

2020 REALTORS® ANNUAL MEETING RISK MANAGEMENT ISSUES COMMITTEE WORKGROUPS REPORTS

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 NATIONAL
ASSOCIATION OF
REALTORS®

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MIDWEST WORKGROUP NOTES

NAR Risk Management Midwest Workgroup

Chairperson: Janet Judd

Meeting: October 28, 2020 @ 3 pm Central

Via Zoom Call

Questions posed:

1. Buyer love letters – are they an issue in your area? How are you advising sellers and buyers? Are you seeing any fair housing claims or lawsuits?

2. The implementation of the Clear Cooperation Policy in your area and what issues, if any, you're seeing.

ILLINOIS:

- Love Letters
 - Ayn Bartok had never seen one on either side. Said it was more common in Northern Illinois. Could be a problem. Was told that it can create uncomfortable situations. Our counsel strongly discourages the use of "love letters" and advises that brokers (we are all brokers in Illinois) have discussions with sellers about the risks involved and develop a plan to refuse to review "love letters". If sellers want to review "love letters" our general counsel feels we should refer sellers to consult with their own attorney. Of course, the reason for the above position is the potential to have a discrimination claim/fair housing violation. As reported online during our committee meeting, I didn't feel that we had a widespread use of "love letters" in my local association and for my informal poll of NAR members outside my immediate area I found that the use of "love letters" was also low.
- CCP
 - With regard to the implementation of Clear Cooperation Policy, in my association there was no suspected abuses of implementation of this policy. Other respondents concurred. There was one association member I spoke to that indicated there was some suspected issue of manipulation of availability of property by one firm. The General Counsel indicated she was not aware of issues of Clear Cooperation violations having reached their ears at the Illinois REALTORS® level.

INDIANA:

- Love Letters
 - Richelle Cohen Mossler Legal Counsel for the state - Not really seeing any issues. Not used substantially State advises against using the letters due to potential fair housing

issues. Not very widespread because of that advice and the lack of endorsement. People are careful and as a result it is not used frequently. Educational process.

- CCP: No problems.

IOWA:

- No representative present to report.

KANSAS:

- Love Letters:
 - Brian Jones: Not in favor of the practice at all. Has only seen a few. Maybe one a month. As inventory gets smaller and tougher in certain price ranges, we will probably see more letters. Really depends on how the letter is written and doesn't discuss family/partner, etc. Certain issues cross the line. There are ways to get around it, but they are very limiting. This is from a smaller community, so that could be why they have not had many buyer love letters. Sample letter attached.
 - Kathy Minden - Big Issue. Sees them frequently in the Kansas City area corridor. If a buyer of hers does ask about doing it, she does not encourage them but will "let" them. She has nothing to do with writing them. Has received them as a Listing Agent. Sellers: Will ask if they want to see them. Will ask them if they want to make a business decision versus emotional one. If not, she will not show sellers the letters until after the decision or process is finished. Believes that some/most letters contain fair housing issues, race, religion, family status especially when pictures are used to influence the seller.
- CCP
 - Brian Jones: At first early on there were issues with signs, websites, tweets, etc. and it is much better now. Education was a major factor. Cleared up a lot since then. Again, small market agents not reading the information that was sent to them.
 - Kathy Minden - mostly followed. There will always be agents that try to get around the issue. Seems like there are more coming soon and pre-MLS listings.
 - Overall no problems per se. Agents getting around the rule. A lot more coming soon signs. More pre-MLS in Heartland MLS. They have ready to be shown box saying "This will be ready_____". Listings in place and searchable, cannot be shown, can have pictures. Sometimes buyers will write an offer without seeing the house.
- It was recognized how differently MLS's and associations are handling/labeling coming soon, exemptions, pre-MLS listings etc. NAR may need to come up with definitions that can be implemented and adhered to. See attached MARIS Marketing Options form.

KENTUCKY:

- No representative present to report.

MICHIGAN:

- Love Letters
 - Adam Paarlberg: This has been a practice by agents for a long time. They do it to get a leg up on their competition. Many associations within the state have worked hard to create extensive MLS rules, company rules and policies, guidelines etc. in place to educate about the process. More liability for the seller. Listing agreement actually has a paragraph regarding non-discrimination which covers the Buyer Love Letter. Check boxes. Will or will not look at them. Once they are aware of the legal issues that could arise, most choose not to look at them. Does remove liability for the parties. See example below:

NON-DISCRIMINATION. The parties acknowledge that discrimination on the part of a real estate broker, real estate licensee, seller or lessor because of religion, race, color, national origin, age, sex, marital status, height, weight, physical or mental disability, or familial status is prohibited by law.

Seller is advised that the receipt and consideration of information contained in a letter from the Buyer accompanying an offer to purchase may result in a violation of Federal or State Fair Housing Laws. Seller directs the Broker that a letter from the Buyer ____ WILL or ____ WILL NOT be presented with any offer to purchase.

- John North: Has not seen a lot of them. Was a big deal last year. This agent tries to avoid them. Will not handle or deliver them. Guided by company policy and listing agreement.
- CCP
 - Adam Paarlberg: Most everyone understands and really not having issues. Has been fairly quiet. No Facebooking. Brokerages within their network. Layered on top of that is Delay of Submission. Shared a Delayed Showing Addendum. Sample included.
 - John North: Most everything is going well. Smooth Sailing. Agrees with Adam.

MINNESOTA:

- Love Letters
 - Deb Greene: Has had them for a while. Very commonplace. Speedy market. 50% of recent sales on listings had letters included. Photographs are a concern. This particular agent will cut off photos if they are included in the letter. She will redact and remove discriminatory statements and visuals. Some sellers want to see them since they wrote a letter when they purchased their home.
 - Some letters relay more or alternate terms that are not written into the offer presented...which presents a presentation conflict. Association does suggest no photographs. State has pushed out multiple videos regarding no photos. But they are not opposed to love letters.

- Buyer “Love Letters”: We are seeing quite a few love letters – my personal experience is about 4 out of 10 offers come in with them. My biggest concern is that although our Minnesota REALTORS® Association continues to push out education re: these, many still include a personal photo which could potentially create some discrimination. If they are attached, I remove them, and I may also redact any verbiage in the letter that may also create some discrimination. Once I have removed those items I do let my clients decide if they want to review them or not. The other issue re: these letters is that some buyers say things in their letters re: price, term, or motivation that may not be accurately reflected in the actual purchase agreement.
- CCP:
 - Really doing well with Clear Cooperation. Many similarities to what Michigan does. Doing very well with it. Tons of education on state and local level. It is the Seller’s prerogative as to whether they choose to wait and see offers. Thursday is the magical day for being homes on the market. They have in their listing agreement the following items:
 - Are you going to disclose multiple offers - check box
 - Implementation of the Clear Cooperation Policy - Our RMLS, Minnesota REALTORS® Association & Companies have done a very effective job educating members. As we all know, there will always be an agent who tries to go around the system, as I commented on during our Zoom meeting – Specifically, when they do NOT put it on MLS, but put it on Zillow as a “Coming Soon” so they can pick & choose who they allow to show it, as well as potentially gather more buyers personally.
- OTHER ISSUES
 - Escalation clauses. Many agents are using these, however, have not educated themselves about how to still protect their clients. As an example, they may say – “Buyers agree to pay up to \$5,000 over the highest offer”. They do not require seeing the proof of that highest offer, discuss appraisal issues, etc. These are the transactions that collapse especially when either their lender has not approved them for that price, or the buyer gets cold feet. Personally, I discuss this with my sellers at the time of closing & we determine if they want to allow them or not. If NOT, I include the verbiage in my signed listing contract.

MISSOURI:

- Love Letters
 - Cindy Fox: Per attorney for the State, Steve Graham, we have not had an issue with buyer love letters and possible fair housing issues in our state. Steve said there is an NAR video on this topic, and the only people who he has heard speak about this have been people who have watched the video. It is something we should be aware of, but currently not an issue here.
 - Janet Judd: Love letters are rampant in St. Louis. Buyers know about them and want to write them. Unfortunately, and unintentionally, most contain inflammatory and discriminatory statements regarding the classes. I urge them not to do it, in writing, via

email, and most will do it anyway. They figure they have nothing to lose and everything to gain. I strongly discourage my sellers from looking at the letters until after the home is under contract. I tell them about the possible negative responses from buyers and potential liability if one decided to file a lawsuit. I have submitted offers that were not accepted by sellers because they looked at the love letters and chose a different offer. I've been told that our offer was more money but they accepted the "young couple," the pregnant lady with twins, the family with dogs, or cats, or kids who could play in the yard etc. Very frustrating when they go that route.

- CCP
 - Per Tim Dain - the biggest issue we have is the ability to detect violations. The only way to detect people circumventing it, is if agents report it and because we all have to work together, people are reluctant to report it. He did say that they send out a few notices a day. He said once it is explained to the violator, they are good with it. They are not seeing any repeat offenders. He suggested adding the ability for 1 on 1 communication between brokers, but said he didn't think NAR would add that to the rule. He also suggested adding a component to C2EX. Locally we do see violations - signs in yards without MLS entry and especially on social media. I think there are a lot of agents who are unaware about this new ruling and additional information and education could be helpful especially at the local level through our Associations.

NEBRASKA:

- Love Letters
 - Julie Joeckel - No fair housing claims that I am aware of, but I will check with the State AE on this further.
- CCP
 - Clear Cooperation Policy - the intent, while good, I think has created more office exclusive listings that aren't even hitting the "market place". If you have a bigger office, we have created what seems like office MLS's, and I am not really thinking that is what the purpose was. Of course, the challenge of the office is to make sure that no one talks about the office exclusive including the seller and the family, which makes it challenging.

NORTH DAKOTA

- Love Letters
 - Diane Zietz reached out to North Dakota Education Director Jill Beck for a state viewpoint. There are no issues - asked state directors and they are not used
 - Vicki Roller: so far have not been an issue in our market. I visited with some of our top producers in our market to see what their experiences have been and found that there were only a few letters anyone had even experienced. They were presented to Sellers along with the offer and the transaction and negotiations went on as usual. One agent said that her seller replied "buyers can write any sob story they like, but the bottom line is that I am looking out for MY bottom line." So, the letter did not seem to have an impact on the seller decision

- CCP
 - Diane Zietz: There are no issues, and there has not been an issue at all across the state of ND. Rolled right into it. Smooth from the beginning.
 - Vicki Roller: No problems with that either. Our board had protocols in place prior to this ruling so "coming soon" and pocket listings were already frowned upon and brought to the board for disciplinary action when discovered. So again, not really an issue in our market.
- New issues: people are worried about the outcome of the election and what it could do to ND energy production.

OHIO:

- Love Letters
 - Andrea Lupton, attorney for office, recommended no love letter unless all about the house and not about the people. Trainers teach you to do it, but lawyers say not to because of the possibility of fair housing violations. This agent never announces the buyer's name. They present facts only because you can discriminate by the "look" of a name. She advises the sellers to focus on most money for the house. Thinks having this addressed in the listing contract is brilliant because if WE are making decisions for the seller- we are creating liability on our side.
- CCP
 - Largest MLS rolled out information early and everything went great. Rolled it out beautifully. Lots of training, notice, and newsfeeds. Three day waiting period was shortened to two days. Once they were told how it works, they were good with it. MLS does have heavy and punitive fines. Sometimes an agent has their seller put their house on Zillow as a FSBO, and then when they get inquiries about the house—they are referred to the listing agent. That's not right either. Or they pick and choose which agent can gain entry. Increases opportunity to sell it themselves and double dip.
- Additional Comments
 - Other associations have Covid issue on listing agreement check boxes and video tour issues check box.

SOUTH DAKOTA:

- Love Letters
 - Via Bud Hannah - received one buyer love letter in 16 years. And that was not really a love letter. It was the buyer telling the seller what was wrong with the house and why they made the offer they did. Said they are in a hot market and no letters.
- CCP
 - More "coming soon" signs - Local rules were created because sellers were putting homes on Facebook. Fines are \$2,500 from the association. More rules. NAR rules made it easier. Lots of in-house listings, not in MLS. Seller has to fill out paper. Still no advertising in that time frame. A lot of in-house listings held out of the MLS, and there are a lot of double-sided deals.

WISCONSIN:

- No representative present to report.



NORTHEAST WORKGROUP NOTES

NAR Risk Management Northeast Workgroup

Chairperson: Dawn Bricker

Meeting: October 30, 2020 @ 10 am Central

Via Zoom Call

Questions posed:

1) Buyer Love Letters

- a. Are they an issue in each area?
- b. How are you advising Seller's?
- c. Are you seeing Fair Housing claims or lawsuits?

2) Clear Cooperation Policy

- a. How has implementation gone in each area?
- b. What issues are you seeing?

Then provide any **emerging issues** in your area

CONNECTICUT

- Information via Tammy Felenstein
- Love Letters
 - Discouraging letter and asking agents to discuss at the beginning of the listing
- CCP
 - MLS is not REALTOR®-owned so they are not mandating by NAR but are following the rules.
 - People are trying to circumvent the policy.
 - Require every agent to upload the listing to the MLS within 48 hours of the listing going live
- Emerging Issues
 - Formed a Diversity committee
 - Zoning legislative proposal will allow State to take zoning from the municipalities so that they can create Affordable Housing. Listening to the membership.

DELAWARE

- Information via Sandi Bisgood
- Love Letters
 - Not seeing many Love letters
 - Discouraging the use of Love letters
 - Created a Diversity and Inclusion committee within the last couple of months
 - Making plans to create a comprehensive Fair Housing Course

- Having issues getting the CE accreditation from Real Estate Commission due to Pandemic
- CCP
 - No big problems, seeing some confusion
- Emerging Issues
 - One issue with cooperation is with agents putting language requiring anyone showing the property must be a member of their board to access the lock box.
 - Agents working outside the area
 - Copies of deposit check with old/outdated but still pervasive practice

MAINE

- Information via Leanne Nichols
- Love Letters
 - Not seeing any fallout from Buyer love letters
 - Not seeing any Fair Housing Issues or Claims
- CCP
 - Adjusting some policy structure
 - People are starting to get it
 - Continues to evolve, people feel it is complicated and cumbersome and not happy about it
 - Seeing some print media violations/reported two in last week
- Emerging Issues
 - A document has been circulated that has suggested that the buyer pay the buyer's agent so that the seller did not have to pay the buyer's agent.
 - A Covid-19 issue where a seller tested positive and on camera found that the buyer and their agent were not protected with a mask or gloves.
 - GPBR just started a Diversity Task Force and is going gangbusters, we've been doing the 21 Day Challenge of training with the Greater Portland Chamber of Commerce and we've been collaborating on a project with two Grad students at University of Southern ME brainstorming ways that we can increase diversity in our membership and in homeownership here in Maine.
 - We just got the Fair Housing course approved for online delivery for CEU's here in Maine and we offered it on Wed 10/28.

MARYLAND

- Information via Kim Mills
- Love Letters
 - They do see the letters
 - Agents on Facebook talk about how they believe the letters help
 - She tries to education on the risk of Fair Housing violations
 - Diversity Panel has addressed the love letters
- CCP

- We need a lot more education
- Some people think the Clear Cooperation is meant to hurt their business
- Emerging Issues
 - Agent giving access codes to buyers and not accompanying the buyer to the buyer
 - Property managers charging astronomical fees for Resale Packages
 - Created Diversity Panels to address issues

MASSACHUSETTS

- Information via Anne Meczywor
- Love Letters
 - Have not been terribly prevalent
 - State has been proactive to discourage use
 - Government affairs committee has been disseminating information
- CCP
 - Clear cooperation is a non-issue
- Emerging Issues
 - Diversity with respect to comments on MLS sheets and changing “Master Bedroom” to Primary Bedroom”
 - Working on bolstering up Diversity Committee

NEW HAMPSHIRE

- No report

NEW JERSEY

- Love Letters (Christina Ban)
 - Not seeing any issues with Love Letters
 - MLS picks up violations and removes the
- Love Letters (Brenda Richmond and Dawn Bricker)
 - Have seen a lot of Love letters
 - Not seen any issues at this point
- CCP (Christina Ban)
 - Still needs more education
 - There are violations
 - There are people going around the Clear Cooperation Policy
 - Listings going into MLS with a nominal commission offering to allow the listing in the MLS
- CCP (Brenda Richmond and Dawn Bricker)
 - Have seen many issues with Clear Cooperation
 - Not being interrupted as intended
 - Need much more education and interpretation
 - Seeing a lot of issues on Facebook

- Emerging Issues
 - Diversity and Fair Housing

NEW YORK

- Information via Brittany Matott
- Love Letters
 - Discouraged by State Attorney due to familial status discrimination
 - Discuss with the seller at the time of the listing agreement and encourage seller not to read/entertain the letters.
 - The listing agent is not to handle any letters received
 - Found that buyers and sellers find each other on facebook and by passing their Agent
- CCP
 - Implemented policies earlier
 - Seeing violations on social media
 - Attached a very hefty fine
- Emerging Issues
 - Fair Housing surrounding Long Island issue has stemmed very important communication
 - Lack of education regarding Fair housing in New York

PENNSYLVANIA

- No report

RHODE ISLAND:

- Information via Janie Aracil
- Love Letters
 - Discouraging love letters but not having any problems
- Clear Cooperation
 - Not experiencing any problems
 - Low inventory and seeing some properties come on MLS under contract
 - Adding more education for clear cooperation
- Emerging Issues
 - Created a Diversity Task Group
 - Reintroduced the Diversity Committee back into State along with new task force groups in local boards. Excited to have them back and being proactive.
 - Properties that are going extremely over asking
 - Has written 8 which all were well over asking and still not get the deal

VERMONT

- No report

VIRGINIA

- Information via Claire Forcier and Candice Bower
- Love Letters
 - Still are coming in and she does see the possible risk of Fair Housing Violations
- CCP
 - Big problem with agents circumventing the Clear Cooperation Policy
 - Top Agent Network reporting listing on their listings coming soon
 - Concerned that Top Agent Network might risk being a Fair Housing Violation
- Emerging Issues
 - Diversity/They created a Community and Industry Relations Committee
 - People coming in from outside of the area and wanting to have the listing agent show the house for them. She does not advise her agent to show the property.
 - Issues with Lock boxes where agents are allowing their buyer's to have the code to the box and go in unaccompanied.

WASHINGTON, D.C.

- Information via Fred Kendrick
- Love Letters
 - Have seen more recently
 - Believes that they are a Fair Housing Violation Risk
 - All for getting rid of them
- CCP
 - Seen significant increase in office exclusives and off market sales
 - Believes that off market sales are encouraged by sellers who do not want their property shown
 - Believes that the result of the clear cooperation is creating the off-market sales that the policy did not intend to create.
 - Not seeing real egregious violations
- Emerging Issues
 - Checks obtained at the time of an offer that are copies and sometime actual checks submitted with offers.
 - Lock box issues where agents are not allowing buyer's agents not from their area to show the property.

