptions to those eligibility requirements.

Constitutional Violations

Count I – Prior Restraint of Speech

35. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1 through 34 above.

36. Plaintiff's business activities and the information it conveys are fully within the protection of the First Amendment to the U.S. Constitution as it applies to the States through the Fourteenth Amendment and reflect the exercise of fundamental rights to freedom of speech and of the press.

37. New Hampshire's real estate licensing requirements and the actions of the Defendants have harmed and will continue to irreparably harm the Plaintiff by requiring it and/or its employees to spend at least one year of training at great expense to obtain a real estate broker's license as a condition of exercising its First Amendment rights to free speech and freedom of the press and by causing it a loss of business in New Hampshire.

38. The licensing requirements—both on their face and as applied to the Plaintiff—violate the Plaintiff's First Amendment rights to publish and speak freely without prior restraint or compelled licensure.

Count II – Unconstitutional Burden Based on Content, Viewpoint and Status

39. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1 through 38 above.

40. The Plaintiffs' business activities and the information it conveys are fully within the protection of the First Amendment to the U.S. Constitution as it applies to the States through the Fourteenth Amendment and reflect the exercise of fundamental rights to freedom of speech and of the press.

41. New Hampshire's real estate licensing requirements and the actions of the Defendants have harmed and will continue to irreparably harm the Plaintiff by requiring its agents or employees to spend at least one year of training at great expense to obtain a real estate broker's license as a condition of exercising its First Amendment rights to free speech and freedom of the press and by causing it a loss of business in New Hampshire.

42. Under N.H. Rev. Stat. Ann. § 331-A:2(I) and by the general practices and policies of the New Hampshire Real Estate Commission, the licensing requirements—both on their face and as applied to the Plaintiff—violate the Plaintiff's First Amendment rights to publish freely without being discriminated against on the basis of the content of its publications, the media used to disseminate its views and information, or its viewpoints. Only publishers of real estate information are subject to the licensing requirements; newspapers and other publications of general circulation that publish the same information as the Plaintiff are exempted from the licensing requirements.

43. The licensing requirements—both on their face and as applied to the Plaintiff—violate the Plaintiff's First Amendment right to publish freely without being discriminated against on the basis of the content of its publications, the media used to disseminate its views and information, or its viewpoints.

Count III – Unconstitutional Regulation of Commercial Speech

44. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1 through 43 above.

45. The Plaintiff's business activities and the information it conveys are fully within the protection of the First Amendment to the U.S. Constitution as it applies to the States through

the Fourteenth Amendment and reflect the exercise of fundamental rights to freedom of speech and of the press, including the rights to publish truthful, non-misleading commercial information.

46. New Hampshire's real estate licensing requirements and the actions of the Defendants have harmed and will continue to irreparably harm the Plaintiff by requiring its agents or employees to spend at least one year of training at great expense to obtain a real estate broker's license as a condition of exercising its First Amendment right to free speech and freedom of the press and by causing it a loss of business in New Hampshire.

47. The licensing requirements—both on their face and as applied to Plaintiffs—violate the Plaintiff's First Amendment right to publish truthful, non-misleading commercial speech.

Request for Relief

WHEREFORE, Plaintiff Skynet Corporation d/b/a ZeroBrokerFees.com respectfully request that the Court grant the following relief:

A. Entry of a judgment declaring that N.H. Rev. Stat. § 331:A-1 *et seq.* violates the Constitution of the United States by prohibiting ZeroBrokerFees.com from listing and advertising New Hampshire properties for sale on Internet websites and/or in print.

B. Entry of a preliminary and permanent injunction against all Defendants from enforcing New Hampshire's real estate licensing laws, policies, and regulations in a manner that impairs ZeroBrokerFees.com's ability to disseminate information and to operate its business and from imposing fines or criminal penalties, or otherwise subjecting ZeroBrokerFees.com to harassment;

C. Award ZeroBrokerFees.com reasonable attorney's fees, costs, and other recoverable expenses of litigation pursuant to 42 U.S.C. § 1988; and

D. Award further legal and equitable relief, as the Court may deem proper.

DATED this 13th day of June, 2006.

Respectfully submitted,

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**Motion for Pro Hac Vice Pending*

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