TEXAS REALTORS®

Risk Reduction Committee Meeting
2019 Texas REALTORS® Winter Meeting

Saturday, February 9, 2019
11:45 a.m. – 12:15 p.m.
Texas 1
Hyatt Regency
Austin, Texas

Risk Reduction Committee Meeting
Saturday, February 9, 2019
11:45 a.m. – 12:15 p.m.
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Hyatt Regency Austin

I.	Call to Order	Terri Covington, Chair
II.	Minutes	Terri Covington, Chair
III.	Association Update a. Legal Hotline b. Model Copyright Forms	Cathy Trevino, Liaison
IV.	TREC Update	Leigh York, Vice Chair
V.	State & Federal Issues Update a. Legislative Update	Terri Covington, Chair Governmental Affairs Staff
VI.	Case Law Update	Hunter Jackson, Associate Counsel
VII.	Unfinished Business	Terri Covington, Chair
VIII.	New Business a. REALTOR® Day at the Texas Capitol	Terri Covington, Chair
IX.	Adjourn	Terri Covington, Chair

Meeting minutes
Risk Reduction Committee
Regular meeting – February 10, 2018
Austin, TX
Minutes recorded by: Abby Lee

Chair Bob Baker called the meeting to order at approximately 11:47 a.m. Roll was called and a quorum was established. Chair Baker asked for any corrections to the meeting minutes from September 9, 2017. The minutes were approved as distributed.

The Chair provided an update on TAR forms. Liaison Leigh York provided an update on TREC form changes.

Senior Associate Counsel Abby Lee provided information on TREC rules regarding the IABS & Consumer Protection Notice, unauthorized practice of law and use of forms, and the 2018 TREC rule review. Deputy General Counsel Kinski Moss updated the committee on the adopted changes to the TREC advertising rule. Legislative Attorney Kelly Flanagan provided a federal tax reform update.

There was no unfinished business.

The meeting was adjourned at 12:19 p.m.

Roll:

	Name	Present
1	Abayomi Owolabi	
2	Carmen Canto	
3	Leigh York	x
4	Lynda Conway	
5	Marilyn O'Neill	x
6	Mary Ann Jeffers	
7	Monica Atkins	x
8	Shannon Cobb Evans	
9	Shirley Solis	x
10	Toni Romano	
11	Barbara Trumbull	
12	Diana Ayers	x
13	Jan Miller	x
14	Joanne Justice	x
15	Lisa Nettey	
16	Ann Walker	
17	Bob Baker	x
18	Denise Price	x
19	Derek Westley	x
20	Doug Srader	x
21	Pam Titzell	x
22	Terri Covington	

Meeting minutes
Risk Reduction Committee
Regular meeting – September 8, 2018
San Antonio, TX
Minutes recorded by: Abby Lee

Chair Bob Baker called the meeting to order at approximately 11:51 a.m. Roll was called and a quorum was not established, therefore, the minutes were not approved.

During the state and federal issues update, Associate Director of Legislative Affairs provided an outlook to the committee on the 2019 legislative session. Senior Associate Counsel Abby Lee provided information on the following topics: i) the General Data Protection Regulation; ii) the Crapo Act; iii) PHH and Marketing Agreements; iv) the recent FTC-DOJ antitrust workshop; v) ADA website compliance; and vi) relevant case law.

Liaison Leigh York provided an update on the TAR broker responsibility guide and the model brokerage policies and procedures manual. The liaison also informed the committee about the findings from the recent TAR errors and omissions insurance/risk management task force meeting. Vice Chair Terri Covington provided an update on changes to TREC forms, the TREC advertising rule, and other proposed TREC rules.

There was no unfinished business.

Under new business, the committee discussed concerns about FIRPTA and some title companies unwillingness to provide the FIRPTA affidavit at closing or to otherwise assist with FIRPTA compliance.

The meeting was adjourned at 12:37 p.m.

Roll:

	Name	Present
1	Abayomi Owolabi	
2	Carmen Canto	
3	Leigh York	x
4	Lynda Conway	
5	Marilyn O'Neill	x
6	Mary Ann Jeffers	
7	Monica Atkins	x
8	Shannon Cobb Evans	x
9	Shirley Solis	
10	Toni Romano	
11	Barbara Trumbull	
12	Diana Ayers	x
13	Jan Miller	
14	Joanne Justice	x
15	Lisa Nettey	
16	Ann Walker	
17	Bob Baker	x
18	Denise Price	x
19	Derek Westley	x
20	Doug Srader	
21	Pam Titzell	x
22	Terri Covington	x

TEXAS ASSOCIATION OF REALTORS®

Copyright Basics

& How Copyright Impacts Real Estate Brokerages

What is copyright?

Copyright is a form of legal protection provided to the authors of "original works of authorship" fixed in a tangible form of expression

What can be protected?

Things like....

- Books
- Plays
- Paintings
- Photographs

What can't be protected?

Things like...

- Ideas
- Facts
- Short phrases or slogans

Who owns a copyright?

Generally, the copyright owner is the author who created the work:

- The writer
- The painter
- The photographer

Work made for hire

The author and owner is not the person who actually created the work, but is the person or entity that hired the person.

A work can be considered a work made for hire if the work is created by:

- An employee within the scope of employment, or
- An independent contractor under an express written agreement signed by both parties, but only for 9 specific categories.

What rights does a copyright owner have?

Copyright owners own certain exclusive rights, like the right to:

- reproduce the work
- distribute the work
- display the work
- make derivative works (create something new)

Can I grant or share rights with others?

Yes, a copyright owner can grant or share certain rights with another through:

- an assignment, or
- a license agreement

Subject to the terms and conditions of this Agreement, **Licensor** hereby grants to **Licensee** a **non-exclusive, non-transferable, worldwide, perpetual, royalty-free** license to **reproduce, display, and distribute** the material **for marketing Licensee's services**.

How can I protect my copyrights?

- Registration
- Copyright Notice:
  © 2018 Texas Association of REALTORS®, Inc.
- Agreements

What is copyright infringement?

Copyright infringement is the violation of one or more of the copyright owner's exclusive rights.

What are the remedies?

- Injunctive Relief
- Damages
  - Actual damages and wrongful profits, or
  - Statutory damages
- Attorneys' Fees and Costs

What about fair use?

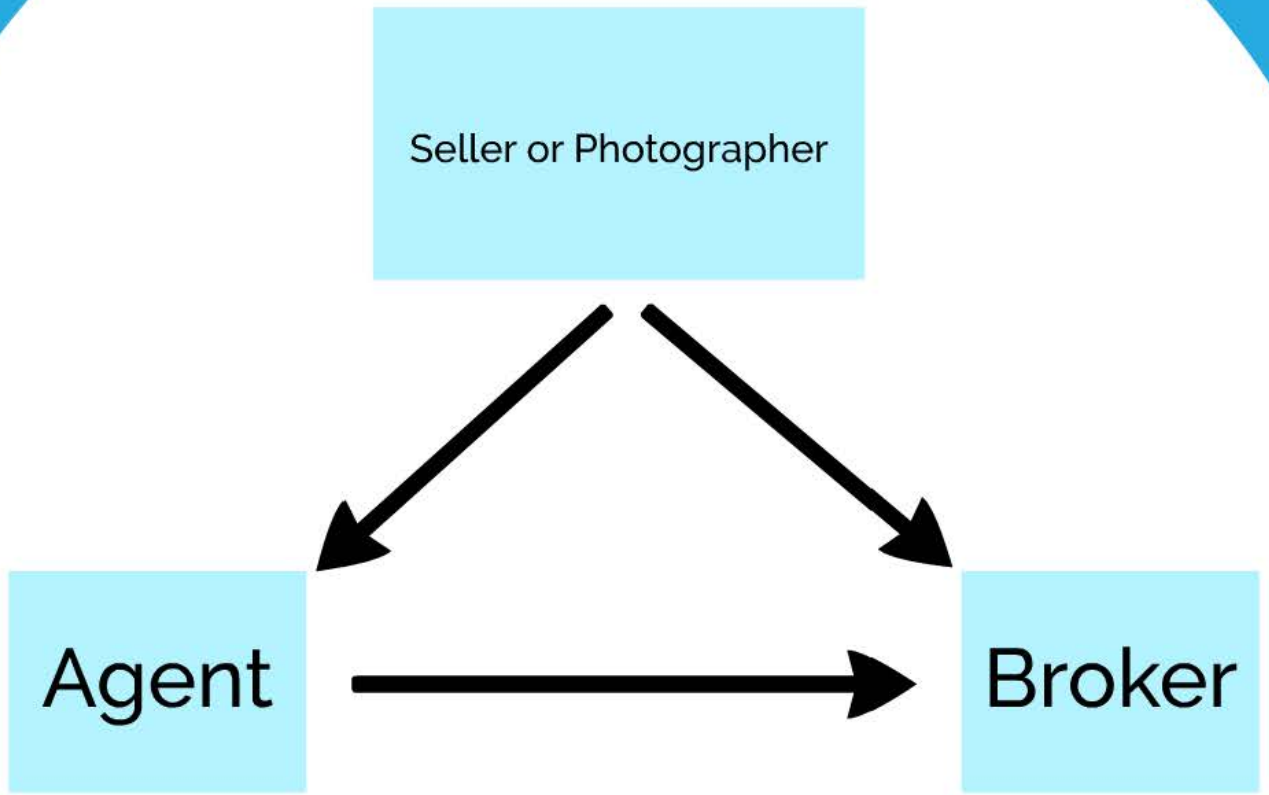
Fair use is an affirmative defense.

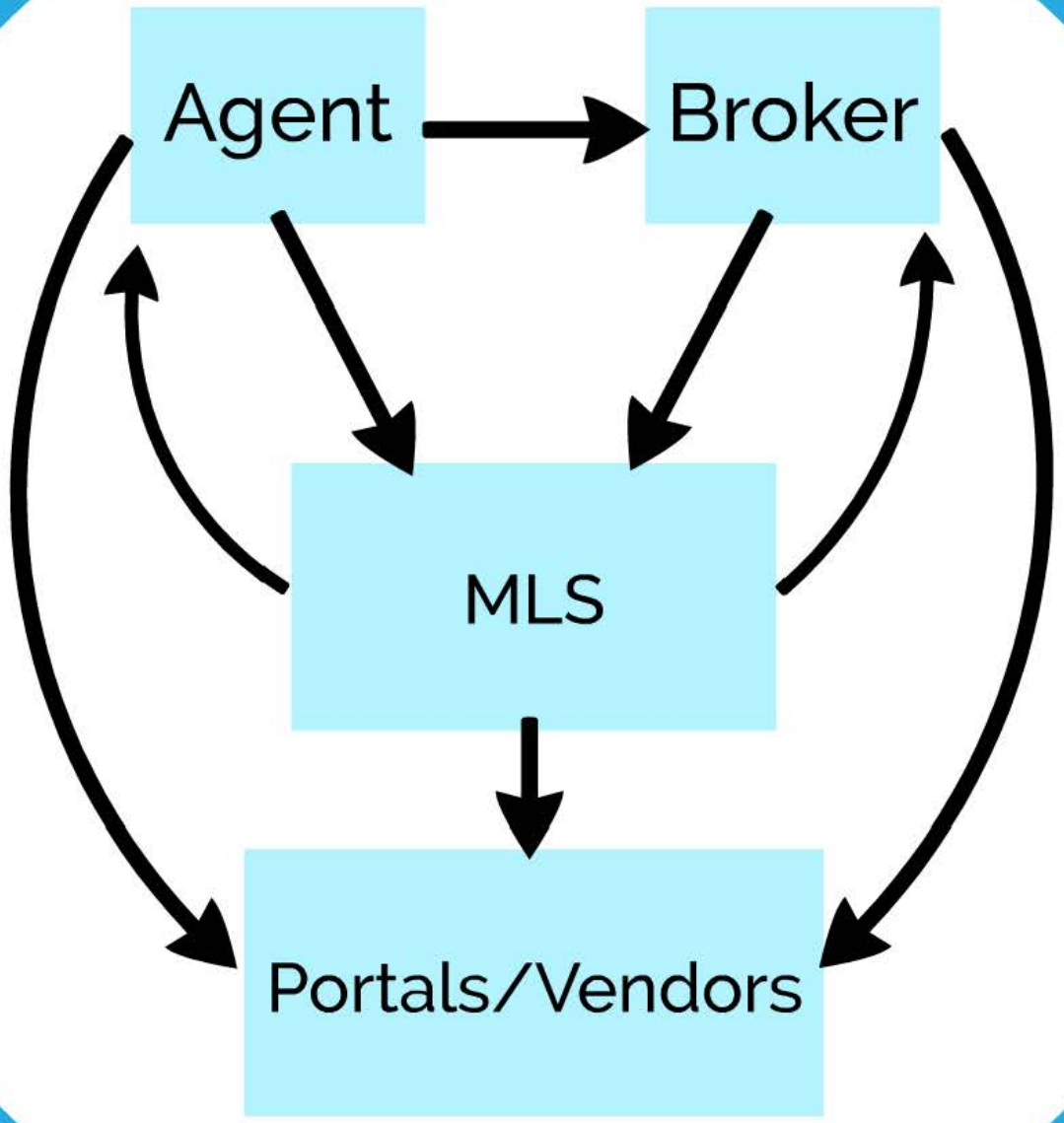
In determining whether any use is a "fair use", a judge or jury will consider the following factors:

- Purpose and character of the use
- Nature of the copyrighted work
- How much was taken
- Economic impact

How does any of this impact me or my brokerage?

Typically through use of photographs when marketing a property


Seller or Photographer
Agent
Broker


Agent
Broker
MLS
Portals/Vendors

Relevant Case Law

How can I protect myself or my brokerage from an infringement claim?

Know your rights

- Don't use content, like a photograph, unless you have permission.
- Review your existing agreements so that you know what rights you have and make sure your use complies.
- Ensure future agreements have given you the necessary rights

DMCA Safe Harbor

The Digital Millennium Copyright Act's "safe harbor" provision can protect you from a third party's infringing activity, but you must comply with the requirements.

TAR provides members with a free model policy to assist in compliance with the safe harbor requirements

Requirements

- Have no knowledge of complained-of infringing activity or of facts that make complained of infringing activity apparent
- If capable of controlling infringing activity, make sure no financial benefit can be attributable to the infringing activity
- Comply with DMCA takedown procedure
- Designate a copyright agent on website and with the Copyright Office.
- Implement a DMCA-compliant website policy

Requirements

- Have no knowledge of complained-of infringing activity or of facts that make complained of infringing activity apparent
- If capable of controlling infringing activity, make sure no financial benefit can be attributable to the infringing activity
- Comply with DMCA takedown procedure
- Designate a copyright agent on website and with the Copyright Office.
- Implement a DMCA-compliant website policy

contractor agreement

- Designed to address ownership of listing content created by an agent or a third party

TAR Resources

- Model Addendum to Independent Contractor Agreement Regarding Listing Content
- Model Copyright Policy
- Model Photography Agreements

odel Photography Agreements

Made for Hire: The broker is the matic owner of the photographs from creation.
nment: The photographer assigns all to the photographs to the broker.
se: The photographer retains rship of the photographs, but grants broker a license to use the graphs

Model Addendum to Independent Contractor Agreement Regarding Listing Content

- Model addendum to an independent contractor agreement
- Designed to address ownership of listing content created by an agent or a third party

Model Copyright Policy

- Addresses ownership of listing content created by agents and third parties
- Instructs agents on how to properly use listing content and the types of agreements they must secure

Model Photography Agreements

- Work Made for Hire: The broker is the automatic owner of the photographs from their creation.
- Assignment: The photographer assigns all rights to the photographs to the broker.
- License: The photographer retains ownership of the photographs, but grants to the broker a license to use the photographs.

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

THIRD PARTY FINANCING ADDENDUM

TO CONTRACT CONCERNING THE PROPERTY AT

_____

(Street Address and City)

1.[A.] **TYPE OF FINANCING AND DUTY TO APPLY AND OBTAIN APPROVAL** [TYPE OF FINANCING AND DUTY TO APPLY AND OBTAIN APPROVAL]**:** Buyer shall apply promptly for all financing described below and make every reasonable effort to obtain approval for the financing, including but not limited to furnishing all information and documents required by Buyer's lender. (Check applicable boxes):

❑ A.[1.] CONVENTIONAL FINANCING [Conventional Financing]:

❑ (1)[(a)] A first mortgage loan in the principal amount of $_____ (excluding any financed PMI premium), due in full in _____ year(s), with interest not to exceed _____% per annum for the first _____ year(s) of the loan with Origination Charges as shown on Buyer's Loan Estimate for the loan not to exceed _____% of the loan.

❑ (2)[(b)] A second mortgage loan in the principal amount of $ (excluding any financed PMI premium), due in full in _____year(s), with interest not to exceed _____% per annum for the first _____year(s) of the loan with Origination Charges as shown on Buyer's Loan Estimate for the loan not to exceed _____% of the loan.

❑ B.[2.] TEXAS VETERANS LOAN [Texas Veterans Loan]: A loan(s) from the Texas Veterans Land Board of $_____for a period in the total amount of _____years at the interest rate established by the Texas Veterans Land Board.

❑ C.[3.] FHA INSURED FINANCING [FHA Insured Financing]: A Section _____ FHA insured loan of not less than $_____(excluding any financed MIP), amortizable monthly for not less than _____years, with interest not to exceed _____% per annum for the first _____year(s) of the loan with Origination Charges as shown on Buyer's Loan Estimate for the loan not to exceed _____ % of the loan.

❑ D.[4.] VA GUARANTEED FINANCING [VA Guaranteed Financing]: A VA guaranteed loan of not less than $_____(excluding any financed Funding Fee), amortizable monthly for not less than_____years, with interest not to exceed_____% per annum for the first year(s) of the loan with Origination Charges as shown on Buyer's Loan Estimate for the loan not to exceed _____% of the loan.

❑ E.[5.] USDA GUARANTEED FINANCING [USDA Guaranteed Financing]: A USDA-guaranteed loan of not less than $_____ (excluding any financed Funding Fee), amortizable monthly for not less than_____years, with interest not to exceed _____% per annum for the first _____year(s) of the loan with Origination Charges as shown on Buyer's Loan Estimate for the loan not to exceed ____% of the loan.

❑ F.[6.] REVERSE MORTGAGE FINANCING [Reverse Mortgage Financing]: A reverse mortgage loan (also known as a Home Equity Conversion Mortgage loan) in the original principal amount of $ _____ (excluding any financed PMI premium or other costs), with interest not to exceed _____% per annum for the first _____ year(s) of the loan with Origination Charges as shown on Buyer's Loan Estimate for the loan not to exceed ____% of the loan. The reverse mortgage loan ❑will ❑ will not be an FHA insured loan.