WEST VIRGINIA

- No report

NORTHEAST WORKGROUP SUMMARY

- Love Letters
 - Still see letter's being presented
 - May pose a Fair Housing violation
 - Many discourage the use
 - Buyer's and Seller's on Facebook going around agent recommendations
- CCP
 - Issues with agents trying to circumvent the policy
 - Need more education
 - Violations in print media
 - Violations on Facebook
- Emerging Issues
 - Diversity
 - Agents allowing buyers to see houses unattended
 - Agents not allowing buyers agents outside of the area to show the house
 - Deposit checks with offers

SOUTHEAST WORKGROUP NOTES

NAR Risk Management Southeast Workgroup

Chairperson: Kelly Marks

Meeting: October 29, 2020 @ 11 am Eastern

Via Zoom Call

Questions posed:

1. Buyer love letters – are they an issue in your area? How are you advising sellers and buyers? Are you seeing any fair housing claims or lawsuits?

2. The implementation of the Clear Cooperation Policy in your area and what issues, if any, you're seeing.

ALABAMA:

- Love Letters
 - Montgomery area discourages buyers from writing a love letter
 - It gives the seller an advantage too to not do certain repairs if the buyer loves the house so much
 - Also poses a fair housing issue
 - No parts of the offer can be included in the love letter
 - All offers have to be presented up until closing
 - Several brokerages in the area discourage buyer love letters it because it may give the seller some advantage for example in not doing repairs because they know the buyer loves the home
 - There are also concerns with Fair Housing, make sure there are no offers in the love letters.
- CCP
 - Clear Cooperation for the most part being successfully implemented with a few issues here and there
- Additional Comments
 - Down payment assistance is not in our contract
 - We are using escalation clauses now. Been in business since the late 90s and had not used one until this year. Seeing them more and more in multiple offers.
 - Tells buyers not to say anything. Assume there are cameras.

FLORIDA:

- Love Letters
 - No violations on them yet

- As long as they do not use any words that would pertain to the protected classes, then it is ok
- CCP
 - There are some issues with disclosures on multiple offers
 - Should all contracts be presented?
 - Issues with team advertising going rogue
 - Lack of inventory now, and they did a “coming soon” for education purposes
 - Per Beverly Pindling: Clear Cooperation will be working on getting information from our MLS; as far as issues we are having we are seeing a lot of multiple offers. At open houses there is already a line, and they are prepping offers before even seeing property in case client wants to make an offer; up to 25 offers on a property; concern with offers being presented. We have in place not a multiple offer disclosure for the buyer and one for the seller that was put into place this year. Seeing more procuring causes cases in Professional Standards.
 - Per Paula Cash: We aren’t seeing many problems. Lack of inventory. Had Coming Soon too so everyone was used to it. Companies were policing the agents so it’s had a successful implementation.
- Additional Comments
 - Down payment assistance is not in our contract.
 - Haven’t seen any of the issues with escalation clauses
 - Has seen a property go up so high from escalation clause the property didn’t apprise. Then what good are they doing?
 - Haven’t heard anything on issues with security cameras in homes so far, but sees where it could be a problem.

GEORGIA:

- No representative present to report.

MISSISSIPPI:

- No representative present to report.

NORTH CAROLINA:

- Love Letters
 - Per Kelly Marks: Uses buyer love letters a lot. Has had great success with buyer love letters for buyer clients; seeing in high end markets with celebrities; especially the Charlotte market home to several professional sports teams. Try to discourage clients about getting into talking about familial status to avoid any Fair Housing Concerns and focus on how they would take care of the home and property. Allows for some differentiation when you have multiple offers.
 - Per Caitlin Thompson: From the NC REALTORS® State Association perspective not hearing as much on the buyer love letters as we did several years ago but focusing on

pushing out information from our legal team and NAR's resources to our Brokers in Charge. Have heard more from the MLSs about Clear Cooperation and the challenges they've had with implementation.

- Per Tom Gongaware: There are some strong views about buyer love letters and have heard at least one agent put in the listing – no buyer love letters accepted. We discourage at our firm and a number of other firms discourage them. Fair housing violation waiting to happen.
- Seems to be less of this going on and they push out guidance
- They are discouraging love letters now
- CCP
 - Associations had some issues implementing those
 - Some folks are resistant to that policy and change
 - Seems to be going well though overall
 - Per Tom Gongaware: Clear Cooperation Policy seems to be going well. Suspect there might be some abuse but not to the point where it's come to the attention of the data quality folks at the MLS.
- Additional Comments
 - Seeing a lot of escalation clauses. Our NC Real Estate Commission frowns upon them. Legal Counsel at state association says they are risky. Our company had webinars to explain the pluses and minuses of them. Tried to educate agents on their use and misuse. They are another tool that is being used.

PUERTO RICO:

- Love letters
 - When there is more than one offer, they need to be careful about showing information past the offer – this could be a violation of ethics.
- CCP
 - Lower inventory, prices are up for the first time in years, after the earthquake listed 10,000 properties, probably an area for new construction. Clear Cooperation – seeing some excuses; concern about offers being presented. Enforcing fines and pursuing complaints for brokers not following Clear Cooperation.
- Additional Comments
 - Down payment assistance is not in our contract.
 - Not seeing escalation clauses, seeing a lot of flipping of old homes.

SOUTH CAROLINA:

- Love letters
 - No report.
- CCP
 - Earlier this year there were many more pocket listings with a firm exclusive agreement
 - They are continuing to see that withheld listings are less than 1/3 of what they were prior to CCP

- People have not filed complaints about this
- A lot of people are not understanding that this came down from NAR
- Went to Canopy MLS for data; prior to May 1st 10-13 of the old certification to withhold forms (pocket listings) per day; April 13-17 we received approximately 437 total pocket listings by brokers submitting the new firm exclusive agreement. They have issued 41 Failure to Submit Listings since April 13. One of the complaints – as soon as the listing becomes active it is under contract. Some complaints that agents are not able to see if or present an offer. MLS believes Clear Cooperation will help with that. Challenge with educating agents on why this was done.

TENNESSEE:

- Love Letters
 - See love letters all the time. Client's ask about it and coaching them on the appropriate way to do it. As far as other issues we are seeing, escalation clauses are big right now.
- CCP
 - There was a 30-day grace period for handing out fines and such. This was used as an opportunity to educate members
 - No fines have been given since
 - Some people do not agree with the policy and are vocal about it, but even those people are complying with the policy
 - Talked to MLS Director and have not seen many issues. We are fortunate that we had a Coming Soon feature.

US VIRGIN ISLANDS:

- No representative present to report.

SOUTHWEST WORKGROUP NOTES

NAR Risk Management Southwest Workgroup

Chairperson: Joanne Justice

Meeting: October 30, 2020 @ 10:30 am Central

Via Zoom Call

Questions posed:

1. Buyer love letters – are they an issue in your area? How are you advising sellers and buyers? Are you seeing any fair housing claims or lawsuits?

2. The implementation of the Clear Cooperation Policy in your area and what issues, if any, you're seeing.

ALASKA:

- No representative present to report

ARIZONA:

- Love Letters
 - Love letters are not causing any issues in Arizona at this time
- CCP
 - There are 21 MLS's in Arizona, and Arizona is re-writing forms to be consistent in including the Clear Cooperation Policy in them.
- Emerging Issues
 - They are experiencing issues with Limited Service listings. This is creating problems with agency relationships. They are a dual agent state.

ARKANSAS:

- Love Letters
 - Arkansas is experiencing issues with Buyer Love Letters. The legal counsel for the Arkansas REALTORS® Association has put out a statement that Arkansas members should not be involved in the creation or delivery of these type of letters from potential buyers to sellers. If there is a letter presented we are being advised not to present it to the seller and to return it to the buyer with a note stating it is their policy not to participate in presenting these types of communication. There is an inherent risk of Fair Housing violations.
- CCP
 - Clear Cooperation Policy – Not experiencing any issues with this at this time.
- Emerging Issues

- They are having issues with Escalation Clauses in real estate contracts. Arkansas REALTOR® Association's legal counsel has advised against the use of these clauses because of unauthorized practice of law issues. If they are going to be used, they should be drawn up by an attorney.

COLORADO:

- Love Letters
 - The issue of Buyers love letters has created a lot of complaints. Buyers are doing the letters and adding photos of the family. They are putting in the MLS that these types of letters will not be opened.
- CCP
 - Clear Cooperation Policy – MLS has adopted all of the NAR rules and regulations but there are still some issues that are being caused by this.
- Emerging Issues
 - Colorado can't do limited service listings. They use escalation clauses a lot without any problems.

LOUISIANA:

- Love Letters
 - Buyer love letters are not an issue at this time.
- CCP
 - Clear Cooperation Policy – There have only been 10 complaints since May, and most of those were from not understanding the policy. Most paid fines and have not been repeat offenders.
- Emerging Issues
 - Also having issues with Limited Service listings.

NEW MEXICO:

- Love Letters
 - New Mexico has in their Listing Agreements a choice of whether the seller wants to receive Buyer Love letters or not.
- CCP
 - Clear Cooperation Policy – Some agents are ignoring the policy, but agents are reluctant to report them.
- Emerging Issues
 - They, like everyone else, are having issues with Covid-19 and out of state buyers who have to quarantine for 14 days.

OKLAHOMA:

- Love Letters
 - There does not seem to be an issue with Buyer love letters.

- CCP
 - Clear Cooperation Policy – There are no major issues in regards to the Clear Cooperation Policy.
- Emerging Issues
 - They are having the same problems with escalation clauses. They are also experiencing issues that the state constitution says contracts must be in English.

TEXAS:

- Love Letters
 - They are seeing Buyer love letters, but they are not experiencing a real problem with them.
- CCP
 - Clear Cooperation Policy – This is not a real problem for them. Their MLS has a “coming soon” status that a property can be in for 14 days.
- Emerging Issues
 - Texas is having Property Management issues. They are also having issues with buyers buying “sight unseen”.

WEST WORKGROUP NOTES

NAR Risk Management West Workgroup

Chairperson: Kevin M. Burke, JD

Meeting: October 29, 2020 @ 1 pm PT

Via Zoom Call

Questions posed:

1. Buyer love letters – are they an issue in your area? How are you advising sellers and buyers? Are you seeing any fair housing claims or lawsuits?

2. The implementation of the Clear Cooperation Policy in your area and what issues, if any, you're seeing.

CALIFORNIA:

- Love Letters
 - There is much discussion in California regarding Buyer Love Letters. In California, there are 22 “protected classes”, and, as we see it, most Agents are now choosing to stay clear of the use of these types of letters to avoid either implicitly, or explicitly, violating federal fair housing laws. I believe that the practice will continue in that direction as California tends to be fairly litigious anyway. I field calls daily from those asking me why they can't produce the letter in their offer. The answer is that it is not that they can't, but that it needs to be the Seller's decision whether or not to receive them. Where the Seller chooses NOT to receive them, there needs to be a written instruction in the Listing Agreement, and a corresponding instruction in the MLS, of the Seller's wishes. In the event that the Offer includes a “love letter” that cannot be separated from the Offer, then there needs to be instructions from the Seller in the Listing Agreement, and the MLS that says that the offer will be returned for resubmission without the letter. One large brokerage has already reported three major lawsuits based on discrimination; the concern is while there may not be “Discriminatory intent”, there may be “Discriminatory effect”.
 - Listings agents are more inclined to have that conversation at the time of listing. Buyers are struggling to differentiate their offers from others.
- CCP
 - The status of “Clear Cooperation” seems to have been slightly muddled by the advent of COVID-19; some have used the Governor Mandates as a way of restricting the showing of properties (unintended consequence) to allow the Listing Agent more opportunity to sell the property themselves. While we have obviously seen an “uptick” in the number of “Coming Soon” listings in the MLS, I believe that we saw more when we required an “Authorization to Exclude” to be filed with the MLS when a property was NOT going to

be put on the market right away. While most Agents are following the guidelines that were set out starting on 1 May; overall there seems to be compliance with the rule (certainly there are those who hide the fact that they are NOT putting their properties in the MLS). Many have expressed that they are happy that the field has been “leveled” so to speak. I see this as a stepping stone for becoming a better agent as well as better benefit to the public.

- Additional Comments
 - New spin is the seller cameras

HAWAII:

- Love Letters
 - I am assuming these are letters that a Buyer writes to a Seller to influence the Seller to pick their offer in a multiple offer situation. If that is incorrect, please let me know. I haven't heard of any fair housing claims or lawsuits related to this. I also haven't heard of any issues with these letters. I advise my Buyers in these situations of the option of writing a letter to the Seller, but will often just write a short description of my clients and the reason(s) for their interest in the property, in the email that I send to the Seller's agent accompanying the offer. When I am the Seller's agent, I let them know that they have the option of not reading these letters.
- CCP
 - I spoke with our MLS director, and he told me that they have only had a handful of complaints, and zero fines have been handed out – they educate the agent instead of fining, so far. They have added a “coming soon” status category, which can help agents comply with the clear cooperation policy.
- Additional Comments
 - Nancy Donahue Jones—very low inventory. Not doing anything to attract people back that have left the state (emigration). Degrees of love letters, some with pictures, some with video

IDAHO:

- Love Letters
 - In our area we have not seen any issues pertaining to fair housing with the buyer love letters. In fact, it is being discussed and discouraged through our CORE 2020 classes. However, I must share a story about one that backfired on the poor buyers. The property was owned by an 80+ year old widow woman who had lived in the home for over 40 years. This family wanted this property and thought were in competition for it. The seller was a bit cantankerous and always wanted to be there for showings and would visit with the people as they went through to see who wanted HER HOUSE. She initially liked this family with their kids and the family loved the property. Another potential buyer was circling at the time the family decided to write their offer, so they felt they wanted to explain how much they loved the property and what they were going to do there. In their letter they included that their children were very involved in

4H and they were excited to have the room to do their “pig” project at the property. The reaction they received was NOT what they thought it would be. The seller had such an emotional attachment to the property she and her husband had built up for so many years, she was insulted that they would even think of putting pigs on that property. She refused to sell it to them. I know of this because, I brought the next buyer for this house. Agent had briefed me about the “pig” incident. We never discussed changing anything about the property with the seller, but it did not include pigs. The deal was closed, she was happy and the buyers are delighted.

- CCP
 - The primary issue, as always, is getting the information to the members and then getting them to understand what it is and what they should do. We always have those who are slower to grasp than others. We simply keep reminding those who are not implementing the policy to get in line.

MONTANA:

- No representative present to report.

NEVADA:

- Love Letters
 - Yes and no—some agents have done sales with them. Agents taking it on themselves to deny offers with letters.
- CCP
 - Has been a real issue. People starting to report it. Larger companies have private Facebook pages where they provide “just listed” properties.
- Additional Comments
 - No inventory greatest number of escrows closed in April. Seller cannot be present at OH. Now able to show tenant occupied properties but not while the tenant is in it.

OREGON

- Love Letters
 - We are advising to not provide; although, in essence there is inherently more risk to the sellers due to Fair Housing and potential violations of the Oregon Equality Act. Due to the extreme limited inventory and multiple offers – some buyers insist on providing some sort of “letter”.
- CCP
 - As a REALTOR®-owned MLS, RMLS™ should stay in compliance with the National Association of REALTORS® (“NAR”) MLS Model Rules. For 2020, NAR made several changes to the MLS Model Rules that are mandated. The first mandatory change was reviewed and approved by the RMLS™ Board of Directors at their January meeting and became effective on February 17, 2020.
 - The second part of the 2020 NAR Model Rule changes were reviewed and approved by the RMLS™ Board of Directors and became effective on April 30, 2020. The changes

incorporate the NAR-mandated Clear Cooperation MLS Policy 8.0 that governs the public marketing of listings and their entry into the multiple listing service. Within one (1) business day of marketing a property to the public, the Seller's Agent must submit the listing to the MLS for cooperation with other MLS participants.

- We have had compliance and understanding in both Oregon and SW Washington.

UTAH:

- Love Letters
 - No legal action that anyone is aware of yet. We advise that the Seller avoid any liability by only looking at the objective criteria. On the Buyer side, Agents advise their people to write letters because they sway Sellers.
- CCP
 - Early on, there was lots of grumbling, but not now. Is a private Facebook page "public"? Majority are glad to have the Clear Cooperation policy. Above asking price offers are extremely common. The government is not as involved in things.
 - Has not slowed down our industry.

WASHINGTON:

- No representative present to report.

WYOMING:

- No representative present to report.

STATE FORMS

FAIR HOUSING & DISCRIMINATION ADVISORY

(C.A.R. Form FHDA, 10/20)

1. **EQUAL ACCESS TO HOUSING FOR ALL:** All housing in California is available to all persons. Discrimination as noted below is prohibited by law. Resources are available for those who have experienced unequal treatment under the law.
2. **FEDERAL AND STATE LAWS PROHIBIT DISCRIMINATION AGAINST IDENTIFIED PROTECTED CLASSES:**
 - A. FEDERAL FAIR HOUSING ACT ("FHA") Title VIII of the Civil Rights Act; 42 U.S.C. §§ 3601-3619; Prohibits discrimination in sales, rental or financing of residential housing against persons in protected classes;
 - B. CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT ("FEHA") California Government Code ("GC") §§12900-12996, 12955; 2 California Code of Regulations ("CCR") §§12005-12271; Prohibits discrimination in sales, rental or financing of housing opportunity against persons in protected classes by providers of housing accommodation and financial assistance services as related to housing;
 - C. CALIFORNIA UNRUH CIVIL RIGHTS ACT ("Unruh") California Civil Code ("CC") §51; Prohibits business establishments from discriminating against, and requires full and equal accommodation, advantages, facilities, privileges, and services to persons in protected classes;
 - D. AMERICANS WITH DISABILITIES ACT ("ADA") 42 U.S.C. §§12181-12189; Title III of the ADA prohibits discrimination based on disability in public accommodations; and
 - E. OTHER FAIR HOUSING LAWS: Section 504 of Rehabilitation Act of 1973 29 U.S.C. §794; Ralph Civil Rights Act CC §51.7.; California Disabled Persons Act; CC §§54-55.32; any local city or county fair housing ordinances, as applicable.
3. **POTENTIAL LEGAL REMEDIES FOR UNLAWFUL DISCRIMINATION: Violations of fair housing laws may result in monetary civil fines, injunctive relief, compensatory and/or punitive damages, and attorney fees and costs.**
4. **PROTECTED CLASSES/CHARACTERISTICS:** Whether specified in Federal or State law or both, discrimination against persons if based on that person's belonging to, association with, or perceived membership to, any of the following classes or categories is prohibited.

