Risk Reduction Committee Meeting
2020 Texas REALTORS® Winter Meeting

Saturday, February 8, 2020
11:45 a.m. – 12:15 p.m.
Texas 1
Hyatt Regency
Austin, Texas

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I.	Call to Order	Leigh York, Chair
II.	Minutes	Leigh York, Chair
III.	Association Update a. Model Brokerage Policies and Procedures Manual Updated for 2020 b. Code of Ethics Training	Moiri Brown, Liaison
IV.	TREC Update a. November Meeting Form Changes b. Additional November Meeting Actions and Upcoming Items	Cathy Trevino, Vice Chair
V.	State & Federal Issues Update a. ADA Website Accessibility b. Case Law Update	Leigh York, Chair Robin Harris, Associate Counsel Robin Harris, Associate Counsel
VI.	Local Issues	Leigh York, Chair
VII.	Unfinished Business	Leigh York, Chair
VIII.	New Business	Leigh York, Chair
IX.	Adjourn	Leigh York, Chair

Meeting minutes
Risk Reduction Committee
Regular meeting – September 13, 2019
Fort Worth, TX
Minutes recorded by: Abby Lee

Vice Chair Leigh York called the meeting to order at approximately 11:51 a.m. Roll was called and a quorum was established. Vice Chair York asked for any corrections to the meeting minutes from the February 2019 meeting. The minutes were approved as distributed.

During the state and federal issues update, Legislative Attorney Kelly Flanagan provided an update on the 2019 legislative session, including information on changes in the law like the seller's disclosure notice form. General Counsel Lori Levy and Associate Counsel David Jones reported on several recent and ongoing lawsuits related to issues like the Association's Seller's Disclosure Notice and copyright infringement. Senior Associate Counsel Abby Lee provided information on proposed federal copyright legislation and a recent Supreme Court case regarding copyright registrations.

Liaison Cathy Trevino provided an update on Texas REALTORS® forms. Vice Chair Leigh York provided an update on changes to TREC forms and other TREC rules.

There was no unfinished business.

There was no new business.

The meeting was adjourned at 12:28 p.m.

Roll:

	Name	Present
1	Barbara Trumbull	x
2	Diana Ayers	x
3	Jan Miller	
4	Joanne Justice	x
5	Lisa Nettey	
6	Ann Walker	
7	Denise Price	x
8	Derek Westley	x
9	Doug Srader	
10	Bob Baker	x
11	Cathy Mitchell	x
12	Cathy Trevino	x
13	Ivy Boland	x
14	Kandi Luensmann	x
15	Leigh York	x
16	Moiri Brown	x
17	Monica Atkins	
18	Myra Oliver	
19	Pam Titzell	x
20	Sheila Stanush	x
21	Terri Covington	

TABLE OF CONTENTS

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

THIRD PARTY FINANCING ADDENDUM

TO CONTRACT CONCERNING THE PROPERTY AT

_____

(Street Address and City)

1. 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. CONVENTIONAL FINANCING:

❑ (1) 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) 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. 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. 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. 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. 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. 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. APPROVAL OF FINANCING: Approval for the financing described above will be deemed to have been obtained when Buyer Approval and Property Approval are obtained. **Time is of the essence for this paragraph and strict compliance with the time for performance is required.**

A. 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 refunded to Buyer. If Buyer does not terminate the contract under this provision, the

DRAFT

(Address of Property)

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. 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.

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

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

4. 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. The 3-day notice of termination requirements in 2.B. does not apply to this Paragraph 4.

A. 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. 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. 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. AUTHORIZATION TO RELEASE INFORMATION:

A. 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. 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.

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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. 40-9[40-8]. This form replaces TREC No. 40-8[40-7].

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

11-13-2019 [~~2-12-18~~]

ADDENDUM FOR AUTHORIZING HYDROSTATIC TESTING

EQUAL HOUSING OPPORTUNITY

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

Consult a licensed plumber about the scope of hydrostatic testing and risks associated with the [~~hydrostatic~~] testing before signing this form.