2.[B.] **APPROVAL OF FINANCING** [APPROVAL OF FINANCING]: Approval for the financing described above will be deemed to have been obtained when Buyer Approval and Property Approval are obtained.

A.[1.] BUYER APPROVAL [Buyer Approval]*(Check one box only)*:

❑ This contract is subject to Buyer obtaining Buyer Approval. If Buyer cannot obtain Buyer Approval, Buyer may give written notice to Seller within_____days after the effective date of this contract and this contract will terminate and the earnest money will be

(Address of Property)

refunded to Buyer. If Buyer does not terminate the contract under this provision, the contract shall no longer be subject to the Buyer obtaining Buyer Approval. Buyer Approval will be deemed to have been obtained when (i) the terms of the loan(s) described above are available and (ii) lender determines that Buyer has satisfied all of lender's requirements related to Buyer's assets, income and credit history.

❑ This contract is not subject to Buyer obtaining Buyer Approval.

B. [2.] PROPERTY APPROVAL [Property Approval]: If Buyer's lender determines that the Property does not satisfy lender's underwriting requirements for the loan (including but not limited to appraisal, insurability, and lender required repairs) Buyer, not later than 3 days before the Closing Date, may terminate this contract by giving Seller: (i) notice of termination; and (ii) a copy of a written statement from the lender setting forth the reason (s) for lender's determination. If Buyer terminates under this paragraph, the earnest money will be refunded to Buyer. If Buyer does not terminate under this paragraph, Property Approval is deemed to have been obtained. [Property Approval will be deemed to have been obtained when the Property has satisfied lender's underwriting requirements for the loan, including but not limited to appraisal, insurability, and lender required repairs. If Property Approval is not obtained, Buyer may terminate this contract by giving notice to Seller before closing and the earnest money will be refunded to Buyer.]

C. [3.] **Time is of the essence for this paragraph and strict compliance with the time for performance is required.**

3. [C.] **SECURITY** [SECURITY]: Each note for the financing described above must be secured by vendor's and deed of trust liens.

4. [D.] **FHA/VA REQUIRED PROVISION** [FHA/VA REQUIRED PROVISION]: If the financing described above involves FHA insured or VA financing, it is expressly agreed that, notwithstanding any other provision of this contract, the purchaser (Buyer) shall not be obligated to complete the purchase of the Property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise: (i) unless the Buyer has been given in accordance with HUD/FHA or VA requirements a written statement issued by the Federal Housing Commissioner, Department of Veterans Affairs, or a Direct Endorsement Lender setting forth the appraised value of the Property of not less than $_____; or (ii) if the contract purchase price or cost exceeds the reasonable value of the Property established by the Department of Veterans Affairs.

A. [(1)]The Buyer shall have the privilege and option of proceeding with consummation of the contract without regard to the amount of the appraised valuation or the reasonable value established by the Department of Veterans Affairs.

B. [(2)]If FHA financing is involved, the appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development will insure. HUD does not warrant the value or the condition of the Property. The Buyer should satisfy himself/herself that the price and the condition of the Property are acceptable.

C. [(3)]If VA financing is involved and if Buyer elects to complete the purchase at an amount in excess of the reasonable value established by the VA, Buyer shall pay such excess amount in cash from a source which Buyer agrees to disclose to the VA and which Buyer represents will not be from borrowed funds except as approved by VA. If VA reasonable value of the Property is less than the Sales Prices, Seller may reduce the Sales Price to an amount equal to the VA reasonable value and the sale will be closed at the lower Sales Price with proportionate adjustments to the down payment and the loan amount.

5. [E.] **AUTHORIZATION TO RELEASE INFORMATION** [AUTHORIZATION TO RELEASE INFORMATION]:

A. [(1)]Buyer authorizes Buyer's lender to furnish to Seller or Buyer or their representatives information relating to the status of the approval for the financing.

B. [(2)]Seller and Buyer authorize Buyer's lender, title company, and escrow agent to disclose and furnish a copy of the closing disclosures and settlement statements provided in relation to the closing of this sale to the parties' respective brokers and sales agents provided under Broker Information [identified on the last page of the contract].

Buyer _____ Seller _____

Buyer _____ Seller _____

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

NOTICE OF BUYER'S TERMINATION OF CONTRACT

CONCERNING THE CONTRACT FOR THE SALE OF THE PROPERTY AT

_____

(Street Address and City)

BETWEEN THE UNDERSIGNED BUYER AND _____

_____ (SELLER)

Buyer notifies Seller that the contract is terminated pursuant to the following:

❑(1) The [~~the~~] unrestricted right of Buyer to terminate the contract under Paragraph 23 of the contract.

❑(2) Buyer cannot obtain Buyer Approval in accordance with the Third Party Financing Addendum to the contract.

❑(3) The [~~the~~] Property does not satisfy Property Approval in accordance with the Third Party Financing Addendum to the contract. Buyer has delivered to Seller lender's written statement setting forth the reason(s) for lender's determination.

❑(4) Buyer elects to terminate under Paragraph A of the Addendum for Property Subject to Mandatory Membership in a Property Owners' Association.

❑(5) Buyer elects to terminate under Paragraph 7B(2) of the contract relating to the Seller's Disclosure Notice.

❑(6) Buyer elects to terminate under Paragraph (3) of the Addendum Concerning Right to Terminate Due to Lender's Appraisal. Buyer has delivered a copy of the Appraisal to Seller.

❑(7) Buyer elects to terminate under Paragraph 6.D. of the contract (6.C. for Residential Condominium Contract) because [~~Buyer's or Lender's~~] timely objections were not cured by the end of the Cure Period.

❑(8)[~~(6)~~] Other *(identify the paragraph number of contract or the addendum)*: _____

_____

_____

_____

_____

NOTE: This notice is not an election of remedies. Release of the earnest money is governed by the contract.[~~Release of the earnest money is governed by the terms of the contract.~~]

CONSULT AN ATTORNEY BEFORE SIGNING: TREC rules prohibit real estate license holders from giving legal advice. READ THIS FORM CAREFULLY.

_____ _____

Buyer Date Buyer Date

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC) 11-15-2018[~~11-12-2018~~][~~2-12-18~~]

ADDENDUM CONCERNING RIGHT TO TERMINATE DUE TO LENDER'S APPRAISAL

Use only if the Third Party Financing Addendum is attached to the contract and the transaction does not involve [~~Not for use in transactions involving~~] FHA insured or VA guaranteed financing

EQUAL HOUSING OPPORTUNITY

CONCERNING THE PROPERTY AT: _____
(Street Address and City)

The financing described in the Third Party Financing Addendum attached to the contract for the sale of the above-referenced Property does not involve FHA or VA financing. *(Check one box only)*

❑ (1) **WAIVER**. Buyer waives Buyer's right to [~~may not~~] terminate the contract under Paragraph 2B [~~B(2)~~] of the Third Party Financing Addendum if Property Approval is not obtained because the opinion of value in the [~~lender's~~] appraisal does not satisfy lender's underwriting requirements. [~~for the financing described in the addendum.~~]

If the [~~Buyer's~~] lender reduces the amount of the loan due to the opinion of value, the cash portion of Sales Price is [~~automatically~~] increased by the amount the loan is reduced due to the appraisal.

❑ (2) **PARTIAL WAIVER.** Buyer waives Buyer's right to [~~may not~~] terminate the contract under Paragraph 2B [~~(2)~~] [~~Paragraph B(2)~~] of the Third Party Financing Addendum if:

(i) Property Approval is not obtained because the opinion of value in the [~~lender's~~] appraisal does not satisfy lender's underwriting requirements [~~for the financing described in the addendum~~]; and

(ii) the opinion of value is $_____ or more.

If the [~~Buyer's~~] lender reduces the amount of the loan due to the opinion of value, the cash portion of Sales Price is [~~automatically~~] increased by the amount the loan is reduced due to the appraisal.

❑ (3) **ADDITIONAL RIGHT TO TERMINATE.** In addition to Buyer's right to terminate under Paragraph 2B [~~B(2)~~] of the Third Party Financing Addendum, Buyer may terminate the contract within _____ days after the Effective Date if:

(i) the appraised [~~opinion of~~] value, according to the [~~in the lender's~~] appraisal obtained by Buyer's lender [~~Buyer~~], is less than $_____; and

(ii) Buyer delivers a copy of the appraisal to the Seller.

If Buyer terminates under this paragraph, the earnest money will be refunded to Buyer.

Buyer	Seller
Buyer	Seller

AGENDA ITEM 14
ADOPTED RULE ACTION FROM THE NOVEMBER 15, 2018, MEETING OF THE COMMISSION
CHAPTER 535 GENERAL PROVISIONS
Subchapter B. General Provisions Relating to the Requirements of Licensure
§535.2. Broker Responsibility

§535.2. Broker Responsibility.

(a) – (d) (No change.)

(e) A broker may delegate to another license holder the responsibility to assist in administering compliance with the Act and Rules, but the broker may not relinquish overall responsibility for the supervision of license holders sponsored by the broker. Any license holder who leads, supervises, directs, or manages a team must be delegated as a supervisor. Any such delegation must be in writing. A broker shall provide the name of each delegated supervisor to the Commission on a form or through the online process approved by the Commission within 30 days of any such delegation that has lasted or is anticipated to last more than three consecutive [~~six~~] months. The broker shall notify the Commission in the same manner within 30 days after the delegation of a supervisor has ended. It is the responsibility of the broker associate or newly licensed broker to notify the Commission in writing when they are no longer associated with the broker or no longer act as a delegated supervisor.

(f) (No change.)

(g) A broker is responsible to ensure that a sponsored sales agent's advertising complies with §535.154 and §535.155 of this title.

(h) Except for records destroyed by an "Act of God" such as a natural disaster or fire not intentionally caused by the broker, the broker must, at a minimum, maintain the following records in a format that is readily available to the Commission for at least four years from the date of closing, termination of the contract, or end of a real estate transaction:

(1) disclosures;

(2) commission agreements such as listing agreements, buyer representation agreements, or other written agreements relied upon to claim compensation;

(3) substantive communications with parties to the transaction [~~work files~~];

(4) offers, contracts and related addenda;

(5) receipts and disbursements of compensation for services subject to the Act;

(6) property management contracts;

(7) appraisals, broker price opinions, and comparative market analyses; and

(8) sponsorship agreements between the broker and sponsored sales agents.

(i) A broker who sponsors sales agents or is a designated broker for a business entity shall maintain, on a current basis, written policies and procedures to ensure that:

(1) Each sponsored sales agent is advised of the scope of the sales agent's authorized activities subject to the Act and is competent to conduct such activities, including competence in the geographic market area where the sales agent represents clients.

(2) Each sponsored sales agent maintains their license in active status at all times while they are engaging in activities subject to the Act.

(3) Any and all compensation paid to a sponsored sales agent for acts or services subject to the Act is paid by, through, or with the written consent of the sponsoring broker.

(4) Each sponsored sales agent is provided on a timely basis, before the effective date of the change,

notice of any change to the Act, Rules, or Commission promulgated contract forms.

(5) In addition to completing statutory minimum continuing education requirements, each sponsored sales agent receives such additional educational instruction the broker may deem necessary to obtain and maintain, on a current basis, competency in the scope of the sponsored sales agent's practice subject to the Act. At a minimum, when a sales agent performs a real estate brokerage activity for the first time, the broker must require that the sales agent receive coaching and assistance from an experienced license holder competent for that activity.

(6) Each sponsored sales agent complies with the Commission's advertising rules.

(7) All trust accounts, including but not limited to property management trust accounts, and other funds received from consumers are maintained by the broker with appropriate controls in compliance with §535.146.

(8) Records are properly maintained pursuant to subsection (h) of this section.

(j) A broker or supervisor delegated under subsection (e) of this section must respond to sponsored sales agents, clients, and license holders representing other parties in real estate transactions within two [~~three~~] calendar days.

(k) A sponsoring broker or supervisor delegated under subsection (e) of this section shall deliver mail and other correspondence from the Commission to their sponsored sales agents within three [~~10~~] calendar days after receipt.

(l) – (m) (No change.)

TEXAS REAL ESTATE COMMISSION

Agenda Item 18:

Discussion and possible action to adopt amendments to 22 TAC §535.101, Fees

Summary:

The amendments to §535.101 were published in the August 31, 2018, issue of the *Texas Register* (43 TexReg 5654).

The amendment to §535.101 reduces the fee paid by a broker or sales agent from $20 to $10 each time a sales agent establishes or changes sponsorship. This change is recommended by the Commission as part of its FY2019 budget approval. Each year that revenues exceed expenses, after projecting the next year's revenues and expenses and meeting the requirements for fiscally responsible operational reserves, the agency has a standing policy of considering whether a reduction in fees is appropriate.

Comments:

No comments were received. However, the Commission has developed a free online license history certificate, so the rule was revised to take out the charge for that item.

Staff Recommendation:

Adopt amendments as published.

Recommended Motion:

MOVED, that staff is authorized, on behalf of this Commission, to submit for adoption, amendments to 22 TAC §535.101, Fees , as presented, to the *Texas Register*, along with any technical or non-substantive changes required for adoption, to be effective as of March 1, 2019.

TREC
TEXAS REAL ESTATE COMMISSION

AGENDA ITEM 18
ADOPTED RULE ACTION FROM THE NOVEMBER 15, 2018, MEETING OF THE COMMISSION
CHAPTER 535 GENERAL PROVISIONS
Subchapter J. Fees
§535.101. Fees

§535.101. Fees.

(a) The Commission shall charge and collect the following fees:

(1) a fee of $150 for filing an original or reinstatement application for a real estate broker license, which includes a fee for transcript evaluation;

(2) a fee of $72 for the timely renewal of a real estate broker license;

(3) a fee of $120 for filing an application to step down from a real estate broker license to a real estate sales agent license;

(4) a fee of $150 for filing an original or reinstatement application for a real estate sales agent license, which includes a fee for transcript evaluation;

(5) a fee of $66 for the timely renewal of a real estate sales agent license;

(6) a fee equal to 1-1/2 times the timely renewal fee for the late renewal of a license within 90 days of expiration;

(7) a fee equal to 2 times the timely renewal fee for the late renewal of a license more than 90 days but less than six months after expiration;

(8) a fee of $50 for filing a request for, or renewal of, a license for each additional office or place of business for a period of two years;

(9) the fee charged by an examination provider pursuant to a contract with the Commission for taking a license examination;

(10) a fee of $10 for deposit into the real estate recovery trust account upon the filing of an original sales agent or broker application;

(11) a fee of $10 to establish or change a relationship with a sponsoring broker;

(12)[~~(11)~~] a fee of $20 for filing a request for a license certificate due to a change of place of business[~~,~~] or a change of a license holder name[~~, or to establish a relationship with a sponsoring broker~~]:

(A) A change of address or name submitted with an application to renew a license, however, does not require payment of a fee in addition to the fee for renewing the license.

(B) The Commission may require written proof of a license holder's right to use a different name before issuing a license certificate reflecting a change of name.

(13)[~~(12)~~] a fee of $50 to request an inactive broker license be returned to active status;

(14)[~~(13)~~] a fee of $40 for preparing a certificate of [~~license history,~~] active licensure[~~,~~] or sponsorship;

(15)[~~(14)~~] a fee of $50 for filing a moral character determination;

(16)[~~(15)~~] a fee of $400 for filing an application for accreditation of a qualifying education program for a period of four years;

(17)[~~(16)~~] after initial approval of accreditation, a fee of $200 a year for operation of a qualifying real estate education program;

(18)[~~(17)~~] a fee of $50 plus the following fees per classroom hour approved by the Commission for each qualifying education course for a period of four years:

(A) $10 for content and examination review;

(B) $10 for classroom delivery design and presentation review; and

(C) $20 for distance education delivery design and presentation review;

(19)[~~(18)~~] a fee of $400 for filing an application for accreditation as a Continuing Education provider for a period of two years;

(20)[~~(19)~~] a fee of $50 plus the following fees per classroom hour approved by the Commission for each continuing education course for a period of two years:

(A) $5 for content and examination review;

(B) $5 for classroom delivery design and presentation review; and

(C) $10 for distance education delivery design and presentation review;

(21)[~~(20)~~] the fee required under paragraphs (18)(C)[~~(17)(C)~~] and (20)(C)[~~(19)(C)~~] will be waived if the course has already been certified by a distance learning certification center acceptable to the Commission;

(22)[~~(21)~~] a fee of $150 for filing an application for approval as an instructor for a two-year period for real estate qualifying or continuing education courses;

(23)[~~(22)~~] the fee charged by the Federal Bureau of Investigation and Texas Department of Public Safety for fingerprinting or other service for a national or state criminal history check in connection with a license application or renewal;

(24)[~~(23)~~] the fee required by the Department of Information Resources as a subscription or convenience fee for use of an online payment system;

(25)[~~(24)~~] a continuing education deferral fee of $200;

(26)[~~(25)~~] a late reporting fee of $250 to reactivate a license under §535.93 of this title;

(27)[~~(26)~~] a fee of $30 for processing a check or other equivalent instrument returned by a bank or depository as dishonored or reversed;

(28)[~~(27)~~] a fee of $20 for filing any application, renewal, change request, or other record on paper that a person may otherwise file with the Commission electronically by accessing the Commission's website, entering the required information online, and paying the appropriate fee; and

(29)[~~(28)~~] a fee of $20 per certification when providing certified copies of documents.

(b) – (c) (No change.)

Agenda Item 19:

Discussion and possible action to adopt amendments to 22 TAC §535.191, Schedule of Administrative Penalties

Summary:

The amendments to §535.191 were published in the August 31, 2018, issue of the *Texas Register* (43 TexReg 5656).

The amendments to §535.191 are made as a result of the Commission's quadrennial rule review. The amendments move several violations to a lower tier of penalties and add several violations that are new or were missing from the penalty matrix.

Comments:

No comments were received.

Staff Recommendation:

Adopt amendments as published.

Recommended Motion:

MOVED, that staff is authorized, on behalf of this Commission, to submit for adoption, amendments to 22 TAC §535.191, Schedule of Administrative Penalties, as presented, to the *Texas Register*, along with any technical or non-substantive changes required for adoption.

TREC
TEXAS REAL ESTATE COMMISSION

AGENDA ITEM 19
ADOPTED RULE ACTION FROM THE NOVEMBER 15, 2018, MEETING OF THE COMMISSION
CHAPTER 535 GENERAL PROVISIONS
Subchapter Q. Administrative Penalties
§535.191. Schedule of Administrative Penalties

§535.191. Schedule of Administrative Penalties.