Race	Color	Ancestry	National Origin	Religion
Sex	Sexual Orientation	Gender	Gender Identity	Gender Expression
Marital Status	Familial Status (family with a child or children under 18)	Source of Income (e.g., Section 8 Voucher)	Disability (Mental & Physical)	Medical Condition
Citizenship	Primary Language	Immigration Status	Military/Veteran Status	Age
Criminal History (non-relevant convictions)			Any arbitrary characteristic	

5. **THE CALIFORNIA DEPARTMENT OF REAL ESTATE REQUIRES TRAINING AND SUPERVISION TO PREVENT HOUSING DISCRIMINATION BY REAL ESTATE LICENSEES:**
 - A. California Business & Professions Code ("B&PC") §10170.5(a)(4) requires 3 hours of training on fair housing for DRE license renewal; Real Estate Regulation §2725(f) requires brokers who oversee salespersons to be familiar with the requirements of federal and state laws relating to the prohibition of discrimination.
 - B. Violation of DRE regulations or real estate laws against housing discrimination by a real estate licensee may result in the loss or suspension of the licensee's real estate license. B&PC §10177(l)(1); 10 CCR §2780
6. **REALTOR® ORGANIZATIONS PROHIBIT DISCRIMINATION:** NAR Code of Ethics Article 10 prohibits discrimination in employment practices or in rendering real estate license services against any person because of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity by REALTORS®.
7. **WHO IS REQUIRED TO COMPLY WITH FAIR HOUSING LAWS?**
Below is a non-exclusive list of providers of housing accommodations or financial assistance services as related to housing who are most likely to be encountered in a housing transaction and who must comply with fair housing laws.
 - Sellers
 - Landlords
 - Sublessors
 - Real estate licensees
 - Real estate brokerage firms
 - Property managers
 - Mobilehome parks
 - Homeowners Associations ("HOAs");
 - Banks and Mortgage lenders
 - Insurance companies
 - Government housing services
8. **EXAMPLES OF CONDUCT THAT MAY NOT BE MOTIVATED BY DISCRIMINATORY INTENT BUT COULD HAVE A DISCRIMINATORY EFFECT:**
 - A. Prior to acceptance of an offer, asking for or offering buyer personal information or letters from the buyer, especially with photos. Those types of documents may inadvertently reveal, or be perceived as revealing, protected status information thereby increasing the risk of (i) actual or unconscious bias, and (ii) potential legal claims against sellers and others by prospective buyers whose offers were rejected.
 - B. Refusing to rent (i) an upper level unit to an elderly tenant out of concern for the tenant's ability to navigate stairs or (ii) a house with a pool to a person with young children out of concern for the children's safety.
9. **EXAMPLES OF UNLAWFUL OR IMPROPER CONDUCT BASED ON A PROTECTED CLASS OR CHARACTERISTIC:**
 - A. Refusing to negotiate for a sale, rental or financing or otherwise make a housing opportunity unavailable; failing to present offers due to a person's protected status;
 - B. Refusing or failing to show, rent, sell or finance housing; "channeling" or "steering" a prospective buyer or tenant to or away from a particular area due to that person's protected status or because of the racial, religious or ethnic composition of the neighborhood;
 - C. "Blockbusting" or causing "panic selling" by inducing a listing, sale or rental based on the grounds of loss of value of property, increase in crime, or decline in school quality due to the entry or prospective entry of people in protected categories into the neighborhood;
 - D. Making any statement or advertisement that indicates any preference, limitation, or discrimination;



- E. Inquiring about protected characteristics (such as asking tenant applicants if they are married, or prospective purchasers if they have children or are planning to start a family);
 - F. Using criminal history information before otherwise affirming eligibility, and without a legally sufficient justification;
 - G. Failing to assess financial standards based on the portion of the income responsible by a tenant who receives government subsidies (such as basing an otherwise neutral rent to income ratio on the whole rent rather than just the part of rent that is the tenant's responsibility);
 - H. Denying a home loan or homeowner's insurance;
 - I. Offering inferior terms, conditions, privileges, facilities or services;
 - J. Using different qualification criteria or procedures for sale or rental of housing such as income standards, application requirements, application fees, credit analyses, sale or rental approval procedures or other requirements;
 - K. Harassing a person;
 - L. Taking an adverse action based on protected characteristics;
 - M. Refusing to permit a reasonable modification to the premises, as requested by a person with a disability (such as refusing to allow a wheel chair bound tenant to install, at their expense, a ramp over front or rear steps, or refusing to allow a physically disabled tenant from installing, at their own expense, grab bars in a shower or bathtub);
 - N. Refusing to make reasonable accommodation in policies, rules, practices, or services for a person with a disability (such as the following, if an actual or prospective tenant with a disability has a service animal or support animal):
 - (i) Failing to allow that person to keep the service animal or emotional support animal in rental property,
 - (ii) Charging that person higher rent or increased security deposit, or
 - (iii) Failing to show rental or sale property to that person who is accompanied by the service animal or support animal, and;
 - O. Retaliating for asserting rights under fair housing laws.
- 10. EXAMPLES OF POSITIVE PRACTICES:**
- A. Real estate licensees working with buyers or tenants should apply the same objective property selection criteria, such as location/neighborhood, property features, and price range and other considerations, to all prospects.
 - B. Real estate licensees should provide complete and objective information to all clients based on the client's selection criteria.
 - C. Real estate licensees should provide the same professional courtesy in responding to inquiries, sharing of information and offers of assistance to all clients and prospects.
 - D. Housing providers should not make any statement or advertisement that directly or indirectly implies preference, limitation, or discrimination regarding any protected characteristic (such as "no children" or "English-speakers only").
 - E. Housing providers should use a selection process relying on objective information about a prospective buyer's offer or tenant's application and not seek any information that may disclose any protected characteristics (such as using a summary document, e.g. C.A.R. Form SUM-MO, to compare multiple offers on objective terms).
- 11. FAIR HOUSING RESOURCES:** If you have questions about your obligations or rights under the Fair Housing laws, or you think you have been discriminated against, you may want to contact one or more of the sources listed below to discuss what you can do about it, and whether the resource is able to assist you.
- A. Federal: https://www.hud.gov/program_offices/fair_housing_equal_opp
 - B. State: <https://www.dfeh.ca.gov/housing/>
 - C. Local: local Fair Housing Council office (non-profit, free service)
 - D. DRE: <https://www.dre.ca.gov/Consumers/FileComplaint.html>
 - E. Local Association of REALTORS®. List available at: <https://www.car.org/en/contactus/rosters/localassociationroster>.
 - F. Any qualified California fair housing attorney, or if applicable, landlord-tenant attorney.
- 12. LIMITED EXCEPTIONS TO FAIR HOUSING REQUIREMENTS:** No person should rely on any exception below without first seeking legal advice about whether the exception applies to their situation. Real estate licensees are not qualified to provide advice on the application of these exceptions.
- A. Legally compliant senior housing is exempt from FHA, FEHA and Unruh as related to age or familial status only;
 - B. An owner of a single-family residence who resides at the property with one lodger may be exempt from FEHA for rental purposes, PROVIDED no real estate licensee is involved in the rental;
 - C. An owner of a single-family residence may be exempt from FHA for sale or rental purposes, PROVIDED (i) no real estate licensee is involved in the sale or rental and (ii) no discriminatory advertising is used, and (iii) the owner owns no more than three single-family residences. Other restrictions apply;
 - D. An owner of residential property with one to four units who resides at the property, may be exempt from FHA for rental purposes, PROVIDED no real estate licensee is involved in the rental; and
 - E. Both FHA and FEHA do not apply to roommate situations. See, *Fair Housing Council v Roommate.com LLC*, 666 F.3d 1216 (2019).
 - F. Since both the 14th Amendment of the U.S. Constitution and the Civil Rights Act of 1866 prohibit discrimination based on race; the FHA and FEHA exemptions do not extend to discrimination based on race.

Buyer/Tenant and Seller/Landlord have read, understand and acknowledge receipt of a copy of this Fair Housing & Discrimination Advisory.

Buyer/Tenant _____ Date _____
 Buyer/Tenant _____ Date _____
 Seller/Landlord _____ Date _____
 Seller/Landlord _____ Date _____

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Buyer Interest Letters and Unconscious or Implicit Bias: Dos and Don'ts

Member Legal Services

(213)739-8282

October 28, 2020

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I. Introduction

Q1. What are buyer interest letters? (aka, buyer love letters, or buyer letters)

A1. In a competitive real estate market, it is not uncommon for a buyer to submit a personal letter to the seller, sometimes including a photo or picture of the buyer, as a way to make the buyer's offer stand-out among the many the seller may have received. Many real estate agents suggest it, and even help their buyers write the letters. You can't blame those buyers who try this tactic, after all, in those competitive markets everyone is looking for an edge, and a letter may help explain the need for a long escrow, a small down payment, or just a way to make a personal connection or pull at the heartstrings of the seller. Sometimes sellers request such letters to help them decide among competing offers that are virtually identical.

Q2. Why would a seller ask a buyer for a letter to accompany an offer?

A2. When confronted with the usually pleasant scenario of having many offers to choose among, many sellers ask themselves, and their agents, how to decide which one to accept when all offers will net the seller practically the same amount? This may be true for sellers that are less concerned about the difference in the monetary proceeds, especially if perceived by the sellers to be relatively small, if there is substantial equity in the property. A house is often more than just a non-descript, detached, interchangeable, objective product to property owners; it is a "home," a series of memories, a lifetime of experiences and events. It is personal. To many sellers, a home is like a family heirloom, to be passed along to the next recipient with the expectation it will be cared for and even loved. These

sellers may want to transfer the home to the next owner that they think will value and appreciate their home just as much as they did.

Q3. What was the impetus behind the interest in buyer letters?

A3. In response to social unrest that began in the late Spring and into the Summer of 2020, many residents of the United States, and California, began to focus greater attention on social injustice, primarily racial injustice. REALTOR® support of policies aimed at addressing housing discrimination and disparities is not new. But with recent increased dialogue and awareness of persistent homeownership disparities, some REALTORS® voiced concern that buyer interest letters could be viewed as contributing to unfair or unlawful results in real estate transactions.

In October 2020, C.A.R. released a form titled, “Fair Housing & Discrimination Advisory.” This form was widely disseminated as it came bundled with all purchase agreements, listing agreements, buyer representation agreements and the residential lease. Paragraph 8 of that form addresses buyer interest letters as an example of conduct that may not be motivated by discriminatory *intent* but could have discriminatory *effect*.

II. The Law and its Application

Q4. What does the law say about discrimination?

A4. In California, where both State and Federal laws apply, it is unlawful to discriminate against a person because that person belongs to or is associated with one or more protected classes or characteristics. These include the following 22 categories: Race, color, ancestry, national origin, religion, sex, sexual orientation, gender, gender identity, gender expression, marital status, familial status, source of income, disability, medical condition, citizenship, primary language, immigration status, military/veteran status, age, criminal history, and any arbitrary determination.

Q5. Even if one were not familiar with all 22 items listed, most people know discrimination can be unlawful. But is it wrong to accept an offer because a seller “likes” one buyer better than another or thinks one buyer is more deserving than another?

A5. Possibly, if another prospective buyer is denied an equal opportunity to purchase because of one of the categories above.

Q6. Overt discrimination is sometimes easy to spot. What about unconscious or implicit bias? Does it exist, and if so, what are the implications?

A6. Although overt discrimination has become less common, there are quite a few recent news stories and studies that reveal the prevalence of more subtle discrimination and implicit bias in the real estate industry. Famously, a three-year investigation by Newsday found rampant steering and different treatment based on race. Studies suggest that implicit bias, or the brain’s subconscious linking of

certain groups with stereotypes, can cause people to treat people of different groups differently without conscious awareness.

This different treatment may have legal implications, if a REALTOR, whether consciously or not, is treating individuals differently based on membership in protected classes or categories. These actions may also perpetuate segregation and homeownership disparities.

Unconscious or Implicit bias sample exercise.

Pretend you (as an agent or a buyer) are showing up to your appointment for a property that was just put on the market. As you drive up, you can't help but notice the "Vote for XXXX" sign in the front window or on the lawn. What do you think if the property has an American flag flying? Or Palestinian? Or Mexican? When you are touring the property, you notice a Prius in the garage, or an electric vehicle charging station or Land Rover or Ford 450. During this same tour, you notice a prayer scroll on the door jamb, or a picture of backpackers, or travel photos from throughout the world, or a law school diploma, or a high school diploma. What if you see a framed basketball jersey ... or a framed hockey jersey? Maybe it is the end of the year and you observe a Christmas tree, or Nativity scene, or a candle holder with multiple candles. Maybe on the mantel you see a picture of someone wearing a police officer's or firefighter's or military uniform, or a picture of a teenager with the swim team or football team or cheer squad, or a wedding photo, or picture of someone in a turban, or on a prayer rug.

How many of you made assumptions, with one or more of the examples above, **good or bad**, about the seller's race, color, religious beliefs, sex, gender, nationality, family status or any of the other protected classes or categories? Be honest with yourself now. For example, did you picture the wedding photo with two people of the same skin color? Of the same sex? When you saw the candle holder, in your mind did you think of Hanukkah? Or Kwanzaa? When you walked up to the property, were you insulted, pleased, self-righteous or indignant by what you saw? Would you feel the same way about the Nativity scene if it were August instead of December? Would you feel the same way about the flag if you knew the World Cup was going on? Would you feel the same about the seller's vehicle if the property were in San Francisco or Los Angeles or Bakersfield or Mammoth?

If you, as an agent or prospective buyer, drew conclusions based on your perceptions of group characteristics maybe you can see how the seller might do the same thing based on information in, or pictures included with, a buyer letter.

Of course, any assumptions that could be made will not necessarily determine whose offer gets accepted. But discrimination is not always black and white, literally, or figuratively; it can be subtle.

Parting thought. California is diverse. It is a minority, majority (or is it majority, minority) State. Because of that, it is highly likely that persons of different legally protected classes or having different legally protected characteristics may be competing against one another or contracting with one another. Something to think about. Be aware ... and take care.



III. Actions that a Real Estate Brokerage Company Can Take regarding Buyer Interest Letters

Q7. What Actions Should a Broker Take to Address Buyer Interest Letters?

A7. Brokers could bring the issue up at office meetings and other gatherings or communications with salespersons and broker-associates affiliated with broker. Although some people may be uncomfortable with the topic, since agents can be liable for following a principal's instruction to illegally discriminate, it is better that they are made aware of high-risk conduct. Armed with information, agents can then be better prepared to answer questions that may come up from buyers and sellers.

If a broker has discussed buyer interest letters with the broker's legal counsel and has determined that such letters present potential legal implications for the broker and seller, the broker might establish a policy on how to address the issue. For example, a broker may have a policy recommending against inviting such letters or accepting them if presented.

Q8. What Actions Should a Seller's Agent Take to Address Buyer Interest Letters?

A8. If the broker has a policy pertaining to interest letters, this policy should be explained to a seller with a form requiring the seller's consent. Some have found that adding the policy as an attachment to the listing agreement presents an opportunity to discuss the issue up front. If the seller will not give written consent to the broker's policy, the broker may want to consider either (i) notifying the seller, in writing, that the seller should seek the advice of independent legal counsel should offers be submitted with such letters, or (ii) refusing to accept the listing, especially if the broker or agent involved suspects the seller may have overt discriminatory intentions. Even if the seller does consent to such a policy, if offers come in with such letters, the listing agent should inform the seller of the offers but remind the seller of why they are not being presented.

Q9. What Actions Should a Seller's Agent Take if the Seller Will Not Be Reviewing Buyer Letters?

A9. If the seller will not be reviewing buyer letters, an agent can indicate in the remarks section of the MLS that buyer letters will not be presented to the seller. If an offer is presented and the letter is in the same electronic document as the offer, and the listing agent is not able to separate them, the offer will be returned to the buyer's agent so that the letter can be removed and the offer resubmitted. Since brokers have a common law fiduciary duty to present all offers to seller clients unless instructed otherwise by the seller, brokers who institute such policies should obtain the written consent from the seller first. If the buyer's agent insists that the listing agent present the offer with the letter, listing licensees can then show this seller-signed document to the buyer's agent.

If the seller has given written instructions not to accept any buyer letters, and to return any offers that are accompanied by such letters, the seller's agent will not be breaching a fiduciary duty or other legal obligation to the seller to present all offers if such offers are returned. However, the seller's agent should still inform the seller that the offer with a letter was received but not presented.

The seller's agent should not knowingly present some offers with buyer letters and not others.

Q10. What Actions Should a Seller's Agent Take if the Seller Has Not Given Any Instruction on Buyer Letters?

A10. If a seller has not given any instruction on the issue, and a buyer submits an offer accompanied by a buyer letter, the seller's agent would be obligated to present that offer. However, the agent should also remind the sellers of the obligation to sell the property in accordance with fair housing laws and that by reading such letters, and not focusing on objectively neutral criteria, the seller is potentially exposed to legal claims, whether justified or not.

If the seller insists on reading buyer letters in support of an offer, the seller should be advised to speak with legal counsel before deciding on which offer to accept and to document neutral criteria applied to all offers that are used in the decision-making process.

The seller's agent should not knowingly present some offers with buyer letters and not others.

IV. Advice to Sellers regarding Buyer Interest Letters

Q11. My seller wants to know more about the buyers to help them decide among multiple offers. What should I say?

A11. Sellers could be reminded that their home must be sold within the boundaries of the law and the law prohibits discrimination based on certain characteristics or belonging to certain classes. Everyone, regardless of their nationality, sex, race, gender, color, religion, family status, etc. brings their own set of biases into the decision-making process. If, intentionally or unconsciously, a seller treats one person's offer differently from another's offer, and that difference is based on a protected class or category, then the seller is potentially exposed to a fair housing claim. Focusing on neutral factors will minimize the possibility of unlawful bias.

Q12. What if my sellers tell me that they don't want to discriminate, but they just want to help others who have historically been the subjects of unlawful discrimination? After all, they may say, government entities seem to be able to take background and personal characteristics into consideration to "level the playing field," why can't we?

A12. In a private home sale transaction, the law prohibiting unlawful discrimination applies to all persons, entitled to protection because of a protected class or characteristic, not just some. Favoring one person based on group characteristics may discriminate against others possessing different group characteristics.

Q13. What if the sellers ask if this just a race or color issue? What if the sellers agree not to allow pictures to accompany a buyer offer letter?

A13. While race and color are certainly legally protected categories that may be identifiable in a picture, protected classes and characteristics, including but not limited to race and color, may reveal themselves even without a picture. Refusing to accept pictures accompanying an offer is a step in the right direction, but it may not be sufficient to guard against other claims of unlawful bias.

V. Advice to Buyers regarding Buyer Interest Letters

Q14. In many communities, especially in times of multiple offers, it has been commonplace to have a buyer write a letter to the seller to distinguish that buyer's offer from the others and to help the buyer's offer "stand out among the crowd." May buyers continue to do so?

A14. If, the seller has not expressed any instruction on the acceptability of such letters, and the buyer insists on including such a letter, then the buyer's agent may suggest to the buyer to focus on objective criteria and even subjective matters, such as taste, flattery, and style, while striving to avoid language in the letter that may directly or indirectly indicate belonging to a protected class or having protected characteristics. In such a case, it is a good practice to have the buyer's letter be reviewed by the broker, office manager or even legal counsel first.

If the seller has given written instructions to the seller's broker not to submit offers that are accompanied by such letters, and that direction is made publicly available, such as through the MLS, then buyers making offers on that property should be instructed not to include such a letter, as doing so will decrease, rather than increase, the chance of the offer being accepted because the offer itself may not be presented to the seller under the circumstances.

Q15. Is a buyer in violation of fair housing laws by submitting a letter accompanying an offer?

A15. No, but it may not be advisable for other reasons. The decision-making process regarding to whom to sell a property belongs to the seller, not the buyer. And a buyer letter may be written in such a way to not address any protected category. But buyer letters might include information suggesting that the buyer belongs to, or associates with, a protected class or characteristic. If that were the case, it could raise questions as to whether the seller based their decision (explicitly or implicitly) on this information, and even whether the buyer intended to use protected categories to influence the seller's decision. Accordingly, even though a buyer letter in most cases is unlikely to give rise to a direct claim for violation of fair housing laws, submitting a buyer letter may inadvertently drag a buyer into an unwanted claim regarding the property.

VI. Resources

Q16. What other information is available to learn more about buyer letters, unconscious or implicit bias, and unequal treatment in real estate transactions?

