Risk Reduction Committee Meeting
2018 Texas REALTORS® Conference

Saturday, September 8, 2018
11:45 a.m. – 12:15 p.m.
Room 302 A - C
Henry B. Gonzalez Convention Center
San Antonio, Texas

Risk Reduction Committee Meeting
Saturday, September 8, 2018
11:45 a.m. – 12:15 p.m.
Room 302 A - C
Henry B. Gonzalez Convention Center
San Antonio, Texas

I.	Call to Order	Bob Baker, Chair
II.	Minutes	Bob Baker, Chair
III.	State & Federal Issues Update	Abby Lee, TAR Staff
	a. Legislative Outlook	Julia Parenteau, TAR Staff
	b. EU's General Data Protection Regulation (GDPR)	
	c. Federal Economic Growth, Regulatory Relief, and Consumer Protection Act ("Crapo Act")	
	d. PHH and Marketing Agreements	
	e. Antitrust/DOJ Workshop	
	f. ADA Website Compliance	
	g. Case Law	
IV.	TAR Update	Leigh York, Liaison
V.	TREC Update	Terri Covington, Vice Chair
	a. Advertising	
	b. Forms	
	c. Other Proposed Changes	
VI.	Unfinished Business	Bob Baker, Chair
VII.	New Business	Bob Baker, Chair
	a. Committee Terms	
VIII.	Adjourn	Bob Baker, 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	

On May 25, 2018, a sweeping new data privacy law goes into effect in the European Union ("EU"). The General Data Protection Regulation (GDPR) protects the personal data of EU residents and requires compliance by any entity that holds personal data of an EU resident. Additional guidance from the EU is forthcoming, and will likely provide clarity for entities, such as real estate brokerages and associations, with limited contacts with EU residents. There is also uncertainty regarding how EU regulators seeking to enforce the GDPR will obtain jurisdiction over U.S. entities. Additional guidance will be posted on nar.realtor when it is available.

GDPR's Impact on Real Estate:

The GDPR does not impact entities that do not have, and do not plan to collect, the personal data of EU residents. However, U.S.-based real estate companies and REALTOR® associations that currently have, or plan to collect, the personal data of EU residents may be subject to GDPR compliance.

Real estate companies and REALTOR® associations may collect personal data of EU residents in a variety of ways. For example, an entity's website may use online tracking tools, such as cookies, to collect data about an EU resident. An entity may maintain information about current and former clients and members that are EU residents. And, associations may have direct contact with current EU residents through a presence at trade shows, the sale of association products, or attendance at association educational sessions.

Personal Data Under to the GDPR:

The GDPR includes an extremely broad definition of the term "personal data", and includes any information related to an EU resident, frequently referred to by the GDPR as the "data subject", including any information that may lead to the identification of a data subject.

Consent is Required to Collect Personal Data:

The GDPR defines "consent" as a "freely given, specific, informed and unambiguous" indication that the individual provides, through an explicit statement or through a specific action, consent to the processing of the individual's personal data. In order for consent to be valid, the identity of the "data controller", the entity that determines what personal data is collected, and the intended purpose(s) for collecting the personal data must be made clear. In addition, the GDPR requires an EU resident to

provide affirmative consent prior to the collection of their personal data, which means that the required consent may not be obtained from a website's terms of use or other statements that presumes consent to the processing of their personal data. Keep in mind that an individual's consent may be withdrawn at any time.

The best way to obtain affirmative consent is to require a website user to affirmatively check a box consenting to the collection of their personal data. If the personal data is not collected via a website, then affirmative consent should be obtained at the point of collection, either electronically or in writing.

Rights of Data Subjects:

The GDPR provides every data subject with the following specific set of rights:

1. Right of Access: An individual may request confirmation from a data controller that it processes the individual's personal data and, if so, require that the data controller provide the individual with access to their personal data, as well a list of specific uses of the individual's personal data.

2. Right of Rectification: An individual may request corrections to inaccurate personal data or a supplement to incomplete personal data.

3. Right of Erasure (also referred to as the "Right to be forgotten"): An individual may request that the data controller erase all of their personal data.

4. Restriction of Processing: An individual may request that the data controller only process personal data upon the individual's consent.

5. Right to Object to Processing: An individual may object to specific uses of their personal data.

6. Right to Data Portability: An individual may request a copy of all personal data held by a data controller.

Vendors Collecting and Processing Data:

Companies may use third-party vendors to collect data or process data on their behalf. For example, a third party operator of a brokerage website may collect data for the brokerage. In this instance, the third party website operator is considered a "data processor", and the brokerage is considered the "data controller". Pursuant to the GDPR, the data controller is responsible for the actions of the data processor. Therefore, it is important that data controllers address GDPR compliance in its contract with data processors.

Preparing for the GDPR:

Entities subject to GDPR compliance should consider taking the following steps:

1. **Conduct a Data Inventory.**

   Determine what personal data is in the entity's possession, and where the personal data is located. Personal data may reside in a number of places, including spreadsheets, databases, paper files, or with third parties acting on the entity's behalf. Once relevant data is identified, determine if there is a need to continue using the personal data and, if not, erase or remove the data from the entity's system.

2. **Establish Process for Obtaining Consent.**

   Establish a process to obtain an individual's affirmative consent to the continued processing of their personal data, as well as from individuals whose data may be collected and processed in the future. For example, an entity could use a direct communication to affected individuals or obtain the required consent through the entity's website. Creating a pop-up box whenever an individual first visits the website that requires the individual to affirmatively consent to the collection and processing of their data is an effective way to obtain affirmative consent.

3. **Establish Process for Responding to Requests.**

   Establish a process for how to receive and respond to a data subject exercising their rights articulated in the GDPR.

4. **Contact Data Processors and Amend Contracts.**

   Address GDPR compliance by data processors acting on an entity's behalf. Include specific language related to GDPR compliance to new contracts, and be sure to amend existing contracts to ensure the data processor's GDPR compliance. Be sure to include a requirement that the vendor provide the entity with notice of any data breach, as well as an outline of the data processor's plans for complying with applicable law related to such breach.

Conclusion:

The vast majority of real estate companies and REALTOR® associations may determine that they are not subject to GDPR compliance because they do not collect or maintain personal data of EU residents. For those real estate companies and REALTOR® associations that have personal data of EU residents, and are subject to the GDPR, be sure to take steps necessary to comply.

NATIONAL ASSOCIATION of REALTORS®

National Association of Realtors® Applauds Passage of Banking Reform Bill

Media Contact: Sara Wiskerchen 202-383-1013

Mortgage Financing

WASHINGTON (May 22, 2018) – The U.S. House passed bipartisan legislation today that the National Association of Realtors® believes will bring much-needed bank regulatory relief and consumer protections and is a step in the right direction for the industry.

S. 2155, the Economic Growth, Regulatory Relief, and Consumer Protection Act contains several favorable provisions for housing, including easing mortgage credit through reduced regulatory burdens on smaller community banks and credit unions. Ahead of today's vote, NAR sent a letter to the House of Representatives urging for their support.

NAR believes having mortgage credit available from small, local lenders is critical to a robust housing market and supports relief from overly burdensome compliance regulations for small, community banks and credit unions to ensure they can continue to offer safe, affordable mortgage credit.

"We commend members of Congress for passing this bipartisan legislation to level the lending playing field for community banks and credit unions," said NAR President Elizabeth Mendenhall, a sixth-generation Realtor® from Columbia, Missouri and CEO of

RE/MAX Boone Realty. “This bill provides appropriate consumer protections while going a long way toward removing undue regulatory burdens on small lenders, which will help keep them strong, so they can help keep communities strong.”

The legislation also requires Fannie Mae and Freddie Mac to evaluate and consider credit innovations, such as adopting alternative credit scoring models. Fannie and Freddie are the largest mortgage purchasers in the nation but rely on credit score models that do not take into account simple factors like whether borrowers have paid their rent or utility bills on time. NAR believes utilizing newer, more predictive and inclusive credit scoring models will responsibly expand access to mortgage credit and homeownership to first-time borrowers and those who lack access to traditional forms of credit because of ‘thin’ credit files.

S. 2155 also holds Property Assessed Clean Energy, or PACE, loans more accountable by giving the Bureau of Consumer Financial Protection the authority to regulate PACE lenders and require them to corroborate a homeowners’ ability to repay loans that are levied as tax assessments on their homes. While energy efficiency upgrades are positive home improvements, these loans are not required to conform to ability-to-repay standards or certain consumer home mortgage disclosures, and as a result, some borrowers may enter into contracts without fully understanding the impact on the future resale of their property.

The bill also clarifies which commercial acquisition, development or construction loans require banks to hold higher levels of capital. Additionally, it improves access to manufactured housing by excluding manufactured housing retailers and sellers from the definition of a loan originator as long as they don’t receive compensation for the loan application.

S. 2155 now heads to President Trump for his signature.

The National Association of Realtors® is America’s largest trade association, representing 1.3 million members involved in all aspects of the residential and commercial real estate industries.

NATIONAL ASSOCIATION *of* REALTORS®

REALTOR®

Court Reinstates Decision Supporting NAR Position on Marketing Service Agreements

January 31, 2018

Real Estate Settlement Procedures Act (RESPA), Legal, Marketing

The U.S. Court of Appeals for the D.C. Circuit has reinstated its prior holding that payments for bona fide services provided and made at fair market value do not violate the Real Estate Settlement Procedures Act (RESPA). This decision reinforces NAR's support of marketing service agreements.

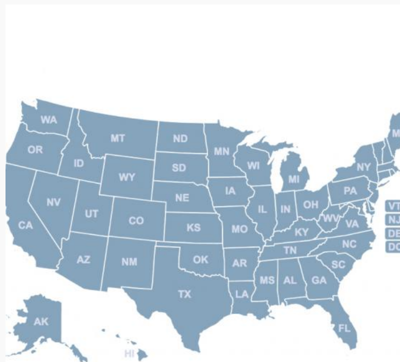
"The National Association of REALTORS® is pleased with the court's reinstatement of its previous decision affirming that payments to settlement service providers are permitted by RESPA so long as those payments are for goods and services actually furnished or performed and are made at fair market value," said NAR President Elizabeth Mendenhall. "We're hopeful this much-needed clarity will address any and all uncertainty moving forward for real estate professionals who have entered into marketing service agreements with settlement and other service providers."

The court's reinstatement of the previous decision reaffirms longstanding RESPA interpretations issued by the Department of Housing and Urban Development that had been challenged by the Consumer Financial Protection Bureau (CFPB) in the agency's

case against PHH, a mortgage lending and services company. NAR filed a “friend of the court brief” opposing CFPB’s interpretation, and the Court’s initial opinion upheld NAR’s position. Read NAR’s issue brief on the case, *PHH v. CFPB*.

The opinion of the en banc court—made up of all 13 judges in the D.C. circuit—was focused exclusively on the constitutional question regarding the structure of the Consumer Financial Protection Bureau. The judges ruled that the unilateral authority of the CFPB vested in a single person not subject to dismissal in the discretion of the President – the director of the CFPB – was not unconstitutional. The court upheld the provision in the 2010 Dodd-Frank law, which limited removal of the director only “for cause” as consistent with the President’s constitutional authority.

In affirming the constitutionality of the CFBP and reinstating the earlier court decision, the justices issued a variety of concurring and dissenting opinions. NAR will provide an analysis of the court’s opinion.



State-by-State International Business Reports

2018 Conference & Expo Registration is Now Open

The premier industry event for REALTORS® is taking place November 2-5 in

@nardotrealtor on Twitter

In its recently issued decision in *PHH v. CFPB*, the U.S. Court of Appeals for the D.C. Circuit supported the National Association of REALTORS® (NAR) position by offering much needed clarity on the legality of marketing service agreements, and rejecting recent unwarranted enforcement proceedings by the Consumer Financial Protection Bureau (CFPB) regarding such relationships.

Background: PHH, a mortgage lending and servicing company, challenged a $109 million penalty administratively imposed by the CFPB for violating Section 8 of the *Real Estate Settlement Procedures Act* (RESPA) by allegedly paying for referrals.

The CFPB claimed PHH violated RESPA based on payments by mortgage insurers to PHH's reinsurance subsidiary, Atrium, for reinsurance. The CFPB alleged that PHH referred substantially more business to mortgage insurers who purchased reinsurance from Atrium. The CFPB contended this arrangement violated Section 8 because those payments included "disguised referral fees" even if the payments were fair and reasonable market value for such reinsurance – a substantial departure from previous interpretations of Section 8 of RESPA.

Issues Before the Court: The court's opinion addresses three issues: (1) the constitutionality of the structure of the CFPB and the Director's authority; (2) the CFPB's interpretation of Section 8 of RESPA; and (3) the scope of the statute of limitations applicable to CFPB administrative enforcement actions.

Ruling: On October 11, 2016, the U.S. Court of Appeals for the D.C. Circuit held in favor of PHH, stating that payments for bona fide services provided and made at fair market value do not violate Section 8 of RESPA.

(1) The constitutionality of the structure of the CFPB and the Director's authority – The court held the unilateral authority of the CFPB vested in a single person – the Director of the CFPB – was unconstitutional because the Director could be dismissed only "for cause," and not at the discretion of the President. The court ordered a restructure of the agency to be accountable directly to the President by eliminating the requirement that the Director be terminated by the President only for cause.

***(2) The CFPB's interpretation of Section 8 of RESPA* –** The court held Section 8(c)(2) of RESPA is a safe harbor that industry has been relying on for decades, in accordance the plain meaning of the statutory text and longstanding interpretations issued by the Department of Housing and Urban Development (HUD). The court rejected the CFPB's arguments that payments for services might violate Section 8 even if made at fair market value, stating Section 8 was clear and HUD's prior interpretation was reasonable. As applied to this case, payments by mortgage insurers to PHH's captive reinsurer are permissible as long as the amount paid by the mortgage insurer for the reinsurance does not exceed the fair market value of the reinsurance.

In addition to holding that the CFPB's interpretation was unreasonable and inconsistent with prior HUD guidance, the court also found that the CFPB's retroactive application of its novel reading of the law violated PHH's due process rights. As a result, the court vacated the $109 million penalty imposed for the RESPA violations and remanded the case for further proceedings to determine whether the mortgage insurers paid more than fair market value to the reinsurer for the reinsurance.

(3) The scope of the CFPB's statute of limitation authority – The court held that the statute of limitations for actions under Section 8 of RESPA is three years, rejecting the CFPB's interpretation that no statute of limitations period applied to agency administrative enforcement actions. As such, the court ordered the CFPB to reexamine any potential RESPA violations within this three-year period.
Next Steps: The CFPB will almost certainly appeal the case, either *en banc* to the full D.C. Circuit or directly to the Supreme Court.

Impact for Real Estate Professionals' Marketing Service Agreements

As NAR has long contended, this decision confirms that real estate marketing service agreements (MSAs) are permissible under RESPA, and that real estate professionals may be confident in entering into such arrangements, as long as they comply with the statute that payment is made for goods and services actually furnished or performed and are made at fair ("reasonable") market value.

MSAs must be carefully constructed to comply with the law, otherwise all parties involved could face civil and criminal liability. The court made clear that these arrangements are permissible if the payments made are: (1) for services actually furnished or for services performed and (2) are bona fide compensation that does not exceed the value of such services. *If payments are more than the reasonable market value, it is likely that the excess amount above fair market value will be presumed not to be a bona fide payment but instead "disguised payment for a referral."*

NAR recommends implementing best practices for these agreements such as: memorializing the MSA in writing; insuring that bona fide services are provided; disclosing the relationship to the consumer; obtaining independent valuations of the marketing, advertising, or other services provided; and documenting marketing fees and determinations of fair market value.

While the CFPB will likely continue enforcement actions with respect to payments tied directly to referrals, its efforts to challenge payments for services provided as disguised referral fees will be stymied in the near future because of this case and pending appeals.

For more best practices, see NAR's RESPA Do's & Don'ts for MSAs.

Read the full opinion here.

NATIONAL ASSOCIATION of REALTORS®
REALTOR®

scyther5 / iStock / Getty Images Plus / Getty Images

Breaking Down the 2008 DOJ–NAR Settlement Agreement

Know what a VOW is — and what NAR and MLSs have done to facilitate competition — when talking about NAR's soon-to-expire 10-year agreement with the Department of Justice.

February 14, 2018

Being a Broker, MLS & Online Listings

By: Katie Johnson

There has been a lot of speculation recently about the 2008 settlement agreement between the Department of Justice and the National Association of REALTOR® and what will happen when that agreement expires in November 2018. Much of this speculation

misconstrues the settlement agreement, the practices it addresses, and what it accomplished. Here, I aim to break it down so that any future discussion about the fate of the settlement agreement, or the conduct of NAR and MLSs following expiration of the agreement, can be based on a correct understanding of that agreement.