(a) – (b) (No change.)

(c) An administrative penalty range of $100-$1,500 per violation per day may be assessed for violations of the following sections of the Act and Rules:

(1) §1101.552;
(2) §1101.652(a)(3);
(3) §1101.652(a)(7);
(4) §§1101.652(a-1)(3);
(5) §1101.652(b)(23);
(6) §1101.652(b)(29);
(7) §1101.652(b)(33);
(8)[~~(7)~~] 22 TAC §535.21(a);
(9)[~~(8)~~] 22 TAC §535.53;
(10)[~~(9)~~] 22 TAC §535.65;
(11)[~~(10)~~] 22 TAC §535.91(d);
(12) 22 TAC §535.121;
(13)[~~(11)~~] 22 TAC §535.154;
(14)[~~(12)~~] 22 TAC §535.155; and
(15)[~~(13)~~] 22 TAC §535.300.

(d) An administrative penalty range of $500-$3,000 per violation per day may be assessed for violations of the following sections of the Act and Rules:

(1) §§1101.652(a)(4)-(6)[~~§§1101.652(a)(4)-(5)~~];
(2) §1101.652(a-1)(2);
(3) §1101.652(b)(1);
(4) §§1101.652(b)(7)-(8);
(5) §1101.652(b)(12);
(6) §1101.652(b)(14);
(7) §1101.652(b)(22);
(8) §1101.652(b)(28);
(9) §§1101.652(b)(30)-(31);
(10) §1101.654(a);
(11) 22 TAC §531.18;
(12) 22 TAC §531.20;
(13) 22 TAC §535.2; [~~and~~]
(14) 22 TAC §535.6(c)-(d);
(15) 22 TAC §535.16;
(16) 22 TAC §535.17; and
(17)[~~(14)~~]22 TAC §535.144.

(e) An administrative penalty range of $1,000-$5,000 per violation per day may be assessed for violations of the following sections of the Act and Rules:

(1) §1101.351;
(2) §1101.366(d);
(3) §1101.557(b);
(4) §1101.558;
(5) §§1101.559(a) and (c);
(6) §1101.560;
(7) §1101.561(b);
(8) §1101.615;
(9) §1101.651;
(10) §1101.652(a)(2)[~~§§1101.652(a)(2) and (6)~~];
(11) §1101.652(a-1)(1);
(12) §§1101.652(b)(2)-(6);
(13) §§1101.652(b)(9)-(11);
(14) §1101.652(b)(13);
(15) §§1101.652(b)(15)-(21);
(16) §§1101.652(b)(24)-(27);
(17) §1101.652(b)(32)[~~§§1101.652(b)(32)-(33)~~];
(18) 22 TAC §535.141(g);
(19) 22 TAC §§535.145 - 535.148; and
(20) 22 TAC §535.156.

(f) (No change.)

TEXAS ASSOCIATION OF REALTORS®

Here's What You Missed at Last Week's TREC Meeting

The Texas Real Estate Commission met on November 15. Here are rule changes relevant to your business.

Adopted changes to 535.2, Broker Responsibility

- Brokers must designate anyone who leads, supervises, or directs a team in their brokerage as a delegated supervisor with TREC if he or she has or will be supervising for more than three months. This will require that person to take the six-hour broker responsibility course at each license renewal.
- The time frame that a broker or delegated supervisor has to respond to clients, agents, or other brokers is now two days.
- The time frame that a broker or delegated supervisor has to deliver TREC correspondence to their agents is now three days.
- In the section covering records retention, the term "work files" is deleted and replaced with "substantive communications with parties to the transaction" to clarify what should be retained. Offers should also be retained.
- Brokers must ensure—through their brokerage policies and procedures manual—that agents are geographically competent in the market area being served; and that brokers will ensure training or coaching for new agents when they undertake new tasks.

The members-only *Model Brokerage Policies and Procedures Manual*, which gives brokerages instant compliance with TREC requirements to maintain written policies and procedures, will be updated with these changes.

Adopted form revisions

The revised forms will be mandatory for use March 1, 2019, but you can use them voluntarily as soon as they become available. The association will work with all forms vendors to post the forms as quickly as possible.

Third Party Financing Addendum

- The language in the Property Approval section will change to require that if the buyer wants to terminate the contract under this paragraph, the buyer must give the seller written notice not later than three days before the contract's

- The form was reformatted and other non-substantive changes were made for consistency with other TREC-promulgated forms.

Notice of Buyer's Termination of Contract

- Statement added that a buyer terminating the contract under the Property Approval section of the *Third Party Financing Addendum* has delivered to the seller a written statement from the lender as to why the property isn't approved in line with the changes to the Third Party Financing Addendum.
- Box added to check if the buyer is terminating under Paragraph 3 of the *Addendum Concerning Right to Terminate Due to Lender's Appraisal*.
- Box added to check if the buyer is terminating under Paragraph 6D of the contract because timely objections were not cured by the end of the cure period.

Addendum Concerning Right to Terminate Due to Lender's Appraisal

- Statement added clarifying that this form is to be used only if the Third Party Financing Addendum is part of the contract (and the transaction still cannot involve FHA or VA financing).
- Non-substantive changes were adopted to make the form clearer.

Other adopted changes

TREC Rule 535.101, Fees, is amended to reduce the fee from $20 to $10 for an agent establishing or changing sponsorship. In addition, TREC has developed a free online license history certificate, so the $40 fee has been removed from the rule.

TREC Rule 535.191, Schedule of Administrative Penalties, is amended to move several violations to a lower tier of penalties and adds several violations from recently adopted rules and those missing from the penalty matrix.

Unless otherwise stated, the adopted changes become effective 20 days after the date they are filed with the Secretary of State.

Find the materials from the meeting on TREC's website.

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What's the Correct Way for the Seller to Terminate a Contract?

The latest post from the Advice for REALTORS® blog:

View this email in your browser

TEXAS REALTORS

TREC Rule Change Shortens Time Requirements for Delegated Supervisors

At its November meeting, the Texas Real Estate Commission shortened the time span that determines whether a broker must designate someone as a delegated supervisor from six months in a two-year license period to three consecutive months. A broker must now notify TREC within 30 days if someone has been or is anticipated to be acting as a delegated supervisor for more than three consecutive months.

TREC also clarified that anyone who leads, supervises, or directs a team in their brokerage for more than three consecutive months—or is anticipated to do so for more than three consecutive months—must be designated as a delegated supervisor by the broker with TREC.

A delegated supervisor is a sales agent or another broker who has been assigned in writing the responsibility of assisting the sponsoring broker in complying with The Real Estate License Act and TREC rules. Delegated supervisors are required to take the six-hour broker responsibility course at each license renewal.

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3 Clever, Low-Tech Uses for your Phone's Camera

REVERSE and REMAND; Opinion Filed December 13, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01472-CV

SAMUEL ADAM AFLALO, Appellant
V.
DEVIN LAMAR HARRIS AND MEGHAN THERESA HARRIS, Appellees

On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-00247

EN BANC OPINION

Before the En Banc Court
Opinion by Justice Evans

On motion for rehearing en banc, we withdraw our panel and dissenting opinions and judgment of May 23, 2018, and concurring opinion in denial of panel rehearing of July 16, 2018. This en banc opinion is now the opinion of the Court.

Samuel Adam Aflalo contracted to sell his home to Devin Lamar Harris and Meghan Theresa Harris. Before the purchase closed, a dispute erupted because although Aflalo timely made property code section 5.008 disclosures on Texas Association of Realtors' form TAR-1406, he did not attach or deliver TAR-1414, which is not listed in the text of the parties' contract.[1]

[1] The contract provided a place for making other documents part of the contract by reference in the merger clause provision. Paragraph 22 provides, together with the first and only box the parties checked, as follows:

> AGREEMENT OF THE PARTIES: This contract contains the entire agreement of the parties and cannot be changed except by their written agreement. Addenda which are a part of this contract are (Check all applicable boxes):
>
> ☑ Third Party Financing Addendum for Credit Approval

Aflalo sued the Harrises for the $10,000 escrow after the Harrises refused to close the sale. The trial court granted the Harrises' motion for summary judgment. A majority of a panel of this Court affirmed concluding that the contract required Aflalo to include TAR-1414 and the undisputed summary judgment evidence is that he did not do so; therefore he breached the parties' agreement.

After considering the issues in this appeal, including Aflalo's motion for rehearing, en banc, the Harrises' response, and Aflalo's reply, a majority of the Court concludes the texts of the contract and section 5.008 of the property code did not require Aflalo to deliver to the Harrises TAR-1414. Because the summary judgment evidence established that Aflalo made all the disclosures required by the contract and section 5.008 of the property code, we conclude Aflalo did not breach the contract. Accordingly, we reverse the judgment of the trial court in favor of the Harrises and remand the case for further proceedings for the following reasons.

I. BACKGROUND

The parties agree the following facts pertinent to the core issue are undisputed. Aflalo and the Harrises executed their contract effective November 20, 2015, for the Harrises to buy Aflalo's house for $1.45 million escrowing $10,000 with a title company. Paragraph 7.B of the contract provided, "SELLER'S DISCLOSURE NOTICE PURSUANT TO 5.008, TEXAS PROPERTY CODE (Notice)." Under that provision, the parties skipped subparagraph (1) that provided, "Buyer has received the Notice," and instead they checked paragraph (2), which stated:

> ☑ **(2)** Buyer has not received the Notice. Within 3 days after the effective date of this contract, Seller shall deliver the Notice to Buyer. If Buyer does not receive the Notice, Buyer may terminate this contract at any time prior to the closing and the earnest money will be refunded to Buyer. If Seller delivers the Notice, Buyer may terminate this contract for any reason within 7 days after Buyer receives the Notice or prior to the closing, whichever first occurs, and the earnest money will be refunded to Buyer.

The contract provided for closing to occur on or before December 18, 2015.

On November 20, within the three-day contractually allotted time for Aflalo to make the property code section 5.008 disclosures, Aflalo delivered to the Harrises a disclosure notice using a fill-in-the-blanks-and-check-boxes, form TAR-1406. Underneath the title, "SELLER'S DISCLOSURE NOTICE," form TAR-1406 contains the statement, "This form complies with and contains additional disclosures which exceed the minimum disclosure required by [property code section 5.008]." Section 3 stated, "Are you (Seller) aware of any of the following conditions: (Mark Yes (Y) if you are aware and No (N) if you are not aware.)." Aflalo checked 'no' to "Located in 100-Year Floodplain." He checked 'yes' to "Located in Floodway." He checked 'yes' to "Present Flood Ins. Coverage." Following the instruction, "If the answer to any of the items in Section 3 is yes, explain (attach additional sheets if necessary)," Aflalo handwrote in the blank lines provided, "*I have flood insurance. My lender told me that it was recently added to a flood area. I made roof repairs several monts* [sic] *ago*."[2] Aflalo's explanation used two and one-half lines of the available four and one-quarter blank lines for explanation. Preprinted on form TAR-1406 underneath the words, "Present Flood Ins. Coverage," was the statement, "(If yes, attach TAR-1414)." Aflalo did not attach TAR-1414, nor did he deliver it at any time prior to producing documents to comply with the Harrises' discovery requests in this lawsuit.

On November 24, 2015, the day after the contractual deadline for Aflalo to deliver the disclosure notice, the Harrises requested Aflalo to deliver TAR-1414. Aflalo did not do so. The Harrises did not deliver a termination notice by November 27, 2015, the seventh day following Aflalo's delivery of his disclosures, nor by November 30, 2015, the tenth day after the effective date of the contract.[3] On December 17, 2015, the day before the scheduled closing and twenty-

[2] Aflalo also had checked 'yes' that he had roof repairs.

[3] In paragraph 23, the Harrises bought an option for $500 granting them "the unrestricted right to terminate this contract by giving notice of termination to Seller within 10 days after the effective date of this contract (Option Period)."

seven days after Aflalo's disclosures, the Harrises delivered a letter terminating the contract. After the Harrises failed to pay and close, Aflalo sued to recover the money in escrow claiming the Harrises breached the contract by failing to pay and close. The Harrises counterclaimed that Aflalo breached the contract by failing to complete and deliver TAR-1414 within the contractually allotted time, which was a condition precedent that excused their failure to close and entitled them to recover the money in escrow. Both parties moved for summary judgment, and the trial court granted summary judgment for the Harrises on the ground that Aflalo breached the contract and the Harrises were entitled to return of the money in escrow. A trial on attorney's fees was held, judgment was entered, and this appeal ensued.

II. ANALYSIS

Aflalo asserts in his first issue that the trial court erred in granting the Harrises' motion for summary judgment and denying his motion for partial summary judgment on the breach issue when the trial court granted final judgment awarding the Harrises return of the money in escrow. To resolve Aflalo's issue, we must construe the parties' unambiguous contract and section 5.008 of the property code.

A. Applicable Law

"We review a summary judgment de novo." *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). "When both sides move for summary judgment and the trial court grants one motion and denies the other, we review the summary judgment evidence presented by both sides and determine all questions presented." *Id.* "In such a situation, we render the judgment as the trial court should have rendered." *Id.* But where a cross-motion for summary judgment is only a motion for partial summary judgment and does not seek final disposition of the claims in the trial court, the issue is not properly before us. *Pac. Mut. Life Ins. Co. v. Ernst & Young & Co.*, 10 S.W.3d 798, 810 (Tex. App.—Dallas 2000), *rev'd on other*

grounds, 51 S.W.3d 573 (Tex. 2001); *Montgomery v. Blue Cross & Blue Shield of Tex., Inc.*, 923 S.W.2d 147, 152 (Tex. App.—Austin 1996, writ denied) (en banc).

We review questions of statutory interpretation and contract construction de novo. *See Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011) (statutory interpretation reviewed de novo); *Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 449 (Tex. 2015) (construction of unambiguous contract is reviewed de novo).

When parties dispute their contract's meaning,[4] "the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005). "In the usual case, the instrument alone will be deemed to express the intention of the parties for it is objective, not subjective, intent that controls." *Matagorda Cty. Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 740 (Tex. 2006) (quoting *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968)); *see also URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 757 (Tex. 2018) ("[O]bjective, not subjective, intent controls, so the focus is on the words the parties chose to memorialize their agreement.") (internal quotation marks and footnote omitted); *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 127 (Tex. 2010) (objective manifestation of intent is required, not "what one side or the other alleges they intended to say but did not."); *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 746 (Tex. 2006) ("[T]he parties' intent is governed by what they said, not by what they intended to say but did not"). For these reasons, we "presume parties intend what the words of their contract say," *Gilbert Texas Construction*, 327 S.W.3d at 126, and interpret contract language according to its "plain, ordinary, and generally accepted meaning" unless the instrument directs otherwise.

[4] The existence of a valid contract is one of the essential elements of a breach of contract claim. *See Kay v. N. Tex. Rod & Custom*, 109 S.W.3d 924, 927 (Tex. App.—Dallas 2003, no pet.) (setting out elements of breach of contract claim). Parties form a binding contract when the following elements are present: (1) an offer, (2) an acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Levetz v. Sutton*, 404 S.W.3d 798, 803 (Tex. App.—Dallas 2013, pet. denied).

Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118, 121 (Tex. 1996). "When examining an unambiguous contract, courts must construe the meaning of the language used in the contract. When the language is plain, it must be enforced *as written*." *Phillips v. Union Bankers Ins. Co.*, 812 S.W.2d 616, 618 (Tex. App.—Dallas 1991, no writ) (citing *Republic Nat'l Life Ins. Co. v. Spillars*, 368 S.W.2d 92, 94 (Tex. 1963)).

We interpret statutes in context giving effect to every word, clause, and sentence, because every word or phrase is presumed to have been intentionally used with a meaning and a purpose. *Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 893 (Tex. 2017); *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017); *Morton v. Nguyen*, 412 S.W.3d 506, 516 (Tex. 2013). When we must decide the meaning of a term not defined by the statute, we use the term's common, ordinary meaning, typically looking first to dictionary definitions, unless a contrary meaning is apparent from the statute's language. *Tex. State Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 34–35 (Tex. 2017).

B. TAR-1414 Compared to Section 5.008 Statutory Form

Aflalo made his disclosures on form TAR-1406, which states underneath its title, "This form complies with and contains additional disclosures which exceed the minimum disclosures required by" section 5.008 of the property code. As will be discussed at length later, form TAR-1406 directs attachment of TAR-1414 based on the disclosures Aflalo made. So we begin our analysis by comparing TAR-1414 to the statutory form in section 5.008(b) of the property code to determine whether TAR-1414 lacks substantial similarity to the statutory form and, therefore, is within the material that form TAR-1406 indicates "exceed[s] the minimum disclosures required." In summary, we conclude TAR-1414 contains generic information not specific to any property, is not substantially similar to the statutory form in section 5.008(b), and therefore TAR-1414 is within the material form TAR-1406 indicates "exceed[s] the minimum disclosures required."

TAR-1414 is titled, "INFORMATION ABOUT SPECIAL FLOOD HAZARD AREAS." At the top of every page, TAR-1414 has one blank to be filled in with the property address: "Information about Special Flood Hazard Areas concerning [Aflalo's address]." The only other blanks in TAR-1414 are for the signatures of the recipients to acknowledge receipt. There is no question or directive to the seller of property to disclose any property-specific information nor any check-box or blank line for any property-specific disclosure. The three-page document provides general information from the Texas Association of Realtors for buyers to consider. None of the information in TAR-1414 is specific to Aflalo's property or any particular property. The generality of the entire content of TAR-1414 is demonstrated by the first paragraphs of each section, although every paragraph would demonstrate the document's non-specific content:

> A. FLOOD AREAS:
>
> (1) The Federal Emergency Management Agency (FEMA) designates areas that have a high risk of flooding as special flood hazard areas.
>
> . . . .
>
> B. AVAILABILITY OF FLOOD INSURANCE:
>
> (1) Generally, flood insurance is available regardless of whether the property is located in or out of a special flood hazard area. Contact your insurance agent to determine if any limitations or restrictions apply to the property in which you are interested.
>
> . . . .
>
> C. GROUND FLOOR REQUIREMENTS:
>
> (1) Many homes in special flood hazard areas are built-up or are elevated. In elevated homes the ground floor typically lies below the base flood elevation and the first floor is elevated on piers, columns, posts, or piles. The base flood elevation is the highest level at which a flood is likely to occur as shown on flood insurance rate maps.
>
> . . . .