A16. <https://www.car.org/en/riskmanagement/tools/Buyer-Interest-Letters>

<https://www.nar.realtor/videos/window-to-the-law/how-to-handle-multiple-offers>

<https://www.nar.realtor/newsroom/nar-introduces-implicit-bias-training-for-realtor-members-associations>

<https://www.nar.realtor/fair-housing> Has links to ACT and printable copy of Fair Housing Declaration

<https://store.realtor.org/product/multimedia/housing-point-fair-housing-act-video-download>
Free video, pocket guide, handbook on FHA to NAR members

<https://www.nar.realtor/thats-who-we-r/fair-housing-assets> Free downloadable Fair Housing Assets (30 sec video clip, print ads, animated social ads, Zoom backgrounds, billboard, poster).

<https://projects.newsday.com/long-island/real-estate-agents-investigation/>

<https://kinder.rice.edu/2018/03/16/study-how-houstons-appraisal-industry-reinforces-racial-inequality>

<https://www.cnbc.com/2020/08/19/lenders-deny-mortgages-for-blacks-at-a-rate-80percent-higher-than-whites.html>

<https://www.car.org/en/riskmanagement/quickguides> for other resources on fair housing.

VII. Examples of Language in Buyer Interest Letters that Are Probably OK (numbered paragraphs below) or Potentially Problematic (lettered paragraphs below) and the Reason(s) Why (parenthetical information below)

1. The big back yard is perfect ... for our two dogs, Bert and Ernie, to run around
 - A. The big back yard is perfect ... for my seeing eye dog, Hawkeye, to get fresh air. (Disability)
 - B. The big back yard is perfect ... for our three children, Manny, Moe and Jack, to get fresh air.(Family status)
 - C. The big back yard is perfect ... for our wheelchair-bound adopted daughter from Bangladesh to go outside without fear of being injured. (Disability. Nationality.)

2. The multiple rooms in the home will allow ... each of us to have separate offices in the work-from-home environment, and a guest room for the many visitors we expect.
 - A. The multiple rooms in the home will allow ... each of our children to have their own bedroom for the first time and will be perfect for our upcoming wedding.(Family status. Marital Status. Potentially, religion.)
 - B. The multiple rooms in the house will allow ... me to maximize the number of paying residents in the group home for battered spouses and recovering alcoholics.(Family status, disability.)

3. The location of the home is perfect for me because it is near ... grocery stores and entertainment and restaurants and (my all-electric vehicle can only go a limited distance without requiring a recharge) (I prefer to walk or ride a bicycle rather than spew carbon emissions by driving a gas vehicle for everyday tasks and activities.)
 - A. The location of the home is perfect for me because it is near ... both my kids' school and my dialysis treatment center. (Family status. Medical condition.)
 - B. The location of a home is perfect for me because it is near ... the only non-denominational, LGBTQ+ place of worship in the city. (Religion. Sexual orientation. Gender. Gender Identity. Gender Expression.)
 - C. The location of a home is perfect for me because ... the streets are well-lit, and I, as a young (or old) woman, can feel safe jogging (walking) in the early evening.(Age. Sex.)
 - D. The location of the home is perfect for me because it is not near ... a park, school or other place I have to avoid as a condition of my parole even though I have found religion and turned over a new leaf.(Criminal History, religion)

4. I love the big kitchen because ... I like to entertain and the center of all my parties tends to revolve around food and cooking.
 - A. I love the big kitchen because ... my big Italian (or fill in name of other ethnic group) family loves to cook and eat and the whole family can join in. (Ancestry. Family status.)
 - B. I love the big kitchen because ... I always host my parents, children, and grandchildren as we celebrate Christmas, the day of birth of our lord and savior, Jesus Christ. Everybody participates in the kitchen by baking fruit loafs, and cookies, and popping popcorn, and drinking egg nog. It will be just like when my grandma was alive. (Religion. Family status.)

5. The architecture and molding are exquisite and remind me ... of my vacation to Greece. They also make the home feel unique and warm rather than sterile and impersonal.
 - A. The architecture and molding are exquisite and remind me ... of the house I grew up in Greece, where I was born and spent the first 17 years of my life before coming to America on a student visa. I loved this country so much I decided stay and hope to become a citizen one day I want to own my part of the American dream.(Citizenship. Immigration status.)
 - B. The architecture and molding are exquisite and ... will make it easy for the blind military vets of the group home I plan to establish to easily distinguish one room from another. (Disability. Military/Veteran status.)
 - C. The architecture and molding are exquisite ... Su casa es muy bonita.Por favor, véndeme su casa.Muchas gracias.(Primary language)

6. The condominium in the city is perfect for someone like me ... looking to be close to entertainment, shopping, and nightlife.
 - A. The condominium in the city is perfect for someone like me ... looking to escape the memories of my suburban home stolen from me by my former spouse in my recent divorce, and its location near the core of the city's historically (fill in the buyer's ethnicity, religion, skin color,

race, sexual orientation, etc.)community will allow me to feel comfortable exploring my newfound freedom without feeling like an outsider.(Race, color, religion, sexual orientation, marital status, or whatever is filled in the parenthesis.)

- B. The condominium in the city is perfect for (a single person) (an elderly person) like me ... looking to avoid responsibilities for property maintenance and upkeep. (Marital status. Age.)
- C. The condominium in the city is perfect for someone like me ... looking for an affordable place to own, since me and my child have limited income coming from spousal support and government assistance.(Source of income.)
- D. The condominium in the city is perfect for a single mom like me ... ever since my husband died of cancer, my son and I have been looking for an affordable place without the painful memories of what life was like before. The insurance proceeds will enable me to easily make the down payment and monthly loan payments.(Marital status. Family status. Source of Income.)

7. The double-wide French door ... is so inviting, I felt at home as soon as I came up the walk.

- A. The double-wide French door ... and smooth, flat walkway, is just what I have been looking for. Ever since I lost my legs due to an IED while serving in Iraq, I have been wheelchair-bound. There is plenty of room for me to enter comfortably and not panic every time I come to or go from home.(Disability. Military/Veteran status.)
- B. The double-wide French door ... has great fung shui allowing life and vitality to flow through the house. (National origin.)
- C. The double-wide French door ... has plenty of room to bring into the home a cauldron for my weekly group Wiccan meeting.(Religion.)

8. It's not easy ... finding an affordable house in a neighborhood within walking or reasonable driving distance.

- A. It's not easy ... being a single parent in today's society. I have worked very hard to be able to afford such a beautiful home and will care for it the rest of my life as a symbol of my achievement.(Marital status. Family status.)
- B. It's not easy ... being a devout Muslim in today's society. Ever since September 11, 2001, it feels as though prejudice is everywhere and blocking my path to success. Owning a home in this neighborhood will serve as a symbol I am an American, with the full rights and privileges afford anyone else.(Religion. Nationality.)
- C. It's not easy ... being a Native American in today's society. Owning a home will make me feel like I am getting back my fair share of what was taken away from my people.(Nationality.)
- D. It's not easy ... being a woman in today's society. Everywhere one goes there are obstacles, glass ceilings, pressure to quit the workforce, stay at home, marry, have children, and rely on others, particularly men, for support. Being a first-time homeowner will allow me to stand proud, stand on my own, and be independent. For other buyers, your home may just be a house. For me, your property will be a symbol of freedom that I will always cherish.(Sex.)

9. I plan on living in the home and becoming an active member of the community. I am a member of the neighborhood board where I live now and plan on joining the local one once I move in. I am not just going to make some cosmetic improvements and flip the house or rent it out. (Note: Investor

purchasers are not a protected class or category. Indeed, in many cases owner-occupancy is considered a societal benefit.)

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Written correspondence should be addressed to:

CALIFORNIA ASSOCIATION OF REALTORS®

Member Legal Services

525 South Virgil Avenue

Los Angeles, CA 90020.

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Multiple Offer Disclosure to Seller

This disclosure is provided by _____ (Brokerage Name)
to you, _____ Seller(s),
regarding your Property located at: (Address) _____

As a Seller, you should be aware that during the listing process, you may receive more than one offer on your Property at approximately the same time. There are several options for you to consider if this occurs, each with its own benefits, risks, and potential legal consequences. Here are some commonly used options so that you, as a Seller, can provide direction to the Brokerage as to how you would like to proceed. The decision about how to proceed with any offer is entirely up to you as the Seller.

- 1) You can accept or counter the best offer and reject the others: it is possible in a multiple offer situation for you to simply accept or counter the best offer that you receive, thereby rejecting the other offers. It is important to understand the risks in doing this, of course, because if you are countering one offer, the buyer may not accept those countered term(s), which would mean there is no agreement. During this time, it is possible that the other interested buyers have moved on with other properties, although nothing prevents you from reaching back out to them to resubmit an offer. Additionally, in responding to only one buyer's offer, you may not be getting the best price as it is possible that if that buyer had known of other interested buyers, the buyer would have increased the purchase price.
- 2) You can respond with counteroffers to some or all of the offers you've received: with this option, to avoid the potential of being under contract with more than one buyer, you would need to reserve the right to be bound to only one of the accepted counteroffers in your response. This would require disclosure to each of the interested buyers that the counteroffer from you is one of a number of counteroffers you are making. It is therefore possible that a buyer would choose to withdraw from the negotiations if the buyer does not want to compete with other buyers.
- 3) You can ask all buyers to submit their "highest and best" offer: with this option, you are going back to the buyers who submitted an offer and asking them to present their "highest and best" offer on the Property. The buyers would be asked to supply this offer by a certain deadline. It is important to understand this could result in the buyer resubmitting their original offer or submitting a new one. You would then have the option of considering all "highest and best" offers and deciding to accept, reject or counter them. Similar to option 2, any buyer could decide to withdraw from the negotiations if the buyer did not want to compete with other buyers.

If you as a Seller are in a multiple offer situation, your Realtor must check with you as to how you'd like to proceed, including whether or not to disclose that multiple offers exist. Understanding that you have options with regards to your response(s) to any offer is important so that you can properly instruct the Brokerage as to how to handle the negotiation process if you've received more than one offer at approximately the same time. Please consult an attorney if you have questions regarding your options.

The Seller acknowledges receipt of this disclosure.

(Seller's Signature)

(Date)

(Seller's Signature)

(Date)

Notice of Multiple Offers to Buyers

Property Address: ("Property"). _____

MLS# _____

Seller(s): _____ ("Seller")

Listing Brokerage: _____

Listing Agent: _____

Listing Agent's Email: _____

Buyer(s): _____ ("Buyer")

Selling Brokerage: _____

Selling Agent: _____

Selling Agent's Email: _____

Multiple Offers have been received on the above described Property.

Seller has requested each Buyer to submit his/her "highest and best" offer by _____ a.m. p.m. on _____, _____. ("Deadline")

Offers submitted by the Deadline are subject to the following:

- 1) All offers must be in writing.
- 2) Offers may be submitted to the Listing Agent via email or personal delivery.
- 3) Seller has the sole and absolute discretion to accept, counter or reject any offer received. Seller is not required to accept any offer, regardless of the terms or conditions, and has the right and discretion to reject all offers received.
- 4) After receiving all offers, Seller has the right to further negotiate the terms and conditions of any offer. Seller has no obligation to negotiate or communicate with each, every or any Buyer.
- 5) Seller can make the decision to accept an offer based on criteria they deem appropriate under the circumstances and in Seller's sole judgement. Price is only one factor of many that is considered.
- 6) If Seller accepts Buyer's offer and such offer does not result in a closed sale of the Property, Seller may, in Seller's sole discretion, re-open negotiations with any Buyer. Seller may also request the Listing Agent to solicit new offers.
- 7) Other: _____

By signing this form, all signatories are acknowledging their understanding of all terms and conditions in this disclosure.

Seller(s) Name (Print): _____ / _____

Seller(s) Signature: _____ / _____

Date: _____ / _____

Buyer(s) Name (Print): _____ / _____

Buyer(s) Signature: _____ / _____

Date: _____ / _____

Commission Agreement



_____ ("**Seller/Landlord**")
agrees that _____ ("**Broker**")
may show and will use diligent effort to (**Check as applicable**) sell lease **Seller's/Landlord's** Property located at
_____ ("**Property**")
to _____ ("**Prospect**").

In the event the Property is (**Check as applicable**) sold, optioned, or contracted to be sold leased
to Prospect, or any other prospect procured by **Broker**, on _____ [date] or within _____ days (180
days if blank) thereafter, **Seller/Landlord** agrees to pay **Broker**:

- \$ _____
- _____ % of the gross purchase price of the Property.
- _____ % of the gross lease value of a lease executed regarding the Property.
- other (specify) _____

Seller/Landlord will pay **Broker's** fee in the event of sale, at time of closing the sale; or in the event of lease, at time of
lease execution. **Broker's** fee is due if **Seller/Landlord** defaults on an executed sales contract or lease with Prospect or if
Seller/Landlord agrees with Prospect to cancel an executed sales contract or lease. In any litigation arising out of this
agreement, the prevailing party will be entitled to recover from the non-prevailing party reasonable attorney's fees, costs,
and expenses.

If the Property is commercial real estate as defined by Section 475.701, Florida Statutes, the following disclosure will
apply: The Florida Commercial Real Estate Sales Commission Lien Act provides that when a broker has earned a
commission by performing licensed services under a brokerage agreement with you, the broker may claim a lien against
your net sales proceeds for the broker's commission. The broker's lien rights under the act cannot be waived before the
commission is earned.

If the Property is commercial real estate as defined by Section 475.801, Florida Statutes, the following disclosure will
apply: The Florida Commercial Real Estate Leasing Commission Lien Act provides that when a broker has earned a
commission by performing licensed services under a brokerage agreement with you, the broker may claim a lien against
your interest in the property for the broker's commission. The broker's lien rights under the act cannot be waived before
the commission is earned.

Additional Terms: _____

Seller/Landlord

Date

Seller/Landlord

Date

Authorized **Broker** or Associate

Date

Electronically Filed
Supreme Court
SCWC-15-0000529
18-JUN-2020
10:18 AM

IN THE SUPREME COURT OF THE STATE OF HAWAII

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CHRISTIAN SAKAL, Petitioner/Plaintiff-Appellant,

vs.

ASSOCIATION OF APARTMENT OWNERS OF HAWAIIAN MONARCH; JONAH SCOTT
KOGEN; and K&F 1984 LLC, Respondents/Defendants-Appellees.

SCWC-15-0000529

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-15-0000529; CAAP-15-0000573; CIV. NO. 14-1-1118)

JUNE 18, 2020

McKENNA, POLLACK, AND WILSON, JJ., WITH
RECKTENWALD, C.J., CONCURRING IN PART AND DISSENTING IN PART,
WITH WHOM NAKAYAMA, J., JOINS

OPINION OF THE COURT BY POLLACK, J.

This case arises from the nonjudicial foreclosure of the petitioner's apartment by the apartment owners' association based on unpaid assessments. After the sale was conducted, petitioner filed a complaint against the association and the

purchaser of the property for wrongful foreclosure, seeking relief that included damages and title to the property. The trial court dismissed the complaint, finding that it failed to state a claim upon which relief could be granted. Particularly, the court found that Hawai'i Revised Statutes (HRS) chapter 667, which governs foreclosures, contained a statutory bar that precluded the claims in the complaint. On appeal, the Intermediate Court of Appeals determined the statutory bar precluded petitioner's claim to title of the property against the purchaser but did not preclude petitioner's claim for damages against the association.

On certiorari, we consider whether the petitioner's claim for wrongful foreclosure, which is based on the association's lack of a valid power of sale, is statutorily limited or barred. Because we conclude that the petitioner's claim to title of the property is not limited by HRS chapter 667 and that its provisions do not bar a common law claim of wrongful foreclosure based on the lack of a power of sale, we hold that the complaint did state a claim against both the association and the purchaser of the apartment. Thus, the dismissal of the apartment owner's claims against both defendants for wrongful foreclosure and the Intermediate Court of Appeals' partial affirmance of the dismissal were erroneous.

I. BACKGROUND

On March 28, 2006, Christian Sakal acquired an apartment in the Hawaiian Monarch Condominium Project (the property) as a tenant in severalty. On March 16, 2012, the Association of Apartment Owners of Hawaiian Monarch (AOAO Hawaiian Monarch or the AOAO) filed a Notice of Lien with the Office of Assistant Registrar of the Land Court against Sakal's property for unpaid assessments. The Notice stated that the lien claimed a pre-petition amount of \$11,417.91 and a post-petition amount of \$10,589.42.¹ Three months later, the AOAO filed a Notice of Default and Intention to Foreclose on Sakal's property in the Office of the Assistant Registrar of the State of Hawai'i (Assistant Registrar). Subsequently, AOAO Hawaiian Monarch filed a Notice of Association's Non-Judicial Foreclosure Under Power of Sale with the Assistant Registrar, which stated that a public auction would be held on December 3, 2012, pursuant to HRS §§ 514B-146 and 667-21 through 667-42.

Four days before the sale was scheduled to occur, Sakal filed a motion for preliminary injunction to stay the non-judicial foreclosure sale of the property in the Circuit Court of the First Circuit (circuit court). On December 3, 2012, the

¹ Sakal filed a voluntary petition "under Chapter 13" in the United States Bankruptcy Court for the District of Hawai'i on April 27, 2011.

circuit court denied Sakal's motion for preliminary injunction, and AOA Hawaiian Monarch held a public auction offering Sakal's property for sale. A quitclaim deed was executed after the sale conveying Sakal's property to Jonah Scott Kogen for \$50,500. The deed was then recorded in the Office of the Assistant Registrar on January 16, 2013.

On May 5, 2014, Sakal filed a complaint against AOA Hawaiian Monarch, Kogen, and K&F 1984 LLC in the circuit court.² The complaint alleged wrongful foreclosure against AOA Hawaiian Monarch and common law trespass and quiet title claims against AOA Hawaiian Monarch, Kogen, and K&F 1984 LLC.³ As to the wrongful foreclosure claim, Sakal alleged that the AOA's bylaws did not include a power of sale that would allow it to nonjudicially foreclose on his property. Additionally, Sakal contended that the AOA was not granted a power of sale by statute. Thus, Sakal claimed that AOA Hawaiian Monarch's nonjudicial foreclosure was void and title should be restored to him.

Sakal further alleged that because neither AOA

² The Honorable Bert I. Ayabe presided.

³ The complaint alleged that K&F 1984 LLC was "a limited liability company registered in the State of Hawaii on December 31, 2012." The circuit court entered default against K&F 1984 LLC for failing to plead or otherwise defend against the complaint. Sakal dismissed all claims against K&F before appealing the circuit court's final judgment to the ICA.

Hawaiian Monarch nor Kogen had authority to enforce a nonjudicial foreclosure of an association lien, they were committing a continuing trespass on the property. Sakal requested that the circuit court declare the foreclosure auction and subsequent documents transferring title null and void and strike such documents, as well as "any and all other recorded documents relating to the wrongful foreclosure," from the records of the Office of the Assistant Registrar. Sakal also asked the circuit court to grant a preliminary and permanent injunction preventing AOA Hawaiian Monarch and Kogen from enforcing the nonjudicial foreclosure and from trespassing on the property. Finally, Sakal prayed for actual and treble damages resulting from the foreclosure and his subsequent eviction from his property.

AOA Hawaiian Monarch filed an answer asserting that Sakal's claim was barred by, inter alia, the applicable statute of limitations, laches, and improper service of process. Kogen did not file an answer to Sakal's complaint.