The 2008 DOJ-NAR settlement agreement pertains specifically to NAR's MLS policy for brokers that operate virtual office websites, also called VOWs.

The scope of the 2008 settlement agreement is narrowly focused on a broker's operation of a virtual office website and the use of MLS listing data on such a site: Broker + VOW. Two critical components to any discussion invoking the 2008 settlement agreement.

A VOW is:

- a website operated by a broker;
- through which the broker is capable of providing real estate brokerage services;
- to consumers with whom the broker has first established a broker-consumer relationship, as defined by state law;
- where the consumer has the ability to search MLS data, subject to the broker's oversight, supervision, and accountability.

In 2003, NAR adopted a VOW policy that, among other things:

- Allowed brokers to opt out of having their listings displayed on the VOW sites of other brokers
- Prohibited VOWs from referring consumers to other real estate professionals for a fee
- Prohibited VOWs from displaying an advertisement for one broker on a page displaying the listing of another broker

The Department of Justice believed those three aspects of the VOW policy to be anticompetitive and initiated a two-year investigation that resulted in DOJ filing a lawsuit against NAR in 2005. The 2008 settlement agreement required NAR to replace the existing VOW policy with the Modified VOW Policy approved by the DOJ, and to take other actions described below. Significantly, the settlement agreement does not address or limit distribution of MLS or other property listing data to real estate portals, such as realtor.com or Zillow, or other third-party sites. It covers only the use of MLS listing data on VOW sites.

> ### In the News
>
> For another perspective on NAR's VOW policy and the impending expiration of our agreement with the Department of Justice, read this Feb. 11, 2018, article from the trade newspaper *Banker & Tradesman*.

The Modified VOW policy contains very detailed criteria and requirements for the relationship between the broker operating the VOW site and the consumer receiving the brokerage services on that site. The vast majority of internet sites that make property listing information available to consumers do not comply with those criteria and requirements, and therefore are not websites to which the Modified VOW policy and the 2008 settlement apply.

While we do not know how many VOWs are still operating today, we do know that NAR's MLS policies have evolved over the past decade to permit MLS participants to share a wealth of MLS data with consumers on their public websites, including information that was once only available via VOWs. For example, in 2014, NAR's MLS rules were amended to authorize use of any MLS content for valuation purposes when servicing clients and customers, including online displays of property valuations known as AVMs. In 2015, NAR's MLS rules were amended to require that non-confidential pending sale listing data be included in IDX data feeds and to eliminate any restrictions on participants' display of pending listings. Also in 2015, the NAR MLS Committee approved a policy requiring MLSs

to provide at least three years of sold data for display on participants' IDX sites, and that policy was expanded last year to require MLSs to provide all sold data available as of 2012.

Moreover, it's often overlooked that well before adoption of the VOW rules challenged by the DOJ, NAR adopted policies that facilitated the display of property listing data by brokers on public internet sites. That was achieved when NAR established the IDX policy in May 2001. DOJ has never voiced any concerns about the IDX policy, and undoubtedly recognizes the pro-competitive benefits that policy provides.

The 2008 DOJ-NAR settlement agreement prohibits all REALTOR® associations and association-owned MLSs from impeding a broker's ability to operate a VOW.

> *"NAR shall not adopt, maintain, or enforce any Rule, or enter into or enforce any agreement or practice, that directly or indirectly prohibits a Broker from using a VOW or prohibits, restricts, or impedes a Broker who uses a VOW from providing to Customers on its VOW all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery."*

This is the crux of the 2008 settlement agreement. Every other provision prohibiting or requiring certain conduct of NAR is geared toward achieving this objective that we refer to as "the parity rule." That is, MLSs must treat brokers providing real estate services via websites the same way they treat brokers providing real estate services via bricks-and-mortar businesses. Those other provisions of the settlement agreement include prohibiting NAR from adopting any rule or enforcing any practice that

- Unreasonably disadvantages or discriminates against a broker's use of a VOW
- Impedes referral of customers whose identities are obtained from a VOW by a broker who uses a VOW to other persons
- Imposes unreasonable fees or costs upon any broker who operates a VOW

The agreement requires NAR to

- Adopt the Modified VOW Policy and not change it without DOJ consent
- Deny insurance coverage to any REALTOR® association or association-owned MLS that refuses to act consistently with the Modified VOW Policy
- Report compliance with the Modified VOW Policy to DOJ on a quarterly basis

Apart from these requirements of the settlement agreement, it's clear that discrimination by an MLS among participants based on a participant's business model risks serious challenge under the antitrust laws. The expiration of the 2008 settlement agreement will have no impact in the extent to which MLSs make their services available to their participants. They will continue to do so uniformly, irrespective of the manner in which participants provide brokerage services to consumers.

The Participation Rule set forth in the 2008 settlement agreement permits MLSs to limit access to only those brokers engaged in real estate brokerage; that is, those actively endeavoring to list real property or to accept offers of cooperation and compensation made by listing brokers or agents in the MLS.

Another important aspect of the 2008 settlement agreement was DOJ's acknowledgement that the purpose of an MLS is to facilitate brokerage services, and it was therefore lawful and appropriate for an MLS to limit participation in the MLS to those actually engaged in brokerage activity. Mere possession of a broker's license was no longer sufficient to qualify for MLS participation. Rather, MLSs may require that

participants actively endeavor to list real property of the type listed on the MLS and/or to accept offers of cooperation and compensation made by listing brokers or agents. This added requirement essentially disqualifies any company or individual from joining the MLS if such person has no intention of cooperating with and compensating real estate brokers for their role in listing and selling real property.

The 2008 settlement agreement states that it is permissible for NAR to adopt the Participation Rule attached to the agreement. Such rule is not required and, therefore, amending it without DOJ approval would be permissible provided that the amendment does not violate any other provision of the 2008 settlement agreement.

NAR has no plans to alter the Modified VOW Policy when the 2008 settlement agreement expires on November 18, 2018.

Since we do not know how many VOWs are in operation today, we cannot know how many brokers are affected by the Modified VOW Policy. Therefore, there has been no real discussion that we are aware of about making any changes to the Modified VOW Policy when the settlement agreement expires. If NAR determines that some modifications to that policy are helpful and lawful, we may consider implementing them but would do so very judiciously and with careful consideration to avoid any potentially anticompetitive implications of such proposed changes.

Katie Johnson is the General Counsel and Senior Vice President of Member Experience for the National Association of REALTORS®.

@nardotrealtor on Twitter

NATIONAL ASSOCIATION of REALTORS®
REALTOR®

Elizabeth Mendenhall
2018 President

Bob Goldberg
Chief Executive Officer

ADVOCACY GROUP
William E. Malkasian
Chief Advocacy Officer/Senior Vice President

Jerry Giovaniello
Chief Lobbyist

500 New Jersey Ave., NW
Washington, DC 20001-2020
Ph. 202-383-1194
WWW.NAR.REALTOR

July 31, 2018

The Honorable Joseph J. Simons
Chairman
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580

Submitted via: https://ftcpublic.commentworks.com/ftc/realestateworkshop/

Re: Competition in Residential Real Estate Brokerage Workshop Project #747

Dear Chairman Simons:

The National Association of REALTORS® (NAR), whose 1.3 million members identify themselves as REALTORS®, represents a wide variety of real estate industry professionals. REALTORS® have been early adopters of technology and are industry innovators who understand that consumers today are seeking real estate information and services that are fast, convenient and comprehensive. Increasingly, technology innovations are driving the delivery of real estate services and the future of REALTORS'® businesses. NAR welcomes the opportunity to comment on the state of competition in the real estate brokerage industry.

NAR believes the Department of Justice (DOJ) and the Federal Trade Commission (FTC) should conclude that the residential real estate industry is robustly competitive with multiple business models offering consumers the prices and services to fit their needs.

I. Over the past decade, technology has positively enhanced the real estate consumer's experience

It is undisputed that technology has fundamentally changed the real estate brokerage industry over the last ten years. It allows for listing information to be distributed widely and to be freely accessible to consumers. A primary example of this is the explosion in the availability of property listing data to consumers. Today, property listing data is available to consumers on thousands of websites and mobile applications.

In order to demonstrate how REALTORS® enable a consumer friendly real estate environment, it is helpful to understand the data involved in creating, marketing and ultimately executing the transaction that is based upon a property listing.

Property listings are created each time a homeowner decides to sell their property. Real estate brokers and agents invest a considerable amount of time, money and energy obtaining a listing and creating a trusted relationship with their client. For example, agents target markets in neighborhoods, follow up on leads, advertise, and make listing presentations in order to secure a listing. All of this work is uncompensated until the property sells. These efforts expended by real estate brokers and agents to organize, build and distribute listing information form the backbone of the MLS.

What's more, real estate brokers and agents are liable for the use and content of the information contained in a listing under state and federal law.[1] They are liable to their clients to properly protect that data and ensure its accuracy as well as liable to third parties like

REALTOR® is a registered collective membership mark which may be used only by real estate professionals who are members of the NATIONAL ASSOCIATION OF REALTORS® and subscribe to its strict Code of Ethics.

[1] For example, state advertising laws and federal fair housing laws.

Multiple Listing Services (MLSs) and advertising platforms to whom they represent and warrant the accuracy of the data.

Once the listing is created by the agent and broker, in the majority of cases, it is transferred to the MLS. The MLS, through its rules and policies, organize and standardize the listing data to create an efficient marketplace for home buying and selling transactions.

From the MLS, listing data can be licensed and transferred at the direction of the broker to varying third parties including: consumer facing advertising platforms, appraisers and other broker websites (via Internet Data Exchange (IDX) and Virtual Office Website (VOW) feeds) with all of these data flows ultimately delivered to the consumer for their benefit. While consumers may not be aware of the role the MLS plays in delivering listing data to the sites they ultimately visit, it is the MLSs who provide the important mechanisms and create industry policies and standards to deliver timely, accurate and relevant information to consumers.

Despite recent calls for "freeing listing data"[2] economist Frederick Flyer concluded in a recent economic report that:

> "There is nothing exclusionary about preventing third-party data aggregators from using MLS data. Real estate websites such as Zillow and Trulia are in the business of vying for Internet 'eyeballs' and are not in the business of providing brokerage services hence limiting these sites' access to proprietary MLS data does not harm consumers of brokerage services nor does it limit their access to information. These sites are not even essential to consumers who use actual real estate brokerage services, since these data aggregation sites do not provide consumers of real estate brokerage services with any greater access to information."[3]

Real estate brokers and agents invest resources into obtaining property listings. They have rights and responsibilities to control the distribution of their listings. Appropriation of a commercial entity's data, work product, or intellectual property for exploitation by another commercial entity is not justified.

As Flyer concludes, policy demands for greater public access to proprietary MLS listing data are based on faulty expectations that unrestricted access to listing data will help consumers. Instead, "freeing" the listing data can alter important incentives to the creation of that listing data ultimately harming consumers. Simply put, effective policies must be cognizant and protective of real estate brokers' property rights.[4]

Real Estate Data Standards Promote Innovation

The Real Estate Standards Organization (RESO) is a non-profit 501c (6) membership based open source standards organization that maintains the standardized methods and formats for distributing and accessing real estate data including the RESO Data Dictionary, the RESO Web API, and the RESO RETS standards. These widely-adopted industry standards simplify access and encourage innovation to real estate data for new companies to engineer their solutions with the latest technological techniques for distribution of data. Over 750 companies actively participate today in the development and adoption of RESO open source standards.[5]

The real estate industry has worked hard over the past several years to simplify and speed up the process of gaining access to MLS data. MLS Policy outlined by the National Association of REALTORS®[6] now requires MLSs to provide timely approvals to applications for MLS data. In May 2017, NAR enacted the following policy: Requests for IDX

---

[2] Daniel Castro, Michael Steinberg, *Blocked: Why Some Companies Restrict Data Access to Reduce Competition and How Open APIs Can Help* Internet Technology Industry Foundation, November 6, 2017.
[3] Procompetitive Benefits of Policies Limiting Access to Local Multiple Listing Service Data, Frederick Flyer, Ph.D., April 5, 2018, available at: https://www.nar.realtor/procompetitive-benefits-of-policies-limiting-access-to-local-multiple-listing-service-data.
[4] *Id.*
[5] See, Real Estate Standards Organization https://www.reso.org.
[6] See, National Association of Realtors, MLS Policies: https://www.nar.realtor/about-nar/policies/mls-policy.

feeds/downloads must be acted on by the MLS within five (5) business days from receipt, barring extenuating circumstances related to an individual's qualification for MLS Participation, and review of the participant's and vendor's use of the IDX information consistent with the MLS rules, in which case an estimated time of approval or denial must be issued.

Today, due to the hard work of the Real Estate Standards Organization, there are over 3,000 fields and values available in a standardized format while also allowing access to additional localized fields in each individual MLS. These fields include everything from bedrooms and baths to home energy efficiency information to saved search-sharing options.

The efforts RESO has taken in standardizing the way real estate data is described and transported is making it much easier for new and established companies to innovate. RESO has published two cases that clearly outline the cost and time advantages standardized data delivers. MyTheo, a start-up organization proved that using RESO data saved them 40% of their development time. Homes.com, a well-established online platform recently published a case study that demonstrated that the industry could save $1 billion overall by fully deploying data standards.

There is no doubt that technology companies that provide services to agents and brokers have access to comprehensive, accurate and timely real estate data by simply applying to the MLS with authorization from the MLS participant that is requesting data access.

Technological Innovation Comes with Costs

While technology has enabled more efficient marketing of listing data, it has not necessarily driven down costs. Instead, costs have shifted or, in many cases, increased. For example, the home seller's agent costs of preparing a listing have increased via demands for high resolution photography and video. Additionally, advertising and promotional costs on third party advertising platforms continue to go up. Lead generation costs through programs like Zillow's "Premier Agent" have steadily increased, and reportedly tripled, over the past several years.

While advertising on online platforms has added a layer of cost for brokers and agents, that technology has not reduced the human cost of managing a real estate transaction. Agents and brokers are still critical to completing the real estate transaction. As such, these platforms act as a super-intermediator in the real estate market and not a disintermediator as certain technology has in other service industries, such as travel.

II. Despite technology's positive contribution, consumers still choose to hire real estate professionals.

In 2017, ninety-two percent of consumers used a real estate professional in their transactions. Specifically, eighty-seven percent of buyers recently purchased their home through a real estate agent or broker, and seven percent purchased directly from a builder or builder's agent leaving only 5% that did not work with a real estate professional. [7]

In response to critics of information restrictions who opine on why the Internet hasn't played a more significant role in the provision of real estate brokerage services, economist Frederik Flyer explains, "effective brokerage services still require substantial personal services for which there are no computer substitutes (currently)…so comparing this industry to others with far less human capital requirements [such as travel industry] leads to misleading inferences on the level of innovation occurring in brokerage services."[8]

Consumer facing home listings websites empower consumers by providing more choice when it comes to choosing a real estate professional to represent them. The fact that the overwhelming majority of consumers choose to work with a real estate agent demonstrates the value they bring to the transaction. It is critical to acknowledge that real estate agents do more than push buttons and unlock doors, among the many values a real estate agent provides is to act as a trusted

---

[7] 2017 *Profile of Homebuyers and Sellers,* National Association of REALTORS®.

[8] Procompetitive Benefits of Policies Limiting Access to Local Multiple Listing Service Data, Frederick Flyer, Ph.D., April 5, 2018, available at: https://www.nar.realtor/procompetitive-benefits-of-policies-limiting-access-to-local-multiple-listing-service-data.

advisor who helps the consumer emotionally manage the home buying process. Real estate brokers and agents reduce uncertainty for home buyers and sellers about market conditions given the infrequency with which most home buyers and sellers are in the market.

Robust competition exists among real estate brokers and agents on many variables. From For Sale By Owner (FSBO) to full service brokerage and myriad service and price options in between, consumers have numerous choices for real estate brokerage services and numerous fee options to choose from. In fact, the FTC-DOJ Workshop[9] featured panelists representing several competing brokerage models including discount, flat-fee, and full-service hybrid, and ibuyer brokerage models.

Competition among agents and brokers is robust. There are low barriers to entry, many competing business models and greater consumer choice in how to buy and sell real estate today. Consumers are indicating their preference and satisfaction with real estate brokerage services by continuing to engage real estate professionals to represent them in purchase and sale of their homes.