> D. COMPLIANCE:
>
> (1) The above-referenced property may or may not comply with regulations affecting ground floor enclosures below the base flood elevation.
>
> . . . .
>
> E. ELEVATION CERTIFICATE:
>
> The elevation certificate is an important tool in determining flood insurance rates. It is used to provide elevation information that is necessary to ensure compliance with floodplain management laws. To determine the proper insurance premium rate, insurers rely on an elevation certificate to certify building elevations at an acceptable level above flood map levels. If available in your area, it is recommended that you obtain an elevation certificate for the property as soon as possible to accurately determine future flood insurance rates.

(TAR-1414, §§ A.(1), B.(1), C.(1), D.(1), E.).

In addition to all the general information, TAR-1414 contains advice to buyers throughout its text. For example, section B.(1) advises buyers, "Contact your insurance agent to determine if any limitations or restrictions apply to the property in which you are interested." (TAR-1414, § B.(1)). Section B.(2) advises, "FEMA encourages every property owner to purchase flood insurance regardless of whether the property is in a high, moderate, or low risk flood area." (TAR-1414, § B.(2)). Section C.(3)(c) advises, "It is important for a buyer to determine if the first floor of a home is elevated at or above the base flood elevation. It is also important for a buyer to determine if the property lies in a floodway." (TAR-1414, § C.(3)(c)). And section E advises, "If available in your area, it is recommended that you obtain an elevation certificate for the property as soon as possible to accurately determine future flood insurance rates." (TAR-1414, § E). After the five sections and immediately above the blank lines for the recipients' signatures is the following advisory paragraph in bold font:

> You are encouraged to: (1) inspect the property for all purposes, including compliance with any ground floor enclosure requirement; (2) review the flood insurance policy (costs and coverage) with your insurance agent; and (3) contact the building permitting authority if you have any questions about building requirements or compliance issues.

In summary, TAR-1414 is a document containing general information not specific to any property. It includes advice to buyers on many topics. The Texas Association of Realtors, who promulgated TAR-1414, filed an amicus brief in which it characterized TAR-1414 as a "generic informational form if the property is in a flood plain or if the seller maintained flood-insurance coverage." The Association further described TAR-1414 as "nothing specific to a particular property. Rather, it is generic information about flood zones. It encourages buyers to inspect and investigate the issue. It does not add any information about the specific property subject of a sale." The Association accurately describes TAR-1414.

The Harrises contend that TAR-1414 discloses important information about the subject property. They state,

> Aflalo's response provided no information relevant to the Property due to its flood insurance coverage, such as: (i) the flood area in which the Property is located; (ii) the availability of flood insurance; (iii) the requirements that the ground floor of the Property must meet; (iv) whether the Property is in compliance with such requirements; and (v) the availability of an elevation certificate. *See id*. All of this information is provided in a TAR-1414 form.

The Harrises are incorrect because TAR-1414 makes no property-specific disclosure about any of those matters, nor does it pose questions to a seller, such as Aflalo, to answer that would have disclosed that information. The only property-specific disclosures made by Aflalo were on form TAR-1406 that is discussed at length *infra*. For example, it was on form TAR-1406 that Aflalo disclosed to the Harrises that Aflalo's bank informed him the property was in a floodway; nothing in TAR-1414 disclosed "the flood area in which the Property is located" contrary to the Harrises' contention (i). The Harrises' contentions (ii) through (v) are equally erroneous.

The statutory form in section 5.008(b) is quite different from TAR-1414. The statutory form contains 110 separate blanks or check-boxes for answers to questions about different aspects of the specific property that is the subject of the disclosures. *See* TEX. PROP. CODE ANN. § 5.008(b). In addition, each of five sections of check-box disclosures is followed by directives to

explain any yes-answers in any check-box in the preceding section together with space provided for explanation. *See id*. By contrast, TAR-1414 contains no property-specific disclosure questions, check-boxes, blanks, or places for requested explanation. As noted above, TAR-1414 contains three pages of general information and advice not specific to any property. In accordance with the complete dissimilarity between TAR-1414 and the statutory form, no party has contended TAR-1414 is substantially similar to the statutory form in section 5.008, nor could they do so successfully. *See id*. § 5.008(a) (Supp.) (requiring seller to make disclosures using statutory form or substantially similar form). We, therefore, conclude TAR-1414 is not substantially similar to the statutory form in section 5.008(b) of the property code. TAR-1414 is, therefore, material within the ambit of the statement in form TAR-1406 that "exceed[s] the minimum disclosures required" by section 5.008 by directing attachment of TAR-1414 to form TAR-1406.

C. Harrises' Motion for Partial Summary Judgment

In his brief, Aflalo challenges the partial summary judgment in favor of the Harrises. He argues TAR-1414 is nowhere referred to or incorporated into the contract. He is correct according to the text of the contract, including paragraph 22 that listed documents incorporated by reference but omitted TAR-1414. *See supra* n.1. Aflalo further argues TAR-1414 is not required by section 5.008 of the property code. Again, he is correct that nowhere in the text of section 5.008 is there a stated requirement for a seller to deliver TAR-1414 or state its contents.

Aflalo points out that he disclosed what section 5.008 of the property code required him to disclose: whether the property was "Located in 100-Year Floodplain" and whether he had "Present Flood Insurance." TEX. PROP. CODE ANN. § 5.008(b) (Supp.) (statutory form at ¶ 4). If he checked "yes" to either disclosure, section 5.008 instructed, "If the answer to any of the above is yes, explain (Attach additional sheets if necessary)." *Id*. Section 5.008 then provided three blank lines for explanation. *Id*. Aflalo asserts the disclosures he made on form TAR-1406 completely

satisfied the requirements of section 5.008. He inserted in his brief a picture of the disclosure he made showing his check-marks and explanations. So in addition to the minimum disclosures required by section 5.008, Aflalo disclosed the property was in a floodway (presumably one that flooded less frequently than every 100 years because he checked "no" to that question) and his lender had informed him the property had recently been added to a flood area. Aflalo contends these disclosures "completely satisfied the provisions of [section 5.008 of] the [Property] Code—and by extension, the Contract."

Aflalo argues the only mention of TAR-1414 is in the disclosure notice form he chose to use and that it is not part of the contract. Aflalo argues section 7.B.(2) of the contract specifically addresses the fact that the Harrises had not received Aflalo's disclosure notice at the time the contract was executed, because the parties checked paragraph 7.B.(2) which provides, "☑ (2) Buyer has not received the Notice." Because form TAR-1406 as completed by Aflalo was not exchanged information between the parties at the time of the contract, it was not a part of the contract when the parties entered into their contract. Indeed, as Aflalo argues, nowhere in the summary judgment record is there any document signed by both parties providing that Aflalo agreed to make disclosures required by, or use, TAR-1414. Aflalo summarizes his argument, "The summary judgment record does not contain any evidence, let alone explanation, as to how a reference to TAR-1414 on a Notice form delivered after execution of the Contract became a part of, or modified, the Contract."

In their brief, the Harrises attempt to meet Aflalo's challenge. They do not dispute the accuracy of the contractual provision that before signing the contract they had not received Aflalo's disclosure. But the Harrises emphasize the content of the form Aflalo chose to use to make his disclosure, form TAR-1406, provided "Present Flood Ins. Coverage (***If yes, attach TAR-1414***)." (Harrises' emphasis). From this, the Harrises argue, "Aflalo's self-selected Seller's Disclosure

Notice required that he attach the TAR-1414 form" and "as such, attaching the TAR-1414 form was required by the Contract." The Harrises make several arguments to support that conclusion.

First, the Harrises seek to elevate form TAR-1406's statement, "If yes, attach TAR-1414," to create a binding legal obligation on Aflalo's part by arguing, "In short, Aflalo assumed an *additional* obligation by choosing this Seller's Disclosure Notice form, and he must fully comply with the form he chose." (Emphasis added). Their argument, however, admits TAR-1414 was an additional obligation to Aflalo's contractual disclosure obligation, but the Harrises neither pleaded modification of contract, moved for summary judgment on modification, nor proved the requirements of modification.[5] In other words, the issue before the trial court was whether Aflalo failed to comply with the contract the parties mutually agreed to, not whether Aflalo failed to comply with form TAR-1406 by failing to deliver TAR-1414. The general cause of action is breach of contract, not breach of form.

Next, the Harrises make a contract formation argument that TAR-1414 was indeed required by the contract. They argue:

> In his Appellant's Brief, Aflalo makes the argument that there is nothing to indicate that the "reference to the TAR-1414 on a Notice form delivered after execution of the Contract became part of, or modified, the Contract." What Aflalo fails to mention is that he executed the Seller's Disclosure Notice (which required the

[5] There is no mention of contractual modification in the trial court record, and the Harrises never argued in the trial court or in their appellate brief that the reference in form TAR-1406 to TAR-1414 resulted in modification of the contract. In addition to the contract formation requirement of mutual agreement—*see supra* n.2—modification also requires consideration to be effective:

> Parties having the power to make a contract may modify their contract in any manner they choose. *Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986). ***The modification must be supported by new consideration***. *Rhoads Drilling Co. v. Allred*, 70 S.W.2d 576, 583 (Tex. 1934). Consideration is either a benefit that accrues to one party or a detriment incurred by the other party. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991).

Grace Creek Dev., LP v. REM-K Builders, Ltd., No. 12-16-00184-CV, 2017 WL 2351523, at *4 (Tex. App.—Tyler May 31, 2017, pet. denied) (mem. op.) (emphasis added). Because the trial court granted the Harrises' motion for partial summary judgment and nowhere in the Harrises' motion do they raise modification as a ground for summary judgment, the trial court's judgment cannot be affirmed by treating form TAR-1406's reference to TAR-1414 as a modification of the real estate contract between the parties. *See Stiles v. Resolution Trust Corp*., 867 S.W.2d 24, 26 (Tex. 1993) (Rule 166a(c) as amended in 1971 and 1977 "unequivocally restrict[s] the trial court's ruling to issues raised in the motion, response, and subsequent replies.")

> TAR-1414 form to be attached) on September 16, 2015. That is, Aflalo executed the Seller's Disclosure Notice more than two (2) months before he entered into the Contract with the Harrises. This fact, and the fact that no other form of seller's disclosure notice has ever been produced by Aflalo, shows that the Seller's Disclosure Notice provided by Aflalo was the exact notice that Aflalo promised to supply by November 23, 2015, under the Contract. Aflalo cannot argue that this was not the notice he contemplated in the Contract when he prepared this Seller's Disclosure Notice for the express purpose of listing the Property for sale.

(Footnote citations to record omitted). This argument is seriously and fundamentally flawed because at its core it asserts one party's unexpressed thoughts and intentions are evidence of the mutual agreement of the parties. To the contrary, "[i]n the usual case, the instrument alone will be deemed to express the intention of the parties for it is objective, not subjective, intent that controls." *Burwell*, 189 S.W.3d at 740; *see also Gilbert Tex. Constr.*, 327 S.W.3d at 127; *Fiess*, 202 S.W.3d at 746. So, we construe contract language according to its "plain, ordinary, and generally accepted meaning" unless the instrument directs otherwise. *Heritage Res.*, 939 S.W.2d at 121. "When the language is plain, it must be enforced *as written*." *Phillips*, 812 S.W.2d at 618. The plain meaning of "SELLER'S DISCLOSURE NOTICE PURSUANT TO 5.008, TEXAS PROPERTY CODE (Notice)" is that section 5.008 of the property code, and not section 5.008 plus TAR-1414, is what Aflalo and the Harrises agreed Aflalo was obligated to disclose.

Finally, the Harrises argue section 5.008 of the property code required Aflalo to make additional disclosures of TAR-1414, that is, they assert Aflalo's failure to complete and deliver TAR-1414 violated section 5.008 of the property code and thereby breached the contract. The Harrises point out section 5.008 provides for minimum disclosures and permits disclosure to be made on "a written notice as prescribed by this section or a written notice substantially similar to the notice prescribed by this section." PROP. CODE § 5.008(a) (Supp.). Next, the Harrises point out that in the notice form provided in section 5.008(b) after a place to check "Present Flood Insurance Coverage," the disclosure notice states, "If the answer to any of the above is yes, explain. (Attach additional sheets if necessary)." *Id*. at § 5.008(b) (¶ 4 of statutory form). The Harrises

argue that form TAR-1406's statement, "If yes, attach TAR-1414," is substantially similar to section 5.008(b)'s, "If . . . yes, explain. (Attach additional sheets if necessary)." The Harrises conclude that, when Aflalo selected form TAR-1406 to make his disclosures, Aflalo was thereby obligated to complete and deliver TAR-1414 as a requirement of section 5.008 and thereby a requirement of the contract.

The Harrises' argument is incorrect both generally as to the substantial similarity argument and specifically when Aflalo's disclosures are considered. First, as pointed out above, the text of TAR-1406 clearly states it exceeds the statutory form and includes a directive to attach TAR-1414, which exceeds the statutory form in section 5.008(b). In his first amended petition and summary judgment response and affidavit, Aflalo pointed out this statement in form TAR-1406 arguing, "The Notice not only met the minimum required disclosures, it exceeded what was required to be disclosed under the Texas Property Code." In our analysis above we agreed with Aflalo's argument that form TAR-1406's directive to "attach TAR-1414" is one of the "additional disclosures which exceed the minimum disclosure required by" property code section 5.008. Nothing in the text of section 5.008 prohibits a seller from making additional disclosures, but nothing in the text imposes liability on a seller for failing to exceed section 5.008's disclosure requirements.

Second, normal statutory interpretation using dictionary meanings for undefined terms and the context of the statute require the conclusion that form TAR-1406's statement, "If yes, attach TAR-1414," is not substantially similar to section 5.008(b)'s, "If . . . yes, explain. (Attach additional sheets *if necessary*)." *See Melden & Hunt, Inc.*, 520 S.W.3d at 893; *Coleman*, 512 S.W.3d at 899; *Tex. State Bd. of Exam'rs of Marriage & Family Therapists*, 511 S.W.3d at 34–35. The imperative mood of the verb "attach" is used in both the statute and the form indicating a command. But the statutory text conditions its commands by the phrase, "if necessary." The

conjunctive, "if," functions to "introduc[e] a conditional clause; on the condition or supposition that; in the event that." *If*, NEW OXFORD AMERICAN DICTIONARY 865 (3d ed. 2010). The adjective, "necessary," means "required to be done, achieved, or present; needed; essential." *Necessary*, *id.* at 1171. So the statute commands "additional sheets" be attached only "in the event that they are needed." In addition, the immediate context of the statutory form provides three blank lines for explanation, further indicating the Legislature provided space for explanation thereby intending the condition, "if necessary," might not occur if a seller's disclosure explanation required fewer than three full lines. Finally, if the explanation will not fit in the allotted space, the statutory language directs attachment of "additional sheets" and does not specify any particular form. Because "additional sheets" is in the immediate context of three blank lines, the text means the seller should continue the explanation on additional blank sheets. So the clear and unambiguous text of the statute does not support the conclusion that the statute required Aflalo to complete and deliver TAR-1414.

The Harrises, using a novel method of statutory interpretation, argue the unconditional, mandatory language of form TAR-1406 removes the condition the Legislature inserted into section 5.008(b), "*if necessary*." Specifically, they contend the two are substantially similar and therefore the unconditional mandate of TAR-1414 should be used to measure whether Aflalo complied with the statute. This argument is not a proper way to interpret an unambiguous statute, and we reject it. There is not a substantial similarity between section 5.008 and form TAR-1406 to the extent form TAR-1406 *requires* attachment of TAR-1414; the statute does not.

The dissenting opinion by Justice Boatright argues the verb "complete" in section 5.008(d) means that a seller is required to provide responses to the entirety of any form including portions of a disclosure form that exceed the minimum requirements of section 5.008(b). Section 5.008(d) provides,

> The notice shall be completed to the best of seller's belief and knowledge as of the date the notice is completed and signed by the seller. If the information required by the notice is unknown to the seller, the seller shall indicate that fact on the notice, and by that act is in compliance with this section.

The verb "complete" in the context of a form or questionnaire means, "write the required information on (a form or questionnaire)." *Complete*, NEW OXFORD AMERICAN DICTIONARY 355. The focus of subsection (d) is to require sellers to include both what they know and what they believe about the condition of their property when they "complete" "[t]he notice." *See id*. ("to the best of seller's belief and knowledge"). Section (d) requires a seller to complete "[t]he notice." That is a reference to "a written notice as prescribed by this section or a written notice substantially similar to the notice prescribed by this section" in subsection (a). *See* § 5.008(a). A form such as TAR-1406 that in its text alerts the user both that the form meets the requirements of section 5.008 and also exceeds section 5.008, is informing the user the form in part is substantially similar to section 5.008 and in part is dissimilar to it. A form that is not substantially similar to the statutory form is not "[t]he notice" referred to in subsection (d). Therefore, section 5.008(a), (b), and (d) do not require a seller to complete the parts of forms that are not substantially similar to the statutory form in subsection (b). We have already decided form TAR-1406 according to its text included parts that were not substantially similar to the statutory form in section 5.008(b) and that the requirement to attach TAR-1414 was one such non-substantially similar part—both the directive in form TAR-1406 and the content of TAR-1414. We conclude, therefore, Aflalo's disclosures on form TAR-1406 without attaching or ever delivering TAR-1414 did not violate section 5.008(d)'s mandate to complete "[t]he notice." We reject the dissenting opinion's view of section 5.008.[6]

[6] Hypothetically parties could use a single form that combined into one form a section 5.008(b) form with every form listed in paragraph 22 of the contract. Such an hypothetical All-In-One-Addendum-and-Disclosure Form would contain the subject matters included in Third Party Financing Addendum; Seller Financing Addendum; Addendum for Property Subject to Mandatory Membership in a Property; Owners Association Buyer's Temporary Residential Lease Loan Assumption Addendum; Addendum for Sale of Other Property by Buyer Addendum for Reservation of Oil, Gas and Other Minerals; Addendum for "Back-Up" Contract; Addendum Concerning Right to Terminate Due to

The difference between form TAR-1406 and section 5.008(b) is crucial. As a matter of law, Aflalo disclosed everything the text of section 5.008 required and, in addition, disclosed the property was "Located in Floodway" and explained, "I have flood insurance. My lender told me that it was recently added to a flood area." This information took Aflalo only two and one-half lines (he also included explanation about his roof; *see supra* n.3). So "additional sheets" were not necessary for Aflalo's explanation. And Aflalo's explanation was delivered within the contractually allotted time, providing the Harrises seven days to terminate the contract when they learned the home was in a flood plain and had flood insurance coverage required by a lender. Although the Harrises argue Aflalo's disclosures and explanation were inadequate, the only support they cite for their position is the additional information TAR-1414 would have required Aflalo to disclose. Merely because TAR-1406 directs attachment of TAR-1414's generic information and advice not specific to any property does not make Aflalo's disclosures insufficient to comply with the requirements of section 5.008, which is all the contract required. If the Legislature wanted to require disclosure of the information in TAR-1414, it could have stated that requirement in the text of the statute. Likewise, if the parties wanted to agree to require disclosure of whatever disclosures were required by a third party such as the Texas Association of Realtors, the parties could have agreed doing so was mandatory for performance of their contract. Or the parties could have listed TAR-1414 in the blank lines in their contract in paragraph 22. *See supra* n. 1. But the Harrises' post-contract, unilateral desire for the information in TAR-1414 does not make it part of the contract or Aflalo's non-delivery of TAR-1414 a breach of their contract. *See*

Lender's Appraisal; Addendum for Coastal Area Property Environmental Assessment, Threatened or Endangered Species and Wetlands; Addendum Seller's Temporary Residential Lease Short Sale Addendum; Addendum for Property Located Seaward of the Gulf Intracoastal Waterway; Addendum for Property in a Propane Gas System Service Area. According to the dissent, a seller's omission to "complete" one blank pertaining to any of the paragraph 22 documents—if combined into one form—even though not substantially similar to the statutory form in section 5.008(b) would violate section 5.008. Contrary to the dissent's view, section 5.008 requires the statutory form or a substantially similar form, not dissimilar forms and documents. *See* PROP. CODE § 5.008(a), (b) (Supp.).