A. **AUTHORIZATION:** Seller authorizes Buyer, at Buyer's expense, to engage a licensed plumber to perform a hydrostatic plumbing test on the Property.

B. **ALLOCATION OF RISK**:

- ❑ (1) Seller shall be liable for damages caused by the hydrostatic plumbing test.
- ❑ (2) Buyer shall be liable for damages caused by the hydrostatic plumbing test.
- ❑ (3) Buyer shall be liable for damages caused by the hydrostatic plumbing test in an amount not to exceed $_____.

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. 48-1 [~~48-0~~].

What Happened at TREC's November Meeting

www.texasrealestate.com

2 mins read

The Texas Real Estate Commission met November 19. The full agenda and materials are available at TREC's website. Below are highlights relevant to your business.

Adopted Form Changes

The commission adopted changes to the *Third Party Financing Addendum*. It was amended to clarify that the three-day notice requirement in Paragraph 2B does not apply to Paragraph 4. See the redline.

Changes were adopted to the *Addendum for Authorizing Hydrostatic Testing*. It was amended to include a reference to the scope of hydrostatic testing in the top sentence. See the redline.

These forms were adopted for voluntary use until March 1, 2020, when they become mandatory. Texas REALTORS® will work with form vendors to post the updated forms as quickly as possible.

Proposed Form Changes Withdrawn

The commission withdrew proposed changes to its contract forms. The changes would have affected the following forms.

- *Unimproved Property Contract*
- *One to Four Family Residential Contract (Resale)*
- *New Home Contract (Incomplete Construction)*
- *New Home Contract (Completed Construction)*
- *Farm and Ranch Contract*
- *Residential Condominium Contract (Resale)*.

Proposed changes to the *Addendum for Property Subject to Mandatory Membership in a Property Owners Association* were also withdrawn.

The commission withdrew these proposed changes at the recommendation of TREC's Broker-Lawyer Committee, which would like to further consider the proposed changes.

Adopted Rule Changes

The commission approved a number of rule changes proposed at its August 12 meeting, many of which were necessitated by action during the 2019 legislative session.

Eliminated branch office license: As a result of Senate Bill 624, a branch office license is no longer required. Therefore, the commission adopted changes to TREC rules to remove references to a branch office license. For more information about this change, you can visit TREC's website.

Eliminated certain fees: The adopted amendments eliminate fees for a branch office license, establishing or changing a relationship with a sponsoring broker, change of address or name, an active license certificate, instructor approval, submitting paper application or forms, and certified copies. The fee for dishonored checks is also removed; however, the rule creates a process for requesting payment and allowing the commission to place a license on inactive status if payment isn't received.

Removed residency requirement: The Texas Legislature removed the residency requirement for real estate license eligibility. The adopted amendment removes that requirement from the rule and removes references to service members to incorporate them in a new section, §535.58, License for Military Service Members, Veterans, or Military Spouses.

Additional rule changes adopted by the commission are available in the meeting materials.

Proposed Rule Changes

Changes were proposed to §531.18, Consumer Information, adding an additional statement to the *Consumer Protection Notice* that inspectors are required to maintain errors and omissions insurance to cover losses.

Details about additional proposed rule changes are available in the meeting materials. All proposed rule changes will be posted in an upcoming Texas Register, after which the public will have 30 days to comment. Once published in the register, you can send comments to general.counsel@trec.texas.gov.

New Executive Director Announced

Chelsea Buchholtz was announced as the next executive director of the Texas Real Estate Commission effective January 1, 2020. She replaces Douglas Oldmixon, who will remain with the agency during a transition period through March 2020. Buchholtz currently serves as TREC's general counsel.

Texas REALTORS® Members Appointed to TREC Committee

Texas REALTOR® Candy Cooke was appointed to the Education Standards Advisory Committee. Rob Cook and Sarah Norman were reappointed to the committee. Rick Albers also was appointed as a member of the public.