Kogen and AOA Hawaiian Monarch filed separate motions to dismiss the complaint pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 12(b)(6).⁴ In the memorandum supporting

⁴ HRCP Rule 12(b)(6) (2000) provides as follows:

(continued . . .)

his motion, Kogen argued that the recordation of the quitclaim deed on January 16, 2013, precluded Sakal from challenging his right to title in the property. Kogen asserted that the AOA had, as required by HRS § 667-101(a), submitted an affidavit after the public sale of the property attesting that the sale had been lawfully conducted.⁵ Kogen maintained that HRS § 667-102(b) prevented Sakal from challenging his title to the

(. . . continued)

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [HRC] Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by [HRC] Rule 56.

⁵ HRS § 667-101(a) (Supp. 2012) provides as follows:

(a) After the public sale is held, the association shall sign an affidavit under penalty of perjury:

(1) Stating that the power of sale foreclosure was made pursuant to the power of sale provision in the law or association documents;

(2) Stating that the power of sale foreclosure was conducted as required by this part;

(3) Summarizing what was done by the association;

(4) Attaching a copy of the recorded notice of default and intention to foreclose; and

(5) Attaching a copy of the last public notice of the public sale.

property once the deed and the affidavit were recorded.⁶ Thus, Sakal's claims were barred, Kogen asserted, because the complaint was filed after such documents were recorded.

Additionally, Kogen argued that even if Sakal's claims were not foreclosed by section 667-102, the claims were barred by HRS § 667-60(c) (Supp. 2012), which provides that "[a]ny action to void the transfer of title to the purchaser of property pursuant to a foreclosure by power of sale" must be filed "no later than sixty days following the recording of the

⁶ HRS § 667-102(a)-(b) (Supp. 2012) provide the following in full:

(a) The affidavit required under section 667-101 and the conveyance document shall be recorded no earlier than ten days after the public sale is held but not later than forty-five days after the public sale is held. The affidavit and the conveyance document may be recorded separately and on different days. After the recordation, the association shall mail or deliver a recorded copy to those persons entitled to receive the public notice of the public sale under section 667-96(c).

(b) When both the affidavit and the conveyance document are recorded:

(1) The sale of the unit is considered completed;

(2) All persons claiming by, through, or under the unit owner and all other persons having liens on the unit junior to the lien of the association shall be forever barred of and from any and all right, title, interest, and claims at law or in equity in and to the unit and every part of the unit, except as otherwise provided by law;

(3) The lien of the association and all liens junior in priority to the lien of an association shall be automatically extinguished from the unit; and

(4) The purchaser shall be entitled to immediate and exclusive possession of the unit.

affidavit required by section 667-32." Because Sakal failed to file his complaint within sixty days of the recording of the affidavit, Kogen contended that the claims were barred and the complaint should be dismissed. AOA Hawaiian Monarch's memorandum submitted in support of its motion restated Kogen's memorandum verbatim.

In opposition, Sakal argued that HRS § 667-102(b)(2) provided an exception to the time bar for claims "as otherwise provided by law." The claim was not statutorily barred, Sakal maintained, because the foreclosure was unlawful from its inception due to the AOA's lack of a power of sale. Sakal contended that since he was challenging the validity of the foreclosure sale based on the AOA's lack of a power of sale, the statutory bar did not apply to his claim.

Sakal also argued that the time bar set forth in HRS § 667-60(c) did not apply because the AOA's nonjudicial foreclosure of his property was governed by part VI of HRS chapter 667 and HRS § 667-60(c) was located within part IV, making it inapplicable to the AOA's foreclosure.

The circuit court ruled that HRS § 667-102(b)(2), which Kogen argued prevented Sakal from challenging title to the property once the deed and the affidavit were recorded, was applicable to Sakal's claim because he was a unit owner. On this basis, the court granted Kogen's and the AOA's motions and

dismissed Sakal's claims against both parties with prejudice. The circuit court thereafter issued a final judgment. Sakal timely appealed.

II. ICA PROCEEDINGS

The Intermediate Court of Appeals (ICA) issued a published opinion that partially affirmed and partially vacated the circuit court's grant of the motions to dismiss.⁷ The ICA held that Sakal's wrongful foreclosure claim was not barred by HRS § 667-102 because the statute only bars claims "in and to the unit" and not all claims arising out of wrongful and unlawful nonjudicial foreclosures, such as claims for money damages. The ICA reasoned that the statute barred any claim to title to the property by Sakal because he failed to challenge the nonjudicial foreclosure of the property prior to the recordation of the affidavit and the quitclaim deed. However, the ICA concluded that Sakal had stated a claim for wrongful foreclosure on which damages could be granted because the AOAO lacked a power of sale permitting it to foreclose on Sakal's property.

Therefore, the ICA held that the circuit court erred in dismissing Sakal's complaint in its entirety against AOAO

⁷ The opinion is published as Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch, 143 Hawai'i 219, 426 P.3d 443 (App. 2018).

Hawaiian Monarch. The ICA vacated the dismissal of Sakal's claims for damages against the AOA0 arising out of the wrongful foreclosure and remanded the case to the circuit court. The ICA affirmed the dismissal of all claims against Kogen and all claims "at law or in equity" against the AOA0 "that seek right, title, or interest in and to the Property."

AOA0 Hawaiian Monarch and Sakal both sought certiorari review of the ICA's judgment on appeal.⁸

⁸ The AOA0's application for writ of certiorari challenged the ICA's conclusion that the AOA0 was not statutorily empowered to conduct a nonjudicial foreclosure on Sakal's property absent a power of sale provision in the AOA0's bylaws. This court rejected the AOA0's application on December 28, 2018. Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch, No. SCWC-15-0000529, 2018 WL 6818901 (Haw. Dec. 28, 2018) (order rejecting application for writ of certiorari). It is noted that on July 10, 2019, SB 551, SD1, HD2, CD1 of 2019, A Bill for an Act Relating to Condominiums, was enacted as Act 282 without the Governor's signature. See Gov. Msg. No. 1402, (attaching Act 282 as pages 3-18 of the document), https://www.capitol.hawaii.gov/session2019/bills/GM1402_.PDF. Act 282 purported to retroactively grant apartment associations a statutory right to foreclose on members' apartments pursuant to part VI of HRS chapter 667. Malabe v. Ass'n of Apartment Owners of Executive Centre, No. SCWC-17-0000145, at 44-45 (Haw. June 17, 2020). In Malabe, we concluded that it was unnecessary to consider Act 282's effect on the Malabes' claim of wrongful foreclosure because the Act was only applicable to foreclosures conducted under part VI of HRS chapter 667 and the foreclosure in Malabe was conducted under part I of HRS chapter 667. Id. at 33, 52-54. We also observed that the United States District Court for the District of Hawai'i recently held Act 282 unconstitutional as violative of the Contracts Clause of Article I, § 10 of the United States Constitution. Id. at 55-57 (citing Galima v. Ass'n of Apartment Owners of Palm Court, Civ. No. 16-00023 LEK-RT, 2020 WL 1822599 (D. Haw. Apr. 10, 2020)).

In this case, neither the Notice of Association's Non-Judicial Foreclosure Under Power of Sale nor the Grantor's Affidavit of Non-Judicial Foreclosure Under Power of Sale are included in the record on appeal. Sakal's complaint, however, indicates that the notice stated the AOA0 intended to conduct a public foreclosure sale pursuant to HRS §§ 667-21 through 667-42, which corresponds to part II of HRS chapter 667. Because the motions to dismiss were pursuant to HRCF Rule 12(b)(6), the allegations in the complaint are taken to be true. Bank of America, N.A. v. Reyes-Toledo, 143 Hawai'i 249, 265, 428 P.3d 761, 777 (2018). Thus, it is unnecessary for us to consider Act 282's effect on this litigation. See Malabe, No. SCWC-17-

(continued . . .)

III. STANDARDS OF REVIEW

A. Motion to Dismiss

This court reviews a trial court's ruling on a motion to dismiss de novo. Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai'i 92, 104, 176 P.3d 91, 103 (2008).

B. Statutory Interpretation

The interpretation of a statute is a question of law, which we review de novo. State v. Carlton, 146 Hawai'i 16, 22, 455 P.3d 356, 362 (2019) (quoting State v. Lau, 78 Hawai'i 54, 58, 890 P.2d 291, 295 (1995)).

IV. DISCUSSION

A. The ICA Erred in Holding Sakal's Claim to the Property Was Barred by HRS § 667-102(b) (2).

Sakal argued before the ICA that his claim of wrongful foreclosure was not barred by HRS § 667-102(b) (2) because his claim was based on the AOA's lack of a valid power of sale. In response, the AOA and Kogen contended that this statutory provision barred Sakal from seeking title to the property and damages once the affidavit and the deed were recorded. In its opinion, the ICA concluded that Sakal was barred from any claim to the property itself because he failed to challenge the AOA's

(. . . continued)

0000145, at 54 (declining to consider the constitutionality of Act 282 under the doctrine of constitutional avoidance).

foreclosure prior to the recordation of the AOA's affidavit and the quitclaim deed, but that he could seek damages for wrongful foreclosure. Before this court, Sakal argues that such an interpretation violates his constitutional right to procedural due process. Thus, the ICA's construction of HRS § 667-102 is a critical and potentially dispositive issue in this case, and accordingly we begin our analysis with a review of the ICA's statutory interpretation.⁹

This court's construction of statutes is governed by well-settled principles. State v. Carlton, 146 Hawai'i 16, 22, 455 P.3d 356, 362 (2019). First, we examine the language of the statute itself. Jaylo v. Jaylo, 125 Hawai'i 369, 373, 262 P.3d 245, 249 (2011) (quoting State v. Silver, 125 Hawai'i 1, 4, 249 P.3d 1141, 1144 (2011)). Second, if the language is plain and

⁹ This court has consistently held that we have a duty to review de novo dispositive questions of law, such as the proper interpretation of a statute, even when the parties have not challenged or have stipulated to an erroneous interpretation. See, e.g., State v. Medeiros, 146 Hawai'i 1, 3 n.2, 454 P.3d 1069, 1071 n.2 (2019) (noting that the State's failure to challenge the defendant's eligibility for a deferred acceptance of a no contest plea did not relieve this court of its obligation to determine whether the offense charged was nonprobationable, which was a dispositive question of law); Hawaiian Ass'n of Seventh-Day Adventists v. Wong, 130 Hawai'i 36, 46, 305 P.3d 452, 462 (2013) ("We note, however, that the parties' stipulation as to a question of law is not binding on the court, and does not relieve us from the obligation to review questions of law de novo." (citing Chung Mi Ahn v. Liberty Mut. Fire Ins. Co., 126 Hawai'i 1, 10, 265 P.3d 470, 479 (2011))). Thus, Sakal's focus on the constitutionality of the ICA's interpretation of HRS § 667-102 does not "relieve us from the obligation to review questions of law de novo." LC v. MG & Child Support Enf't Agency, 143 Hawai'i 302, 320, 430 P.3d 400, 418 (2018) (Opinion of McKenna, J., writing for the court as to Part III.B) (citing Wong, 130 Hawai'i at 46, 305 P.3d at 462).

unambiguous, we must give effect to its plain and obvious meaning. Id. Third, implicit in statutory construction is our obligation to ascertain and give effect to the intention of the legislature, which is obtained primarily from the language of the statute itself. Carlton, 146 Hawai'i at 22, 455 P.3d at 362 (citing State v. Choy Foo, 142 Hawai'i 65, 72, 414 P.3d 117, 124 (2018)).

Therefore, we first examine the language of the statute. HRS § 667-102 provides in relevant part as follows:

(b) When both the affidavit and the conveyance document are recorded:

.....

(2) All persons claiming by, through, or under the unit owner and all other persons having liens on the unit junior to the lien of the association shall be forever barred of and from any and all right, title, interest, and claims at law or in equity in and to the unit and every part of the unit, except as otherwise provided by law[.]

.....

(c) The unit owner and any person claiming by, through, or under the unit owner and who is remaining in possession of the unit after the recordation of the affidavit and the conveyance document shall be considered a tenant at sufferance subject to eviction or ejection.

(Emphases added.)

The ICA appears to have concluded that Sakal is "a person claiming by, through, or under the unit owner" to whom HRS § 667-102(b)(2) applies. However, by its plain meaning, the phrase "persons claiming by, through, or under the unit owner" does not include a unit owner. In specifying that it applies to

"persons claiming by, through, or under the unit owner," the provision contemplates at least one degree of separation between the identified party and the unit owner. In other words, the statute on its face applies to extinguish only interests derived from the unit owner's interest in the property and not to any interest in the property retained by the unit owner.

When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty as to an expression used in a statute, the expression is ambiguous and the meaning of any ambiguous words may be sought by examining the context or resorting to extrinsic aids to determine legislative intent. Carlton, 146 Hawai'i at 22, 455 P.3d at 362 (citing Citizens Against Reckless Dev. v. Zoning Bd. of Appeals, 114 Hawai'i 184, 194, 159 P.3d 143, 153 (2007)). Assuming there was some ambiguity as to whether the legislature intended "persons claiming by, through, or under the unit owner" to include the unit owner themselves, which there is not, the plain meaning of the text is confirmed by subsection (c) of the same statute, which provides that following recordation, "The unit owner and any person claiming by, through, or under the unit owner . . . shall be considered a tenant at sufferance subject to eviction or ejection." HRS § 667-102(c) (emphases added); see State v. Yokota, 143 Hawai'i 200, 205, 426 P.3d 424, 429 (2018) ("[L]aws in pari materia, or upon the same subject matter, shall be

construed with reference to each other." (quoting State v. Arceo, 84 Hawai'i 1, 19, 928 P.2d 843, 861 (1996))). By specifying that subsection (c) applies to both the "unit owner" and "any person claiming by, through, or under the unit owner," the legislature indicated that unit owners themselves are not "persons claiming by, through, or under the unit owner" within the meaning of the statute. See Yokota, 143 Hawai'i at 205, 426 P.3d at 429. To hold otherwise would render subsection (c)'s use of "unit owner" redundant, which is contrary to the "cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute." Coon v. City & Cty. of Honolulu, 98 Hawai'i 233, 259, 47 P.3d 348, 374 (2002) ("[N]o clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." (quoting Franks v. City & Cty. of Honolulu, 74 Haw. 328, 339, 843 P.2d 668, 673 (1993))).

Additionally, it is fundamental that when the same phrase is used in different parts of the same statute, it is presumed to have the same intended meaning. See State v. Guyton, 135 Hawai'i 372, 380, 351 P.3d 1138, 1146 (2015) ("[W]here the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be

imparted to the unclear usage on the assumption that it means the same thing throughout the statute." (quoting Kam v. Noh, 70 Haw. 321, 325, 770 P.2d 414, 416 (1989)). Because HRS § 667-102(c)'s reference to "any person claiming by, through, or under the unit owner" does not encompass unit owners themselves, HRS § 667-102(b)(2)'s bar to claims by "persons claiming by, through, or under the unit owner" does not bar claims by unit owners themselves. Cf. Peak Capital Grp., LLC v. Perez, 141 Hawai'i 160, 174, 407 P.3d 116, 130 (2017) (stating that the circuit court's interlocutory foreclosure decree provided that "All Defendants . . . and all persons claiming by, through or under them . . . will be perpetually barred of and from any and all right . . . in the Property . . . upon closing of the sale herein authorized." (emphases added)); Fed. Home Loan Mortg. Corp. v. Transamerica Ins. Co., 89 Hawai'i 157, 165, 969 P.2d 1275, 1283 (1998) ("[T]he foreclosure order . . . expressly divested [defendants] 'and all persons claiming by, through or under them' of 'any and all right, title and interest in the said mortgaged property or any part thereof.'" (emphasis added)).

Inasmuch as Sakal's claim to title to the property arises directly from his status as a unit owner and not "by, through, or under" a unit owner, HRS § 667-102(b)(2) is inapplicable. The ICA thus erred in determining that the

provision operated to bar Sakal from seeking recovery of the property.

B. The Sixty-Day Time Limit of HRS § 667-60(c) Is Not Applicable to a Claim of Wrongful Foreclosure Based on the Lack of a Power of Sale.

Before the circuit court, Kogen and the AOA argued that Sakal's claim to recover title to the unit was barred because it was not brought within the sixty-day time limit established by HRS § 667-60(c). The circuit court did not address this issue because it concluded that Sakal's claim was barred by HRS § 667-102(b)(2). Although neither Kogen nor the AOA have raised this argument before the ICA or this court, we address the application of this statute as it is likely to be reasserted on remand. Nordic PCL Constr., Inc. v. LPIHGC, LLC, 136 Hawai'i 29, 44, 358 P.3d 1, 16 (2015) ("We now turn to issues that may arise during the evidentiary hearing on remand."); Sentinel Ins. Co. v. First Ins. Co. of Hawai'i, Ltd., 76 Hawai'i 277, 297, 875 P.2d 894, 914 (1994) (addressing issues the court expected would arise on remand).

As the ICA stated in this case, HRS chapter 667 "sets forth the procedures for foreclosure in Hawai'i and does not create a right to foreclose." Within HRS chapter 667, section 667-60 establishes a scheme of sanctions and remedies applicable

when a party utilizing the foreclosure process fails to comply with the statute's procedural requirements.¹⁰ The statute

¹⁰ HRS § 667-60 (Supp. 2012) provides the following in relevant part:

(a) Any foreclosing mortgagee who engages in any of the following violations of this chapter shall have committed an unfair or deceptive act or practice under section 480-2:

(1) Failing to provide a borrower or mortgagor with, or failing to serve as required, the information required by section 667-22 or 667-55;

(2) Failing to publish, or to post, information on the mortgaged property, as required by section 667-27 or 667-28;

. . . .

(5) Holding a public sale in violation of section 667-25;

(6) Failing to include in a public notice of public sale the information required by section 667-27 or section 667-28;

(7) Failing to provide the information required by section 667-41;

. . . .

(b) Notwithstanding subsection (a), the transfer of title to the purchaser of the property as a result of a foreclosure under this chapter shall only be subject to avoidance under section 480-12 for violations described in subsection (a)(1) to (9) if such violations are shown to be substantial and material; provided that a foreclosure sale shall not be subject to avoidance under section 480-12 for violation of section 667-56(5).

(c) Any action to void the transfer of title to the purchaser of property pursuant to a foreclosure by power of sale under part II of this chapter shall be filed in the circuit court of the circuit within which the foreclosed property is situated no later than sixty days following the recording of the affidavit required by section 667-32. If no such action is filed within the sixty-day period, then title to the property shall be deemed conclusively vested in the purchaser free and clear of any claim by the mortgagor or anyone claiming by, through, or under the mortgagor.

declares that certain enumerated violations are deemed to be unfair or deceptive acts or practices in violation of HRS § 480-2. See HRS § 667-60(a). As unfair or deceptive acts or practices, these violations may subject the foreclosing party to the penalties prescribed in Hawai'i's consumer protection statute, HRS chapter 480. See, e.g., HRS § 480-3.1 ("Any person, firm, company, association, or corporation violating any of the provisions of section 480-2 shall be fined a sum of not less than \$500 nor more than \$10,000 for each violation[.]").