Gilbert Tex. Constr., 327 S.W.3d at 127; *Fiess*, 202 S.W.3d at 746; *Burwell*, 189 S.W.3d at 740; *Heritage Res.*, 939 S.W.2d at 121; *Phillips*, 812 S.W.2d at 618. Upon learning the home was in a flood plain and had flood insurance because a lender required it, the Harrises had all they bargained for: the contractually allotted period to terminate the contract and obtain return of their escrow money. The Harrises' arguments that section 5.008 required Aflalo to make disclosures on TAR-1414 are unavailing.

Having considered all of the parties' arguments,[7] we conclude that Aflalo established as a matter of law the contract did not require him to attach or deliver TAR-1414. He further demonstrated the disclosures he made did not breach the contract because they were in accordance with section 5.008(b) of the property code as required by the contract. Because that alleged failure was the Harrises' premise for their motion for summary judgment, the trial court erred when it granted summary judgment in the Harrises' favor.

D. Aflalo's Motion for Partial Summary Judgment

Aflalo further argues in his first issue that the trial court erred when it denied his motion for partial summary judgment. But Aflalo's cross-motion for summary judgment is not properly before us because it is only a motion for partial summary judgment and does not seek final disposition of the claims in the trial court. *See Pac. Mut. Life Ins.*, 10 S.W.3d at 810; *Montgomery*, 923 S.W.2d at 152. Accordingly, we do not reach the second part of Aflalo's first issue.

[7] The Harrises' first section of their brief cites only their appendix for what the Harrises claim is an inconsistent judicial admission in a new and different lawsuit filed by Aflalo against his real estate agent. Apparently, after losing judgment to the Harrises because the trial court decided TAR-1414 became part of the parties' contract and Aflalo breached the contract by failing to deliver TAR-1414, Aflalo sued his real estate agent for not delivering TAR-1414. There are several problems with the Harrises' attempt to use Aflalo's new lawsuit. First, doing so treats the summary judgment record as though it is still open and the Harrises can supplement it. That is incorrect; it was closed at the time of the district court's ruling. Second, doing so treats the appellate record as though it, too, may be supplemented with material not presented to the trial court and not in the appellate record. "'An appendix is not a substitute for a clerk's record nor are citations to the appendix a substitute for citations to the record.'" *Jackson v. Citibank (S. D.), N.A.*, 345 S.W.3d 214, 214–15 (Tex. App.—Dallas 2011, no pet.) (quoting *Willms v. Wilson*, No. 05-08-01718-CV, 2009 WL 4283109, at *1 (Tex. App.—Dallas Dec. 2, 2009, no pet.) (mem. op.)). Accordingly, the Harrises' judicial admission argument presents nothing for our review. *See* TEX. R. APP. P. 38.1.

E. Attorney's Fees

In his second issue, Aflalo contends if he prevails on his first issue then we should reverse the trial court's judgment awarding $140,000 in attorney's fees plus appellate attorney's fees that resulted from the trial subsequent to the summary judgment. We agree. *See Probus Props. v. Kirby*, 200 S.W.3d 258, 265 (Tex. App.—Dallas 2006, pet. denied). The Harrises do not dispute this argument in their brief except to argue they should prevail on the first issue so they would still have a basis in law to recover attorney's fees. Having reversed the trial court's judgment and summary judgment in favor of the Harrises, we also reverse the award of attorney's fees to the Harrises.

III. CONCLUSION

There is no basis in the law of contract or statutory interpretation to conclude Aflalo was obligated to attach or deliver TAR-1414 or that his failure to have done so violated section 5.008 of the property code or was a breach of contract. We therefore reverse the trial court's judgment and remand the case to the trial court for further proceedings consistent with this opinion.

/David Evans/
DAVID EVANS
JUSTICE

Schenck, J., concurring
Francis, J., dissenting joined by Wright, C.J., and Brown, J.
Boatright, J., dissenting

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

SAMUEL ADAM AFLALO, Appellant	On Appeal from the 95th Judicial District Ct, Dallas County, Texas
No. 05-16-01472-CV V.	Trial Court Cause No. DC-16-00247. Opinion delivered by Justice Evans, before the Court sitting en banc.
DEVIN LAMAR HARRIS AND MEGHAN THERESA HARRIS, Appellees	

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant Samuel Adam Aflalo recover his costs of this appeal from appellees Devin Lamar Harris and Meghan Theresa Harris.

Judgment entered this 13th day of December, 2018.

FILE COPY

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RE: Court of Appeals Number: 05-16-01472-CV

Trial Court Case Number: DC-16-00247

Style: Samuel Adam Aflalo
v.
Devin Lamar Harris and Meghan Theresa Harris

Please find attached the opinion that issued in the above cause today.

Respectfully,

/s/ Lisa Matz, Clerk of the Court

DISSENT; and Opinion Filed December 13, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01472-CV

SAMUEL ADAM AFLALO, Appellant
V.
DEVIN LAMAR HARRIS AND MEGHAN THERESA HARRIS, Appellees

On Appeal from the 95th Judicial District Ct
Dallas County, Texas
Trial Court Cause No. DC-16-00247

DISSENTING OPINION

Before the En Banc Court
Dissenting Opinion by Justice Francis

The majority concludes the failure of a seller in a residential real estate contract to produce a document that "exceeded the minimum required by the Texas Property Code," but was required by the seller's own disclosure notice, did not constitute a breach justifying termination of the contract by the buyers for inadequate notice. Based on the same general contract law and principles of statutory interpretation cited by the majority to support its decision, I conclude, as did the trial court, that such failure was a breach allowing termination. Therefore, I respectfully dissent.

Seller Aflalo and the Harrises entered into a real estate contract on November 20, 2015, with a closing date of December 18. Under section 7B(2) of the contract, seller Aflalo had three days to provide a Seller's Disclosure Notice "pursuant to" section 5.008 of the property code. If

he failed to provide the notice, the Harrises could terminate the contract prior to closing and have their earnest money returned to them. If Aflalo delivered the notice, the Harrises could terminate for any reason within seven days after receiving the notice or before the closing date, whichever occurred first, and have their earnest money returned to them. If either party defaulted, the other party was entitled to enforce specific performance or terminate the contract and receive the earnest money.

On the same day the contract was signed, Aflalo provided the Harrises a Seller's Disclosure Notice using the TAR-1406 form from the Texas Association of Realtors. The form is, as the majority terms it, a "fill-in-the-blanks-and-check-the-boxes form," just like the real estate contract executed in this case and every other form at issue here. At the top of the form, in bold writing, it states: "**This form complies with and contains additional disclosures which exceed the minimum disclosures required by the [Property] Code.**" As relevant here, section 5.008 of the property code requires a seller of residential real property to provide the purchaser of the property "a written notice as prescribed by this section or a written notice substantially similar to the notice prescribed by this section which contains, *at a minimum,* all of the items in the notice prescribed by this section." TEX. PROP. CODE ANN. § 5.008(a) (Supp.) (emphasis added).

Specifically, section 5.008 requires a seller to disclose if he is aware of numerous conditions on the property, including whether the property is in a 100-year floodplain and has present flood insurance coverage. *Id.* § 5.008(b)4. If the seller answers "yes" to the conditions, the statute requires him to explain and "[a]ttach additional sheets if necessary." *Id*. The form used by Aflalo asked whether the property was located in a 100-year floodplain, was located in a floodway, and had present flood insurance coverage. Like the statute, the form provided that if the seller answered "yes" he was to "explain" any condition and "[a]ttach additional sheets if

necessary[.]" But, in addition to the statute, if the seller answered "yes" to the condition regarding present flood insurance coverage, the form directed the seller to "attach TAR-1414," a three-page document that provides information to the buyer about flood zones, special hazard areas, flood insurance, and FEMA. The relevant portion of the TAR-1406 form completed by Aflalo provides:

Section 3. Are you (Seller) aware of any of the following conditions: (Mark Yes (Y) if you are aware and No (N) if you are not aware.)

Condition	Y	N	Condition	Y	N
Aluminum Wiring		✓	Previous Foundation Repairs	✓	
Asbestos Components		✓	Previous Roof Repairs		✓
Diseased Trees: ☐ oak wilt ☐		✓	Other Structural Repairs		✓
Endangered Species/Habitat on Property		✓	Radon Gas		✓
Fault Lines		✓	Settling		✓
Hazardous or Toxic Waste		✓	Soil Movement		✓
Improper Drainage		✓	Subsurface Structure or Pits		✓
Intermittent or Weather Springs		✓	Underground Storage Tanks		✓
Landfill		✓	Unplatted Easements		✓
Lead-Based Paint or Lead-Based Pt. Hazards		✓	Unrecorded Easements		✓
Encroachments onto the Property		✓	Urea-formaldehyde Insulation		✓
Improvements encroaching on others' property		✓	Water Penetration		✓
Located in 100-year Floodplain	✓		Wetlands on Property		✓
Located in Floodway	✓		Wood Rot		✓
Present Flood Ins. Coverage (If yes, attach TAR-1414)	✓		Active infestation of termites or other wood destroying insects (WDI)		✓
Previous Flooding into the Structures		✓	Previous treatment for termites or WDI		✓
Previous Flooding onto the Property		✓	Previous termite or WDI damage repaired		✓
Located in Historic District		✓	Previous Fires		✓
Historic Property Designation		✓	Termite or WDI damage needing repair		✓
Previous Use of Premises for Manufacture of Methamphetamine		✓	Single Blockable Main Drain in Pool/Hot Tub/Spa*		✓

(TAR-1406) 01-01-14 Initialed by: Buyer MHH DLH and Seller: _____ Page 2 of 5

Aflalo answered "yes" that the property was located in a floodway and had present flood insurance and previous roof repairs. Aflalo also provided the following handwritten explanation: "I have flood insurance. My lender told me that it was recently added to a flood area." He did not, however, attach the TAR-1414 form as directed.

Four days after the TAR-1406 notice was delivered, the Harrises' agent sent an email to Aflalo's agent requesting the missing TAR-1414 form. Aflalo did not respond and did not provide the requested form. One day before closing, the Harrises notified Aflalo they were terminating the contract under section 7B(2) requiring the seller's disclosure notice. Aflalo relisted his

property and made demand on the Harrises to perform according to the agreement. Three weeks later, he sued the Harrises for breach of contract seeking specific performance. The TAR-1414 form was ultimately provided during discovery after this lawsuit was filed. Aflalo alleged he timely provided the Harrises with the seller's disclosure notice because neither the contract he signed nor the property code required that he attach the TAR-1414 form, regardless of directives included in the TAR-1406 form chosen by him.

The majority concludes the trial court erred by granting the Harrises' motion for summary judgment because the undisputed facts established Aflalo provided the required seller's disclosures, rendering the Harrises' termination untimely and a breach of the agreement. The majority holds Aflalo was not required to provide a TAR-1414 form to perform under the contract. I disagree.

In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005). To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all provisions of the contract so that none will be rendered meaningless. *Id*. We presume the parties to a contract intend every clause to have some effect. *Ogden v. Dickinson State Bank*, 662 S.W.2d 330, 331 (Tex. 1983). We give terms their plain, ordinary, and generally accepted meanings unless the contract itself shows them to be used in a technical or different sense. *Valence Operating*, 164 S.W.3d at 662. We enforce an unambiguous document as written. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996).

Section 7 of the sales contract is entitled "PROPERTY CONDITION." Subsection B is entitled, "SELLER'S DISCLOSURE NOTICE PURSUANT TO § 5.008, TEXAS

PROPERTY CODE (Notice)" followed by three subsections. The Harrises checked the box to subsection 7B(2), which stated:

> (2) Buyer has not received the Notice. Within 3 days after the effective date of this contract, Seller shall deliver the Notice to Buyer. If Buyer does not receive the Notice, Buyer may terminate this contract at any time prior to the closing and the earnest money will be refunded to Buyer. If Seller delivers the Notice, Buyer may terminate this contract for any reason within 7 days after Buyer receives the Notice or prior to the closing, whichever first occurs, and the earnest money will be refunded to Buyer.

The majority, citing only general authority, concludes the above notice requirement was limited to information required to be disclosed under section 5.008 of the property code and, because neither the property code nor the sales contract mentions the TAR-1414 form, Aflalo was not required to provide one under the contract. The majority concludes that "[b]ecause form TAR-1406 as completed by Aflalo was not exchanged information between the parties at the time of the contract, it was not a part of the contract when the parties entered into their contract." The majority cites no authority, other than general principles of contract and statutory interpretation, to support this conclusion.

Aflalo argues, and the majority agrees, the sample form provided in section 5.008 only required he answer "yes" or "no" to whether he was aware of "Present Flood Insurance Coverage," and if so, to "explain" and "[a]ttach additional sheets if necessary," which he said he did. As support, Aflalo relies on *Sherman v. Elkowitz*, 130 S.W.3d 316 (Tex. App.—Houston [14th] Dist. 2004, no pet.), for the proposition that the use of "varying forms should not alter the obligations of a party under the Property Code." While the majority fails to mention the *Sherman* case, Aflalo reads too much into the Houston court's opinion. I find it relevant and specific to this discussion.

In *Sherman*, the buyers purchased a home and then discovered various defects in the property. They learned the sellers had sued the prior owner for failing to disclose these same

alleged defects. *Id*. at 318. Neither the defects nor the lawsuit had been disclosed in the seller's disclosure notice. The buyers sued the sellers, the sellers' agent, and the realty company for alleged misrepresentations and nondisclosures in the disclosure notice. The buyers obtained a favorable judgment against the sellers, but the trial court granted a directed verdict in favor of the sellers' agent and the realty company. *Id*. at 319.

On appeal, the buyers argued they presented evidence that the listing agent knew of the earlier lawsuit and could be held liable for failing to disclose that fact. *Id*. at 323. The question before the Houston court was whether the buyers were entitled to disclosure of the earlier lawsuit. As in this case, the sellers' disclosure notice varied from the statute. *Id.* But, unlike here, that variance arguably narrowed the scope of the disclosures required by section 5.008, so the court used the broader, statutory requirements to determine the sellers' disclosure obligations. *See id.* The court's analysis showed the buyers were not entitled to relief because the disclosure of a lawsuit that was not pending was not required by either the statute or the disclosure form used in that case. Nothing in *Sherman* suggests that varying forms can never broaden the disclosure obligations of sellers. If anything, the case supports only the proposition that such forms cannot reduce the seller's disclosure obligations set out in the statute.

While I hesitate to attempt a dissection of the majority's depiction of the facts to benefit its conclusions, I must identify a couple of troubling points. First, the majority characterizes the sales contract as requiring Aflalo to simply make the disclosures required by section 5.008 of the property code. This is not accurate. The sales contract specifically required Aflalo to provide the Harrises with a *seller's disclosure notice* "pursuant to" section 5.008, meaning Aflalo had to provide a notice containing at least certain statutory information. The sales contract did not limit the information Aflalo was to provide in the disclosure notice. Contrary to the majority's apparent position, a completed seller's disclosure notice was not a requirement of a "third party such as the Texas

Association of Realtors." Nor was it a "post-contract, unilateral desire for information" by the Harrises. Rather, a completed disclosure notice was an implicit, if not explicit term of the sales contract. Because Aflalo did not provide the Harrises with a completed seller's disclosure notice within the time allotted, Aflalo breached the sales contract, which allowed the Harrises to terminate.

Second, the majority attempts to bolster its position by mischaracterizing the structure of the TAR-1406 form used by Aflalo (chart included above). The majority describes it as listing the section dealing with "attaching additional sheets as necessary" as appearing directly below "Present Flood Ins. Coverage," which suggests submitting additional information about flood insurance was discretionary. But the form actually reads "If yes, attach TAR-1414" directly below the insurance coverage line, thereby requiring the form to be provided if the relevant box is checked. I agree Aflalo made handwritten comments about having flood insurance, that his lender told him "it was recently added to a flood area," and that he made roof repairs. But these notations at the end of section three do not replace the requirement that he attach a TAR-1414 form. While the majority has briefed the issue exhaustively, I do not dispute section 5.008 does not require the information contained in the TAR-1414 form. This is simply not pertinent to the discussion because the sales contract required a seller's disclosure notice and the seller's disclosure notice required the information.

Third, the majority goes through extensive detail about the contents of the TAR-1414 form only to dismiss it as unnecessary, general information. While the majority does not say so directly, the import of this discussion is that the form is immaterial. I agree the form does not provide property-specific information, but it does provide critical information to buyers purchasing a potentially flood-prone property. The TAR-1414 form provides notice to buyers about special flood hazard areas as designated by FEMA. It addresses high-flood-risk areas and discusses the availability and advisability of flood insurance and the importance of determining

elevation information and certificates. While information about flood areas, flood insurance, and FEMA may not be of paramount importance in all areas of Texas, many parts of this State have been devastated by flooding, and potential purchasers in those areas might feel strongly about requiring and receiving disclosure of flood hazard information.