Commissions

Because consumers have a multitude of choices in service and fee models, they also have great choice regarding payment for real estate services. Importantly, sellers have the ability to discuss and negotiate with their broker what fee they are willing to pay for their broker's services and what fee they are willing to pay a cooperating broker for bringing a willing and able buyer to close the transaction.

Moreover, real estate agents do not get paid unless the transaction is successfully brought to a close. This contingent fee model is inherently pro-consumer. In many cases, agents expend a great deal of time, money and energy working for a consumer but will not be compensated for any of it unless they succeed in closing the transaction.

The customary model of having the seller's broker pay the buyer's broker creates efficiencies in the marketplace. Homebuyers may not be able to afford to pay out of pocket for real estate professional services. Allowing the cost to be financed within the transaction allows consumers, especially lower income consumers, the ability to hire professional representation in the home buying process.

The NAR 2017 Profile of Homebuyers and Sellers indicates that 48% of real estate agents initiated a discussion about commissions/fees with their clients, 20% of clients brought up the subject of commissions/fees with their agent, 10% of clients knew that the commission/fees were negotiable but did not discuss them with the agent and 15% of clients did not know that commissions/fees were negotiable.[10]

Moreover, the REAL Trends consumer research shows that a majority of consumers are aware that they can sell or purchase a home without using an agent, they are aware that there are alternatives to using a full service, full price agent and that they often try other methods to either sell or buy a home prior to the selection of an agent.[11]

From this, we can see that the majority of real estate consumers are aware of the multitude of market options available to them when buying or selling a home and that the majority engage in a conversation about commission/fees with their agents. Consumers benefit from disclosure of the commission structure as well as expanding choices in what type of fee/service model they wish to engage. Consumers indicate their preference and satisfaction with these services by continuing to engage real estate professionals to represent them in transactions.

III. The market for real estate brokerage services is robustly competitive with low barriers to entry.

With the full cooperation of NAR's 1500 local and state associations, the NAR-DOJ consent decree on Virtual Office Websites (VOWs) was implemented and has been carefully adhered to over the past ten years.

[9] *What's New in Residential Real Estate Brokerage Competition*, an FTC-DOJ Workshop, June 5, 2018.
[10] 2017 *Profile of Homebuyers and Sellers,* National Association of REALTORS®.
[11] *2016 Brokerage Compensation Report,* REAL Trends.

Regardless of the consent decree, MLSs have always facilitated an efficient marketplace where competing brokers work together in the best interest of buyers and sellers, including easy access to information on homes for sale in a particular market. NAR's Internet Data Exchange (IDX) rules have evolved over time to allow MLSs and MLS participants to facilitate indexing of listings by Google and others, display listings on social media sites, require implementation of the RESO data dictionary to facilitate standardization of data categories, and require use of RESO API to facilitate data sharing with third parties, among other innovations.

The expiration of the decree will have no impact on the extent to which MLSs make their services available to participants. They will continue to do so uniformly, irrespective of the manner in which participants provide brokerage services to consumers.

After a thorough examination of the comments submitted and discussion held at the June 5 workshop, NAR is confident the FTC and DOJ will conclude that the market for residential real estate is highly competitive. Multiple competing fee and service models exist in the market and consumers are aware of the growing number of options available to them. Ultimately, there is no need for continuing the consent decree.

IV. MLSs are critical to competition in the real estate marketplace

Courts, regulators, online advertisers, and the real estate industry all agree that local multiple listing services promote competition between real estate brokers, which ultimately benefits consumers. MLSs organize property listing information in a common database resulting in lower search costs, greater exposure of inventory to potential buyers, and easy market entry for new brokers to compete. MLSs also provide a means for communicating unilateral offers of compensation to other participants and they enforce rules and dispute resolution processes to ensure the orderly functioning of the real estate brokerage market.[12]

MLSs depend upon participating brokers to voluntarily agree to share their property listing information with and compensate other participating brokers for the sale of those listings. Participating brokers immediately gain access to the MLS, regardless of size of the brokerage firm, age of the business, or model by which they provide services or charge fees.

The availability and immediate access to listing information facilitates the growth of new brokerage entrants. In fact, a recent article in *Real Estate Economics* concluded: "the MLS found in practically every local real estate market acts to level the playing field because listings from small firms or new entrants receive equal exposure with those of large established firms"[13]

In his economic report, Frederick Flyer found that "the net harm to consumers from diminished broker reliance on the MLS can manifest in different ways as brokers attempt to preserve the value of their listings including: greater participation in private listing markets (pocket listings), delay in posting listings to the MLS and broker withdrawal."[14]

Policy demands for greater public access to brokers' proprietary listing data or MLS information are based on faulty expectations that unrestricted access helps consumers of real estate brokerage services. It is important to remember that incentives for participants also impact outcomes. Forcing brokers to provide unrestricted access to proprietary MLS information can alter important incentives for the creation of listing information that would ultimately harm consumers.

---

[12] See National Association of REALTORS®, *Handbook on Multiple Listing Policy*, available at: https://www.nar.realtor/handbook-on-multiple-listing-policy.

[13] See Scott, Yelowitz "Concentration and Market Structure in Local Real Estate Markets," *Real Estate Economics, 2012 V. 40 3: pp. 422-460.*

[14] Procompetitive Benefits of Policies Limiting Access to Local Multiple Listing Service Data, Frederick Flyer, Ph.D., April 5, 2018, available at: https://www.nar.realtor/procompetitive-benefits-of-policies-limiting-access-to-local-multiple-listing-service-data.

V. Non-broker advertising platforms have benefits and drawbacks.

Consumers have access to much more home listing information today than ten years ago and they can access that information on many more platforms. While large consumer advertising platforms create benefits for consumers, regulators should be mindful of their growing market power and the potential for consumer harm that it creates. Advertising platform dominance can create competition issues in the residential real estate market in the same way other large technology platforms create competition concerns and raise the specter of consumer harm.

As Steven Brobeck of the Consumer Federation of America noted during the FTC/DOJ Workshop on June 5th, certain features and products offered by the advertising platforms could cause consumer confusion and frustration and may bear additional investigation from regulators.

Zillow's premier agent advertising program wherein agents purchase from Zillow the exclusive right to advertise in a specified market on the Zillow platform leads to consumer confusion. Consumers searching for homes on Zillow see agent contact information next to a particular listing and are led to believe that agent is the listing agent. They click to seek more information on the listing and are then subject to marketing from an agent who is not the listing agent and has no additional information on the listing the consumer is interested in. As Redfin CEO, Glenn Kelman put it, "There is now a multibillion dollar industry based on fundamental misdirection."[15] In fact, in his testimony during the June 5 FTC/DOJ workshop, Kelman described advertising platforms as "a tax we have to pay" and indicated that his agents pay $5,000 to $6,000 a month to portals."

Furthermore, in 2017 the Real Estate Board of New York asked New York regulators to investigate whether the Premier Agent program violates New York state advertising laws[16] citing the practice as a "maelstrom of consumer confusion."

Another advertising platform product, *Zestimates* creates consumer confusion over the value of properties either for determining listing price or for offers on properties for sale. According to Zillow CEO Spencer Rascoff, nationwide *Zestimates* have a median error rate of about 8%. However, according to nationally syndicated real estate reporter Ken Harney, localized median error rates far exceed the national median.[17] Consumers largely do not understand the wide margin of error in *Zestimates* and this can create conflicts when pricing a home for sale or for a buyer determining what price to offer.

While advertising platforms offer consumers an easy and entertaining home shopping experience, as the platforms add features and services they bear scrutiny over potential anti-consumer impacts. Antitrust regulators should be monitoring advertising platforms for market power and anticompetitive behavior.

In conclusion, NAR believes that the FTC/DOJ Workshop on June 5 showed that the residential real estate industry is robustly competitive with multiple business models offering consumers the prices and services to fit their needs.

Sincerely,

Katie Johnson
General Counsel and Chief Member Experience Officer
National Association of REALTORS®

---

[15] Kelman speaking at What's New in Residential Real Estate Brokerage an FTC-DOJ Workshop, June 5, 2018.

[16] *REBNY Asks State to Probe StreetEasy's Premier Agent feature,* The Real Deal, March 8, 2017.

[17] *Inaccurate Zillow 'Zestimates' a Source of Conflict Over Home*, Ken Harney, Los Angeles Times, February 8, 2015.

Affirmed and Opinion Filed May 23, 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

MEMORANDUM OPINION

Before Justices Francis, Evans, and Boatright
Opinion by Justice Francis

Samuel Adam Aflalo sued Devin Lamar Harris and Meghan Theresa Harris for breach of contract alleging they untimely terminated a sales agreement to purchase his residence. The Harrises counterclaimed for declaratory judgment and attorney's fees. After considering competing motions for summary judgment, the trial court ruled in the Harrises' favor and ordered Aflalo to refund the Harrises' earnest money and pay their attorney's fees. In two issues on appeal, Aflalo challenges the ruling. We affirm.

The Harrises entered into a standard One To Four Family Residential Contract (Resale) to purchase Aflalo's house for $1.45 million and put down $10,000 in earnest money. The contract was effective November 20, 2015, and the sale was scheduled to close on December 18. Under section 7B(2) of the contract, Aflalo had three days to provide a Seller's Disclosure Notice

regarding the property's condition as required by section 5.008 of the Texas Property Code. If he failed to provide the notice, the Harrises could "terminate the contract at any time prior to the closing" and have their earnest money refunded 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 November 20, Aflalo provided the Harrises a Seller's Disclosure Notice using a TAR-1406 form promulgated by the Texas Association of Realtors. At the top of the form, in bold writing, it stated: "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 comprising not more than one dwelling unit 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) (West Supp. 2017) (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(4) (West Supp. 2017). 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 about special flood hazard areas. Below is a copy of the relevant portion of the TAR-1406 completed by Aflalo:

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 MTH, DLH and Seller: ______, ______ Page 2 of 5

Aflalo answered "yes" that the property was located in a floodway and had present flood insurance. 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 TAR-1414 as directed by the form.

On November 24, one day after Aflalo's disclosure notice was due under the contract, 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). 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. Aflalo alleged he timely

provided the Harrises with the seller's disclosure notice, giving the Harrises until November 27 to back out of the contract. Instead, he said, they waited until December 17.

The Harrises filed an amended answer generally denying the allegations and raising several affirmative defenses. They also brought a counterclaim for declaratory judgment, asserting Aflalo failed to provide the disclosure notice by not providing the TAR-1414 form, and sought attorney's fees under the contract.

The parties filed competing motions for summary judgment on Aflalo's breach of contract claim. In addition, Aflalo filed a no evidence motion on the Harrises' affirmative defenses. The court denied Aflalo's motions, granted the Harrises' motion, ordered that Aflalo take nothing on his claim, ordered Aflalo to take the steps necessary to refund the Harrises' earnest money, and held the question of attorney's fees for a subsequent evidentiary hearing. The Harrises then nonsuited their affirmative claims against Aflalo. Following a bench trial, the trial court awarded the Harrises $140,000 in attorney's fees through trial, contingent appellate fees, and costs of court. After the trial court denied Aflalo's motion to modify the judgment, Aflalo appealed.

We review a grant of summary judgment de novo. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 331 S.W.3d 419, 422 (Tex. 2010). A party moving for traditional summary judgment has the burden to prove there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mannford Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

When both sides move for summary judgment, each party bears the burden of establishing it is entitled to judgment as a matter of law. *City of Garland v. Dallas Morning News,* 22 S.W.3d

351, 356 (Tex. 2000). When the trial court grants one motion and denies the other, we review the summary judgment evidence presented by both parties and determine all questions presented. *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013). In such a situation, we render the judgment the trial court should have rendered. *Fielding*, 289 S.W.3d at 848.

A successful breach of contract claim requires proof of the following elements: (1) a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendants; and (4) damages sustained by the plaintiff as a result of that breach. *See Petras v. Criswell*, 248 S.W.3d 471, 477 (Tex. App.—Dallas 2008, no pet.).

In their motion for summary judgment, the Harrises asserted the evidence showed as a matter of law that (1) Aflalo failed to perform because he did not provide a TAR-1414 form and (2) they did not breach the contract. In his first issue, Aflalo contends the trial court erred by granting the Harrises' motion for summary judgment and denying his motion because the undisputed facts established he provided the required seller's disclosures, rendering the Harrises' termination untimely and a breach of the agreement. To decide this issue, we must resolve the question of whether Aflalo was required to provide a TAR-1414 form to perform under the contract.

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.*, 164 S.W.3d at 662. 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 Co.*, 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.

Aflalo contends 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, he was not required to provide one under the contract. He further contends the form provided in section 5.008 only required that 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, he relies on *Sherman v. Elkowitz*, 130 S.W.3d 316 (Tex. App.—Houston [14th] 2004, no pet.), for the proposition that the use of "varying forms should not alter the obligations of a party under the Property Code." Aflalo reads too much into the Houston court's opinion.

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 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 the statute, 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 TAR form. Nothing in the case suggests that varying forms can never broaden the disclosure obligations of sellers. If anything, the case supports the proposition that such forms cannot reduce the seller's disclosure obligations set out in the statute.

Here, to meet his contractual obligation, Aflalo used a TAR-1406 form that required him to provide additional information, a TAR-1414 form, if he stated he had present flood insurance coverage. By using a TAR-1406 form to satisfy his notice requirement, Aflalo expanded rather than reduced the disclosure he was required to provide. When he disclosed he had present flood insurance coverage, the form required him to provide the Harrises with a TAR-1414 form. 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. We overrule the first issue. Our resolution of this issue makes it unnecessary to address the second issue.

We affirm the trial court's judgment.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

Evans, J. dissenting

161472F.P05

Dissent; Opinion Filed May 23, 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 Justices Francis, Evans, and Boatright
Dissenting Opinion by Justice Evans

Samuel Adam Aflalo contracted to sell his home to Devin Lamar Harris and Meghan Theresa Harris. Before the purchase closed, a dispute erupted at the center of which is paragraph 7.B of the contract which 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 they checked off paragraph (2) which stated:

> ✓ *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.

(Emphasis added). This is the only provision of the contract the parties argued pertains to the resolution of their dispute—whether the contract required Aflalo to make only the disclosures required by section 5.008 of the property code, or whether he was also required to make the disclosures called for on Texas Association of Realtors' (TAR) form TAR-1414.[1] According to the trial court's judgment and the majority opinion, the contract required Aflalo to include disclosures on form TAR-1414; the undisputed summary judgment evidence is that he did not do so, therefore he breached the parties' agreement. I conclude the text of the contract and section 5.008 required Aflalo to disclose only the information required in section 5.008 of the property code and not the information on form TAR-1414. Because the summary judgment evidence is that Aflalo made all the disclosures required by section 5.008 of the property code, I conclude Aflalo did not breach the contract. Accordingly, I would reverse the judgment of the trial court in favor of the Harrises and remand the case for further proceedings.

I. Background

The parties agree the following facts pertinent to the core issue are undisputed. Within the contractually allotted time for Aflalo to make the disclosures required by the contract, Aflalo delivered to the Harrises a disclosure notice using form TAR-1406. The day after the contractual deadline for Aflalo to deliver a disclosure notice, the Harrises requested Aflalo to complete and deliver form TAR-1414 because it was referred to in form TAR-1406 that Aflalo had used to make his disclosures. Aflalo did not do so. The Harrises did not terminate the contract within the

[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

(Emphasis added). No party argued in the trial court or their appellate briefs about the legal significance of the merger clause, so I do not consider its legal significance in my decision. I only point out there was a specific place in the form contract to reference other documents that were part of the parties' bargain and form TAR-1414 was not listed.

contractually allotted time, if calculated from the disclosure notice Aflalo delivered. The day before the scheduled closing, 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 form TAR-1414 within the contractually allotted time, which was a condition precedent that excused their failure to close and entitled them to return of the money in escrow. Both parties moved for summary judgment, and the trial court granted summary judgment for the Harrises that Aflalo breached and the Harrises were entitled to return of the money in escrow. A trial on attorney's fees was held, judgment 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 have to construe the parties' unambiguous contract and interpret 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,[2] "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*, No. 16-0336, 2018 WL 1440148, at *1 (Tex. Mar. 23, 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 Tex. Constr.*, 327 S.W.3d at 126, and interpret

[2] 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).

contract language according to its "plain, ordinary, and generally accepted meaning" unless the instrument directs otherwise. *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 Examiners of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 34–35 (Tex. 2017).