The law goes on to clarify, however, that when the foreclosure sale has resulted in title passing to a third-party purchaser, only substantial and material violations of a subset of the identified violations will render the underlying transaction void, as is generally the case when HRS chapter 480 is violated in other contexts.¹¹ See HRS § 667-60(b). And HRS § 667-60(c) establishes a sixty-day time limit following the recordation of a power of sale affidavit during which such an action to void a transfer of title must be filed.

¹¹ Under HRS § 480-12 (2008), "Any contract or agreement in violation of [HRS chapter 480] is void and is not enforceable at law or in equity." Thus, a transaction that includes an unfair or deceptive business practice is typically null and subject to rescission. See, e.g., 808 Dev., LLC v. Murakami, 111 Hawai'i 349, 356, 141 P.3d 996, 1003 (2006) ("[B]ased upon the plain language of the above statutes, a contractor who fails to [comply with the statutory requirements] may not enforce the contract against the owner and, consequently, is not entitled to a mechanic's lien upon the property.").

Significantly, HRS § 667-60(c) provides that the sixty-day time limit is applicable to “[a]ny action to void the transfer of title to the purchaser of property pursuant to a foreclosure by power of sale under part II.”¹² (Emphasis added.) By its plain language, the statutory time limit is only applicable when there is a valid power of sale; it does not apply when a foreclosing party is alleged to have conducted a foreclosure without a power of sale. A claim based on a lack of power of sale is markedly different in nature and not dictated by the procedures or relief prescribed in HRS chapter 667. Rather, such a claim is governed by Hawai‘i common law, under which an unauthorized nonjudicial foreclosure renders “the sale of the property [] invalid and voidable at the election of the mortgagor, who shall then regain title to and possession of the property.” Santiago v. Tanaka, 137 Hawai‘i 137, 158, 366 P.3d 612, 633 (2016) (citing Ulrich v. Sec. Inv. Co., 35 Haw. 158, 168 (Haw. Terr. 1939)); see also Lee v. HSBC Bank USA, 121 Hawai‘i 287, 296, 218 P.3d 775, 784 (2009) (holding a nonjudicial foreclosure sale void where the foreclosure sale was invalid under an applicable statute). In this case Sakal’s claim is not based on a violation of the foreclosure procedures set forth in

¹² Part II of HRS chapter 667, entitled “Power of Sale Foreclosure Process,” is comprised of HRS §§ 667-21 through 667-42.

HRS chapter 667. Rather, he claims wrongful foreclosure based on the absence of the AOA's power of sale.¹³ The wrongful foreclosure claim alleged by Sakal is therefore a common-law claim that is not subject to the HRS § 667-60(c) sixty-day time limit.¹⁴

¹³ The "foreclosure by power of sale under part II" referred to in HRS § 667-60(c) means a nonjudicial foreclosure when the mortgage or other governing documents contain a power of sale provision. See Malabe, No. SCWC-17-0000145, at 46-47 (Haw. June 17, 2020). Under Act 282 of 2019, there are three means by which condominium associations may foreclose their liens: (1) by judicial action, (2) by nonjudicial foreclosure when the mortgage contains a nonjudicial foreclosure or power of sale provision, or (3) by power of sale foreclosure, regardless of the presence or absence of power of sale language in an association's governing documents. Id. at 46. With respect to the third means, such "power of sale foreclosure" must be conducted under Part VI of HRS chapter 667. Id. As stated, it is unclear from the record which foreclosure procedures were utilized by the AOA in this case. See supra note 8. By its express terms, the sixty-day time limit contained in HRS § 667-60(c) applies only when there has been a "transfer of title to the purchaser of property pursuant to a foreclosure by power of sale under part II" of HRS chapter 667. (Emphasis added.) On remand, if it is determined that the AOA conducted the foreclosure pursuant to a part of HRS chapter 667 other than part II, such as part VI, HRS § 667-60(c)'s 60-day time limit would be inapplicable to this case on that basis as well.

The dissent maintains that it is unnecessary to consider HRS § 667-60(c)'s effect on this case because the AOA possessed a power of sale to foreclose on Sakal's property, even though the AOA's governing documents did not contain a power of sale provision. Dissent at 1-2. As discussed in Malabe, the AOA was not permitted to foreclose on Sakal's property in the absence of a power of sale provision in either the association bylaws or another enforceable agreement. Malabe, No. SCWC-17-0000145, at 20.

¹⁴ Although we conclude that Sakal is not statutorily precluded from seeking title to the property, we note that in cases of wrongful foreclosure, a court has the "power to fashion an equitable relief" because wrongful foreclosure is a proceeding that is equitable in nature. Santiago, 137 Hawai'i at 158, 366 P.3d at 633 (citing Beneficial Haw., Inc. v. Kida, 96 Hawai'i 289, 312, 30 P.3d 895, 918 (2001)). This court has left open the question of whether, in light of the detailed statutory scheme governing the registration and issuance of certificates of title in the land court system, the equitable protections for good faith purchasers that we recognized in Santiago are available with respect to registered property. See Wells Fargo Bank, N.A. v. Omiya, 142 Hawai'i 439, 457 n.37, 420 P.3d 370, 388 n.37 (2018). In light of the fact that Kogen has not yet filed an answer in the proceedings, we do not consider whether Sakal's request for the equitable relief of restoring the property is subject to an equitable defense.

(continued . . .)

V. CONCLUSION

Based on the foregoing, we vacate in part and affirm in part the ICA's judgment on appeal and remand the case to the circuit court for further proceedings consistent with this opinion.¹⁵

Gary Victor Dubin,
Frederick J. Arensmeyer
for petitioner

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

Robert E. Chapman, Carlos D.
Perez-Mesa, Jr., Mary Martin
for respondent
Association of Apartment Owners
of Hawaiian Monarch

/s/ Michael D. Wilson

Jeffrey P. Miller
for respondent Jonah Scott Kogen

John A. Morris, M. Anne
Anderson, Kapono F.H. Kiakona
for amicus curiae
Community Associations Institute



(. . . continued)

¹⁵ Our disposition of this case renders it unnecessary to address Sakal's argument that the ICA's interpretation of HRS § 667-102 violates his constitutional due process rights.

MARIS

MARKETING OPTIONS

Authorization for Listing Exposure



Notice to REALTOR®: This form may be utilized with all listings. It is only required when the seller chooses the Withhold option. In that case, the completed form must be maintained with all other listing documents related to the property. Updates to the form are unnecessary when moving from Withhold to Coming Soon or Active, as those will have status dates in the MARIS systems.

Date: _____

Informed Consent: The owners/sellers of the property at: _____
(Street#, Street Name, Zip Unit # if applicable)

Have listed it for sale with _____
(Company Name)

Marketing Status:

- Active** – By agreeing to market your property as “Active” you’ve decided to authorize maximum exposure of your home to the marketplace. Your listing broker will share the listing with all other brokers and agents in the marketplace.
- Coming Soon** – By agreeing to market your home as “Coming Soon” you’ve authorized your broker to expose your listing to other brokers, agents, and their clients as a property that will soon be available for wider marketing exposure (i.e. Active Status). The time frame for this status is limited and is typically (not exclusively) utilized to finish any last-minute improvements prior to full market exposure.
- Withheld** – By withholding your property from public marketing and the MLS you authorize your broker to move forward with **limited exposure** of your home to the marketplace. Homeowners may wish to “Withheld” for various reasons related but not limited to privacy concerns, needing extensive repairs, and bank-owned listings.

Under a Withheld Status, the broker can:

1. Share this listing with all agents/brokers in their brokerage.
2. Share your listing directly with clients of this brokerage.
3. Market the listing through one-to-one communication with competing brokers/agents.

Under a Withheld Status, the property cannot be:

1. Publicly marketed, which includes but is not limited to:
 - a. Placing a sign (coming soon, listed, etc.) in your yard.
 - b. Distributing property information flyers in public locations.
 - c. Mass electronic communications distributed to groups of contacts.
 - d. Otherwise publicizing the home on the internet, which includes but is not limited to agent/broker/seller or third-party use of social media, private Facebook groups, consumer destination websites, brokerage websites, etc.

Withheld Minimum Input Fields:

ListingAgentID _____ City _____ Up. Beds _____ Up. Full Bath _____ Up. ½ Bath _____
Main Beds _____ Main Full Baths _____ Main ½ Baths _____ Lw. Beds _____ Lw. Full Bath _____ Lw. ½ Bath _____

(Owner/Seller 1 signature)

(Owner/Seller 2 signature)

(Listing Agent Signature)

(Listing Agent Print)

SAMPLE Love letter KANSAS

#1

Hello,

We are the [REDACTED]! We have a 6 month old daughter, 2 big dogs, and 3 cats. Currently we live west of Pittsburg, near Chicopee on about 6 acres. Having a baby in the middle of a pandemic has brought us some challenges, like most people. For us, it has meant that Grandma Debbie from Florida has moved in with us as our daughter's full time caretaker. Suddenly our quaint 2 bedroom farmhouse is feeling less quaint, and more... just plain too small. We are ready to move back to town.

In touring your home, we see all the potential it would be for our family. We love the yard for our dogs and daughter. We imagine the best playroom in the sunroom. Jarod is our handyman and is ready to put in some elbow grease with some help from family. We're imagining many years of happy family memories, with room to grow our family. The opportunity to own such a great home in our price range doesn't come around in Pittsburg often and we are excited for the opportunity to find a new home. Thanks for reading and considering our offer.

Respectfully,

[REDACTED]

Michigan DELAYED Showings
REQUESTS FOR SHOWINGS AND PRESENTATION OF OFFERS
ADDENDUM TO THE LISTING AGREEMENT

#3

Property Address: _____

Seller acknowledges that the MLS is a forum for exposing the Property to the largest pool of buyers possible. Seller also acknowledges that the standards and policies referenced below are intended to promote a spirit of cooperation amongst the brokers who participate in the MLS.

Article 1 (Standard of Practice 1-6) of the REALTOR Code of Ethics requires that REALTORS shall submit offers and counter-offers to the Seller objectively and as quickly as possible.

MLS Policy provides an exception to the above referenced rule. That policy states that: The MLS will accept listings with a delay in showings, a delay in the presentation of offers, or both, provided that:

- The seller consents to the delay in writing.
- The delay is to a date certain (i.e. month/day/year and time).
- The delay is disclosed to cooperating brokers via the public listing comments on the MLS.
- The delay applies to ALL - including showings and/or offers procured by the listing office.
- Private showings may be delayed until after an open house, provided that open house is promoted on the MLS and cooperating brokers are welcome to attend with their buyers.

As requests for showings of the Property are received, the Seller agrees and consents to the following (check one):

1. Effective immediately, private showings will be permitted with _____ hours of advance notice to the Seller.
2. Private showings will not be permitted until after _____(time) on _____(date). Thereafter, _____ hours of advance notice will be provided to the Seller.

As offers to purchase are received, the Seller acknowledges that the Listing Agent/Broker is obligated to present all offers "objectively and as quickly as possible." Once presented, the Seller may choose to accept, reject, counter, call for highest and best, or wait to determine if additional offers are presented. If choosing to wait, Seller understands that the offer in hand might expire and become null and void.

- Exception: By checking this box, Seller instructs Listing Agent/Broker not to submit offers as quickly as possible. Instead, Seller directs Listing Agent/Broker to hold all offers until _____(date) at _____(time). In this event, Seller and Listing Agent/Broker agree that the Listing Agent/Broker will not disclose any information or provide copies of any offers until the date and time identified herein. This process makes certain that the information published to cooperating brokers on the MLS will be honored and that all interested buyers will be aware of the timeframe for submitting their highest and best offer. Seller and Listing Agent/Broker acknowledge that failure to abide by this process could result in action by the Professional Standards Committee against the Listing Agent/Broker.

By signing below, Seller and Listing Agent/Broker agree and consent to the above referenced terms.

Seller's Signature: _____

Date: _____

Seller's Signature: _____

Date: _____

Listing Agent's Signature: _____

Date: _____

Agent for (Company Name): _____



**NEW MEXICO ASSOCIATION OF REALTORS®
LISTING AGREEMENT – EXCLUSIVE RIGHT TO SELL – 2020**

PART I – BROKERS DUTIES

Per New Mexico law, Brokers are required to perform a specific set of applicable Broker Duties. Prior to the time the Broker generates or presents any written documents that has the potential to become an express written agreement, he/she must disclose such duties and obtain written acknowledgement that the Broker has made such disclosures.

SECTION A: All Brokers in this transaction owe the following broker duties to ALL buyers and sellers in this transaction, even if the broker is not representing the buyer or the seller in the transaction:

1. Honesty and reasonable care and ethical and professional conduct;
2. Compliance with local, state, and federal fair housing and anti-discrimination laws, the New Mexico Real Estate License Law and the Real Estate Commission rules and other applicable local, state, and federal laws and regulations;
3. Performance of any and all written agreements made with the prospective buyer, seller, landlord (owner) or tenant;
4. Written disclosure of potential conflict of interest or other written agreement that the broker has in the transaction, including, but not limited to;
 - A. Any written brokerage relationship the Broker has with any other parties to the transaction or;
 - B. Any material interest/relationship of a business, personal or family nature that the broker has in the transaction; or
 - C. Any written agreement the Broker has with a Transaction Coordinator who will be providing services related to the transaction.
5. Written disclosure of any adverse material facts actually known by the broker about the property or the transaction, or about the financial ability of the parties to the transaction to complete the transaction; adverse material facts requiring disclosure do not include any information covered by federal fair housing laws or the New Mexico Human Rights Act.

SECTION B: In addition to the above duties, Broker(s) owes the following Broker Duties to the seller(s) in this transaction to whom the Broker(s) is/are directly providing real estate services, regardless of the scope and nature of those services.

1. Unless otherwise agreed to in writing by the party, assistance to the party in completing the transaction including:
 - A. timely presentation of and response to all written offers or counteroffers; and
 - B. active participation in assisting in complying with the terms and conditions of the contract and with the finalization of the transaction;
2. Acknowledgement by the broker that there may be matters related to the transaction that are outside the broker’s knowledge or expertise and that the broker will suggest that the party seek expert advice on these matters;
3. Advise to consult with an attorney regarding the effectiveness, validity or consequences of any written document generated by the brokerage or presented to the party and that has the potential to become an express written agreement;
4. Prompt accounting for all money or property received by the broker;
5. Maintenance of any confidential information learned in the course of any prior agency relationship unless the disclosure is with the former principal’s written consent or is required by law;
6. Written disclosure of brokerage relationship option available in New Mexico:
 - A. **Exclusive agency:** an express written agreement between a person and a brokerage wherein the brokerage agrees to exclusively represent as an agent the interest of the person in real estate transaction;
 - B. **Dual agency:** an express written agreement that modifies existing exclusive agency agreements to provide that the brokerage agrees to act as facilitator in real estate transaction rather than as an exclusive agent for either party;
 - C. **Transaction Broker:** The non-fiduciary relationship created by law, wherein a brokerage provides real estate services without entering into an agency relationship.
7. Unless otherwise authorized in writing, a broker who is directly providing real estate services to a seller shall not disclose the following to the buyer in a transaction:
 - A. that the seller has previously indicated he/she will accept a sales price less than the asking or listed price;
 - B. that the seller will agree to financing terms other than those offered;
 - C. the seller’s motivation for selling/leasing; or
 - D. any other information the seller has requested in writing remain confidential, unless disclosure is required by law;

SELLER(S): PLEASE ACKNOWLEDGE RECEIPT BY INITIALING BELOW.



**NEW MEXICO ASSOCIATION OF REALTORS®
LISTING AGREEMENT – EXCLUSIVE RIGHT TO SELL – 2020**

1. EXCLUSIVE SERVICES. THE UNDERSIGNED _____

_____ ("Seller") grants to the undersigned Brokerage Firm _____ ("Brokerage"), the exclusive right to sell the real property described in Paragraph 3. Unless otherwise provided in an amendment hereto, Listing Broker ("Broker") shall act as Seller's Transaction Broker and **NOT as Seller's Agent**; therefore, Broker shall owe Seller the Broker Duties set forth on Cover Pages I but shall **NOT** owe Seller fiduciary duties. It is the parties' intention to minimize the likelihood that Seller shall be held liable for the acts and omissions of the Broker and to eliminate the possibility that Broker is held liable to Seller under agency law. Broker shall not serve as a property manager under this agreement; if such a relationship is desired, such relationship must be established through a separate agreement between Seller and Broker.

2. TERM. The term of this Agreement shall begin on _____, _____ and terminate at 11:59 p.m. Mountain Time on _____. If a property is under contract or the Seller is negotiating a written offer with a Buyer on the date this Agreement would otherwise terminate, the term shall automatically be extended through closing or other final disposition of the Property. The word "Term" as used in this Agreement shall include all extensions.

3. PROPERTY.

A. _____
Address _____ City _____

Legal Description

Or see metes and bounds description attached as Exhibit _____,
County, New Mexico.

B. Type: RESIDENTIAL: Resale New Construction Site Built Manufactured Housing
 COMMERCIAL: Office Industrial Warehouse Specialty Retail Residential Investment
(Rental) Shopping VACANT LAND FARM AND RANCH OTHER

C. OTHER RIGHTS. Unless otherwise provided herein, Seller shall convey to Buyer all existing wind, solar, water and mineral rights appurtenant to the Property. Is Seller aware of any wind, solar, water or mineral rights that have been severed from the Property Yes No If "Yes", explain _____

D. FIXTURES, APPLIANCES, PERSONAL PROPERTY and EXCLUSIONS.

i. FIXTURES. The Property shall include all Fixtures, free of all liens, including, but not limited to, the following Fixtures if such Fixture exists on the Property, unless otherwise excluded as stated in Paragraph 3(D)(iii). A Fixture is defined as an article, which was once personal property, but which has now become a part of the Property because the article has been fastened or affixed to the Property. Fastened/affixed means that removal of the article causes damage to the real property, even if such damage is minor and/or can be repaired. If a unit contains components, some of which are Fixtures and some of which are Personal Property, and a Fixture component of the unit relies on one or more Personal Property components to function as it is intended to do so, then **ALL** components together are considered a Fixture and shall remain together, unless otherwise provided herein.

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- Attached fireplace grate(s) & screen(s)
- Attached floor covering(s)
- Attached mirror(s)
- Attached outdoor lighting & fountain(s)
- Attached pot rack(s)
- Attached window covering(s) & rod(s) (**NOT** including curtains, unless otherwise indicated below)
- Awning(s)
- Built in/attached speaker(s) & subwoofer(s)
- Built-in Murphy bed(s) (**INCLUDING** mattress)
- Ceiling fan(s)
- Central vacuum, to include all hoses & attachments
- Dishwasher(s)
- Fire Alarm(s) (if owned by Seller)
- Garbage disposal(s)
- Garage door opener(s)
- Heating system(s)
- Landscaping
- Light fixture(s)
- Mailbox(es)
- Outdoor plant(s) & tree(s) (other than those in moveable containers)
- Oven(s)
- Pellet, wood-burning or gas stove(s)
- Range(s)
- Window/door screen(s)
- Security System(s) (if owned by Seller)
- Smoke Alarm(s) (if owned by Seller)
- Solar Power System(s)/Panels (**If leased by Seller, lien may exist**)
- Sprinkler(s)/irrigation equipment
- Storm window(s) & door(s)
- TV antenna(s) & satellite dish(es)
- Ventilating & air conditioning system(s)
- Water conditioning/ filtration/water softener/purification system(s) (if owned by Seller)
- TV Wall Mounts (**NOT** including TVs, unless otherwise indicated below)

ii. **PERSONAL PROPERTY.** The following existing Personal Property, if checked, shall remain with the Property, shall be the actual Personal Property that is present as of the date Buyer submits his offer, shall not be considered part of the premises and shall be transferred with no monetary value, free and clear of all liens and encumbrances. Personal Property is defined as a moveable article that is NOT affixed or attached to the Property.