By using the TAR-1406 form to fulfill his contractual obligations, Aflalo did not undertake an onerous burden. Looking at the substance of the TAR-1406 form, six of the eleven sections of the form require the attachment of additional sheets as necessary where an explanation might reasonably be needed. But in the entire five pages of the TAR-1406 form, only three property conditions require that a different, specifically-numbered TAR form be attached. The property conditions that required forms were: (1) the Present Flood Ins. Coverage condition (TAR-1414), (2) the Information About On-Site Sewer Facility (TAR-1407) (which seller Aflalo checked "unknown" and was not required to submit an attachment), and (3) lead-based paint hazards (TAR-1906) (which Aflalo also checked "unknown").

To meet his contractual obligation, Aflalo chose to use a TAR-1406 form that required him to provide a TAR-1414 form once he stated he had present flood insurance coverage. When Aflalo did not attach the form to the disclosure notice provided to the Harrises, the Harrises' agent asked for the additional information. Aflalo did not respond. By failing to provide the TAR-1414 form, he failed to fully comply with his obligation under the sales contract regarding the seller's disclosure notice and the Harrises therefore were allowed to terminate the contract at any time. Because the Harrises established as a matter of law that Aflalo did not perform his obligations and they did not breach the contract, the trial court did not err by granting the Harrises' motion for summary judgment and rendering a take-nothing judgment on Aflalo's breach of contract claim.

For these reasons, I dissent.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

Wright, C.J. and Brown, J., join in this dissent

161472DF.P05

DISSENT; and Opinion Filed December 13, 2018.

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01472-CV

SAMUEL ADAM AFLALO, Appellant
V.
DEVIN LAMAR HARRIS and MEGHAN THERESA HARRIS, Appellees

On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-00247

DISSENTING OPINION

Before the Court En Banc
Opinion by Justice Boatright

I respectfully disagree with the majority's analysis and write separately to present my own.

Section 5.008 of the Texas Property Code requires the seller of certain kinds of residential property to give the buyer a notice disclosing the condition of the property. Subsection 5.008(f) allows the buyer to terminate a sale contract for any reason if the seller does not submit the "required notice." Subsections (a), (b), and (d) explain what the required notice is. Subsection (a) requires that a notice be either the notice prescribed by the section or a substantially similar one that contains, at a minimum, all of the items in the prescribed form. Subsection (b) requires that a notice be executed. And subsection (d) requires that it be completed.

In our case, I do not agree with the majority about whether Aflalo satisfied subsections (a) and (d). Accordingly, I will explain what I think those subsections mean.

Subsection 5.008(a)

Subsection (a) requires that a notice be substantially similar to the notice prescribed by the section. Section 5.008 does not explain what a "substantially similar" notice would be, but this Court has held that the term "substantially similar" means "having considerable characteristics in common; considerably alike." *Winfield v. Lamoyne*, No. 05-09-01851-CV, 1995 WL 634161, at *8 (Tex. App.—Dallas 1995, writ dism'd) (not designated for publication). This meaning is consistent with dictionary definitions of the words "substantial" and "similar." *Id*. It also comports with what I think is the most natural reading of the term, because things that are similar are not identical, and things that are substantially similar are similar in most ways, but not all. So I think the TAR-1406 form that Aflalo submitted and the prescribed form would be substantially similar if they had considerable characteristics in common and were considerably alike.

A comparison of the two forms shows that the TAR-1406 form that Aflalo submitted contains all of the items that the prescribed form contains. The forms are also on the same subject and use almost identical language. There are differences between the two forms, but there are far more similarities than differences. Therefore, TAR-1406 and the prescribed form share considerable characteristics and are considerably alike. They are substantially similar.

The majority concludes that the forms are not substantially similar. It bases its conclusion on the fact that TAR-1406 uses a phrase—"If yes, attach TAR-1414"—that is not in the prescribed form. The majority does not attempt to explain why this difference means that the forms are not substantially similar; it simply establishes that they are not the same. But a prior holding of this court, dictionary definitions, and a natural reading of the term "substantially similar" show that it does not mean the "same," "identical," or even "alike." Therefore, TAR-1406 and the prescribed form can be different but substantially similar nonetheless.

The text of subsection (a) supports this conclusion. It requires a seller to submit a disclosure notice that is substantially similar to the prescribed form, *and* it allows the seller to include additional items. This confirms that a notice can be substantially similar to the prescribed form even though it contains additional language, as TAR-1406 does.

Because TAR-1406 was substantially similar to the prescribed form and contained all of the items in the prescribed form as well as additional items, it complied with subsection 5.008(a).

Subsection 5.008(d)

Subsection (d) provides that "The notice shall be completed to the best of the seller's belief and knowledge as of the date the notice is completed and signed by the seller." Subsection (d) does not distinguish between the prescribed form and a substantially similar one that contains, at a minimum, all of the items in the prescribed form. Subsection (d) simply requires that "The notice" be completed. Therefore, when a seller chooses to submit a notice that is substantially similar to the prescribed form and that contains the items in the prescribed form as well as additional items, subsection (d) requires the seller to complete it.

Subsection 5.008(d) also requires that "The notice shall be completed to the best of seller's belief and knowledge as of the date the notice is completed," and it provides that a seller is "in compliance with this section" if he indicates on the notice that information required by the notice is unknown to him. So, the text of section 5.008 provides that a seller complies with the law if he completes the notice in the manner provided by the section. The text of section 5.008 does not provide that a seller may complete only part of the notice.

The majority disagrees, and its reasoning is noteworthy. The majority says that TAR-1406 claims to be substantially similar to the prescribed form in part and dissimilar in part. The majority then says a form that is not substantially similar to the prescribed form is not the notice referred to in subsection (d). Therefore, the majority concludes, section 5.008 does not require a seller to

complete the parts of forms that are not substantially similar to the prescribed form. In this way, the majority reasons that the text of *TAR-1406* reveals what *section 5.008* requires for *all forms*.

I do not agree with the majority's reasoning. We have to find the meaning of section 5.008 in the text of section 5.008; we cannot find it in the text of TAR-1406. Nor do I see how a claim in TAR-1406 could affect how we treat other forms. I also happen to think the majority's interpretation of TAR-1406 is incorrect—the form expressly claims that it complies with the statute, and section 5.008 requires that a form be substantially similar to the prescribed form, so the form impliedly claims that it *is* substantially similar to the prescribed form—but what matters is the meaning of subsection (d), the controlling statute.

The statutory text (1) states that the notice shall be completed, (2) does not distinguish between the notice prescribed by the section and a substantially similar one that contains the items in the prescribed notice as well as additional items, and (3) does not state that a seller may complete only part of the notice.

Subsections (a), (b), (d), and (f) together

In our case, Aflalo gave the Harrises an executed notice that was substantially similar to the notice prescribed by the statute. Aflalo's notice instructed him to attach TAR-1414 if he indicated that the property had flood insurance. He indicated that the property did have flood insurance, but he did not attach TAR-1414. Therefore, Aflalo did not complete his notice, and the Harrises were expressly authorized by the text of the controlling statute to terminate the contract.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

161472DF.P05

CONCUR; and Opinion Filed December 13, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01472-CV

SAMUEL ADAM AFLALO, Appellant
V.
DEVIN LAMAR HARRIS AND MEGHAN THERESA HARRIS, Appellees

On Appeal from the 95th Judicial District Ct
Dallas County, Texas
Trial Court Cause No. DC-16-00247

CONCURRING OPINION

Before the Court En Banc
Opinion by Justice Schenck

In this Court's majority opinion, we focus on a single provision of the standard One to Four Family Residential Contract (Resale) because it was the only provision of the contract the parties argued pertained to the resolution of their dispute. That provision, paragraph 7.B, addresses the seller's disclosure notice pursuant to section 5.008 of the property code. *See* TEX. PROP. CODE ANN. § 5.008. The Court concludes that Aflalo was required to disclose everything the text of property code section 5.008 required, not what Texas Association of Realtors (TAR) forms 1406 and 1414 required. While I join with my colleagues in this result, I write separately to explain why I believe the merger and modification provision of the sales contract also and more directly mandates reversal in this case. As detailed below, I believe the contract's plain language precludes

the summary judgment the Harrises sought. I pause first to address whether we are entitled to apply its language.

The issue presented in a traditional summary judgment proceeding such as this is whether the movant established, as a matter of law, that it was entitled to judgment. *See James M. Clifton, Inc. v. Premillenium, Ltd.*, 229 S.W.3d 857, 859 (Tex. App.—Dallas 2007, no pet.). Of course, if the movant's summary judgment proof is legally insufficient on its face, the nonmovant need not even respond to it. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). Here, the Harrises presented the resale contract in support of their motion for summary judgment, in which they argued (1) Aflalo failed to perform because he did not provide a TAR-1414 form and (2) they did not breach the contract. That contract also contains a provision that controls the issue presented below and here—namely whether Aflalo was obliged to provide the Harrises with TAR form 1414. I concede that Aflalo did not point to the merger clause in opposition to the Harrises' motion for summary judgment and likewise did not address this provision here. "Of course, not all legal arguments bearing upon the issue in question will always be identified by counsel, and we are not precluded from supplementing the contentions of counsel through our own deliberation and research." *Coggin v. Longview Indep. Sch. Dist.*, 337 F.3d 459, 471 (5th Cir. 2003) (Edith Jones, J., dissenting) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1980) (Scalia, J.)); *see also Miller v. JSC Lake Highlands Operations, LP*, 536 S.W.3d 510, 513 n.5 (Tex. 2017) (holding all arguments relating to an issue presented below to be live for decision regardless of whether they were raised in the intermediate court of appeals).[1] Accordingly, while the lawyers must raise issues, we are not constrained by the arguments and authorities advanced by counsel. Thus, when an argument is fairly subsumed within the issue presented to us for decision, as it is

[1] *See also U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

here, it is often more efficient (and may allow us to avoid unnecessary or novel legal questions) to simply address it on our own or by seeking supplemental briefing, if necessary. TEX. R. APP. P. 38.9.

The construction of an unambiguous contract is a question of law, which we review de novo. *Matheson Tri–Gas, Inc. v. Atmel Corp.*, 347 S.W.3d 339, 343 (Tex. App.—Dallas 2011, no pet.). To determine the parties' intent, we examine the entire agreement and give effect to all its provisions so that none are rendered meaningless. *Id.* We do not consider the parties' present interpretations of the agreement, and we are not concerned with the parties' subjective intent. *Id.*

The resale contract at issue here contains a clause that states "[t]his contract contains the entire agreement of the parties and cannot be changed except by their written agreement. Addenda which are a part of this contract are . . . Third Party Financing Addendum for Credit Approval." There is no mention of TAR forms 1406 and 1414 in the merger provision or otherwise in the contract. Instead, the obligation to execute those forms is said to arise thereafter and by one party's choice of a form that references them. Absent a separate writing signed by the parties, Aflalo had no contractual obligation to provide the information listed in TAR forms 1406 and 1414 that exceed the scope of section 5.008. The summary judgment record does not contain evidence of such an agreement. Accordingly, the Harrises are not entitled to summary judgment on their breach of contract claim.

For the foregoing reasons, I do not join in the majority's opinion and, instead, respectfully concur in the Court's judgment.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

161472CF.P05

NO. 18-50851

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATHANAEL BROWN, for himself and all others similarly situated,

Plaintiff-Appellee,

v.

MID-AMERICA APARTMENT COMMUNITIES, INCORPORATED, as general partner of Mid-America Apartments, LP; MID-AMERICA APARTMENTS, L.P., as successor in merger to Post Apartment Homes, LP doing business as Post Worthington doing business as Post South Lamar doing business as Post Eastside doing business as Post Park Mesa doing business as Post Gallery doing business as Post West Austin doing business as Post Sierra at Frisco Bridges doing business as Post Katy Trail doing business as Post Abbey doing business as Post Addison Circle doing business as Post Cole's Corner doing business as Post Barton Creek doing business as Post Heights doing business as Post Legacy doing business as Post Meridian doing business as Post Midtown Square doing business as Post Square doing business as Post Uptown Village doing business as Post Vineyard doing business as Post Vintage doing business as Post Washington,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
Civil Action No. 1:17-cv-307
The Honorable Robert Pitman

BRIEF OF AMICI CURIAE TEXAS APARTMENT ASSOCIATION AND TEXAS ASSOCIATION OF REALTORS® IN SUPPORT OF APPELLANTS MID-AMERICA APARTMENTS, LP, ET AL.

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

No. 18-50851, *Brown v. Mid-America Apartment Communities, Inc.*

The undersigned counsel of record certify, to the extent such disclosure is necessary, that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Trial Judges:

   The Honorable Robert L. Pitman, United States District Judge for the Western District of Texas

   The Honorable Mark Lane, United States Magistrate Judge for the Western District of Texas

2. Parties:

   Plaintiff–Apellee:

   Nathanael Brown

   Defendants–Appellants:

   Mid-America Apartments, LP

   Mid-America Apartment Communities, Inc.

3. Amicus Parties:

   Texas Apartment Association

   Texas Association of REALTORS®

The amicus parties have no financial interest in the outcome of this case, except to the extent that individual members of Texas Apartment Association have a financial interest in this case.

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5. Entities with a Financial Interest

No other entities have a known financial interest in this case.

6. Federal Rule of Appellate Procedure 26.1

Texas Apartment Association does not have a parent corporation and there is no publicly held corporation that holds 10 percent or more of its stock.

Texas Association of REALTORS® does not have a parent corporation and there is no publicly held corporation that holds 10 percent or more of its stock.

January 9, 2019

/s/ Charles "Skip" Watson

Charles "Skip" Watson
Lead Counsel for Amicus Curiae
Texas Apartment Association

/s/ Lori Levy

Lori Levy
Lead Counsel for Amicus Curiae
Texas Association of REALTORS®

STATEMENT OF CONSENT TO FILE AMICUS BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *Amici* certify that all parties have consented to the filing of this brief.

January 9, 2019

/s/ Charles "Skip" Watson
Charles "Skip" Watson
Lead Counsel for Amicus Curiae
Texas Apartment Association

/s/ Lori Levy
Lori Levy
Lead Counsel for Amicus Curiae
Texas Association of REALTORS®

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae provide this Statement of Interest pursuant to Federal Rules of Appellate Procedure 29(a)(4)(D), (E) and Fifth Circuit Local Operating Rule 29.2.

This brief is filed on behalf of the Texas Apartment Association ("TAA") and Texas Association of REALTORS® ("TAR") as *amici curiae* in support of Mid-America Apartments, LP and Mid-America Apartment Communities, Inc. (collectively "Mid-America").

TAA is a non-profit, statewide trade association that has been serving the rental housing industry in Texas for more than 50 years. TAA has 24 affiliated local chapters and more than 11,000 members, which include property owners, builders, developers, property management firms, and service providers. TAA member companies are responsible for approximately 2.2 million residential homes and units across Texas that house roughly 4 million Texans.

TAR is a non-profit, statewide trade association that has been serving the real-estate industry for more than 90 years. TAR has 77 local associations and more than 112,000 REALTORS® located across the state. Based in Austin, TAR has more than 70 employees. TAR represents REALTORS'® interests in all segments of the industry. TAR provides education and accreditation through certifications and designations for its members. By enforcing ethics and adjudicating grievances against members, TAR strives to elevate the standards of professional conduct for

REALTORS®. TAR also provides assistance with real-estate transactions by providing property information and forms. TAR encourages legislation that protects private-property-ownership rights of all Texans. Finally, as in this case, TAR advocates in litigation on issues that have statewide impact on its members and the real-estate industry.

Mid-America's appeal of the class-certification order in this matter presents critically important questions that affect TAA members, TAR members, and other Texas property owners regarding the process that landlords must follow to charge late fees when a tenant does not pay rent on time without risking class liability for civil penalties, plus three times the fee and attorneys' fees.

Amici Curiae hereby certify that no party's counsel authored this brief in whole or in part. TAA paid the fees for the preparation of this brief, which TAR joins. While Mid-America is a member of TAA, the fees for the preparation of this brief are paid by all of TAA's members.

TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Amici are concerned that the district court certified a class of Texas apartment tenants based on an admitted *Erie* guess about the meaning of a Texas Property Code civil-penalty provision never interpreted by a Texas court. Appellants' Opening Brief correctly demonstrates the error inherent in the district court's superiority, and predominance analyses.

Amici will focus on the court's failure to construe Section 92.019's plain language to effectuate its purpose — penalizing a landlord when it charges a tenant an unreasonable fee for a late rent payment — in certifying the class based on a threshold common question *not found in the statute* — whether the landlord conducted pre-lease calculations to estimate each tenants' prospective damages from late payment of rents. The district court found that common questions about whether Appellants demonstrated sufficient evidence of pre-lease calculations predominate, rather than focusing on the statute's controlling question of whether any fee actually charged any tenant was unreasonable.

The resulting aberrant interpretation of a penal statute is needlessly harmful to all Texas landlords who will now face potential class actions seeking penalties for charging *reasonable* fees for late payment of rent. But it is also detrimental to:

- the statute's purpose;
- the comprehensive statutory scheme containing the statute; and
- the tenants the statute was enacted to protect.

Amici ask this Court to correct the legal missteps that resulted in class certification to resolve a non-existent common question created by the district court's improper construction of a Texas Property Code section. Alternatively, *Amici* respectfully suggest that the dispositive question of first impression be certified to the Supreme Court of Texas, which is charged with interpreting the laws enacted by the Texas Legislature.

SUMMARY OF THE ARGUMENT

Chapter 92 of the Texas Property Code is a comprehensive statutory scheme authorizing private causes of action by individual tenants for civil penalties plus attorneys' fees for 29 potential abuses. Section 92.019 was added to Chapter 92 to provide civil penalties, treble damages, and attorneys' fees for unreasonable late fees while still encouraging timely payment of rent when due.

The Texas Legislature was careful not to create "gotcha" strict liability for landlords that charge reasonable late fees. To that end Section 92.019 requires that the late fee imposed on a tenant merely be within the broad range of a reasonable estimate of landlords' "uncertain damages".

Yet, the district court created class liability by creating *a new threshold condition* that landlords must satisfy to avoid liability, regardless of whether a late

fee charged to any specific tenant was reasonable. Landlords will now suffer class actions for civil penalties plus attorneys' fees for charging *reasonable* late fees if they cannot show how the fees were calculated.

The district court's first misstep put it on a false path of statutory construction that led to the inevitable result reflected in its class certification order. In Texas, legislative intent from the plain meaning of a statute's language is not discerned by simply finding a dictionary definition of an operative term that supports a result and then ignoring every principle of statutory construction (and, in this case, every other definition) contrary to that interpretation. But that is what the district court did when it seized upon a single dictionary definition from the multiple disparate meanings of the term "estimate" while ignoring the meaning apparent from:

- the language used in the four-corners of Section 92.019;
- other commonly understood meanings of "reasonable estimate" that accomplish its purpose without adding to its language;
- the context of its enactment, including its purpose and the common law it codified;
- the comprehensive statutory scheme it was enacted to complement; and
- the strict rule against construing penal statutes to impose penalties when reasonable interpretations would not.