B. Harrises' Motion for Partial Summary Judgment

In his brief, Aflalo argues form 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 and omitted form TAR-1414. *See supra* n.1. Aflalo further argues form 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 make the disclosures using the form TAR-1414 or that disclosure must be made regarding the substance of what form TAR-1414 requires. *See infra* n.5.

Aflalo points out that the relevant part of section 5.008 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) (West Supp. 2017) (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 he checked 'no' to "Located in 100-Year Floodplain," he checked 'yes' to "Located in Floodway," and he checked 'yes' to "Present Flood Ins. Coverage." Then he explained on the four blank lines provided on form TAR-1406, "I have flood insurance. My lender told me that it was recently added to a flood area."[3] So *in addition to the minimum disclosures required by section 5.008*, Aflalo disclosed the property was in a floodway (presumably a flood plain that flooded less frequently than 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." He appears to be correct.

Aflalo argues the only mention of form TAR-1414 is in the disclosure notice form he chose to use and that it is not part of the contract. On form TAR-1406 underneath the words, "Present Flood Ins. Coverage," was the statement, "(If yes, attach TAR-1414)." As mentioned above, Aflalo had checked 'yes' and made his explanation, but he did not attach form TAR-1414. Further, Aflalo argues section 7.B(2) specifically addresses the fact that the Harrises had not received Aflalo's disclosure notice at the time the contract was executed, so it was not a document or shared

[3] Aflalo also checked 'yes' that he had roof repairs, so his explanation also stated, "I made roof repairs several monts [sic] ago."

information between the parties at the time of the contract so it was not a part of the contract when the parties signed the contract. Indeed, 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, form 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."[4]

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***)." (The Harrises' emphasis with bold italics). 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 an 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

[4] The Harrises' arguments at times border on arguing for modification. But 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 form TAR-1414 resulted in modification of the contract. The formation of contract requirement—*see supra* n.2—of consideration is required for an alleged modification 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 form TAR-1414 as a modification of the real estate contract between the parties.

form he chose." (Emphasis added). Their argument, however, admits form TAR-1414 was an additional obligation to Aflalo's contractual disclosure obligation. In other words, the issue before the trial court was whether Aflalo failed to comply with the contract, not whether he failed to comply with the additional disclosure form TAR-1406 directed Aflalo to make in form TAR-1414. The cause of action is breach of contract, not breach of form.

Next, the Harrises make a contract formation argument that form 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 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 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; *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 form 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 on form TAR-1414; that is, that Aflalo's failure to complete and deliver form TAR-1414 violated section 5.008 of the property code. 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." TEX. PROP. CODE ANN. § 5.008(a) (West Supp. 2017). 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 form TAR-1414 as a requirement of the 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, 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 Tex. State Bd. of Examiners of Marriage & Family Therapists*, 511 S.W.3d at 34–35; *Melden & Hunt, Inc.*, 520 S.W.3d at 893; *Coleman*, 512 S.W.3d at 899. The imperative mood of the verb "attach" is used in both the statute and the form indicating a command. But the text of the statute conditions that command 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 an owner's disclosure explanation required fewer than three full lines. Finally, if the condition is met because 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 owner 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 form 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 form 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 should be rejected. There is not a substantial similarity between section 5.008 and form TAR-1406 to the extent form TAR-1406 *requires* attachment of form TAR-1414; the statute does not.

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 critically important information took Aflalo only two and one-half lines (he 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 form TAR-1414 would have required Aflalo to disclose.[5] Merely because form TAR-1414 requires additional, important information be disclosed does not make Aflalo's disclosures insufficient to comply with the requirements of section 5.008. If the Legislature wanted to require disclosure of the information in form TAR-1414, it could have stated those requirements in the statutory form. Likewise, if the parties wanted to agree to require disclosure of whatever the realtors' association required, the parties could have agreed doing so was mandatory for performance of their contract. But the Harrises' post-contract, unilateral desire for the information in form TAR-1414 does not make it part of the contract or Aflalo's non-delivery of form TAR-1414 a breach of their contract. *See Burwell*, 189 S.W.3d at 740; *Gilbert Tex. Constr.*, 327 S.W.3d at 127; *Fiess*, 202 S.W.3d at 746; *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 form TAR-1414 are unavailing.

---

[5] The Harrises state in their brief the following information required by form TAR-1414 is what makes Aflalo's compliance with section 5.08 insufficient:

> (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.

And in addition, the following:

> (i) the insurance carrier; (ii) how long the property has been insured; (iii) if any insurance claims have been made on the insurance policy; and (iv) the level of insurance carried on the Property.

Having considered all of the parties' arguments,[6] I conclude that Aflalo established as a matter of law the contract did not require him to make the disclosures in form TAR-1414 or use form TAR-1414 to make his disclosures. 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.

C. 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, I would not reach the second part of Aflalo's first issue treating it as presenting nothing to review.

D. 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 award of $140,000 in attorney's fees plus appellate attorney's fees that resulted from the trial subsequent to the summary judgment. I agree. *See Probus Props. v. Kirby*,

---

[6] The Harrises' first section of their brief cites only to their appendix to 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 form TAR-1414 became part of the parties' contract and Aflalo failed to make the form TAR-1414 disclosure, Aflalo sued his real estate agent for not making the formTAR-1414 disclosures. There are several problems with the Harrises' attempt to use Aflalo's new lawsuit. First, they treat the summary judgment record as though it is still open and they can supplement it. That is incorrect; it was closed at the time of the district court's ruling. Second, they treat the appellate record as though it, too, is open and they can supplement it with their appendix of material 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. Dakota), N.A.*, 345 S.W.3d 214 (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.

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. Because I would reverse the trial court's judgment and summary judgment in favor of the Harrises, I also would reverse the judgment awarding attorney's fees to the Harrises.

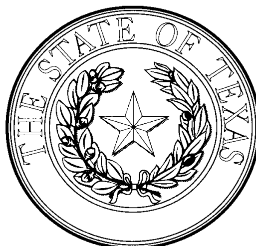
III. CONCLUSION

Because on this record there is no basis in the law of contract, tort, or any statute that obligated Alflalo to make the disclosures in form TAR-1414, I conclude the judgment and summary judgment in favor of the Harrises should be reversed and the case remanded for further proceedings consistent with this opinion. Because the majority concludes otherwise, I dissent.

161472DF.P05

/David Evans/
DAVID EVANS
JUSTICE

Opinion issued May 17, 2018



In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00607-CV

REGGIE LEE VAN DUREN AND SONYA VAN DUREN, Appellants

V.

ALOY CHIFE, GESARE CHIFE, STACY MATHEWS, AND STACY, INC. D/B/A PRUDENTIAL PREMIER PROPERTIES, Appellees

---

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Case No. 16-DVC-231156A

O P I N I O N

This case arises out of water penetration that damaged a residential home. Seeking to recover their losses associated with the water damage, the buyers of the home sued the sellers, as well as the sellers' real estate broker and his company. The sellers counterclaimed, seeking recovery on notes the buyers had signed to finance

the home purchase and for breach of corresponding deeds of trust. The trial court granted summary judgment to the sellers, the broker, and the real estate company on all of the claims brought against them by the buyers. It then severed the sellers' counterclaims against the buyers into a separate cause.

The buyers appeal, contending that the trial court erred in granting summary judgment because they adduced evidence in support of each of their claims.

Because the sellers' counterclaims remain pending, the summary judgment in their favor does not dispose of all the claims between them and the buyers. We therefore dismiss the buyers' appeal of the judgment disposing of their claims against the sellers for lack of jurisdiction. We affirm the trial court's summary judgment in favor of the real estate broker and his company.

BACKGROUND

In November 2013, Reggie Lee and Sonya Van Duren purchased a home from Aloy and Gesare Chife. The home is located at 410 Royal Lakes Manor Boulevard in Richmond, Texas. The purchase price was $1,250,000. The Chifes financed a large part of the Van Durens' purchase price. The Van Durens paid $60,000 at closing and agreed to pay another $140,000 within four months. They agreed to pay the remainder owed on the note to the Chifes in monthly installments of $5,636.63.

After living in the home for about two years, the Van Durens discovered water in the front entryway of the home. Further investigation revealed wet, rotting wood

throughout the structure of the house. Testing for mold was positive.

The Van Durens sued the Chifes for negligent misrepresentation, fraud by nondisclosure, statutory fraud in a real estate transaction, and violations of the Deceptive Trade Practices Act. The gravamen of the Van Durens' claims is that the Chifes knew that construction defects existed in the home but failed to disclose them to the Chifes, and that these defects caused the water intrusion and mold growth. The Chifes counterclaimed, alleging that the Van Durens had not made the $140,000 payment and stopped making the monthly installment payments in May 2016.

The Van Durens also sued the Chifes' real estate broker, Stacy Mathews, and his realty company, Stacy, Inc., which does business as Prudential Premier Properties. Against the broker defendants, the Van Durens asserted claims for negligence, negligent misrepresentation, fraud by nondisclosure, statutory fraud in a real estate transaction, and breach of fiduciary duty. As in their claims against the Chifes, the Van Durens alleged that Mathews knew about the construction defects that caused the water intrusion and concealed these defects. In addition, the Van Durens asserted claims for negligence, negligent misrepresentation, and breach of fiduciary duty against Mathews and his company arising from the 2014 sale of their home at 26315 Crescent Cove Lane in Katy, Texas, after they had purchased the Chifes' home. Mathews acted as the Van Durens' broker in that sale. They allege

that he failed to disclose a conflict of interest and persuaded them to sell their home for less than it was worth in pursuit of his own interest.

The Chifes moved for traditional and no-evidence summary judgment. So did Mathews and his company. Among other grounds, the defendants asserted that the Van Durens had agreed to buy the Royal Lakes home "as-is," which barred their claims absent evidence of any affirmative misrepresentation. Mathews also asserted that the Van Durens' claims for negligence and negligent misrepresentation relating to the Royal Lakes home were barred by the two-year statute of limitations. As to the Crescent Cove home, Mathews contended that the Van Durens agreed to its sales price and that they had no evidence of any damages.

The Van Durens responded, contending that the present-condition clause in the Royal Lakes contract was unenforceable on multiple grounds, including fraudulent inducement. They asserted the discovery rule and fraudulent concealment as defenses to limitations. With respect to the Crescent Cove home, they denied that they gave Mathews permission to lower the sales price and submitted an affidavit in support of home's market value.

The summary-judgment evidence consisted of the Royal Lakes contract documents, excerpts from the parties' depositions, and a few e-mails. Viewed in the light most favorable to the Van Durens, the evidence established the following:

The Chifes bought the Royal Lakes home new from the builder in 2011 or 2012. They moved out in July 2013. Caretakers looked after the home between July and its sale to the Van Durens in November. Mathews represented the Chifes in the sale of the home to the Van Durens. Another broker, Jared Lofton, represented the Van Durens.

The Van Durens visited the Royal Lakes home at least twice before they bought it. They understood that they had the right to have it inspected before buying it, but they chose not to do so. According to the Van Durens, there was not enough time to inspect the home due to how quickly the Chifes wanted to close the sale. The Van Durens also testified that Mathews told them that the home had been inspected in July 2013. Because he said that the July 2013 inspection identified only minor problems, which were repaired, the Van Durens felt comfortable relying on Matthews' representation in lieu of hiring their own inspector.

The record does not contain a July 2013 inspection report or any documentary references to one. Mathews testified that was not aware of a July 2013 inspection.

Reggie Van Duren testified that he relied on the Sellers' Disclosure Notice completed by the Chifes in September 2013 in deciding to buy the home. In the Notice, the Chifes indicated that they were not aware of any defects or malfunctions in the home's roof, ceilings, walls, or structural components. They also indicated that they were not aware of any repairs to the roof or other structural components,

water penetration, wood rot, or any condition that would materially affect one's health or safety. In the Notice, the Chifes disclosed a prior inspection of the home that took place in October 2012, but the Notice made no mention of a July 2013 inspection.

The Van Durens maintained that the Chifes' disclosures in the Notice were knowingly false. Reggie testified that the Notice misrepresented the condition of the home by failing to disclose water penetration. Relying on a series of e-mails from November 2012 and November 2013, the Van Durens contended that the Chifes and Mathews were aware of the water penetration before they sold the Royal Lakes home.

In the 2012 e-mails, Aloy Chife complained to the home builder of "construction anomalies" and "code violations" and asked that the builder make "the necessary repairs." Aloy expressed dissatisfaction that the builder had sent a carpenter to address these issues rather than "licensed plumbers and electricians" as promised. Mathews was copied on these e-mails.

Gesare Chife testified that the builder "fixed everything" and that the Chifes did not have "any other problems" with the Royal Lakes home afterward. The record contains no contrary evidence.

In the 2013 e-mails, Mathews informed the Chifes of several issues with the home, including an exterior leak above the front door from the balcony above it. He

told them that it “may be a structural issue.” Gesare responded that the area needed to be checked out, fixed, and repainted. She asked Mathews to “get a handy man” to do so, and Mathews replied that he would get a bid from someone that week.

Gesare and Mathews testified that the 2013 e-mails were written after the Van Durens brought the leak under the balcony to Mathews’ attention. Mathews testified that he photographed the leak and other issues as the Van Durens—accompanied by their broker, Lofton—pointed them out to Mathews during one of their visits to the property.

While not directly contradicting him, the Van Durens implicitly denied Mathews’ version of events. Reggie stated that he did not enter through the front door on his visits and therefore did not see the area beneath the balcony before buying the home. Sonya stated that she entered the home through the front door but did not notice any water damage on the front porch. The record does not contain any testimony from Lofton.

There also was conflicting evidence as to whether the balcony leak had been repaired. According to Gesare, Mathews told her that he contacted the builder to address the leak, but she did not know if it was repaired. Mathews testified that he did not obtain bids or hire anyone to fix the leak and could not confirm whether repairs were made. He stated that Aloy did not want to make repairs to the home due to the modest size of the Van Durens’ down payment. Reggie testified that the

Van Durens later discovered evidence of repairs in the area above the front door and beneath the balcony.

Mathews explained that he negotiated with Lofton for the Van Durens to buy the home "as is." Unlike a prior draft, the final version of the parties' contract provided that the Van Durens accepted the property "in its present condition."

After the Van Durens moved into the Royal Lakes home, they hired Mathews to sell the Crescent Cove home where they previously had resided. Reggie averred that its market value was $525,000 but that Mathews persuaded the Van Durens to sell it for $430,000. The Van Durens alleged that Mathews had a conflict of interest due to a term in the Royal Lakes contract. Under that contract, a portion of Mathews's commission was not due until the Van Durens paid the $140,000 installment to the Chifes. The Van Durens contend that Mathews advocated the sale of the Crescent Cove home for less than it was worth because a prompt sale would ensure that he would receive that part of his Royal Lakes commission.

The trial court entered two summary judgments, one in favor of the Chifes and the other in favor of Mathews and his company, without specifying a basis for its rulings. These two orders disposed of all of the Van Durens' claims for affirmative relief, which the trial court severed from the Chifes' counterclaims. The Van Durens appeal from both summary judgments.

DISCUSSION

I. Finality

The trial court entered summary judgment in the Chifes' favor on the Van Durens' claims against them. This summary judgment, however, neither purports to finally dispose of all claims and all parties nor does so. The Chifes have asserted counterclaims for breach of contract against the Van Durens. Though the trial court severed the Chifes' counterclaims, these counterclaims remain unadjudicated.

Absent a statute allowing an interlocutory appeal, a party may appeal only from a final judgment. *See* TEX. CIV. PRAC. & REM. CODE §§ 51.012, 51.014; *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). When, as here, "there has not been a conventional trial on the merits, an order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all parties." *Lehmann*, 39 S.W.3d at 205.

Severance does not make an interlocutory judgment final and appealable if the judgment merely disposes of a subset of the claims between the severed parties. *See Harris Cty. Flood Control Dist. v. Adam*, 66 S.W.3d 265, 266 (Tex. 2001) (per curiam) (judgment in severed cause that disposed of all claims between parties to appeal was final and appealable); *Waite v. Woodard, Hall & Primm, P.C.*, 137 S.W.3d 277, 279–80 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (judgment in

severed cause that left "no remaining issues to be disposed of" between parties to appeal was final and appealable).

If a party appeals from a partial summary judgment that disposes of some but not all claims between the parties, we must dismiss the appeal for lack of jurisdiction, even if the trial court severed the disposed claims from those that remain pending. *Davati v. McElya*, 530 S.W.3d 265, 267 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *Duke v. Am. W. Steel*, 526 S.W.3d 814, 816 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

Because the order granting summary judgment in favor of the Chifes disposes of some, but not all, of the claims between them and the Van Durens, we dismiss the Van Durens' appeal from that partial summary judgment for lack of jurisdiction. In contrast, the trial court's summary judgment in favor of Mathews and his company on the Van Durens' claims against them is final because it disposes of all claims between these parties. Thus, we turn to the merits of the Van Durens' appeal from that judgment.