- | | | |
|---|---|---|
| <input type="checkbox"/> All Window Covering(s) | <input type="checkbox"/> Microwave(s) | <input type="checkbox"/> Storage Shed(s) |
| <input type="checkbox"/> Audio Component(s) | <input type="checkbox"/> Pool & Spa Equipment | <input type="checkbox"/> TV(s) |
| <input type="checkbox"/> Decorative Mirror(s) above Bath Vanities | <input type="checkbox"/> Including any Mechanical or other Cleaning System(s) | <input type="checkbox"/> Unattached Fireplace Grate(s) & Screen(s) |
| <input type="checkbox"/> Dryer(s) | <input type="checkbox"/> Refrigerator(s) | <input type="checkbox"/> Unattached Outdoor Fountain(s) & Equipment |
| <input type="checkbox"/> Washer(s) | <input type="checkbox"/> Satellite Receiver(s) with Access Cards (if owned by Seller and if Transferable) | <input type="checkbox"/> Unattached Outdoor Lighting |
| <input type="checkbox"/> Garage Door Remote(s) | <input type="checkbox"/> OTHER: | |
| <input type="checkbox"/> Freezer(s) | | |
| <input type="checkbox"/> Freestanding Range(s) | | |

iii. **EXCLUSIONS.** The following items are excluded from the sales:

IT IS THE SELLER'S RESPONSIBILITY TO ENSURE THAT THESE EXCLUSIONS ARE CONTAINED IN THE FINAL PURCHASE AGREEMENT.

4. **LISTING PRICE.** The listing price shall be\$ _____.

Other terms and conditions: _____



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- 5. BROKER OBLIGATIONS.** Broker will use diligence in effecting the sale of the Property, to include the following:
- A. Assisting Seller in locating qualified buyers;
 - B. If requested, assisting potential buyers in preparing offers and locating financing;
 - C. Assisting Seller in monitoring pre-closing and closing procedures; and
 - D. Unless otherwise waived by Buyer, prior to accepting an Offer to Purchase; 1) requesting from the County Assessor the Estimated Property Tax Levy with respect to the Property, specifying the listed price as the value of the Property to be used in the estimate, and; 2) providing a copy of the Assessor's response in writing to the prospective Buyer(s) or the Buyer's Broker.
- 6. SELLER OBLIGATIONS.** Seller agrees to the following:
- A. To provide to Broker Firm all available data, records, and documents relating to the Property;
 - B. To allow Broker or cooperating Brokers to show the Property at reasonable times and upon reasonable notice;
 - C. To refer to Broker all inquiries relating to the sale/lease of the Property;
 - D. To respond to all offers presented. If Seller is rejecting an offer, Seller agrees to complete the "Rejects Offer" box on the offer, if such a provision exists on the offer or to otherwise provide some written rejection of the offer;
 - E. To commit no act which might tend to obstruct Broker's performance under this Agreement;
 - F. In the event of a sale, to provide all documents necessary to complete the sale; and
 - G. That Seller will will not provide a Seller's Property Disclosure Statement. New Mexico law requires the Seller to disclose all known material defects in the Property.
 - H. To inform Broker if Seller is or begins using any audio or video surveillance systems in/on the Property. Seller IS NOT using any audio or video surveillance in/on the Property. If applicable, type of surveillance audio video.
 - I. To secure all pets, valuables and medication accordingly when the Property is made available for showings; Broker does not guarantee the security of any of the foregoing against acts of third-parties. See Release of Liability, Paragraph. 15.
- 7. OFFERS.**
- A. **Oral Offers.** Broker shall NOT be required to submit to Seller **ORAL** offers to purchase or lease the Property.
 - B. **Offers Received After Contract.** If Seller enters into a written agreement for the sale or lease of the Property, unless that agreement is terminated, or the interest of the Buyer is forfeited, Broker shall shall not be required to submit additional offers to Seller.
 - C. **Offer Letters.** An Offer Letter is a letter written by a buyer interested in purchasing a home that often provides personal information about the buyer and includes reasons why the buyer wishes to purchase the home and/or reasons why, from the buyer's perspective, the seller should sell the home to that particular buyer. In a competitive market, with multiple buyers interested in a home, Offer Letters may assist a seller in determining to whom the seller wishes to sell. **However, sellers should be cautious in accepting Offer Letters from buyers, as Offer Letters have the potential to expose a seller to a claim of discrimination under the Federal Fair Housing Act, as well as the New Mexico Human Rights Act.** Both of these Acts prohibit discriminating against buyers based on their inclusion in certain protected classes (See. Paragraph. 15). Offer Letters may include personal facts about
 A Buyer that would indicate to a seller that the buyer falls into one of these protected classes. If/When a seller decides not to sell their home to the buyer who wrote the Offer Letter, that buyer may believe and therefore, claim, that the reason the Seller rejected the buyer's offer was because the buyer was a member of one of those protected classes. Seller WILL WILL NOT accept Offer Letters from buyers.



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⚠️ MLS ENTRY RULE ⚠️

All Multiple Listing Services require Brokers to enter residential listings into the MLS for dissemination within one (1) business day of conducting any public marketing of the Property. Public marketing includes, but is not limited to flyers displayed in windows, yard signs, digital marketing on public facing websites, brokerage website displays (including IDX and VOW), digital communications marketing (email blasts), multi-brokerage listing sharing networks, and applications available to the general public. If/While Property listing is withheld from dissemination through the MLS, Broker may ONLY market the Property within the Broker’s brokerage. This is referred to as an “Office Exclusive”.

8. SELLER AUTHORIZATIONS

A. AUDIO/VIDEO SURVEILLANCE. In the event Seller is using or begins to use audio or video surveillance, Broker is authorized to notify other brokers and/or buyers of such use by any means appropriate as determined by Broker in Broker’s sole discretion.

B. USE OF LISTING CONTENT; INTELLECTUAL PROPERTY LICENSE

- i.** If Seller(s) authorizes Broker to submit the Property's listing information to the MLS, Seller understands and agrees that all content relating to the Property provided by Seller to Broker, including, but not limited to photographs, images, graphics, video recordings, virtual tours, drawings, written descriptions, remarks, narratives, pricing information, and other copyrightable elements ("Seller Listing Content"), or any content otherwise obtained or produced by Broker in connection with this Agreement ("Broker Listing Content"), and any changes to the Seller Listing Content or the Broker Listing Content, may be filed with one or more MLSs and included in compilations of listings; and
- ii.** Seller(s) understand(s) and acknowledges that the MLS will disseminate the Property's listing information to all MLS Brokers who operate Internet web-sites, as well as on-line providers such as www.realtor.com, and that the information on those web-sites may generally be available to the public, further distributed, and reproduced; and
- iii.** Seller hereby grants to Broker a non-exclusive, irrevocable, worldwide, royalty free license to use, sublicense through multiple tiers, publish, display, and reproduce the Seller Listing Content, to prepare derivative works of the Seller Listing Content, and to distribute the Seller Listing Content or any derivative works thereof. This non-exclusive license shall survive the termination of this Agreement.

C. BROKER CONSENT REQUIRED TO MODIFY.

The following Seller's authorizations serve as material inducement for formation of this agreement and may not be withdrawn without Broker's written consent. Seller's attempt at non-compliance with this provision constitutes interference with Broker's ability to perform under this Agreement and a material default of this Agreement, which entitles Broker to all remedies available through law and/or equity.

SELLER AUTHORIZES:

- i. MLS.** Unless otherwise provided in Paragraph 9, Brokerage Firm to list the Property with the MULTIPLE LISTING SERVICE ("MLS"), or LISTING EXCHANGE (LEX), if any, of the local Board or Association of REALTORS®. Seller acknowledges that by placing the Property in the MLS, Broker is required to adhere to all MLS Rules and Regulations, which includes reporting the terms of the sale to the MLS;
- ii. INTERNET.** Broker to place Property and/or allow the MLS to place Property for display on the Internet. If Seller does not want the Property to be displayed on the Internet, then Seller acknowledges that the listing will not appear on ANY Internet sites, including, www.realtor.com or the listing Broker’s website and that consumers who conduct searches for listings on the Internet will not see information about the Property in response to their searches. With the exception of removal from other MLS participants’ Internet websites, under **NO** circumstances shall Broker be responsible for removing the listing from Internet websites of online providers once Seller has authorized Broker and/or MLS to place Property on the Internet.

YES NO



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- | | YES | NO |
|---|--------------------------|--------------------------|
| iii. SIGNAGE. Broker to place a "For Sale" sign on the Property, if not otherwise prohibited; | <input type="checkbox"/> | <input type="checkbox"/> |
| iv. KEYS. Broker to provide keys to other Brokers and Agents and other authorized personnel to show the Property and to permit access for marketing and inspections; | <input type="checkbox"/> | <input type="checkbox"/> |
| v. PROPERTY INFORMATION. Broker to obtain information about the Property, such as utility bills, loan information, documents, surveys or ILR's, etc.; | <input type="checkbox"/> | <input type="checkbox"/> |
| vi. LOCKBOX. Installation of a lockbox on the Property to show the Property. A lockbox is a locked container on the Property in which a key is placed. The lockbox may be opened by a key, combination, or programmer key, permitting access to the Property. Seller acknowledges that a lockbox and any other keys left with or available to Broker will permit access to the Property by Broker or any other broker, with or without potential purchasers or tenants even when Seller or occupant is absent. Seller further acknowledges that, from time to time, unauthorized persons may have gained access to properties using lockboxes. Seller acknowledges that neither the Brokerage, Broker, nor any Board or Association of REALTORS® is insuring Seller or occupant against theft, loss or vandalism resulting from any such access. | <input type="checkbox"/> | <input type="checkbox"/> |
| vii. PHOTOGRAPHY. In accordance with state and federal law, Broker to take and/or contract with a third-party vendor to take photographs and/or video ("Images") of the Property, including aerial (drone) Images, and to use such Images to market the Property as Broker deems appropriate. | <input type="checkbox"/> | <input type="checkbox"/> |
| viii. OTHER: _____ | <input type="checkbox"/> | <input type="checkbox"/> |

D. NO BROKER CONSENT REQUIRED TO MODIFY. Seller may modify Seller's authorization below at any time with written notice to Broker.

- i. **OFFERS.** Broker to divulge terms existence of offers on the Property in response to inquiries from buyers or cooperating brokers.
- ii. **OPEN HOUSES BY OTHER BROKERS.** Broker to authorize Associate and Qualified brokers within Broker's Brokerage* and/or Qualified Broker's outside Broker's Brokerage to hold an Open House of Property. (check all that apply). ***IMPORTANT NOTE TO BROKERS;** Per NMREC rules, associate brokers ("AB") under the same qualifying broker ("QB") can hold open houses for one another. ABs under different QBs **WITHIN THE SAME BROKERAGE** can hold open houses for one another **IF** the independent contractor agreement between the AB holding the open house and his/her QB allows the AB to conduct work for other QBs within the brokerage. **Only QBs can hold open houses for brokerages other than their own and ABs engaging a QB from another brokerage to hold an Open House should notify his/her QB.**
- iii. **PROPERTY ADDRESS; AVMS; BLOGGING. THIS SECTION ONLY APPLIES IF SELLER HAS AUTHORIZED BROKER TO PLACE PROPERTY ON THE INTERNET.** Upon written notice to Broker of any change in Seller's authorizations, Broker shall transmit the request to the MLS.

If Seller(s) authorizes Broker to submit the Property's listing information to the MLS in which Broker participates, some, but not necessarily all, web-sites to which the listing is disseminated may have features that either allow viewers to make comments about the Property that can be seen by others viewing the Property listing (blogging) or that provide a link to comments made by others about the Property. Additionally, those websites may include with the Property Listing an automated estimate of the market value of the Property or a link to the estimate.

- a. Seller(s) does does not want the address of the listed Property to be displayed on the Internet. If Seller(s) indicates that he/she does not want the Property address to be displayed on the Internet, then the Property will be disseminated via the Internet, but the Property address will not appear in conjunction with the listing.
- b. Seller(s) does does not want the viewers of the Property to have the capability to provide comments (blog) about the Property. If Seller(s) indicates that he/she does not want the blogging feature activated, then this feature will be disabled on all MLS participants' Internet websites. **However, this feature may still appear on the Internet websites of other on-line providers that are not MLS participants.**
- c. Seller(s) does does not want the site operator to allow/provide an automated estimate of the value of the Property (AVM) or a link to the same. If Seller(s) indicates that he/she does not want the AVM feature activated, then this feature will be disabled on all MLS participants' Internet websites. **However, this**



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feature may still appear on the Internet websites of other on-line providers that are not MLS participants.

d. OTHER: _____

E. REPORTING FALSE INFORMATION. If Seller(s) believes that information about the Property appearing on another MLS participant's website is false, he/she should notify the listing Broker who shall bring the false information to the specific website operator, along with an explanation as to why the information is false. The website operator shall have the obligation under MLS Policy to remove any false information. **Information found on some public-facing websites may be inaccurate; however, Broker has limited, and in some cases no, ability to remove false information from non-MLS participants' websites.**

9. WAIVER OF MARKETING THROUGH OR DELAYED ENTRY INTO THE MULTIPLE LISTING SERVICE (MLS). DUE TO MLS RULES, IF/WHILE LISTING IS WITHHELD FROM DISSEMINATION THROUGH THE MLS, **BROKER MAY NOT CONDUCT ANY PUBLIC MARKETING OF THE PROPERTY; BROKER MAY ONLY MARKET THE PROPERTY WITHIN THE BROKER'S BROKERAGE.** NOTE: Broker's MLS may also require Seller to complete a Waiver Form if/while the Property is not being marketed through the MLS. **Check applicable provision.**

A. Broker shall not market Property through the MLS. **Seller acknowledges he/she has been informed of the marketing benefits of the MLS and Seller hereby waives such marketing benefits.** _____ / _____ Seller's Initials

B. Broker shall begin marketing the Property in the MLS within 48 hours of _____ (DATE) or _____ (EVENT).

10. TENANT OCCUPIED PROPERTY. If Property is currently tenant-occupied, then Seller must obtain written consent from Tenant for the following and provide such consent to Broker: (Tenant's Consent – NMAR Form 2110):

A. To photograph/videograph the inside of the Property. If Seller is unable to obtain such authorization, Broker shall not photograph or videograph the inside of the Property; Broker shall only photograph/videograph the Property from the public street;

B. To hold an "Open House" to allow prospective Buyers to inspect the Property. If Seller is unable to obtain such authorization, Broker shall not hold an "Open House" of the Property. **NOTE:** Tenant's grant of consent allowing Broker to hold an "Open House" does *not* obligate Broker to do so.

11. COMPENSATION.

A. SALE.

i. Agreement to Pay Compensation. In the event of the following, Seller agrees to pay Brokerage Firm as compensation for sale of the Property: _____ OF SALES PRICE ("Sales Commission") PLUS New Mexico Gross Receipts Tax ("GRT"). In accordance with New Mexico law, the GRT Rate shall be based on the location of the Property. **GRT Location Code _____ (to be completed by Broker).** The term "sale" and "sell" or any conjugation thereof shall include Seller's grant of an option to purchase the Property, an exchange of the Property and all other transfers of any interest in the Property.

a. If during the term of this Agreement, the Property is sold through Seller or any other source; OR

b. If the sale of the Property is made by Seller within _____ days after the term of this Agreement (the "Protection Period") to persons who were introduced to the Property during the term, PROVIDED HOWEVER, that Broker submits to Seller a notice or other writing, either before or within five (5) days after the end of the Term, which discloses the names of the prospective buyers or their brokers. It shall not be necessary to provide the name(s) of any buyer who has made an offer to purchase the Property. Except as provided in Paragraph 11(A)(iii), the Protection Period shall terminate upon Seller entering into a written exclusive listing agreement with another licensed real estate broker; OR

c. If at ANY time, a Buyer who obtained an option to purchase during the term of this Agreement exercises that option; commission shall be based on sales price of Property. **This provision WILL CONTINUE TO APPLY even if Seller enters into a written exclusive listing agreement with another licensed real estate broker.**

ii. Cooperation. In the event of sale, Seller authorizes Brokerage to share the Sales Commission with the cooperating brokerage firm that procured the Buyer as follows: _____% of Sales Commission plus GRT or \$_____ plus GRT ("Co-Op Broker Commission"). Listing Brokerage shall pay the Co-Op Broker Commission out of the Sales Commission; payment of the Co-Op Broker Commission will **NOT** result in Seller paying any amounts in excess of the Sale Commission. Seller(s) Initials: _____ / _____



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- iii. **Seller Paying Bonus to Buyer’s Broker. (Check ONLY if Applicable)** (Check ONLY if Applicable) **IN ADDITION to the Sales Commission**, as set forth in Para. 11(A), Seller will pay a bonus of _____ % of sales price, plus GRT or \$_____ plus GRT to a Buyer’s Broker under terms and conditions as set forth in NMAR form 4660- Seller’s Bonus to Buyer’s Broker (“Bonus”). Broker is authorized to promote this Bonus in any and all advertising, including, but not limited to the MLS listing.
- B. OTHER EVENTS.** Notwithstanding any provision to the contrary, the parties agree that if any of the following events shall occur, that actual damages suffered by the Broker will be difficult to determine with certainty; therefore the parties agree that Owner shall pay Broker compensation as follows: _____ PLUS New Mexico GRT. For GRT Location Code, See Paragraph 11(A). If amount is based on a percentage, the percentage shall be based on the Listing Price or other amount as set forth below.
 - i. If during the term of this Agreement, Brokerage Firm, Seller or anyone else produces or finds a buyer ready, willing and able to purchase the Property at the price offered in this Agreement and on terms reasonable and customary for a sale of this type AND Seller refuses to contract with the potential Buyer:
 - ii. If during the term of this Agreement, Brokerage Firm, Seller or anyone else produces or finds a buyer ready, willing and able to purchase the Property at a price and on terms acceptable to Seller as evidenced by Seller’s acceptance of the buyer’s offer AND Seller defaults on the purchase agreement by refusing to close on the sale of the Property; commission shall be based on sales price as set forth in contract for sale signed by Seller. If during the term of this Agreement, the Property is made unmarketable by Seller’s voluntary act;
 - iii. If during the term of this Agreement, Property is withdrawn from sale;
 - iv. If during the term of this Agreement, Seller otherwise breaches this agreement in a manner including, but not limited to refusing to cooperate with Broker or unilaterally terminating this Listing Agreement.
- C. The commission/compensation shall be paid upon the earlier of the Closing or ten (10) calendar days after the occurrence of the event set forth in Paragraph 11(B).
- D. Notwithstanding the foregoing, upon forfeiture of Earnest Money by a prospective buyer, Broker shall be entitled to one-half the earnest money, not to exceed Broker’s compensation set forth above.