Simply put, finding an isolated dictionary definition of the noun "estimate" that references a "calculation" does not license a court to convert the term "reasonable estimate" into the verb "to estimate" by assuming that every estimate necessarily requires a prior "calculation." That construction, and the circular reasoning it requires, is the antithesis of intent set forth in Section 92.019 and the statutory scheme containing it.

ARGUMENT

Section 92.019(a) of the Texas Property Code[1] prohibits landlords from charging late fees for failing to pay rent when due unless:

(1) notice of the fee is included in a written lease;

(2) the fee is a reasonable estimate of uncertain damages to the landlord that are incapable of precise calculation and result from late payment of rent; and

(3) the rent has remained unpaid one full day after the date the rent was originally due.

§ 92.019(a). The provision reflects the Legislature's balance of competing policy concerns. It prevents landlords from charging excessive or unreasonable late fees by imposing a $100 penalty, plus treble damages on fees charged, and attorneys' fees on offending landlords. *See id.* On the other hand, it also recognizes the necessity of

[1] All statutory references are to the Texas Property Code unless otherwise indicated.

encouraging timely payment of rent to avoid higher rents and eviction rates by making it clear that a broad range of fees approximating the costs generated by late rent payments are not actionable. *See id*. The construction of the policy balance reflected in the statute's language is at the core of this class-certification dispute.

I. The District Court certified a class of tenants based on a common question not found in the statute.

The class certification order below bases its predominance analysis on two purported common questions that will drive the outcome of the case:

> (1) [D]id Defendants estimate their damages before contracting with the proposed class members, and
>
> (2) [*I*]*f so*, was that estimate a reasonable one under Section 92.019?

ROA.18-50851.2646 (emphasis added). Even in its purported analysis of reasonableness, the court focused on whether Defendants "*calculate* individual-level late-payment costs." ROA.18-50851.2644.

This brief is submitted because the district court avoided addressing the only question found in the text of the statute — whether the fee charged was reasonable — based on the extra-statutory threshold requirement it adopted. Even in its purported analysis of reasonableness, the court focused on whether Defendants "*calculate* individual-level late-payment costs." ROA.18-50851.2644.

Adding an additional non-textual requirement cannot be justified under proper application of Texas law governing statutory construction. Instead, the district

court's reasoning for finding Plaintiffs' threshold requirement in the "plain meaning" of the words actually used in Section 92.019(a)(2) reveals a fundamental misunderstanding of the principles that guide the Texas Supreme Court's constructions of the State's statutes.

II. Texas rules of construction require construing the plain meaning of the words used in the context of the entire statute, its purpose, origins, and the statutory scheme containing it, while avoiding penalties unless clearly intended.

It is not enough to say that courts interpreting Texas statutes "ascertain and give effect to the Legislature's intent as expressed by the language of the statute." *See City of Rockwell v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). The Texas Supreme Court uses the Legislature's prescribed definitions when available. But when, as here, terms are not defined, the Court "construe[s] the statute's words according to their plain and common meaning, *unless* a contrary intention is apparent from the context, *or unless* such a construction leads to absurd results." *Id*. at 625–26 (emphasis added) (citations omitted).

Thus, precisely "because our tools for analyzing isolated words have limitations, *context becomes essential* to clarity." *Jaster v. Comet II Constr.,* 438 S.W.3d 556, 565, n.13 (Tex. 2014) (emphasis added) (internal quotation marks omitted).

Context and avoiding absurd results require, at a minimum:

- that terms not be construed in isolation, but in harmony with the intent expressed in the four corners of the entire statute, *State v. $1,760.00 in U.S. Currency*, 406 S.W.3d 177, 181 (Tex. 2013);
- a construction that furthers the purpose of the statute, *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 510–11 (Tex. 1997), or "the reality [the words used] are intended to affect," *Jaster*, 438 S.W.3d at 579 (Hecht, J. dissenting);
- an interpretation consistent with the statutory scheme to which the statute prompting conflicting constructions was added, *$1,760.00 in U.S. Currency*, 406 S.W.3d at 181; and
- strict construction of penal statutes, such as Section 92.019, by resolving doubts in favor of the penalized party to avoid imposing unwarranted penalties. *See, e.g., Steves Sash & Door Co., Inc. v. Ceco Corp.*, 751 S.W.2d 473, 476 (Tex. 1988) (strictly construing penal usury statute).

Applying Texas rules of statutory construction, Section 92.019 plainly requires landlords to charge reasonable late fees for late rent payments, not unreasonable penalties. This interpretation conforms the words in the statute with the statutory context, including its common-law history and the Legislature's clearly expressed intent to permit landlords to encourage timely payment of rent by allowing

a late fee within a reasonable range. As important, Section 92.019 is part of a greater statutory scheme that protects tenants by enabling individual causes of action against abusive landlords in which a tenant can recover both civil penalties and attorneys' fees. Under the Legislature's comprehensive scheme, Chapter 92 encourages tenants to obtain cost-free legal remedies for specific abusive tactics, including unreasonable fees. Any common meaning interpretation must advance that purpose. By contrast, any meaning imposing strict liability for charging reasonable fees borders on being absurd.

A. The plain meaning of "reasonable estimate" requires the landlord to charge a reasonable amount.

The term "reasonable estimate" is not defined by the statute, so we must ascertain its commonly understood meaning. While "reasonable" has been defined by the Texas Supreme Court, "estimate" has not. Unfortunately, definitions of "estimate" abound, requiring the court to closely analyze the multitude of alternative meanings to advance the purpose of the statute. Therefore, before engaging in dueling definitions it is critical to determine how the Texas Supreme Court interprets statutes that are not always models of clarity because of undefined terms.

1. Construing alternative definitions requires choosing meanings that comport with the text and purpose of the statute.

This case reveals why it is not enough to pick a definition out of a dictionary and declare that "common usage" had been established.

The definitions of the noun "estimate" vary from dictionary to dictionary, and from one numbered meaning to the next within any given dictionary. The meanings vary greatly because the term is used in many diverging contexts to mean different things. But, use of the term as a noun does not implicate the act of estimating.

a. Meanings of the noun "estimate" do not require calculations.

Generally, the noun "estimate" may mean "an opinion or judgment of the nature, character, or quality of a person or thing." *Estimate*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/estimate (last visited Dec. 27, 2018) In another context it may be "an approximate calculation or judgment of the value, number, quantity, or extent of something." *Estimate*, ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/estimate) (last visited Dec. 27, 2018). Or it could be "a judgment or calculation of approximately how large or how great something is." *Estimate*, CAMBRIDGE DICTIONARY, https://en.oxforddictionaries.com/definition/estimate) (last visited Dec. 27, 2018). Regardless of how derived, the judgment or approximation is necessarily imprecise.

The district court limited its analysis to another, somewhat similar definition: "[a] tentative evaluation or rough calculation, as of worth, quantity, or size." *Brown v. Mid-Am. Apartments, LP*, No. 1:17-CV-307-RP, 2018 WL 6695256, at *4 (W.D. Tex. Sept. 18, 2018) (quoting *Estimate*, THE AMERICAN HERITAGE DICTIONARY 609

(5th ed. 2011)).[2] This definition shares a common thread with others: each refers to a thing — a judgment or opinion that is "tentative' or "rough." Yet, in leaping to the conclusion that an estimate necessarily requires a "calculation or evaluation," the district court wrongly shifted its focus to the process of estimating and lost sight of the statute's focus on the end-product — the necessarily tentative and rough judgment of costs from late payment of rent that is inherent in *any* late-fee figure inserted into lease forms used for multiple units in multiple complexes, in multiple locations. *See id.* at *4–5.

b. "Reasonable" confirms the meaning of "estimate."

The adjective "reasonable," used to describe the tentative or rough approximate judgment set forth as the late fee in the lease, confirms the provision's meaning. The Texas Supreme Court has defined "reasonable" to mean "not excessive or extreme, but rather moderate or fair." *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010). In other words, it means "not immoderate; not excessive; not unjust; tolerable; moderate; sensible; sane." *Azar Nut Co. v. Caille*, 734 S.W.2d 667, 669 (Tex. 1987) (quoting WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1502 (2d ed. 1975)).

[2] The district court's statutory-construction analysis is found in its summary-judgment order dated September 18, 2018. Appellants appeal from the class-certification order, dated September 5, 2018, but the class-certification order's analysis rests upon the common questions quoted in this brief, which necessarily relies on the court's erroneous construction of the statute to find a common threshold question about a pre-charge calculation.

The combined term in Section 92.019 demands "the fee is a reasonable estimate." Because "fee" is aligned with "reasonable estimate," the provision's grammatical structure is clear: "fee" and "estimate" are parallel nouns, and because "fee" is an amount, its parallel "estimate" also refers to an amount. Simply put, the estimate is the fee itself. The fee, then, must be reasonable, which is the point of the statute.

c. A "reasonable estimate" is not the act of making an estimate.

It is important to understand that, though spelled the same, the verb "to estimate" and the noun "estimate" have meanings as different as their pronunciations. Used as a verb, it denotes the act of tentatively or approximately judging value or determining size or extent. WEBSTER'S NEW WORLD DICTIONARY 465 (3d 1997). In other words, it refers to the process by which one makes or arrives at an estimate.

There is no basis to argue that the Legislature enacted Section 92.019 to require that the *process* of calculating the fee be "reasonable." The provision's structure requires that one, and only one, thing be reasonable — the fee itself. The term "reasonable estimate" is used simply to emphasize the inherently imprecise approximation of the judgment or opinion the fee represents, *not* to engraft a penalty-laden, bureaucratic process of calculating what is admittedly incalculable.

Section 92.019 thus uses the combined term "reasonable estimate" to require a reasonable fee much as another Texas statute used the term "reasonable damages" to require a reasonable amount of damages. Former Article 8307c § 1 of the Worker's Compensation Act, interpreted by the Texas Supreme Court in *Caille*, called for "*reasonable damages* suffered by the [plaintiff] as a result of the [statutory] violation." *Caille*, 734 S.W.2d at 668 (emphasis added). The Court held that "reasonable" was directed toward the *amount* of damages awarded, and it did not limit damages to actual economic damages suffered, so long as the total amount charged — the end result — was reasonable. *Id.*

Here, too, the statute requires landlords to charge a reasonable amount. It does not purport to require a threshold process before a fee can be reasonable.

2. Construing alternative meanings of undefined terms requires choosing a meaning that advances the statutory scheme.

The Texas Supreme Court also made it clear that courts are not free to select an alternative meaning of "reasonable estimate" that penalizes landlords that charge reasonable fees. It requires that courts confronting undefined statutory terms with multiple common meanings "apply the definition most consistent with the context of the statutory scheme." *City of Richardson v. Oncor Elec. Delivery Co. LLC*, 539 S.W.3d 252, 261 (Tex. 2018) (quoting *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 405 (Tex. 2016).

Here, the statutory scheme is the codification of a long-standing common-law requirement that late fees reasonably approximate just compensation rather than operate as penalties. *See Public Hearing on H.B. 3101 Before the S. Comm. on Bus. & Commerce*, 80th Leg., R.S. (May 17, 2007) (testimony of Robert Doggett on behalf of Tex. Low Income Housing Info. Serv.) http://tlcsenate.granicus.com/MediaPlayer.php?view_id=16&clip_id=3023) (testifying that the statute is a codification of common-law liquidated damages). When damages are impossible or very difficult to calculate, parties may agree to a stipulated-damages provision, or liquidated damages. Texas law only enforces such provisions if they are an enforceable liquidated-damage provision, and not when they are an unenforceable penalty. *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 766 (Tex. 2005).

The Texas Supreme Court first discussed this distinction in *Stewart v. Basey*: "[T]o be enforceable as liquidated damages the damages must be uncertain and the *stipulation must be reasonable*." 245 S.W.2d 484, 486 (Tex. 1952) (emphasis added). This rule has been written and rewritten,[3] but each iteration requires a *reasonable amount*, just like Section 92.019.

[3] *See, e.g.*, TEX. BUS. & COM. CODE § 2.718(a) ("Damages for breach by either party may be liquidated in the agreement but only at *an amount which is reasonable* in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated

The statute also incorporates the common-law requirement that liquidated-damage provisions are only enforceable when damages are "incapable of precise calculation." *Peake*, 178 S.W.3d at 766. This requirement is engrafted directly into Section 92.019, which states the Legislature's finding that a landlord's damages resulting from late rent payments are "uncertain" and "incapable of precise calculation." § 92.019; *cf. Peake*, 178 S.W.3d at 767 (explaining parties stipulate to late fees because precise damages resulting from untimely payments are "generally difficult if not impossible to ascertain").

Despite the parties' pre-breach agreement to the late-fee amount, a party may defeat the provision by showing the damages are unreasonable in light of the actual damages resulting from the late payment. *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991). The party asserting unreasonableness to avoid the provision bears the burden of proof. *SP Terrace, L.P. v. Meritage Homes of Tex., LLC*, 334 S.W.3d 275, 287 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (citations omitted) (upholding liquidated-damages provision because complaining party adduced no evidence that amount was unreasonable).

damages is void as a penalty." (emphasis added)); *Rio Grande Valley Sugar Growers, Inc. v. Campesi*, 592 S.W.2d 340, 342 n. 2 (Tex. 1979) ("In order to enforce a liquidated damage clause, the court must find: (1) that the harm caused by the breach is incapable or difficult of estimation; and (2) that *the amount of liquidated damages* called for is a reasonable forecast of just compensation." (emphasis added)).

The statute's codification of common law demands choosing a definition that aligns with the historical requirements of a reasonable fee and of the challenging party to prove reasonableness, and the district court's chosen definition does not. By interpreting "estimate" as requiring the landlord to demonstrate a pre-charge estimation process, the district court ignored the common-law history. It focused on a process rather than the ultimate amount charged. It required a calculation of incalculable damages. *See infra* Part II.C. And it shifted the burden to the landlord without any statutory support.

B. The context of Section 92.019 confirms the purpose of the statute was to ensure the reasonableness of the fee charged, not of the process used to calculate the fee.

The statutory context reveals that Section 92.019 "represent[ed] a compromise between the interests of landlords and tenants." House Research Organization, Bill Analysis, Tex. H.B. 3101, 80th Leg., R.S. (2007). To that effect, the bill (1) set out specific protections, such as the limitation on unreasonable late fees and a right to receive a key upon lock out,[4] (2) provided methods for tenants to easily and affordably enforce the protections, and (3) required tenants to be informed of their rights and how to enforce those rights against abusive landlords. *Id.*

[4] *See* § 92.009 (permitting tenant to reenter premises after being locked out due to breach of lease).

With respect to the late-fee provision, the Legislature focused on limiting the amount of late fees charged. The House Research Organization explained that "[c]harging excessive or unreasonable fees would make a landlord liable to the tenant for [the statutory penalties.]" *Id.* An earlier draft capped late fees at seven percent of the unpaid rent, but the Legislature rejected that formulation and instead called for reasonable fees. House Comm. on Bus. & Indus., Bill Analysis, Tex. H.B. 3101, 80th Leg., R.S. (2007). The Legislature's debate thus centered around the fee amount, and thus, as in *Caille*, the judicial analysis should likewise center on the reasonableness of the final amount. *See Caille*, 734 S.W.2d at 668–69.

In a public hearing before the House Committee on Business and Industry, a witness testifying on behalf of the Texas Low Income Housing Service — notably representing tenants' interests, not landlord's interests — testified that she did not anticipate any TAA members having problems with the provision because TAA has defined a limit in their own lease that they have determined is reasonable. *Public Hearing on H.B. 3101 Before the H. Comm. on Bus. & Indus.*, 80th Leg., R.S. (April 4, 2007) (testimony of Julie Balovich on behalf of Tex. Low Income Housing Info. Serv.) http://tlchouse.granicus.com/MediaPlayer.php?view_id=24&clip_id= 2430). The concern was not about late fees of an amount prevalent in the market, but rather

about "really excessive, penal amounts" that a reasonable judge would know were unreasonable when presented with the sum. *Id.* [5]

C. The statute's construction must not eviscerate the multiple safeguards ensuring that a reasonable fee need only approximate inherently imprecise damages.

The Legislature was intent on protecting landlords' rights to timely rent payment without incurring liability for charging reasonable late fees. The text of the statute reveals a determined effort to acknowledge the impossibility of calculating damages resulting from late rent payments and must be read to accommodate that difficulty. It acknowledges the impossibility at least three times. *First*, the fee must be an "estimate," which indicates an approximation or rough judgment. *Second*, the fee represents damages that are inherently "uncertain." *Third*, the damages are acknowledged to be "incapable of precise calculation." This verbiage reflects the common-law background of the provision.

As the Texas Supreme Court recognized, damages resulting from late payments are, in fact, difficult or impossible to determine. *Peake*, 178 S.W.3d at 766–67. If a party is forced to undertake such a calculation, rather than make a "judgment" or "approximation," it would be forced to expend funds and resources

[5] The witness's testimony was reminiscent of Justice Stewart's famous description of obscene materials: "I know it when I see it." *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). Here, unreasonable late fees similarly can be clearly identified. Take, for example, the abusive $150 per month for each remaining month penalty from Stewart. *See* 245 S.W.2d at 485. Following this testimony, the bill passed unanimously out of committee. House Research Organization, Bill Analysis, Tex. H.B. 3101, 80th Leg., R.S. (2007).

to undertake a comprehensive study to determine how to calculate the estimate. That requires ascertaining which factors should be included: How does the landlord account for time spent calling a tenant about the late payment, and how might the landlord divide its overhead between rent collection and other unrelated functions? Ultimately, the cost of the study itself could "result from the late payment of rent." *See* § 92.019. And as soon as this process is challenged — as it surely would be, though the district court declined to reach the question — the battle of the experts would begin. *See id.* (citing cases demonstrating excessive litigation costs resulting from challenging attempted calculations of incalculable fees).

Rather than imposing an impossible burden on landlords that would lead to contentious, costly litigation, the statute *only* penalizes landlords that charge excessive fees so unreasonable that a judge would recognize them on sight. The repeated affirmations that damages are uncertain, impossible to predict, and subject to a rough approximation provide landlords with flexibility to charge a late fee so long as it is within a reasonable range, and the statute imposes high penalties for landlords falling beyond that range. The statute should not be read to require calculation of something the Legislature went out of its way to say is incalculable, particularly when other reasonable constructions exist.