II. Summary Judgment

We review summary judgments de novo. *City of Richardson v. Oncor Elec. Delivery Co.*, 539 S.W.3d 252, 258 (Tex. 2018). When, as here, the trial court grants summary judgment without specifying the grounds for granting the motion, we must

affirm its judgment if any one of the grounds is meritorious. *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017).

Mathews moved for summary judgment on both traditional and no-evidence grounds. When reviewing his grounds for summary judgment, we take as true all evidence favorable to the Van Durens and indulge every reasonable inference and resolve any doubts in the Van Durens' favor. *Sommers for Alabama & Dunlavy, Ltd. v. Sandcastle Homes*, 521 S.W.3d 749, 754 (Tex. 2017).

On the traditional grounds, Mathews bore the burden of showing that no genuine issue of material fact exists and that the trial court should grant judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Oncor Elec.*, 539 S.W.3d at 258–59. To do so, he was required to conclusively negate at least one essential element of each of the Van Durens' causes of action or conclusively prove all the elements of an affirmative defense. *KCM Fin. v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015).

On the no-evidence grounds, Mathews had to identify one or more essential elements of each of the Van Durens' causes of action for which there was no evidence. TEX. R. CIV. P. 166a(i); *Cmty. Health*, 525 S.W.3d at 695–96. To defeat the no-evidence grounds, the Van Durens had to adduce more than a scintilla of evidence raising a genuine issue of material fact as to each challenged element. *Lightning Oil Co. v. Anadarko E&P Onshore*, 520 S.W.3d 39, 45 (Tex. 2017).

A. Reliance

Mathews contended in the trial court that the present-condition clause in the Royal Lakes contract barred the Van Durens' negligence and fraud claims as to that transaction as a matter of law, because the clause negates the causation and reliance elements necessary to prove those claims. On appeal, the Van Durens contend that the trial court erred in granting summary judgment based on the present-condition clause because:

(1) the clause doesn't expressly disclaim reliance on the seller's representations and thus cannot negate reliance as a matter of law;

(2) the clause was surreptitiously inserted into the contract without their knowledge and thus is unenforceable as it was not freely negotiated; or

(3) their purported agreement to accept the home in its present condition was induced by fraud or concealment as to the home's defects.

1. Applicable law

Causation is a necessary element of a claim for negligence. *See IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004). Reliance is a necessary element of claims for negligent misrepresentation, fraud by nondisclosure, and statutory fraud in a real estate transaction. *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 693 (Tex. 2002) (negligent misrepresentation); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181–82 (Tex. 1997) (fraud by nondisclosure and statutory fraud in real estate transaction).

When buyers contract to buy something "as is," they agree to make their own appraisal of the bargain and to accept the risk that they may be wrong. *Prudential Ins. Co. of Am. v. Jefferson Assocs.*, 896 S.W.2d 156, 161 (Tex. 1995). The sellers give no assurances, express or implied, as to the value or condition of the thing sold. *Id.* Thus, an enforceable as-is clause negates the elements of causation and reliance on claims relating to the sale. *See id.*; *Williams v. Dardenne*, 345 S.W.3d 118, 124 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

In assessing the enforceability of an as-is clause, courts consider the totality of the circumstances surrounding the agreement. *Gym-N-I Playgrounds v. Snider*, 220 S.W.3d 905, 912 n.10 (Tex. 2007); *Prudential*, 896 S.W.2d at 162. An as-is clause generally is enforceable as long as it was a significant part of the basis of the bargain, rather than an incidental or boilerplate provision, and was entered into by parties of relatively equal bargaining position. *Prudential*, 896 S.W.2d at 162; *Bynum v. Prudential Residential Servs.*, 129 S.W.3d 781, 789 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

Two scenarios may render a valid as-is clause unenforceable. The first involves fraudulent inducement. *Prudential*, 896 S.W.2d at 161–62; *Bynum*, 129 S.W.3d at 788. When sellers secure an agreement to an as-is clause through false assurances about the value or condition of the thing being sold or by the concealment of information as to its value or condition, the as-is clause does not bar claims against

the sellers. *See Prudential*, 896 S.W.2d at 161–62; *Williams*, 345 S.W.3d at 124–25. Buyers also are not bound by an as-is clause if they have a right to inspect the property but the sellers impair or obstruct the exercise of this right. *See Prudential*, 896 S.W.2d at 162; *Bynum*, 129 S.W.3d at 788–89.

In the summary-judgment context, buyers challenging the enforceability of an as-is clause bear the burden of adducing more than a scintilla of proof raising an issue of fact as to its enforceability. *See Bynum*, 129 S.W.3d at 788–94; *accord Santibanez v. Diron*, No. 01-16-00231-CV, 2017 WL 343609, at *3 (Tex. App.—Houston [1st Dist.] Jan. 24, 2017, no pet.) (mem. op.).

2. Analysis

The Van Durens point out that the as-is clause interpreted by the Supreme Court of Texas in *Prudential Insurance* explicitly disclaimed any reliance by the buyer, and that the present-condition clause in the agreement for the Royal Lakes home does not. *See* 896 S.W.2d at 160.

The Royal Lakes contract provided for acceptance of the property "in its present condition." While this provision did not disclaim reliance, an explicit disclaimer is not required for it to be an as-is clause. In *Prudential Insurance*, the Court stated that the clause before it left no doubt as to its meaning but noted that "it should not be necessary in every 'as is' provision to go into this much detail." *Id.* at 161. Since then, numerous courts have held that present-condition clauses operate

as as-is clauses. *See Luftak v. Gainsborough*, No. 01-15-01068-CV, 2017 WL 2180716, at *3 (Tex. App.—Houston [1st Dist.] May 18, 2017, no pet.) (mem. op.). The language "in its present condition" is not ambiguous. *See Birnbaum v. Atwell*, No. 01-14-00556-CV, 2015 WL 4967057, at *6 (Tex. App.—Houston [1st Dist.] Aug. 20, 2015, pet. denied) (mem. op.). Rather, "in its present condition" is a readily understood equivalent of "as is." *See* BLACK'S LAW DICTIONARY 108–09, 1202 (7th ed. 1999) (defining "as is" as "[i]n the existing condition without modification" and "present" as "[n]ow existing; at hand").

The Van Durens have not advanced an alternative reasonable interpretation of this language. Given its lack of ambiguity, we are required to apply the present-condition clause as it was written; interpreting it as anything other than an as-is clause would render it meaningless, contrary to the ordinary rules of contract interpretation. *See Apache Deepwater v. McDaniel Partners*, 485 S.W.3d 900, 906 (Tex. 2016) (unambiguous contract's written terms are controlling and its terms should be interpreted so that none will be rendered meaningless).

Next, the Van Durens contend that the present-condition clause is unenforceable because it was boilerplate and not a genuine, bargained-for term. The Van Durens do not claim unequal bargaining power or lack of sophistication. Nor do they dispute that they bought the Royal Lakes home in an arms-length transaction, in which both sides were represented by licensed real estate brokers.

No evidence supports the Van Durens' contention that the present-condition clause was boilerplate or was surreptitiously inserted into the contract. The contract was a standard form promulgated by the Texas Real Estate Commission that brokers generally must use in homes sales. *See* 22 TEX. ADMIN. CODE § 537.11. The form provides buyers with two options as to the acceptance of a property's condition: one in which they accept the property "in its present condition" and another in which they accept the property subject to the sellers completion of specified repairs. A mandatory form contractual provision that requires the parties in any given transaction to choose from two or more options is by definition negotiable and not boilerplate. *See* BLACK'S LAW DICTIONARY 167 (7th ed. 1999) (defining "boilerplate" as "[f]ixed or standardized contractual language that a proposing party views as relatively nonnegotiable"); *see also Sims v. Century 21 Cap. Team*, No. 03-05-00461-CV, 2006 WL 2589358, at *3 (Tex. App.—Austin Sept. 8, 2006, no pet.) (mem. op.) (provision in form contract promulgated by Texas Real Estate Commission requiring parties to fill in blanks not boilerplate). Mathews conceded that, unlike a draft version of the contract, the final contract signed by the parties specified that the Van Durens accepted the property "in its present condition." Mathews testified that this change resulted from telephone negotiations with Lofton about the Van Durens accepting the property "as is." Mathews explained that Aloy

did not want to make any repairs to the property in connection with the sale given the modest size of the Van Durens' down payment.

The record contains no contrary evidence. Though both of the Van Durens were deposed, neither Sonya nor Reggie testified to being unaware of or surprised by the present-condition clause. On the contrary, Sonya acknowledged that she understood the present-condition clause to mean that she was accepting the property as it existed without any repairs. Reggie said that he understood he was buying the property as described in the Sellers' Disclosure Notice, but he did not disavow knowledge of the present-condition clause. Reggie and Sonya both initialed the page of the contract containing the present-condition clause and both signed the contract, which identifies Lofton as their agent.

The Van Durens nonetheless assert that a reasonable factfinder could infer that Mathews surreptitiously altered the contract at the last minute because the "in its present condition" option was selected in the final draft of the contract and Mathews did not call attention to the present-condition clause when he transmitted the final draft to Lofton. These circumstances, however, are equally consistent with Mathews' testimony that the alteration resulted from negotiations with Lofton about the acceptance of the property in its present condition. When, as here, meager circumstantial evidence is susceptible to equal inferences, a factfinder may not reasonably infer either ultimate fact from it. *See Lozano v. Lozano*, 52 S.W.3d 141,

148 (Tex. 2001). The Van Durens rely on Sonya's testimony that she did not read the contract word for word before signing it and did not recall if the present-condition option was selected in the original draft. But absent some evidence that the Van Durens were tricked into signing the contract with a present-condition clause, their failure to read the final version of the contract before signing it is not a ground for avoiding the enforcement of its terms. *See Royston, Rayzor, Vickery & Williams, LLP v. Lopez,* 467 S.W.3d 494, 500 (Tex. 2015) (stating that "absent fraud, misrepresentation, or deceit, one who signs a contract is deemed to know and understand its contents and is bound by its terms").

The Van Durens further contend that the present-condition clause is unenforceable because Mathews fraudulently induced them to agree to the present-condition clause and impaired or obstructed their right of inspection. Specifically, they argue that their agreement was procured through:

(1) a Sellers' Disclosure Notice that omitted material information about the property's condition, including a water leak, roof repairs, and construction anomalies; and

(2) Mathews' misrepresentation that the Royal Lakes property was inspected in July 2013 and in good condition.

To show fraudulent inducement as to Mathews, however, the Van Durens must show that he made a false material representation, knew it was false when made, intended to induce reliance, and did induce reliance. *Williams*, 345 S.W.3d

at 125. In addition, the Van Durens' reliance must have been justifiable and they must have suffered injury as a result of their justifiable reliance. *Id.*

With respect to the Sellers' Disclosure Notice, the law imposes a duty on the sellers of real property, not their agents, to make the statutorily-required disclosures. *See* TEX. PROP. CODE § 5.008(a), (d). The Notice, which is a standard form promulgated by the Texas Association of Realtors, makes clear that the representations within it are the sellers' alone. *See Sherman v. Elkowitz*, 130 S.W.3d 316, 320–21 (Tex. App.—Houston [14th Dist.] 2004, no pet.). The broker, therefore, generally cannot be held liable for misrepresentations in, or omissions from, the Notice because they are not his misrepresentations or omissions. *Id.*

There is an exception. The Notice contains a representation that the "brokers have relied on this notice as true and correct and have no reason to believe it to be false or inaccurate." Under this provision, the broker has a duty to come forward if he has any reason to believe that the sellers' disclosures are false or inaccurate; thus, he can be held liable for this representation if it is shown that he knew it to be untrue. *Id.* at 321; *see also* TEX. OCC. CODE § 1101.805(e) (brokers are liable for misrepresentation or concealment of material fact made by party to transaction if they knew of the falsity of misrepresentation or concealment and failed to disclose party's or their own knowledge of falsity of misrepresentation or concealment).

The Van Durens contend that Mathews knew the Notice was false or inaccurate. Mathews knew of the Chifes' complaints to the builder about the "construction anomalies" and "code violations," referenced in the November 2012 e-mails; thus, the Van Durens argue, a factfinder could infer that he likewise was aware of construction defects in the home that caused the water penetration. The Chifes' complaints to the builder in the November 2012 e-mails, however, concerned unidentified plumbing and electrical issues, not water penetration or intrusion. Gesare testified without contradiction that the builder had addressed these issues. Knowledge of past repairs does not establish knowledge of a present defect; thus, the fact that Mathews was copied on that email correspondence does not support a reasonable inference that Mathews knew of undisclosed defects. *See Birnbaum*, 2015 WL 4967057, at *7; *Sherman*, 130 S.W.3d at 322.

The Van Durens also argue that Mathews knew the Notice was no longer accurate once he learned of the exterior balcony leak in November 2013 and therefore had a duty to update the earlier notice or compel the Chifes to do so. The law, however, requires only that the Notice "be completed to the best of the seller's belief and knowledge as of the date the notice is completed and signed." TEX. PROP. CODE § 5.008(d). The statute does not impose a continuing duty to update the Notice. *Bynum*, 129 S.W.3d at 795. Accordingly, we hold that the evidence does not raise a genuine issue of material fact as to whether Mathews fraudulently induced

the Van Durens to agree to the present-condition clause through any misrepresentations in or omissions from the Sellers' Disclosure Notice.

To the extent that the Van Durens contend that Mathews had an independent obligation to disclose the leak, they do not raise a genuine issue of material fact because they have not alleged or explained any connection between the exterior balcony leak and the interior water penetration that forms the basis of their suit.

Reggie testified that he discovered that the area above the front door and beneath the balcony had been repaired when he investigated the water penetration that occurred in October 2015. Accepting Reggie's version of events as we must, it raises an inference that repairs had been completed, even though Mathews testified that he did not confirm whether the repairs were made. A repaired defect, however, is not the same as awareness of an existing defect. *See Birnbaum*, 2015 WL 4967057, at *7; *Sherman*, 130 S.W.3d at 322. As one of our sister courts put it, "repairs correct defects, not prove their continued known existence." *Pfeiffer v. Ebby Halliday Real Est.*, 747 S.W.2d 887, 890 (Tex. App.—Dallas 1988, no writ). Thus, knowledge of a leak that was repaired, without more, does not support a reasonable inference of knowledge of an existing defect.

With respect to Mathews's alleged impairment or obstruction of the Van Durens' right to an independent inspection, the summary-judgment evidence conclusively proves that this exception to the enforceability of an as-is clause is

inapplicable. Impairment or obstruction that will render an as-is clause unenforceable occurs when conduct by the sellers or their agents interferes in some fashion with "the buyer's exercise of its contractual right to carefully view, observe, and physically examine the property." *Warehouse Assocs. Corp. Centre II v. Celotex Corp.*, 192 S.W.3d 225, 239–42 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (relying on *Prudential*, 896 S.W.2d at 162–63).

The Van Durens have neither alleged nor adduced proof that Mathews interfered with their right to an independent inspection. Instead, the Van Durens testified that they chose not to hire their own inspector because Mathews told them that the Royal Lakes home was inspected several months earlier in July 2013, only minor problems were identified, these problems were repaired, and the house was in good condition. But Reggie and Sonya both confirmed that they knew they had the right to have the house inspected before buying it. The Sellers' Disclosure Notice, which they admittedly received, repeatedly informed them of this right and urged them to exercise it. The TAR-promulgated Notice, advises prospective buyers that:

- it is a disclosure of the sellers' knowledge of the property's condition only as of the date it is signed and is not a substitute for any inspections or warranties that the buyers may want to obtain; and
- they should not rely on prior written inspection reports identified in the disclosures as a reflection of the property's current condition and should obtain inspections from inspectors chosen by the buyers.

The Notice concludes with another advisory, printed in all capital letters, urging prospective buyers to have the property inspected: "You are encouraged to have an inspector of your choice inspect the property." The Van Durens chose not to exercise this right. When, as in this case, buyers choose not to exercise a contractual right to inspect property in spite of written disclosures encouraging them to have the property inspected, it is impossible for the sellers or their agents to impair or obstruct that unexercised right. *See Warehouse Assocs.*, 192 S.W.3d at 243–44 (alleged fraud and failure to disclose material information did not support claim for impairment or obstruction of exercise of right to inspect where buyer actually had access to inspect; impairment or obstruction exception considers "only the impact of the seller's conduct on the buyer's actual inspection"); *cf. Nelson v. Najm*, 127 S.W.3d 170, 173–75 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (fraudulent inducement exception applied when buyer requested to inspect gas station's property before sale but seller rebuffed request, represented that inspection was not necessary, and falsely claimed that testing for contamination would be waste of money because property's condition was "fine" and gas station was in compliance with environmental regulations).