12. COMPENSATION FOR LEASE. Does Apply Does Not Apply

- A. In the event Seller elects to lease the Property, Seller agrees to pay Brokerage Firm the following amount as compensation for the lease of the property: _____

PLUS New Mexico GRT upon the occurrence of any of the following. In accordance with New Mexico law, the GRT shall be based on the location of the Property. For GRT Location Code, See Paragraph 11(A).

- i. If during the term of this Agreement, the Property is leased through Broker. Seller or any other source; OR
- ii. The lease of the Property is made by Seller within _____ days after the term of this Agreement (the "Protection Period") to person who are introduced to the Property during the term, PROVIDED HOWEVER, that Broker submits to Seller a notice or other writing, either before or within five (5) days after the end of the Term, which discloses the names of prospective tenants or their brokers. It shall not be necessary to provide the name(s) of any buyer or tenant who has offered to buy or lease the Property. Except as provided in Paragraph 12(B) below, the Protection Period shall terminate upon Seller entering into a written exclusive listing or property management agreement with another licensed real estate broker to lease the Property.
- B. If Seller enters into a lease agreement during the term of this Agreement or the Protection Period, with respect to any holdovers or renewals of the lease, regardless of whether this Listing Agreement or the Protection Period has expired, Seller agrees to pay a compensation of _____. In the event this paragraph is left blank, the compensation shall be the lease compensation as set forth in Paragraph 12(A) above. This Paragraph 12(B) shall NOT terminate upon Seller entering into a written exclusive listing agreement with another licensed real estate broker.
- C. Seller authorizes Listing Brokerage Firm to share compensation with a cooperating Brokerage Firm that procures a Tenant as follows: _____
- D. Notwithstanding the foregoing, nothing herein creates a property management agreement with Seller and Broker assumes NO property management responsibilities.



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13. SELLER WARRANTIES; REPRESENTATIONS.

A. WARRANTIES.

- i. **AUTHORITY/OWNER OF RECORD:** Except as otherwise disclosed to Broker in writing, the person or persons designated as Seller above and in the signature block of this Agreement is owner of record of the Property and has the authority to enter into this Agreement. Seller further warrants that there are no other owners of record of the Property, unless otherwise indicated: _____
- ii. **INSURANCE:** Seller has and shall maintain insurance covering personal injury on and property damage to the Property and shall continue to do so during the Term of this Agreement and in the event the Property is or becomes vacant during the term of this Agreement, Seller shall notify Seller's casualty insurance company and obtain any endorsement necessary to maintain insurance coverage.
- iii. **SELLER PROVIDED INFORMATION:** Seller has accurately disclosed to Broker all material latent defects and information concerning the Property known to Seller, including, but not limited to, all material information relating to: connection to a public sewer system, septic tank or other sanitation system; the existence of any tax, judgment or other type of lien; past or present infestation by or treatment for wood-destroying pests or organisms; and past or present repair of the Property for damage resulting from wood destroying pests or organisms. During the term of this Agreement, Seller agrees to continue disclosing to Broker all additional information of the type required by the preceding sentence promptly after Seller becomes aware of any such information.
- iv. **INTELLECTUAL PROPERTY LICENSE.** Seller Listing Content, and the license granted to Broker for the Seller Listing Content, do not violate or infringe upon the rights, including any copyright rights, of any person or entity. Seller acknowledges and agrees that as between Seller and Broker, all Broker Listing Content is owned exclusively by Broker, and Seller has no right, title or interest in or to any Broker Listing Content.

B. REPRESENTATIONS.

- i. Unless otherwise provided herein, there are no delinquencies or defaults under any Deed of Trust, Mortgage, or other Encumbrance on the Property and the Property is not subject to any current litigation: Explain Delinquencies/Defaults: _____
- ii. Is this a Short Sale? YES NO If yes, attach NMAR Form 2109 – Short Sale Addendum to Listing Agreement.
- iii. During the ownership of the Property, has Seller declared bankruptcy? YES NO, or engaged in a loan modification? YES NO. If yes to either, Seller should determine what, if any implications, such bankruptcy and/or loan modification may have on the sale of the Property.
- iv. Is the Seller receiving benefits from any employer, relocation company, or other entity that provides benefits to Seller when selling the Property YES NO. If yes, provide name. _____

Does any person/entity have an Option or a Right of First Refusal (“RFR”) to Purchase the Property? YES NO. If yes, provide a copy of the Option or RFR to Purchase.

14. HOLD HARMLESS; INDEMNIFICATION; RELEASE.

A. HOLD HARMLESS AND INDEMNIFICATION. Seller shall hold harmless and indemnify Brokerage Firm and Broker from any liability or damages, including attorneys' fees, arising out of the following:

- i. incorrect or undisclosed information about the Property, which Seller knew or should have known;
- ii. claims for any personal injury to third-parties or damage to the personal property of third parties occurring on the Property, provided such injury and/or damage is not due to Broker's own negligent, reckless or intentional actions. Such damages or claims to include costs and attorney's fees;
- iii. infringement of any copyright arising out of Broker's use of Seller Listing Content.

B. SELLER RELEASE. Provided the following damages, claims or liability do not arise from the intentional, reckless or negligent acts of Brokerage Firm, Broker or cooperating Broker, Seller agrees that neither Brokerage Firm, Broker, nor any cooperating Broker shall be liable for any damages or claims for any personal injury or damage to real or personal property caused by acts of third parties, including, but not limited to, vandalism and theft or to acts outside of the parties' control, including, but not limited to, acts of God and freezing water pipes. Broker shall not be responsible for maintenance of the Property unless otherwise agreed to in writing.

15. IMPORTANT NOTICE TO SELLER: BROKER IS NOT RESPONSIBLE FOR VERIFYING AUTHENTICITY/ VERACITY OF PRE-QUALIFICATION OR PROOF-OF-FUNDS LETTERS OR FOR DETERMINING BUYER’S CREDITWORTHINESS. _____ **Seller(s) Initials**



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- 16. SERVICE PROVIDER RECOMMENDATIONS.** If Broker recommends a builder, contractor, escrow company, title company, pest control service, appraiser, lender, home inspection company or home warranty company or any other person or entity to Seller for any purpose, such recommendation shall be independently investigated and evaluated by Seller, who hereby acknowledges that any decision to enter into any contractual arrangement with any such person or entity recommended by Broker shall be based solely upon such independent investigation and evaluation.
- 17. INSPECTION REPORTS.** The NMAR Purchase Agreement provides that if buyer opts to terminate the Purchase Agreement after conducting inspections of the Property, the buyer is NOT required to provide a copy of the inspection report to Seller unless otherwise directed by the Seller in writing. Further, if buyer objects to issues identified during the inspection, the Buyer is only required to provide a copy of the **section** of the report on which the objection is based unless otherwise directed by Seller in writing. The Purchase Agreement is structured like this for the following reasons: 1) if Seller receives information regarding material defects in the Property and the contract terminates, the Seller and Broker will be required to provide this information to subsequent buyers; and 2) many inspection reports contain copyright language prohibiting the customer (who in most case is the buyer) from sharing, reproducing or distributing the report, which means that material defects identified in the report would have to be transferred into Seller's Property Disclosure Statement or otherwise disclosed in writing.
- 18. FOREIGN SELLERS.** The disposition of a U.S. Real Property interest by a Foreign Person is subject to the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA") income tax withholding. FIRPTA applies if the Seller is a Foreign Person, Foreign Corporation or Partnership, or non-resident Alien, unless BOTH the purchase price is \$300,000 or less AND Buyer intends to use the Property as Buyer's primary residence. Federal law requires that if Seller is a Foreign Person, then Buyer must withhold a portion of the amount realized from the sale of the Property and remit it to the Internal Revenue Service (IRS) within twenty (20) days of Closing unless the Seller provides written confirmation from the IRS that Seller is not subject to withholding. Generally speaking, the "amount realized" is the sales/purchase price of the Real Estate. If Seller is Non-Foreign, the Seller must provide proof of Non-Foreign Status by fully executing the Affidavit of Non-Foreign Seller (NMAR Form 2303) and delivering it to either the Buyer or to a Qualified Substitute. Under FIRPTA, if Seller is a Foreign Person and Buyer fails to withhold taxes, the Buyer may be held liable for the tax, in addition to other fines and penalties and the Buyer's Broker may be fined up to the amount of his commission. (See NMAR Form 2304 – Information Sheet – FIRPTA)
- 19. NON-DISCRIMINATION.**
- A. RESIDENTIAL:** Seller understands that federal housing laws, the New Mexico Human Rights Act, and the New Mexico Real Estate Commission Regulations prohibit discrimination in the sale, rental, appraisal, financing, or advertising of housing or other property on the basis of race, color, religion, sex, sexual orientation, gender identity, familial status, spousal affiliation, physical or mental handicap, national origin, or ancestry and in some circumstances, age.
 - B. COMMERCIAL:** Seller understands that the New Mexico Human Rights Act prohibits discrimination in the sale or lease of any real property on the basis of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, physical or mental handicap or spousal affiliation.
- 20. FARMS AND RANCHES.** The Agricultural Foreign Investment Disclosure Act ("AFIDA") requires disclosure of a transfer of interest in certain agricultural land (including farms and ranches) to or from a Foreign Person to the Farm Service Agency (FSA) within ninety (90) days of the transaction, on a form provided by the FSA. AFIDA does not apply to agricultural land if in the aggregate it is not more than ten (10) acres and if the gross annual receipts from sale of farm, ranch, farming or timber products do not exceed \$1,000.00. (See NMAR 2304A – Information Sheet – AFIDA).
- 21. LEAD-BASED PAINT.** Are there buildings on the Property that were built prior to 1978? Yes No. If no, proceed to Paragraph 22.
- A. DISCLOSURE AND INFORMATION REQUIREMENTS:** If a residence on the Property was constructed before 1978, Seller MUST provide the following information to the Buyer. The Buyer should receive this information BEFORE making an offer on the Property. **Seller cannot legally accept Buyer's offer unless Buyer has received all of the following AND completed NMAR Form 5112, Lead-Based Paint Addendum to the Purchase Agreement.**
- i.** The pamphlet titled, "Protect Your Family from Lead in Your Home";
 - ii.** Disclosure of known presence of lead-based paint and lead-based paint hazards;
 - iii.** A list and copies of all reports and records available to Seller pertaining to lead-based paint and lead-based hazards on the Property; and
 - iv.** A 10-day opportunity (or mutually agreed upon period) for the Buyer to conduct a risk assessment or inspection for the presence of lead-based paint hazards. Buyer may waive this opportunity (see NMAR Form 5112).



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- B. REPAIRS AND RENOVATIONS;** If the Property falls under the Lead-Based Paint Renovation, Repair and Painting Program ("Program"), AND there have been renovations or repairs made to the Property that are governed by the Program, Seller will will not provide a Lead-Based Paint Renovation, Repair and Painting Disclosure Addendum (NMAR Form 5112A, Lead-Based Paint Renovation, Repair and Painting Disclosure Addendum.) For definitions of properties and renovations covered by the Program refer to NMAR Form 2315, Lead-Based Paint (LBP) Renovation, Repair and Painting Information Sheet.
- 22. PUBLIC IMPROVEMENT DISTRICT:** Is the Property located in a Public Improvement District? Yes No **If yes, PER NEW MEXICO LAW, SELLER IS PROHIBITED FROM ACCEPTING AN OFFER TO PURCHASE UNTIL SELLER HAS PROVIDED SPECIFIC DISCLOSURES TO THE BUYER.** See NMAR Form 4500 – Information Sheet – Public Improvement District Act.
- 23. HOMEOWNERS'/CONDOMINIUM UNIT OWNERS' ASSOCIATION ("HOA/CUOA"):** Is Property located in an HOA OR CUOA? Yes No If yes, Per New Mexico law, Seller is required to provide specific disclosures to the buyer. For HOAs, see NMAR Form 4600, Homeowners' Association Information Sheet, NMAR Form 4650, Seller's Disclosure of HOA Documents and NMAR Form 4700 Homeowners' Disclosure Certificate. For CUOAs, see NMAR Form 4600, Condominium Association Information Sheet and NMAR Form 2302, Residential Re-Sale Condominium Addendum.
- 24. MEDIATION.** If a dispute arises between the parties relating to this Agreement, the parties agree to submit the dispute to mediation. The parties will jointly appoint a mediator and will share equally the costs of the mediation. If a mediator cannot be agreed on or mediation is unsuccessful, the parties may enforce their rights and obligations under this Agreement in any manner provided by New Mexico law. For more information, see NMAR Form 5118 - Information Sheet - Mediation Information for Clients and Customers.
- 25. EXPERT ASSISTANCE.** Broker advises Seller to obtain expert assistance regarding legal, tax, and accounting matters or matters relating to zoning, surveying, inspections, construction, hazardous materials, engineering, or other matters which are not within the expertise of Broker. Broker shall have no liability with respect to such matters.
- 26. CONSENT TO THE ELECTRONIC TRANSMISSION OF DOCUMENTS AND TO THE USE OF ELECTRONIC SIGNATURES.** The parties do do not consent to conduct any business related to and/or required under this Agreement by electronic means, including, but not limited to the receipt of electronic records and the use of electronic signatures. Subject to applicable law, electronic signatures shall have the same legal validity and effect as original hand-written signatures. Nothing herein prohibits the parties from conducting business by non- electronic means. If a party has consented to receive records electronically and/or to the use of electronic signatures, that party may withdraw consent at any point in the transaction by delivering written notice to the other party. In the event the parties have agreed to electronic transmission of documents, a facsimile or e-mail transmission of a copy of this or any related document shall constitute delivery of that document.
- 27. ATTORNEY FEES AND COSTS.** Should any aspect of this Agreement result in arbitration or litigation, the prevailing party of such action, shall be entitled to an award of reasonable attorneys' fees and court costs.
- 28. TIME IS OF THE ESSENCE.** Time is of the essence with respect to the parties' performance under this Agreement.
- 29. FORCE MAJEURE.** Neither party shall be liable for delay or failure to perform any obligation under this Agreement if the delay or failure is caused by any circumstance beyond their reasonable control, including but not limited to acts of God, war, civil unrest or industrial action.
- 30. GOVERNING LAW AND VENUE.** This Agreement is to be construed in accordance with and governed by the internal laws of the State of New Mexico without giving effect to any choice of law rule that would cause the application of the laws of any jurisdiction other than the internal laws of the State of New Mexico to the rights and duties of the parties. Each party hereby irrevocably consents to the jurisdiction and venue of the state and federal courts located in the county in which the Property or any portion of the Property is located in connection with any claim, action, suit, or proceeding relating to this Agreement and agrees that all suits or proceedings relating to this Agreement shall be brought only in such courts.
- 31. SEVERABILITY.** If any portion of this Agreement is found by any court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect.



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32. OTHER.

33. ENTIRE AGREEMENT. This Agreement together with the following addenda, and any exhibits referred to in this Agreement contains the entire Agreement between the parties relating to the subject matter and supersedes any previous agreements, arrangements, undertakings or proposals, oral or written with respect to the Property which are not expressly set forth herein. This Agreement may be varied only by a document signed by both parties.

- Agency Addendum Other: _____
 Short Sale Addendum Other: _____

The New Mexico Association of REALTORS® and the local board or association of REALTORS® do not fix, control, recommend, suggest or maintain compensation rates for services to be rendered by members, nor the division of Broker's compensation between Broker and cooperating Brokers in a transaction. The amount of compensation and the terms of the Agreement are not prescribed by law and are subject to negotiation.

THE LISTING AGREEMENT – EXCLUSIVE RIGHT TO SELL IS BY AND BETWEEN BROKERAGE FIRM,

AND

⚠ WIRE FRAUD ALERT ⚠

Criminals are hacking email accounts of real estate brokers, title companies, settlement attorneys and others, resulting in fraudulent wire instructions being used to divert funds to the account of the criminal. The emails look legitimate, but they are not. Buyer and Seller are advised not to wire any funds without personally speaking with the intended recipient of the wire to confirm the routing number and the account number. Buyer and Seller should not send personal information such as social security numbers, bank account numbers and credit card numbers except through secured email or personal delivery to the intended recipient.

SELLER(S)

Seller Signature	If Entity, Title of Signatory	Date	Time
Seller Signature	If Entity, Title of Signatory	Date	Time
Seller Name (Print)	If Entity, Title of Signatory	Email Address	
Seller Name (Print)	If Entity, Title of Signatory	Email Address	
Seller Address	City	State	Zip Code
Seller Home Phone	Business Phone	Cell Phone	Fax

LISTING/SELLER'S BROKER

Seller's Broker Name	Seller's Broker Signature		
If different, Seller's Broker's Qualifying Broker's Name	Seller's Broker's Qualifying Broker's NMREC License No.		
Seller's Brokerage Firm	Office Phone	Fax	
Seller's Brokerage Address	City	State	Zip Code
Seller's Broker Email Address	Broker <input type="checkbox"/> is <input type="checkbox"/> is not a REALTOR®		

Views from the Board

Think Twice Before Submitting a Buyer Letter to a Seller

Kim Hedding, Oregon Real Estate Board Member



Kim Hedding

"Views from the Board" features the opinions of Real Estate Board members. The views expressed are not necessarily those of the *Oregon Real Estate News-Journal*, the Oregon Real Estate Agency, or Agency staff. The message provided does not, and is not intended to, constitute legal advice; all content is for informational purposes only.

Before the death of George Floyd and the expanding social movement for racial justice in our country, submitting buyer letters to sellers was already a risky business for brokers due to the federal [Fair Housing Act](#). The Fair Housing Act provides, in part, that sellers cannot refuse to sell a house based on race, religion, color, national origin, sex, family status, or disability. [The Oregon Equality Act](#) extends this to source of income, status as domestic violence survivor, sexual orientation, and gender identity.

Most letters follow the same format of eager buyers wanting to introduce themselves. These letters typically contain a brief bio about the buyers, why they love the home, and why the seller should sell to them. While these letters may seem innocent enough, there are some very real issues with them that can violate fair housing laws.

Consider the submission of a photograph with the letter. These photos can give details to the seller like race, social class, color, national origin, sex, family status, or disability, all of which are protected under the Fair Housing Act. Picking a buyer or rejecting a buyer based on any of the protected classes is against the law. I have seen in the last several months a case where a seller was indeed influenced by a buyer letter and the attached photos. The seller accepted a lower offer because they wanted to sell to these particular buyers.

And this is where the legal liability for you and your seller enters the picture. Your seller, after viewing the buyer letter and photograph, ends up accepting the offer from the nice family and not the offer from the single individual. In this situation,

both the listing broker and the seller could potentially be named as a party in an action against the seller. The listing broker could be found to have assisted their seller in making a discriminatory decision based upon the protected classes mentioned in the letter.

It is advisable that listing brokers inform the seller of the potential liability that these letters carry and strongly encourage the seller not to accept them. Listing brokers should keep detailed notes in their file about the efforts they took in advising their sellers to not accept these letters.

In conclusion, the time is now to once and for all do away with buyer letters. The liability to both sellers and brokers, and, most importantly, the personal pain to protected classes, is just too great of weight to bear.

Editor Note: Kim Hedding is principal broker and co-owner of Golden Realty in Eugene. She is an industry member of the Oregon Real Estate Board. ■

Next Real Estate Board Meeting

October 5, 2020, 10:00 a.m.
by videoconference

All are welcome at this regularly scheduled general meeting of the Oregon Real Estate Board. Please contact [Leandra Hagedorn](#) for information on how to attend.