In sum, the statute grants discretion to landlords in setting fees and to courts in judging fees. It penalizes abusive landlords but does not demand a high standard

for conscientious landlords, particularly those charging reasonable fees calibrated to the market.

D. The statute's interpretation must be consistent with Chapter 92's comprehensive scheme of authorizing private litigants to bring individual suits for civil penalties and their attorneys' fees.

Section 92.019 must also fit within the broader statutory scheme that protects tenants by notifying them of their rights and encouraging private litigants to resolve individual disputes. Chapter 92, especially after the amendments passed in House Bill 3101, balances fair business practices with the need to protect vulnerable tenants from unscrupulous landlords.

Through its comprehensive scheme, the Chapter creates at least 29 individual causes of action that tenants may bring against abusive landlords. (*See* App. Tab A). Each provision awards the tenant with attorneys' fees and costs, enabling tenants to adequately prosecute relatively minor suits on an individual basis.[6]

Moreover, whenever a protected right is critical or a tenant is unlikely to seek out information about that right, the Chapter requires landlords to give tenants notice about the right. For example, a lease must contain an underlined or bold notice about

[6] *See, e.g.*, § 92.015(c) (landlord who wrongfully prohibits tenant from for calling emergency in response to family violence liable for attorney's fees, penalty of one-month rent, actual damages, court costs, attorneys' fees, and injunctive relief); § 92.055(e) (landlord who closes rental unit and violates re-occupancy and move-out rules is liable to tenant for attorney's fees and penalty of one-month rent plus $100); § 92.354 (landlord who in bad faith fails to return application fee or deposit is liable for fees, $100 penalty, and treble damages); *see also* App. Tab A.

the tenant's rights and remedies pursuant to Sections 92.056 and 92.0561, which relate to the landlord's responsibility to repair the leased property.

After enactment of House Bill 3101, Chapter 92 fully sets out the Legislature's intent to protect tenants through specific prohibitions of common abusive tactics and numerous causes of action that individual tenants can easily assert to recover penalties and all costs associated with litigating. The district court unintentionally but effectively defeated this comprehensive self-help scheme by creating a threshold pre-charge procedure to enable class actions.

E. The court must not penalize landlords more than strictly compelled by the statute's text and intent.

If the court has any doubts about the district court's construction, it must resolve those doubts in a way that imposes no harsher a penalty than absolutely required by the statute's text and context. The Texas Supreme Court strictly construes penal statutes to avoid penalizing a party unless the penalty is required by clear and unambiguous language. *City of Houston v. Jackson*, 192 S.W.3d 764, 770 (Tex. 2006); *see also Steves Sash & Door Co., Inc. v. Ceco Corp.*, 751 S.W.2d 473, 476 (Tex. 1988) (strictly construing penal usury statute).

The rule is grounded in fair notice, and thus requires that "when a [penal] statute is susceptible of either an expansive or a restricted meaning," the court must choose the meaning that restricts liability in order that the penalized party "may with reasonable certainty ascertain what the statute requires to be done, and when it must

be done." *Cain v. State*, 882 S.W.2d 515, 519 (Tex. App.—Austin 1994, no pet.) (quoting *Mo., K. & T. Ry. v. State*, 100 S.W. 766, 767 (Tex. 1907)).

Section 92.019 penalizes landlords who charge unreasonable fees. As such, it must be strictly construed, resolving doubts in favor of the landlord to avoid penalties for failing to comply with requirements not clearly compelled by the text. Faced with varied definitions of the term "estimate," courts must determine if a definition could cause the statute to be applied to landlords that would not have known their late fees violate Section 92.019. The court must choose a more restrictive definition (such as an approximate judgment of the value, number, quantity, or extent of something) that does not require unforeseen processes neither set forth by the text nor intended by the Legislature.

III. The district court thus reached a conclusion the Texas Supreme Court would never have reached.

In sum, the district court did not conduct the required analysis under Texas law. Specifically, the court:

- did not analyze the competing common meanings of the undefined statutory term "estimate," only considered a single definition to require focus on the actions preceding an estimate rather than the estimate itself, and never reached the truly operative term "reasonable;"
- entirely ignored the Legislature's purpose to limit unreasonable late fees in enacting the statute;

- permitted class actions based on a made-up threshold question to resolve suits which the Legislature ensured could be resolved in individual suits; and
- penalized landlords charging reasonable fees, resulting in landlords having no fair notice that they could be penalized for failing to engage in an admittedly impossible process.

The result of these errors is to impose strict liability on every late fee that was not the subject of demonstrable pre-charge calculations and evaluations, even if the fee is reasonable. It distorts the Legislature's intent by penalizing conscientious landlords for failing to engage in a process that landlords could not fairly and reasonably have known they were expected to engage in. It thus obliterates the Legislature's intent in a way that Texas courts, which apply each of the principles of statutory construction outlined above, would never have done.

IV. Bad public policy is the inevitable result of failing to construe the statute to achieve its purpose.

The plain meaning of the statute furthers the goals of the Legislature, as described above. On the other hand, the district court's analysis offers poor policy results. Lease-breaching tenants will penalize conscientious landlords, and plaintiffs' attorneys will recover the penalties intended for abused tenants. Landlords complying with federally mandated lease forms in public-housing programs will be subject to penalty. And, rather than utilizing reasonable late-fee schemes to

encourage timely rent payments, landlords may be forced to turn to evictions when tenants do not follow lease terms.

A. Class actions that impose strict liability for non-compliance with a process never envisioned by the Legislature harm landlords who charge reasonable late fees and rewards tenants who pay rent late.

In the end, no one is served by holding landlords liable for charging late fees because they failed to undertake a process that was not intended by the Legislature. This result punishes conscientious landlords with harsh penalties for common, reasonable, and legal behavior. It rewards tenants who breached their lease by paying rent late and who were not subject to abusive tactics by landlords. Rewarding tenants for paying rent late without any justification is unfair to landlords and to tenants who pay rent when due by causing rent increases to cover higher costs. And class actions rarely reward class members: benefits generally only inure to plaintiffs' attorneys and named plaintiffs. MAYER BROWN LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 2–3 (2013), https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.

B. Class actions that impose strict liability for non-compliance with a process never envisioned by the Legislature harm tenants subject to reasonable late fees.

Appellants illustrate the absurdity of the plaintiffs' and district court's position with an example of a $5 late fee not supported with evidence of a pre-charge

calculative process. *See Appellants' Opening B.* 30. Indeed, considering Department of Housing and Urban Development ("HUD") leases demonstrates the problem with their position. A portion of government-subsidized, public-assistance housing is through a project-based program, which requires participating landlords to use a form lease promulgated by HUD. *See* U.S. DEP'T OF HOUSING & URBAN DEV., *HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs* (Nov. 2013), at 6-5–6-6, https://www.hud.gov/sites/documents/43503C6HSGH.PDF. Landlords must use proscribed lease (the "HUD lease"). *Id.* at 6-5, app. 4-A.

The HUD lease sets a late-fee scheme with a five-day grace period, a $5 initial late fee on the sixth day of unpaid rent, and an additional $1 per day for each additional day. *Id.* at app. 4-A p.2. These amounts are consistent across the country, regardless of the rental size, the rental collection processes or systems, amount of rent, or any other fact that could impact the amount of money damages to a landlord for late payment of rent.

Nobody would seriously contend that a $5 late fee is unreasonable, excessive, or abusive. Yet under the district court's interpretation, any landlord charging HUD-mandated late fees is in violation of Section 92.019 simply because the landlord did not undertake a process to "calculate or evaluate" the amount of damages suffered

when the tenant has paid rent late. This outcome cannot be what the Legislature intended, and it is not compelled by the words the Legislature wrote.

C. No one will benefit if class actions cause landlords to replace late fees with evictions.

Rather than charging reasonable late fees, landlords may elect to evict tenants who fail to pay timely rent. *See* § 24.005 (authorizing landlord to evict non-paying tenant after three-day grace period). Consistent application of eviction rules will ensure landlords receive timely rent, but will harm everyone by leaving vulnerable tenants without housing and without the ability to secure new housing due to a combination of lack of funds and an eviction record and increasing costs to landlords due to higher rates of turnover.

The Legislature intended to promote fair business practices including permitting landlords to charge reasonable late fees for tenants who fail to timely pay rent. Late fees must be reasonable in light of damages to the landlord, but they also serve the important purpose of encouraging tenants to timely pay rent. If this mechanism is destroyed, as it likely will be if the district court's analysis stands, everyone the Legislature sought to protect will lose.

In the end, the district court's failure to fully understand the goal and the process required to properly construe Texas statutes resulted in a construction contrary to the rules described by the Texas Supreme Court in *Hughes*. The district court's failure to "construe the statute's words according to their plain and common

meaning, [and recognize that] contrary intention is apparent from the context, [results in] a construction [that] leads to absurd results." *Hughes*, 246 S.W.3d at 625–26. *Amici*, therefore, respectfully request this Court to reverse the order certifying the class.

V. Any lingering doubt regarding the proper construction of a statute never interpreted by any Texas court can easily be resolved by certifying the question to the Supreme Court of Texas.

The Court should decertify the class because Section 92.019 adequately protects tenants' ability to individually sue abusive landlords by ensuring that successful tenants will recover their attorneys' fees, treble damages, and a penalty. Nonetheless, if the Court concludes that a class action is an appropriate means to resolve Section 92.019 disputes, it should decertify the class in this case because the district court's analysis misconstrues the statute, which has never been interpreted by a Texas court. And if the Court remains uncertain about the meaning of the statute, it should certify the question of statutory construction to the Texas Supreme Court "[i]n the absence of a definite pronouncement from the Texas Supreme Court on an issue." *Austin v. Kroger Tex. L.P.*, 746 F.3d 191, 196 (5th Cir. 2014).

This question is critical because, as the district court recognized, many landlords rely on the same promulgated lease forms. If this question is later presented in state court and the state court constructs the statute differently, a split between federal and state courts will undermine principles of federalism by incentivizing

state claims to be brought in federal court. And because this class action involves many if not thousands of class members, it is important that this Texas law be interpreted exactly as a Texas court would interpret it. Otherwise, Appellants will be heavily penalized under an incorrect interpretation of the law.

The potential impact of a wrong *Erie* guess is self-evident. The issue can easily be framed, as demonstrated by the district court's framing of the question in its class certification analysis.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request the Court reverse the district court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of **BRIEF OF AMICI CURIAE TEXAS APARTMENT ASSOCIATION AND TEXAS ASSOCIATION OF REALTORS® IN SUPPORT OF APPELLANTS MID-AMERICA APARTMENTS, LP, ET AL.** was served on counsel of record by using the Court's CM/ECF system on the 9th day of January, 2019, addressed as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(g) and 32(g)(1), I certify this brief complies with the type-volume limitations set forth in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because this brief contains 6,056 words, exclusive of the corporate disclosure statement, table of contents, table of authorities, statement of interest, certificates of counsel, and other items exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type–style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in Microsoft Word in a proportionally spaced typeface using a plain, roman-style, 14-point font.

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/s/ Lori Levy
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NO. 18-50851

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATHANAEL BROWN, for himself and all others similarly situated,

Plaintiff-Appellee,

v.

MID-AMERICA APARTMENT COMMUNITIES, INCORPORATED, as general partner of Mid-America Apartments, LP; MID-AMERICA APARTMENTS, L.P., as successor in merger to Post Apartment Homes, LP doing business as Post Worthington doing business as Post South Lamar doing business as Post Eastside doing business as Post Park Mesa doing business as Post Gallery doing business as Post West Austin doing business as Post Sierra at Frisco Bridges doing business as Post Katy Trail doing business as Post Abbey doing business as Post Addison Circle doing business as Post Cole's Corner doing business as Post Barton Creek doing business as Post Heights doing business as Post Legacy doing business as Post Meridian doing business as Post Midtown Square doing business as Post Square doing business as Post Uptown Village doing business as Post Vineyard doing business as Post Vintage doing business as Post Washington,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
Civil Action No. 1:17-cv-307
The Honorable Robert Pitman

APPENDIX TO BRIEF OF AMICI CURIAE TEXAS APARTMENT ASSOCIATION AND TEXAS ASSOCIATION OF REALTORS® IN SUPPORT OF APPELLANTS MID-AMERICA APARTMENTS, LP, ET AL.

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Respectfully submitted,

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TAB A

Chapter 92: Individual Causes of Action

Landlord Violation		Authority	Miscellaneous
1.	Application fee or deposit—bad-faith failure to return.	§ 92.354	Landlord is liable for fees, $100, and three times amount wrongfully retained.
2.	Disclosure of information about ownership and management—incorrect information.	§ 92.205(a)(2)-(4); § 92.202	Tenant may recover fees, actual costs, one month's rent plus $100, and court costs.
3.	Disclosure of ownership and management — suit under ch. 92, subch. E	§ 92.005	Prevailing party may recover fees and court costs. No fees in suit for disclosure if suit relates to property damage, personal injury, or criminal acts.
4.	Closure of rental unit and violation of reoccupancy and move-out rules.	§ 92.055(e)	Landlord is liable to tenant for fees and one month's rent plus $100.

Landlord Violation		Authority	Miscellaneous
5.	Failure to install or rekey security devices.	§ 92.164(a)(3), (4)	Tenant who files suit without serving request for compliance may obtain judgment for fees, as well as court costs and actual damages. Tenant who files suit after serving request for compliance may obtain judgment for fees, actual damages, punitive damages, civil penalty of one month's rent plus $500, and court costs. Fees are not recoverable in suits for property damage, personal injury, or wrongful death. Even if request has not been served, court can order landlord to comply if tenant still occupies dwelling.
6.	Occupancy limits.	§ 92.010(c)	Prevailing party in suit to enjoin landlord may recover fees and court costs. In addition, prevailing plaintiff may recover $500 for each violation.
7.	Prohibition from summoning police or emergency assistance in response to family violence.	§ 92.015(c)	Tenant is entitled to recover fees, civil penalty of one month's rent, actual damages, court costs, and injunctive relief.
8.	Refusal to rekey, change, add, repair, or replace security device.	§ 92.165 (3) (B)-(F)	Tenant may obtain judgment for fees, as well as actual damages, punitive damages, civil penalty of one month's rent plus $500, and court costs. Fees are not recoverable in suits for property damage, personal injury, or wrongful death.

Landlord Violation		Authority	Miscellaneous
9.	Removal of door, window, or landlord-supplied furniture, fixtures, or appliances.	§ 92.0081(h)(2)	Tenant may recover fees, as well as actual damages, court costs, and either civil penalty of one month's rent plus $1,000 (residential). Any delinquent rents or other sums owed by tenant will be deducted.
10.	Landlord violation— tenant's right to make cash rental payments.	§ 92.011(c)	Prevailing party in suit to enjoin may recover fees and court costs. In addition, prevailing tenant may recover greater of one month's rent or $500 for each violation.
11.	Landlord violation — tenant's right to vacate after certain decisions related to military service.	§ 92.017(h)	Landlord is liable for fees, actual damages, and civil penalty of one month's rent plus $500.
12.	Landlord violation — tenant's right to vacate after certain sex offenses or stalking.	§ 92.0161(f)	Landlord is liable for fees, actual damages, and civil penalty of one month's rent plus $500.
13.	Tenant's right to vacate after family violence.	§ 92.016(e)	Landlord is liable for fees, actual damages, and civil penalty of one month's rent plus $500.

Cause of		Authority	Miscellaneous
14.	Unlawful exclusion of tenant.	§ 92.0081(h)(2)	Tenant may recover fees, as well as actual damages, court costs, and either civil penalty of one month's rent plus $1,000 (residential) Any delinquent rents or other sums owed by tenant will be deducted.
15.	Repairs—affidavit for delay submitted in bad faith or landlord fails to continue diligent efforts to repair.	§ 92.0562(f)	Landlord is liable for fees (excluding fees for cause of action relating to personal injury), civil penalty of one month's rent plus $1,000, actual damages, and court costs.
16.	Repairs—landlord breach of duty to repair.	§ 92.0563(a)	Landlord is liable for fees (excluding fees for cause of action relating to personal injury), civil penalty of one month's rent plus $500, actual damages, and court costs.
17.	Repairs—landlord contracts with tenant to waive duty to repair.	§ 92.0563(b)	Landlord is liable for fees, civil penalty of one month's rent plus $2,000, and actual damages.
18.	Repairs—new landlord violates duty to repair.	§ 92.0562(g)(5).	New landlord is liable for fees, civil penalty of one month's rent plus $2,000, and actual damages.

Landlord Violation		Authority	Miscellaneous
19.	Repairs—suit under PROP ch. 92, subch. B.	§ 92.005(a)	Prevailing party may recover fees and court costs.
20.	Repairs — withholding rent.	§ 92.058(c)	Prevailing party shall recover fees (in litigation); landlord may recover one month's rent and $500.
21.	Retaliation against tenant.	§ 92.333	Tenant may recover fees, civil penalty of one month's rent plus $500, actual damages, and court costs. Any delinquent rents or other sums owed by tenant will be deducted.
22.	Revocation of certificate of occupancy.	§ 92.023	Landlord is liable for tenant's security deposit, pro rata portion of rent paid in advance, tenant's actual damages, and costs and fees arising from any related cause of action against landlord.
23.	Security deposit — bad-faith failure to provide written description of damages.	§ 92.109(b)	Landlord is liable for fees and forfeits right to withhold any portion of deposit or sue tenant for damages to premises.
24.	Security deposit — bad-faith retention.	§ 92.109(a)	Landlord is liable for fees and $100 plus three times the portion of deposit wrongfully withheld.

Landlord Violation		Authority	Miscellaneous
25.	Smoke alarm—failure to install, inspect, or repair.	§ 92.260(5)	Tenant may recover fees in action for court order directing landlord to comply with request and may recover fees and civil penalty of one month's rent plus $100 if landlord does not comply with written request within seven days.
26.	Smoke alarm—suit under Prop ch. 92, subch. F.	§ 92.005	Prevailing party may recover fees and court costs, unless suit relates to property damage, personal injury, or criminal acts.
27.	Utilities — interruption due to landlord's nonpayment.	§ 92.301(b)(6), (7)	Tenant may recover fees, actual damages, and court costs. Fees are not recoverable in suits for personal injury.
28.	Utilities—landlord interrupts when paid by tenant or furnished as incident of tenancy.	§ 92.008(f)(2)F	Tenant may recover fees, actual damages, one month's rent plus $1,000 (residential) and court costs. Any delinquent rents or other sums owed by tenant will be deducted.
29.	Late Payment—landlord may not charge unreasonable late fees.	§ 92.019(c)	Tenant may recover $100, three times the amount of the late fees charged, and tenant's attorney's fees.