Because the present-condition clause negates causation and reliance with respect to the claims against Mathews and his company as a matter of law, and the Van Durens have not raised a genuine issue of material fact as to any exception that

would negate that clause's enforceability, we hold that the trial court properly granted summary judgment in favor of Mathews and his company on the Van Durens' claims for negligence, negligent misrepresentation, fraud by nondisclosure, and statutory fraud in a real estate transaction.

Because we affirm the trial court's summary judgment on the Van Durens' negligence-related claims against Mathews and his company relating to the Royal Lakes home on the basis of the contract's present-condition clause, we do not reach the parties' additional arguments as to whether these claims are barred by the statute of limitations.

B. Fiduciary Duty

Mathews contended in the trial court that, as the Chifes' broker, he did not owe a fiduciary duty to the Van Durens in connection with their purchase of the Royal Lakes home. On appeal, the Van Durens contend that Mathews' general obligation to treat all parties to the transaction in a fair manner was fiduciary in nature.

The existence of a fiduciary duty is an element of a claim for breach of fiduciary duty. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017). Real estate brokers owe a fiduciary duty to their clients. *See Birnbaum*, 2015 WL 4967057, at *10 (citing 22 TEX. ADMIN. CODE § 531.1). While brokers also must treat other parties to a transaction fairly, this obligation does not

make the broker a fiduciary of these other parties whom he does not represent. *See Kubinsky v. Van Zandt Realtors*, 811 S.W.2d 711, 715 (Tex. App.—Fort Worth 1991, writ denied) (realtors' fiduciary duties ran to sellers they represented in transaction).

The evidence establishes that Mathews was the Chifes' real estate broker with respect to the Royal Lakes home sale and that another broker, Lofton, represented the Van Durens. The Royal Lakes contract identifies Mathews and Lofton as the brokers for the sellers and buyers respectively. Gesare testified that Mathews represented her and her husband in connection with the sale of the Royal Lakes home. Sonya likewise testified that Mathews represented the Chifes in this transaction. There is no contrary evidence in the record.

Mathews met his burden to conclusively negate the existence of a fiduciary duty, a necessary element of the Van Durens' claim for breach of fiduciary duty against him with respect to the Royal Lakes home sale. We therefore hold that the trial court properly granted summary judgment in favor of Mathews and his company on this claim.

C. Damages

The Van Durens alleged causes of action for negligence, negligent misrepresentation, and breach of fiduciary duty against Mathews in connection with the sale of their Crescent Cove home. They sought to recover "the difference

between the actual market value of the Crescent Cove property and the value it was sold at" as a result of Mathews's tortious conduct.

Mathews contended in the trial court that the Van Durens agreed to the reduced price at which they sold the Crescent Cove home. He further contended that there was no evidence that Van Durens suffered any damages arising out of the sale of the property. On appeal, the Van Durens contend that Mathews failed to disclose a conflict of interest and persuaded them to sell the house for less than it was worth in furtherance of his own interest. They also contend that Reggie's affidavit, in which he opines on the value of the Crescent Cove home, as compared to its sales price, is more than a scintilla of evidence regarding their damages.

Damages are a necessary element of claims for negligence, negligent misrepresentation, and breach of fiduciary duty. *See First United*, 514 S.W.3d at 220 (breach of fiduciary duty); *IHS Cedars*, 143 S.W.3d at 798 (negligence); *Stromboe*, 102 S.W.3d at 686 n.24 (negligent misrepresentation).

A property owner may testify as to the value of his property, provided that his testimony is based on its market value. *See Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012). His testimony cannot be speculative or conclusory. *See id.* at 155–59, 161. The owner must substantiate his opinion of market value with the factual basis on which his opinion rests, which may include evidence of facts such as the price he paid, nearby sales, tax valuations, appraisals,

and online resources. *See id.* at 159. If the owner's testimony does not satisfy these requirements, it is no evidence. *See id.* at 161.

The parties dispute whether Reggie's summary-judgment affidavit, which was filed untimely, was considered by the trial court and may be considered on appeal. Because we hold that his affidavit would not constitute competent evidence of damages even if it were considered, we need not decide whether it was before the trial court.

In his affidavit, Reggie stated that he was "familiar with the area" as well as "the value" that "property in the area sells for." Based on his "knowledge of the area" and "other homes that have sold in the area," he opined that the Crescent Cove home's value was $525,000 as of 2014. But on Mathews' advice, the Van Durens sold it for $430,000.

These averments do not explain the factual basis for Reggie's valuation of the Crescent Cove home. Reggie did not provide information about the other homes' proximity to the Crescent Cove home or any characteristics that would show them to be comparable sales. He did not identify the timeframe during which the other sales occurred or the actual sales prices. Nor did Reggie include supporting evidence with his affidavit, such as the appraisals or tax valuations suggested in *Justiss*. *See* 397 S.W.3d at 159. Reggie's affidavit therefore is no evidence of the market value of the Van Durens' Crescent Cove home at the time it was sold. *See id.* at 155–61.

Without evidence of the market value of the Crescent Cove home, the Van Durens cannot establish that it was sold for less than it was worth. As they did not come forward with more than a scintilla of evidence as to their alleged damages, the trial court properly granted summary judgment in favor of Mathews and his company on the Van Durens' Crescent Cove claims.

CONCLUSION

We dismiss the Van Durens' appeal from the partial summary judgment in favor of the Chifes for lack of jurisdiction. We affirm the judgment of the trial court in favor of Mathews and Stacy, Inc.

Jane Bland
Justice

Panel consists of Justices Higley, Bland, and Caughey.

ACCEPTED
05-17-01028-CV
FIFTH COURT OF APPEALS
DALLAS, TEXAS
5/14/2018 3:23 PM
LISA MATZ
CLERK

No. 05-17-01028-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS, TEXAS

RECEIVED IN
5th COURT OF APPEALS
DALLAS, TEXAS
5/14/2018 3:23:32 PM
LISA MATZ
Clerk

EBBY HALLIDAY REAL ESTATE, INC.,

Appellant,

v.

KEVIN DUGAS,

Appellee.

Appeal from the Dallas County Court at Law No. 3, Dallas County, Texas
No. CC-15-04871-C

BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF REALTORS® IN SUPPORT OF APPELLANT EBBY HALLIDAY REAL ESTATE, INC.

Laurie Ratliff
State Bar No. 00784817
IKARD RATLIFF P. C.
2630 Exposition Blvd., Ste. 118
Austin, Texas 78703
Telephone: (512) 472-4601
Telecopier: (512) 472-3669
Laurieratliff@ikardratliff.com

ATTORNEYS FOR AMICUS CURIAE
TEXAS ASSOCIATION OF REALTORS®

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE.. iii

INTRODUCTION 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Imposing a duty on real estate agents to verify square-footage data or to measure properties violates Texas licensing laws 3

II. Real estate agents reasonably use an appraisal district's square-footage data ..7

III. Imposing a duty to verify square-footage data or to measure properties will have a negative impact on the real-estate industry 9

IV. Numerous protections exist in real-estate transactions 10

PRAYER 12

CERTIFICATE OF COMPLIANCE 13

CERTIFICATE OF SERVICE 14

APPENDIX .... Tabs A - C

TABLE OF AUTHORITIES

CASES

Pfeiffer v. Ebby Halliday Real Estate, Inc.,
747 S.W.2d 887 (Tex. App.—Dallas 1988, no pet.) 3

Pleasant v. Bradford,
260 S.W.3d 546 (Tex. App.—Austin 2008, pet. denied) 6, 7, 10

Sutton v. Ebby Halliday Real Estate, Inc.,
279 S.W.3d 418 (Tex. App.—Dallas 2009, no pet.) 3

STATUTES AND ADMINISTRATIVE CODES

TEX. GOV'T CODE § 81.051... 3, 4

TEX. GOV'T CODE § 81.101.. 4

TEX. GOV'T CODE § 81.102... 3, 4

TEX. TAX CODE § 6.01(b)... 8

22 TEX. ADMIN. CODE § 153.1(6).. 3, 4

22 TEX. ADMIN. CODE § 153.8 .... 3, 4

22 TEX. ADMIN. CODE § 153.15 .... 3, 4

INTEREST OF AMICUS CURIAE

Amicus Curiae Texas Association of REALTORS® ("TAR") is a statewide trade association made up of 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 for its members.

As the central body for the local REALTOR® associations, TAR is interested in the correct application of the law to ensure that liability is not expanded in ways that are detrimental to its members.

Amicus Curiae TAR is the source of the only fee for preparing this Brief.

TO THE HONORABLE FIFTH COURT OF APPEALS:

Amicus Curiae TAR submits this Amicus Brief in support of Appellant Ebby Halliday Real Estate, Inc. ("Ebby Halliday"). TAR joins Ebby Halliday in asking this Court to reverse the trial court's judgment that imposes liability on a real estate agent who used a square-footage number—obtained from the county appraisal district—in a property listing.

INTRODUCTION

Ebby Halliday's appeal raises an important issue with broad impact for the real-estate industry and Texas consumers. The trial court below imposed liability under the DTPA for a real estate agent's use of a county appraisal district's square-footage data in marketing materials. CR650-53. Under the judgment below, a real estate agent could only avoid liability by: 1) verifying an appraisal district's square-footage data, or 2) measuring a property's square footage. These actions are not within a real estate agent's expertise or training. In fact, other real-estate professionals are charged with measuring properties and verifying square-footage data.

Texas real estate agents have long used third-party sources for obtaining the square footage of a property. In particular, the vast majority of real estate agents use square-footage data found in county appraisal district's records. And real estate agents disclose the source of the square footage listed on their marketing materials.

Further, real estate agents inform buyers that such square-footage data may not be reliable.

This Court's opinion could open the door for other courts across the state to impose a duty on real estate agents to verify square-footage data or measure properties. TAR highlights the importance of this issue to the real-estate industry and urges this Court to reverse the judgment and conclude that real estate agents have no duty to verify square-footage data obtained from third parties or measure properties.

SUMMARY OF ARGUMENT

The effect of the trial court's judgment—if affirmed here—will place real estate agents in an untenable position and force Texas consumers to pay for an increase in costs in residential real-estate transactions.

Real estate agents are not trained to measure property or to interpret deeds or other real property records, such as homeowners' association declarations or covenants, that might impact square-footage data. Instead, other real-estate professionals perform these services.

Real estate agents have historically and reasonably used appraisal-district records as a source for square-footage data. Appraisal districts are charged with appraising property, which necessarily includes obtaining square-footage data.

In addition, there are numerous safeguards for consumers in the real-estate-transaction process. As relevant here, real estate agents disclose the source of the square-footage data and inform buyers that square-footage data may not be reliable.

The trial court below erred in imposing liability on a real estate agent who passed along a county appraisal district's square-footage data which the agent did not know and could not reasonably have known was inaccurate as found by the jury in answer to Jury Question Number 2, which the trial court improperly disregarded. The Court should reverse and render judgment that real estate agents are not obligated to verify or measure a property's square footage.

Finally, this Court should reverse and render judgment awarding attorney's fees to Ebby Halliday.

ARGUMENT

I. Imposing a duty on real estate agents to verify square-footage data or to measure properties violates Texas licensing laws.

Contrary to the trial court's judgment, Texas law does not impose a duty on real estate agents to verify the accuracy of an appraisal district's square-footage data or to measure a property.[1] Texas law places these duties on other real-estate professionals. Licensed real estate appraisers measure the square footage of

[1] Texas law charges real estate agents with a duty to *not withhold* material information that is actually known to them or to make knowing misrepresentations. *Sutton v. Ebby Halliday Real Estate, Inc.*, 279 S.W.3d 418, 423 (Tex. App.—Dallas 2009, no pet.); *Pfeiffer v. Ebby Halliday Real Estate, Inc.*, 747 S.W.2d 887, 889-90 (Tex. App.—Dallas 1988, no pet.).

properties; licensed attorneys analyze and interpret legal documents that impact square footage. 22 TEX. ADMIN. CODE §§ 153.1(6); 153.8; 153.15; TEX. GOV'T CODE §§ 81.051; 81.102.

Because the duty to verify and measure square footage is on other professionals, real estate agents are not trained to verify square-footage data or measure the properties. And real estate agents' training cannot be changed to add measuring property (without getting licensed as a real-estate appraiser) or verifying legal documents (without getting a law license). In fact, for a non-licensed individual to read and interpret documents constitutes the unauthorized practice of law. TEX. GOV'T CODE § 81.101.

Real estate agents *are* trained, however, to provide the source of the square footage listed in their marketing materials, including the Multiple Listing Service ("MLS").[2] The MLS platform provides a reference for real estate agents to access information on properties, including square-footage data. Only licensed real estate agents have access to MLS; individuals do not.[3] This is true of every MLS database across the state.

[2] MLS is one of several computer-based sources that real estate agents use to market properties.

[3] County appraisal districts also use the MLS as a resource. *See, e.g., How is Your Property Appraised?*, COLLIN COUNTY APPRAISAL DISTRICT, 4, https://www.collincad.org/how-is-your-property-appraised/finish/14-miscellaneous-downloads/217-how-is-your-property-appraised (last visited May 14, 2018); App. A.

For the square footage of a property, MLS lists three sources: a county appraisal district, an appraisal (typically done at a lender's request), or a builder's plans. 3RR97-98. The MLS platform allows a real estate agent to select which of these three are the source for the square-footage data on a particular listing. 3RR97-98.

In Dallas County, the MLS database system automatically populates information about a given property, including its square footage, from the Dallas Central Appraisal District's records ("DCAD"). 3RR98; 4RR49. That is, the square footage of the property in dispute here was directly imported from DCAD's records. Ebby Halliday did not type in the number. In the listing, Ebby Halliday selected the source as "tax," which refers to DCAD and which MLS member agents, like the agent for Dugas, know refers to the tax records. 3RR98.

Ebby Halliday had no role in populating the DCAD data onto the MLS listing. Yet the trial court imposed liability on Ebby Halliday for passing along DCAD's square-footage data even though there was no evidence that a real estate agent in Texas has a duty to verify MLS size information or to measure property.

As the MLS listing in this case shows, Ebby Halliday listed "1,178/tax" on the top portion of the listing but, in the narrative section, referred back to the "1,178" square-footage figure without including the notation "/tax." That the MLS listing

contained a second reference to square footage without again referring to its source makes no difference to the outcome of the case.

There is no dispute that DCAD's records showed the property's square footage as "1,178." Thus, there was no misrepresentation, as argued in Ebby Halliday's brief. Appt. Br. 15-20. If there were any misrepresentation, it would be on the part of DCAD.

Further, there was no dispute that Appellee Kevin Dugas ("Dugas") possessed and used the MLS listing that stated "1,178/tax" and further, that the condominium covenants for the property also listed the same number. 7RRDxs 7, 8. That Dugas chose to ignore "1,178/tax" does not change the fact that the Ebby Halliday provided the source of its square-footage data on the MLS listing.

Finally, there was no evidence or authority that real estate agents have a duty to verify square-footage data or measure properties. Real estate agents on both sides testified that there is no such duty on Texas real estate agents. 3RR88, 93; 4RR49, 50, 54, 60-62, 65, 68, 69, 120 & 132.

Dugas cites *Pleasant v. Bradford* to support his argument that he relied on the MLS listing. 260 S.W.3d 546 (Tex. App.—Austin 2008, pet. denied). *Bradford* is distinguishable on several grounds.

Unlike Ebby Halliday's case, the real estate agent in *Bradford* did not disclose the source of the square-footage data on the MLS listing. *Id*. at 550. Further, the

Bradford Court did not address the issue of whether a real estate agent has a duty to verify or measure a property's square footage. Accordingly, the court of appeals in that case has no discussion of the primary issue in Ebby Halliday's appeal. The primary issue in *Bradford* was whether the buyers relied on the MLS listing or their own investigation of the county appraisal district's records for square footage.

Further, unlike Ebby Halliday in this case, the real estate agent in *Bradford* did not dispute the characterization of the use of appraisal-district data as a "misrepresentation." *Id.* at 552-53. Ebby Halliday, however, strongly contends that using DCAD's square-footage data on an MLS listing, which turned out to be incorrect, is not a misrepresentation by the real estate agent who used the number. Appt. Br. 15-20.