Hot Topics in Broker Risk Reduction

Katie Johnson, General Counsel and Chief Member Experience Officer
kjohnson@realtors.org
November 2019

WIRE FRAUD (https://www.nar.realtor/topics/wire-fraud)

a. Follow these tips to reduce risk of wire fraud:
   i. Alert homebuyers at the outset of the transaction. Many brokers are requiring signed disclosures. http://www.realtor.org/videos/wire-fraud-alert-for-buyers
   ii. Instruct homebuyers to call wire recipient using an independently-verified phone number.
   iii. Avoid sending wire instructions (and any sensitive financial information) via email.
   iv. Use a secure transaction management platform to share documents and information.
   v. Use good email security practices – never open unsolicited links or attachments, keep operating system and anti-virus updated, use strong passwords and two-factor authentication, purge regularly, and avoid using unsecured wifi.
   vi. Create an e-mail rule to flag email communications where the "reply" email address is different from the "from" email address shown.
   vii. Immediately report suspected fraud to the bank from which the funds were transferred.
   viii. Get to know your local FBI field office and contact them immediately if fraud is suspected.
   ix. Report fraud incidents to www.ic3.gov.
b. Resources:
   i. How to Avoid Wire Fraud video: https://www.nar.realtor/window-to-the-law/how-to-avoid-wire-fraud-in-transactions
   ii. Wire Fraud Alert Video for Buyers: https://www.nar.realtor/videos/videowire-fraud-alert-for-buyers
   iii. Client alert handout: https://narfocus.com/billdatabase/clientfiles/172/13/3450.pdf
   iv. Directory of Local FBI Field Offices: https://www.fbi.gov/contact-us/field-offices
   v. Data Security: https://www.nar.realtor/videos/window-to-the-law-data-security-program-basics
   vi. Cyber Insurance: https://www.nar.realtor/reports/cyber-and-fidelity-insurance-report

TEXTING AND CALLING (TELEPHONE CONSUMER PROTECTION ACT AND DO NOT CALL LAWS)

a. Plaintiff lawyers have created a lucrative business model filing class action lawsuits alleging real estate companies have violated the TCPA and DNC laws by sending text messages and making phone calls without the recipient's consent. The TCPA requires prior express consent before using autodialing equipment to send telemarketing messages to wireless numbers. Because the TCPA defines autodialing equipment broadly, it is likely that all text messages sent by a business will fall under the TCPA. Prior express written consent requires a signed agreement clearly and conspicuously disclosing the text recipient's permission to receive text messages from the sender. DNC laws prohibit individuals from contacting phone numbers contained in the DNC registry.

b. Follow these tips to reduce risk of violating TCPA
   i. Obtain written consent before using an autodialer to send a commercial message. Consent should be clearly stated, well documented and preserved.
   ii. Include language on consent forms stating that recipients who submit wireless numbers agree to receive text messages from or on behalf of sender.
   iii. Allow recipients to easily cancel or opt-out (e.g., by responding "STOP" or "UNSUBSCRIBE")
   iv. Set email alerts to document when subscribers opt-out.
   v. Upon receiving an opt-out request, promptly remove the person from your messaging lists.
   vi. Record the opt-out date and date when person was removed.
   vii. Talk to your vendor about compliance and indemnification.

c. Follow these tips to reduce risk of violating DNC
   i. Create an office policy for compliance with Do Not Call rules. https://www.nar.realtor/legal/complying-with-federal-regulations/do-not-call-registry/creating-an-office-policy
   ii. Obtain an updated DNC list monthly and cross reference with your company CRM. https://www.nar.realtor/legal/complying-with-federal-regulations/do-not-call-registry/accessing-the-registry

d. Resources:
   i. *TCPA and Texting Window to the Law video*: https://www.nar.realtor/videos/window-to-the-law/window-to-the-law-tcpa-and-texting
   ii. *Do You Know Who You Are Calling?:* https://magazine.realtor/law-and-ethics/feature/article/2019/07/do-youknow-who-you-are-calling
   iii. *National Do Not Call Registry*: https://www.donotcall.gov/
   iv. *Chinitz v. Nrt W.*, Case No. 18-cv-06100-NC 2019 U.S. Dist. LEXIS 148699 (N.D. Cal. Aug. 30, 2019)