Finally, *Bradford* does not address the policy and practical problems with obligating real estate agents to verify or measure a property's square footage as presented here.

II. Real estate agents reasonably use an appraisal district's square-footage data.

It has long been the industry practice for real estate agents to use appraisal-district records. 3RR96-98; 4RR48-49; 60-61. And with good reason: appraisal districts are the governmental body charged with accurately valuing property, which necessarily includes measuring square footage.

Appraisal districts are charged with identifying and appraising property within their respective counties for *ad valorem* tax purposes. TEX. TAX CODE § 6.01(b). As stated on DCAD's website (and others around the state), "our duties include establishing and maintaining *accurate* property values for all real and business personal property." DALLAS CENTRAL APPRAISAL DISTRICT (last visited May 14, 2018), http://www.dallascad.org. (emphasis added).

Appraisal districts, of course, have a strong incentive to properly appraise property: taxing units rely on the appraisal district's property valuations to set tax rates and obtain revenue to run their governmental operations.

A property's size is one of the factors used to determine value. DCAD often uses third-party sources for obtaining its square-footage figures. DCAD gets these figures from builders seeking permits for new constructions and remodeling. *DCAD Valuation Processes*, DALLAS CENTRAL APPRAISAL DISTRICT, http://www.dallascad.org/valueprocess.pdf (last visited May 14, 2018); App. B. DCAD also gets square-footage information from its own inspections and measurements. *Id.*; *Frequently Asked Questions: Establishing Value*, DALLAS CENTRAL APPRAISAL DISTRICT, http://www.dallascad.org/FAQselect.aspx (follow "Establishing Value" hyperlink); App. C.

While there could be errors in an appraisal district's square-footage figures,[4] the evidence in this case is that the likelihood of such an error is remote. 3RR89, 92; 4RR54, 57, 58, 61 & 62. That there could be an error, however, does not support imposing a duty and corresponding liability on real estate agents who are simply passing the data along.

III. Imposing a duty to verify square-footage data or to measure properties will have a negative impact on the real-estate industry.

If a duty were imposed on real estate agents to verify square-footage data or to measure a property, it will increase the costs of every real-estate transaction. These increased costs will be borne by Texas consumers.

Real estate agents cannot avoid liability by removing square-footage data from their marketing materials. Square footage is an important evaluator in the residential real-estate market for sellers and buyers when evaluating price.

Because real estate agents are not qualified to measure properties or verify square-footage data, real-estate agents' only option will be to hire appraisers to measure a property and/or hire an attorney to read/interpret real-property records before listing properties.

[4] Errors could occur with measuring, inputting data, or in builder plans. DCAD acknowledges the possibility of errors by including a disclaimer: "This website is for informational purposes only. Title research should be performed at the appropriate County Clerk's office. This is not deemed a legal document." DALLAS CENTRAL APPRAISAL DISTRICT (last visited May 14, 2018), http://www.dallascad.org. It is noteworthy that DCAD does not refer readers to a real estate agent—instead, it refers readers to the County Clerk's office.

The cost to hire an appraiser to measure square footage or the cost to hire an attorney, would ultimately be passed on to consumers, either through an increase in the commissions or a line-item expense at closing.

Further, to require pre-marketing measuring or verifying of square-footage data would unnecessarily delay the highly competitive real estate market.

In addition, if real estate agents are charged with a duty to measure property or verify square-footage data, there will be a risk of conflicting numbers—numbers from a real estate agent, an appraiser for a lender, the appraisal district, and a builder's plans. As the expert in *Bradford* testified, "it was 'kind of hard to tell' a house's square footage . . . and . . . a house appearing to contain 2,000 square feet might actually contain only 1,700 square feet." *Bradford*, 260 S.W.3d at 555.

Finally, while the seller in this case was not sued, if affirmed, sellers face exposure to liability based on a real-estate agent's marketing communications that list a property's size using a third-party source.

IV. Numerous protections exist in real-estate transactions.

Industry practices provide the necessary protections for all parties. A duty to verify square-footage data or a duty to measure properties is not needed.

First, buyers and sellers have the opportunity to be represented by real-estate professionals, as in this case, to guide them through the process. Among other matters, real estate agent inform their clients about the potential problems with

relying on square-footage data without measuring it, especially if an offer is based on the square footage of a property.

Second, real estate agents put buyers on notice in *three* different documents that the listed square footage may be unreliable. The MLS listing states that the information is "deemed reliable, but not guaranteed." 7RRPlx7.[5] Next, the "Seller Disclosure Notice" informs buyers that if an offer is based on square-footage data, the buyer should independently measure to verify square-footage data which may be "unreliable." 7RRDx5. The "Seller Disclosure Notice" also informs buyers that information about the size of property "has been obtained by Broker or Seller from third parties, including information obtained from official tax records. Such information is not always accurate." *Id.* Further, the "General Information and Notice to a Buyer" instructs buyers that they "should independently verify the information in the MLS and not rely on the information." 7RRDx15.

Finally, buyers have time to get a property measured. Buyers have an option period during which to conduct inspections and, if they choose, to have a property's square footage measured. During the option period, buyers have the right to terminate the contract for any reason—such as the square footage being incorrect—or for no reason at all.

[5] Even if a buyer does independent research and goes to a county appraisal district website, that website also has disclaimers. DALLAS CENTRAL APPRAISAL DISTRICT (last visited May 14, 2018), http://www.dallascad.org.

If measuring the property is deemed necessary, the option period gives buyers the time to do so and the ability to terminate the contract for any reason. But in the vast majority of transactions, there is no need to measure the square footage and incur the additional expense.

PRAYER

FOR THESE REASONS and those set out in Appellant Ebby Halliday Real Estate, Inc.'s briefs, Amicus Curiae Texas Association of REALTORS® urges this Court to reverse the judgment of the trial court, render judgment that Appellee take nothing, and render that judgment awarding attorney's fees to Appellant.

Respectfully submitted,

IKARD RATLIFF P.C.

/s/ *Laurie Ratliff*

Laurie Ratliff
State Bar No. 00784817
IKARD RATLIFF P. C.
2630 Exposition Blvd., Ste. 118
Austin, Texas 78703
Telephone: (512) 472-6696
Telecopier: (512) 472-3669
Laurieratliff@ikardratliff.com

ATTORNEYS FOR AMICUS CURIAE
TEXAS ASSOCIATION OF REALTORS®

Licensee Liable for Wire Fraud Losses

July 25, 2018

Risk Management, Working With Buyers, Fraud, Negligence & Liability, Legal

Read the full decision: Bain v. PLATINUM REALTY, LLC

Kansas federal court upholds jury verdict that determined that a real estate licensee was 85% responsible for the buyer's losses, which occurred when the buyer transferred purchase money to fake account after licensee allegedly forwarded email containing fake wiring instructions to the buyer.

A real estate buyer ("Buyer") purportedly received an email from the listing broker ("Broker") that provided new wiring instructions for the upcoming closing on a property. The Buyer used the false instructions to wire the purchase money to the fraudulent account and lost $196,622. The criminal had infiltrated the email exchanges between the parties to the transaction and created fake email accounts that were very similar to the email accounts used by the parties. The criminal had used these accounts to transmit the false wire instructions that were eventually sent to the Buyer.

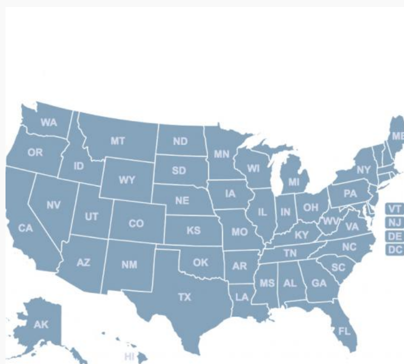
The Buyer brought a lawsuit against a number of parties, including the Broker. The Broker claimed that she had never sent the email with the false wiring instructions. She had initially forwarded an email with the false wire instructions but she had sent it to one of

the fake accounts set up by the criminal. She claimed that she had not sent the later email that the Buyer did receive and used to send the purchase money to the fraudulent account.

The case went to trial, and the jury found that the Broker was 85% responsible for the loss and the court entered judgment against the Broker for $167,129. The Broker filed a post-trial motion seeking a determination in her favor.

The United States District Court for the District of Kansas affirmed the jury verdict. The court rejected the Broker's argument that she did not send the email to the Buyer that was used to send the wire, finding this was an issue of fact for the jury to resolve as there was some evidence that the Broker had sent the later email. The jury determined that the Broker had sent the email, and so the court affirmed the jury verdict in favor of the Buyer.

Bain v. Platinum Realty, LLC, No. 16-2326-JWL, 2018 WL 3105376 (D. Kan. June 25, 2018). [This is a citation to a Westlaw document. Westlaw is a subscription, online legal research service. If an official reporter citation should become available for this case, the citation will be updated to reflect this information.]



Beat the Rush: Complete COE Training Now

Have you fulfilled your NAR Code of Ethics

@nardotrealtor on Twitter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JERRY BAIN and JENNIFER BAIN, Plaintiffs, v. PLATINUM REALTY, LLC and KATHRYN SYLVIA COLEMAN, Defendants.	)	Case No. 16-2326-JWL

MEMORANDUM AND ORDER

This matter comes before the Court on defendants' motion for summary judgment (Doc. # 88). For the reasons set forth below, the motion is **granted in part and denied in part**. The motion is granted as unopposed with respect to plaintiffs' claims of breach of fiduciary duty and negligence and their claim for punitive damages, and judgment is awarded to defendants on those claims. The motion is denied with respect to plaintiffs' claim of negligent misrepresentation.

I. Background

This case arises from plaintiffs' purchase of a house. Defendant Kathryn Sylvia Coleman (hereafter referred to as "Ms. Sylvia") acted as the sellers' real estate agent, and she was employed by defendant Platinum Realty, LLC ("Platinum"). The title company

for the transaction was Continental Title Company ("CTC"). Prior to the closing of the transaction, plaintiffs had their bank wire the purchase amount to a particular bank account owned not by the sellers, but by some unknown party, and the funds were never recovered. Plaintiffs had acted pursuant to wiring instructions attached to an email to plaintiff Jerry Bain's email account purportedly sent from Ms. Sylvia's email account. In this suit, plaintiffs contend that the unknown party (referred to by the parties as "the hacker") intercepted an email from CTC to Ms. Sylvia that contained the intended wiring instructions, changed the wiring instructions, created an email address similar to the CTC address, and sent the changed wiring instructions to Ms. Sylvia by email, who then forwarded those instructions to Mr. Bain. Plaintiffs seek to recover damages in the amount of $196,622.67, the amount wired to the wrong account. By the pretrial order, plaintiffs assert claims against Ms. Sylvia and Platinum for breach of fiduciary duty, negligence, and negligent misrepresentation.[1]

II. Summary Judgment Standards

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine dispute as to any material fact" and that it is "entitled to a judgment as a

[1]The Court exercises supplemental jurisdiction over these claims pursuant to 28 U.S.C. § 1367. Plaintiffs originally asserted claims also against CTC and their bank, including a claim under federal law that permitted this Court to exercise original jurisdiction, but plaintiffs subsequently dismissed the claims against those two defendants, leaving only the claims against Ms. Sylvia and Platinum.

matter of law." Fed. R. Civ. P. 56(a). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Burke v. Utah Transit Auth. & Local 382*, 462 F.3d 1253, 1258 (10th Cir. 2006). An issue of fact is "genuine" if "the evidence allows a reasonable jury to resolve the issue either way." *Haynes v. Level 3 Communications, LLC*, 456 F.3d 1215, 1219 (10th Cir. 2006). A fact is "material" when "it is essential to the proper disposition of the claim." *Id.*

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *Id.* (citing *Celotex*, 477 U.S. at 325).

If the movant carries this initial burden, the nonmovant may not simply rest upon the pleadings but must "bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which he or she carries the burden of proof." *Garrison v. Gambro*, Inc., 428 F.3d 933, 935 (10th Cir. 2005). To accomplish this, sufficient evidence pertinent to the material issue "must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein." *Diaz v. Paul J.*

Kennedy Law Firm, 289 F.3d 671, 675 (10th Cir. 2002).

Finally, the court notes that summary judgment is not a "disfavored procedural shortcut;" rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

III. Abandoned Claims

By the instant motion, defendants seek summary judgment on all claims against them. In their response, plaintiffs have not addressed defendants' arguments with respect to the claims for breach of fiduciary duty, for general negligence, and for punitive damages. Indeed, plaintiffs' brief does not refer to those claims at all. Accordingly, plaintiffs have abandoned any such claims, and the Court grants defendants' motion for summary judgment on those claims as unopposed. *See Maestas v. Segura*, 416 F.3d 1182, 1190 n.9 (10th Cir. 2005) (party appeared to abandon claim by failing to address it in its brief); *Hinsdale v. City of Liberal, Kan.*, 19 F. App'x 749, 768-69 (10th Cir. 2001) (unpub. op.) (affirming district court's ruling that plaintiff abandoned claim by failing to address it in response to motion for summary judgment) (citing *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1393 (10th Cir. 1992)).

IV. Negligent Misrepresentation

A. *Representation to Plaintiffs*

Plaintiffs assert a claim against defendants for negligent misrepresentation. According to the pretrial order, plaintiffs contend that Ms. Sylvia negligently supplied false information to plaintiffs "about where to wire the funds" for the purchase of the house. In that regard, plaintiffs argue that in sending the incorrect wiring instructions to Mr. Bain, Ms. Sylvia negligently represented that those instructions were correct.

Defendants first seek summary judgment on this claim on the basis of their argument that Ms. Sylvia never made such a representation to plaintiffs. Defendants concede that Ms. Sylvia received the fake wiring instructions and attempted to forward them to Mr. Bain. That email (sent at 11:48 a.m. on February 23, 2016), however, was sent not to Mr. Bain's correct email address, but was sent to a very similar address, presumably created by the hacker, from which Ms. Sylvia had received a prior communication. Mr. Bain received the fake wiring instructions in an email sent at 11:54 a.m. on February 23, 2016, which on its face appears to have come from Ms. Sylvia's actual email address. Ms. Sylvia denies that she sent the 11:54 email that Mr. Bain actually received. Defendants thus argue that the hacker sent the fake wiring instructions to Mr. Bain, and that because Ms. Sylvia's email with the fake instructions went elsewhere, she never actually sent the fake instructions to Mr. Bain—which would mean that she did not make any representation to plaintiffs concerning where the money should be wired, and thus cannot be liable for negligent misrepresentation.

The Court is unable to resolve this issue as a matter of law, however, as there is at least some evidence that Ms. Sylvia sent the 11:54 email to Mr. Bain. Most significant

is the fact that the email came from Ms. Sylvia's actual address, from which she had previously communicated with Mr. Bain. Ms. Sylvia denies having sent the email, but the use of her actual address—while fake email addresses were employed to impersonate CTC and Mr. Bain—provides evidence in plaintiffs' favor. The credibility of Ms. Sylvia's denial thus becomes a matter for the jury to decide. Other evidence also supports plaintiffs' claim. For instance, Mr. Bain testified that after discovery of the theft Ms. Sylvia admitted to him that the loss was her fault and could have been avoided if she had reviewed the fake wiring instructions, which admission could indicate her belief that she had sent the fake instructions to Mr. Bain. Mr. Bain also testified that after he received the fake wiring instructions, Ms. Sylvia confirmed to him on the telephone that the funds should be wired prior to closing. Mr. Bain also states that none of his emails to Ms. Sylvia's account were ever returned as undeliverable. Ms. Sylvia did intend to forward the incorrect wiring instructions to Mr. Bain (by the 11:48 email, which she admits sending). Before testifying at her deposition that emails could be recovered from her computer, Ms. Sylvia first testified that she had deleted any emails concerning the transactions, which could indicate an initial desire to conceal evidence. Finally, defendants do not dispute that Ms. Sylvia did nothing after the discovery of the theft to investigate with her email provider how the unauthorized use of her address could have occurred.

Defendants offer evidence and various arguments to counter plaintiffs' evidence. For instance, defendants argue that telephone records dispute Mr. Bain's claim that he

spoke with Ms. Sylvia after he received the wiring instructions. All evidence must be considered in plaintiffs' favor at this summary judgment stage, however, and it is for the jury to weigh any conflicting evidence. Because a question of fact remains for trial, the Court rejects this argument for summary judgment.

B. Positive Assertion

For their second argument for summary judgment on this claim, defendants argue that the 11:54 email, by which the fake wiring instructions were forwarded to plaintiffs, did not contain any positive assertion of fact. That email stated:

> Jerry, see attached. Once the wire is sent kindly forward me a copy of the confirmation slip for my file.
>
> Thank you,
> Kathy Sylvia
> Platinum Realty

Defendants argue that, assuming Ms. Sylvia sent this email, she merely forwarded the wiring instructions without making any particular assertion concerning those instructions. Defendants rely solely on a California case, *OCM Principal Opportunities Fund v. CIBC World Markets Corp.*, 68 Cal. Rptr. 3d 828 (Cal. Ct. App. 2007), in which the court stated that, under California law, negligent misrepresentation requires a "positive assertion" and that an implied assertion or representation is not enough. *See id.* at 847.

Kansas law governs the claim in this case, however, and Kansas has adopted Section 552 of the Restatement with respect to this tort. *See Mahler v. Keenan Real*

Estate, Inc., 255 Kan. 593, 604-05 (1994).[2] By the terms of Section 552, one may be liable for negligent misrepresentation if she "supplies false information" in particular circumstances. *See* Restatement (Second) of Torts § 552(1). The comments to the Restatement provide as follows:

> "Misrepresentation" is used in this Restatement to denote not only words spoken or written but also any other conduct that amounts to an assertion not in accordance with the truth. Thus, words or conduct asserting the existence of a fact constitute a misrepresentation if the fact does not exist.

See id. § 525 cmt. b; *see also id.* §§ 525 cmts. e-g (discussing certain implied representations), 527 (speaker liable for ambiguous representation if she is indifferent to how it will be understood), 529 (liability for misleadingly incomplete representation). In forwarding wiring instructions, Ms. Sylvia could only have intended that plaintiffs would use those instructions to purchase her clients' house. Moreover, the email's reference to "the attached" could also have referred to the forwarded email purportedly from CTC, which stated that the wire instructions were attached and were to be forwarded to the buyers. The jury must decide which facts Ms. Sylvia asserted in the 11:54 email, and the jury could reasonably find in this case that, in supplying wiring instructions to Mr. Bain, Ms. Sylvia was asserting that those were the correct instructions to be used by plaintiffs in that transaction. Accordingly, a question of fact remains for

---

[2]Both sides cite Kansas law for the elements of this tort, and thus they appear to agree that this claim is governed by the law of Kansas, where plaintiffs reside and thus suffered any financial harm. *See O'Bryan v. Wendy's Old Fashion Hamburgers of New York, Inc.*, 1997 WL 158296, at *4 n.2 (D. Kan. Mar. 19, 1997) (Lungstrum, J.).

trial, and the Court rejects this argument for summary judgment.

C. Justifiable Reliance

Finally, defendants argue as a matter of law that plaintiffs did not justifiably rely on the alleged misrepresentation. *See id.* § 552 (liability for negligent misrepresentation for loss caused by the plaintiff's justifiable reliance on the false information). Defendants argue that Mr. Bain is an experienced real estate investor who should have recognized particular red flags in the emails he received. The Court concludes, however, that a reasonable jury could find that Mr. Bain acted reasonably and justifiably in assuming that the 11:54 email, which appeared to come from the actual email address of the sellers' agent, contained the correct wiring instructions. Because a question of fact remains for trial on this element of the tort, the Court rejects this final argument for summary judgment.

IT IS THEREFORE ORDERED BY THE COURT THAT defendants' motion for summary judgment (Doc. # 88) is hereby **granted in part and denied in part**. The motion is granted as unopposed with respect to plaintiffs' claims of breach of fiduciary duty and negligence and their claim for punitive damages, and judgment is awarded to defendants on those claims. The motion is denied with respect to plaintiffs' claim of negligent misrepresentation.

IT IS SO ORDERED.

Dated this 14th day of February, 2018, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

AGENDA ITEM 15
ADOPTED RULE ACTION FROM THE AUGUST 13 2018, MEETING OF THE COMMISSION
CHAPTER 535 GENERAL PROVISIONS
Subchapter N. Suspension and Revocation of Licensure
§535.155, Advertisements

§535.155. Advertisements.

(a)Each advertisement must include the following in a readily noticeable location in the advertisement:

(1)the name of the license holder or team placing the advertisement; and

(2)the broker's name in at least half the size of the largest contact information for any sales agent, associated broker, or team name contained in the advertisement.

(b)For the purposes of this section:

(1)"Advertisement" is any form of communication by or on behalf of a license holder designed to attract the public to use real estate brokerage services and includes, but is not limited to, all publications, brochures, radio or television broadcasts, all electronic media including email, text messages, social media, the Internet, business stationery, business cards, displays, signs and billboards. Advertisement does not include:

(A) a communication from a license holder to the license holder's current client; and

(B) a directional sign that may also contain only the broker's name or logo.

a communication from a license holder to the license holder's current client.

(2)Associated broker has the meaning assigned by §535.154.

(3)"Broker's name" means:

(A)the broker's name as shown on a license issued by the Commission;

(B)if an individual, an alternate name registered with the Commission; or

(C)any assumed business name that meets the requirements of §535.154.

(4)"Contact Information" means any information that can be used to contact a license holder featured in the advertisement, including a name, phone number, email address, website address, social media handle, scan code or other similar information.

(5)"Party" means a prospective buyer, seller, landlord, or tenant, or an authorized legal representative of a buyer, seller, landlord, or tenant, including a trustee, guardian, executor, administrator, receiver, or attorney-in-fact. The term does not include a license holder who represents a party.

(6)"Team name" has the meaning assigned by §535.154.

(c)For an advertisement on social media or by text, the information required by this section may be located on a separate page or on the account user profile page of the license holder, if the separate page or account user profile is:

(1)readily accessible by a direct link from the social media or text; and

(2)readily noticeable on the separate page or in the account user profile.

(d)For purposes of this section and §1101.652(b)(23) of the Act, an advertisement that misleads or is likely to deceive the public, tends to create a misleading impression, or implies that a sales agent is responsible for the operation of the broker's real estate brokerage business includes, but is not limited to, any advertisement:

(1)that is inaccurate in any material fact or representation;

(2)that does not comply with this section;

(3)that identifies a sales agent as a broker;

(4)that uses a title, such as owner, president, CEO, COO, or other similar title, email or website address that implies a sales agent is responsible for the operations of a brokerage;

(5)that contains a team name with terms that imply that the team is offering brokerage services independent from its sponsoring broker, including, but not limited to, ["realty",] "brokerage", "company", and "associates";

(6)that contains the name of a sales agent that is not the name as shown on the sales agent's license issued by the Commission or an alternate name registered with the Commission;

(7)that contains the name of a sales agent whose name is, in whole or in part, used in a broker's name and that implies that the sales agent is responsible for the operation of the brokerage;

(8)that causes a member of the public to believe that a person not licensed to conduct real estate brokerage is engaged in real estate brokerage;

(9)that contains the name or likeness of an unlicensed person that does not clearly disclose that the person does not hold a license;

(10)that creates confusion regarding the permitted use of a property;

(11)about the value of a property, unless it is based on an appraisal that is disclosed and readily available upon request by a party or it is given in compliance with §535.17;

(12)that implies the person making the advertisement was involved in a transaction regarding a property when the person had no such role;

(13)about a property that is subject to an exclusive listing agreement without the permission of the listing broker and without disclosing the name of the listing broker unless the listing broker has expressly agreed in writing to waive disclosure;

(14)offering a listed property that is not discontinued within 10 days after the listing agreement is no longer in effect;

(15)about a property 10 days or more after the closing of a transaction unless the current status of the property is included in the advertisement;

(16)that offers to rebate a portion of a license holder's compensation to a party if the advertisement does not disclose that payment of the rebate is subject to the consent of the party the license holder represents in the transaction;

(17)that offers to rebate a portion of a license holder's commission contingent upon a party's use of a specified service provider, or subject to approval by a third party such as a lender, unless the advertisement also contains a disclosure that payment of the rebate is subject to restrictions;

(18)that offers or promotes the use of a real estate service provider other than the license holder and the license holder expects to receive compensation if a party uses those services, if the advertisement does not contain a disclosure that the license holder may receive compensation from the service provider;

(19)that ranks the license holder or another service provider unless the ranking is based on objective criteria disclosed in the advertisement; or

(20)that states or implies that the license holder teaches or offers Commission approved courses in conjunction with an approved school or other approved organization unless the license holder is approved by the Commission to teach or offer the courses.

Agenda Item 24:

Discussion and possible action to propose amendments to 22 TAC Chapter 537 as follows:

a. §537.45, Standard Contract Form TREC No. 38-5 (Notice of Buyer's Termination of Contract)
b. §537.47, Standard Contract Form TREC No. 40-7 (Third Party Financing Addendum)
c. §537.56, Standard Contract Form TREC No. 49-0 (Addendum Concerning Right to Terminate Due to Lender's Appraisal)

Summary:

The Broker Lawyer Committee recommended revisions to the contract addenda forms adopted by reference under the rules set out in Chapter 537. The revisions to the Notice of Buyer's Termination of Contract add a requirement to include lender's written notice setting forth the reasons Property Approval was not obtained when terminating the contract for that reason. A new and an existing item that grant buyer termination rights under the contracts or addenda, and new notice language were also added.

The Committee rewrote Paragraph 2B, Property Approval, to clarify the intent of the paragraph and to include a timeframe for buyer to give seller notice and evidence of the lender's determination. The Committee also recommended a few clarifying revisions to the Third Party Financing Addendum and reformatted it so that it was consistent with other Commission promulgated addenda and changed the last sentence of Paragraph 5B so that it states "…brokers and sales agents provided under Broker Information."

The Committee revised the Addendum Concerning Right to Terminate Due to Lender's Appraisal to improve understanding and use of the form after receiving comments that it was hard to understand.

Staff Recommendation:

Propose amendments as presented.

Recommended Motion:

MOVED, that staff is authorized, on behalf of this Commission, to submit the proposed amendments to 22 TAC Chapter 537, and the forms adopted by reference, as presented, along with any technical or non-substantive changes required for proposal, to the *Texas Register*, for publication and public comment.

AGENDA ITEM 24
PROPOSED RULE ACTION FROM THE AUGUST 13, 2018, MEETING OF THE COMMISSION
CHAPTER 537 PROFESSIONAL AGREEMENTS AND STANDARD CONTRACTS
§537.45. Standard Contract Form TREC No. 38-5 (Notice of Buyer's Termination of Contract);
§537.47. Standard Contract Form TREC No. 40-7 (Third Party Financing Addendum); and
§537.56. Standard Contract Form TREC No. 49-0 (Addendum Concerning Right to Terminate Due to Lender's Appraisal)

§537.45. Standard Contract Form TREC No. 38-6[~~38-5~~]. The Texas Real Estate Commission (Commission) adopts by reference standard contract form TREC No. 38-6 [~~38-5~~] approved by the Commission in 2018 [~~2015~~] for use as a buyer's notice of termination of contract.

§537.47 Standard Contract Form TREC No. 40-8 [~~40-7~~].
The Texas Real Estate Commission (Commission) adopts by reference standard contract form, TREC No. 40-8 [~~40-7~~] approved by the Commission in 2018 [~~2015~~] for use as an addendum to be added to promulgated forms of contracts when there is a condition for third party financing.

§537.56. Standard Contract Form TREC No. 49-1[~~49-0~~]. The Texas Real Estate Commission (Commission) adopts by reference standard contract form TREC No. 49-1[~~49-0~~] approved by the Commission in 2018 for use as an addendum to be added to promulgated forms concerning the right to terminate due to lender's appraisal.

8-13-18[~~5-7-18~~][~~11-2-15~~]

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 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 Property does not satisfy Property Approval in accordance with the Third Party Financing Addendum to the contract. Buyer has delivered 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.

Draft

______________________		______________________	
Buyer	Date	Buyer	Date

This form has been approved by the Texas Real Estate Commission for use with similarly approved or promulgated contract forms. Such approval relates to this form only. TREC forms are intended for use only by trained real estate license holders. No representation is made as to the legal validity or adequacy of any provision in any specific transactions. It is not suitable for complex transactions. Texas Real Estate Commission, P.O. Box 12188, Austin, TX 78711-2188, (512) 936-3000 (http://www.trec.texas.gov) TREC No. 38-6[~~5~~]. This form replaces TREC No. 38-5[~~4~~].

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

Draft

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

This form has been approved by the Texas Real Estate Commission for use with similarly approved or promulgated contract forms. Such approval relates to this form only. TREC forms are intended for use only by trained real estate license holders. No representation is made as to the legal validity or adequacy of any provision in any specific transactions. It is not intended for complex transactions. Texas Real Estate Commission, P.O. Box 12188, Austin, TX 78711-2188, (512) 936-3000 (http://www.trec.texas.gov) TREC No. 40-8[7]. This form replaces TREC No. 40-7[6].

Draft

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

11-12-2018[~~2-12-18~~]

ADDENDUM CONCERNING RIGHT TO TERMINATE DUE TO LENDER'S APPRAISAL

Not for use in transactions involving FHA insured or VA guaranteed financing

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 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 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 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, 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.

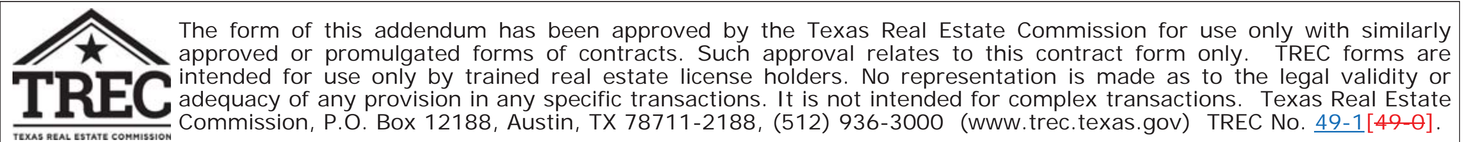
Draft

____
Buyer

____
Seller

____
Buyer

____
Seller



The form of this addendum has been approved by the Texas Real Estate Commission for use only with similarly approved or promulgated forms of contracts. Such approval relates to this contract form only. TREC forms are intended for use only by trained real estate license holders. No representation is made as to the legal validity or adequacy of any provision in any specific transactions. It is not intended for complex transactions. Texas Real Estate Commission, P.O. Box 12188, Austin, TX 78711-2188, (512) 936-3000 (www.trec.texas.gov) TREC No. 49-1[~~49-0~~].

Agenda Item 17:

Discussion and possible action to propose amendments to 22 TAC §535.2, Broker Responsibility

Summary:

The proposed amendments to §535.2 were recommended by the Commission appointed Broker Responsibility Working Group. The amendments requires a broker to designate anyone who leads, supervises or directs a team in the brokerage to be a delegated supervisor. This will require that person to take a six hour broker responsibility course as part of their required continuing education for each renewal. The timeframe when a license holder must be delegated as a supervisor was shortened from six months to three consecutive months. A reference to a recently adopted advertising rule was added. The term "work files" was deleted and replaced with more specific items. A phrase was added to clarify the broker must ensure that a sponsored sales agent has geographic competence in the market area being served. A minimum criteria for training sales agents engaging in a brokerage activity for the first time was added. And, in recognition of digital communications, the time frames for responding to clients, agents, other brokers, and the Commission were reduced to two and three days respectively.

Staff Recommendation:

Propose amendments as presented.

Recommended Motion:

MOVED, that staff is authorized, on behalf of this Commission, to submit the proposed amendments to 22 TAC §535.2, Broker Responsibility, as presented, along with any technical or non-substantive changes required for proposal, to the *Texas Register*, for publication and public comment.

AGENDA ITEM 17
PROPOSED RULE ACTION FROM THE AUGUST 13, 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 [~~§535.154~~] 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) 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 experience 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.)

Agenda Item 21:

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

Summary:

The proposed 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 as part of the FY2019 budget. 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. Lowering this fee will reduce one cost of doing business for license holders.

Staff Recommendation:

Propose amendments as presented

Recommended Motion:

MOVED, that staff is authorized, on behalf of this Commission, to submit the proposed amendments to 22 TAC §535.101, Fees, as presented, along with any technical or non-substantive changes required for proposal, to the *Texas Register*, for publication and public comment.

AGENDA ITEM 21
PROPOSED RULE ACTION FROM THE AUGUST 13, 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 22:

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

Summary:

The proposed 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 from recently adopted rules or that were missing from the penalty matrix.

Staff Recommendation:

Propose amendments as presented.

Recommended Motion:

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

AGENDA ITEM 22
PROPOSED RULE ACTION FROM THE AUGUST 13, 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.)