INDEPENDENT CONTRACTOR STATUS (https://www.nar.realtor/independent-contractor-status)

a. An inherent conflict exists between common law independent contractor status and the traditional classification of real estate salespeople as independent contractors. However, most state real estate statutes expressly address the unique status of real estate agents, permitting classification as independent contractors despite the required control and supervision the broker has over the licensees. In recent years, there have been several attempts by salespeople against brokers to challenge this conflict.

b. Risk Reduction Tips:
   i. Know your state law regarding independent contractor classification of real estate licensees. Statutes protecting this classification are the strongest defense to a legal challenge.
   ii. Always have a written independent contractor agreement and consider including a mandatory arbitration and class action waiver provision in such agreements.
   iii. Don't mandate meetings, administrative office duties, or use of certain tools.
   iv. Allow salespeople to work where, when, and how they deem best.

c. Resources:
   i. White Paper Report: *Independent Contractor Classification in Real Estate*: http://www.realtor.org/sites/default/files/reports/2016/independent-contractor-white-paper-2016.07.14.pdf
   ii. State Statutory Approaches to Worker Classification: http://www.realtor.org/law-and-ethics/state-statutory-approaches-to-worker-classification
   iii. *Key Provisions for Independent Contractor Agreements*: http://www.realtor.org/law-and-ethics/key-provisions-for-independent-contractor-agreements
   iv. *Ten Ways to Manage the IC Relationship:* http://www.realtor.org/articles/ten-ways-to-successfully-manage-your-independent-contractor-relationships
   v. *FAQs*: http://www.realtor.org/law-and-ethics/independent-contractor-status-frequently-asked-questions

COPYRIGHT INFRINGEMENT (http://www.realtor.org/topics/copyright)

a. To avoid risk of copyright infringement, brokers should ensure that they've obtained the rights in the photographs that they assert to have when sharing the photos in the MLS, public portals, and other venues. Brokers should also be able to document that chain of title. In addition, compliance with the Digital Millennium Copyright Act (DMCA) Safe Harbor Provision for IDX displays should greatly reduce brokers' and agents' risk of liability regarding third party photos.

b. Obtain Ownership or Broad Exclusive License for Photographs:
   i. *Sample Work For Hire, Exclusive License, and Assignment Agreements available for you to use at*: http://www.realtor.org/law-and-ethics/who-owns-your-property-photos
   ii. Understand the *Best Practices for Listing Photos*: https://www.nar.realtor/videos/window-to-the-law/copyright-best-practices-for-listing-photos

c. Understand Representations, Warranties, and Indemnification:
   i. "The crux of this lawsuit is whether VHT's clients -- not Zillow -- committed wrongdoing by providing downstream rights they didn't have. Because VHT's claim requires the Court to pass judgment on the actions of VHT's clients, those clients must be joined." *VHT, Inc. v. Zillow Group, Inc.,* No. 2-14-cv-1096 (W.D. Wash. 2015)(Zillow's Motion for Judgement on the Pleadings for Failure to Join Indispensable Parties)

d. Comply with the Digital Millennium Copyright Act:
   i. *DMCA Compliance video*: http://www.realtor.org/videos/window-to-the-law-copyright-infringement-safe-harbor
   ii. *How to Avoid Copyright Infringement video:* https://www.nar.realtor/window-to-the-law/window-to-the-law-how-to-avoid-copyright-infringement

ADA WEBSITE ACCESSIBILITY (https://www.nar.realtor/accessibility)

a. Americans with Disabilities Act (ADA) website accessibility claims are on the rise, with a 177% increase in website accessibility lawsuits filed from 2017 to 2018, and a 131% increase in Q1 2019 filings as compared to Q1 2018. Businesses across industries, including real estate, have seen an increase in demand letters and litigation, alleging that the business operates an inaccessible website in violation of the ADA. While the ADA is silent on its application to electronic spaces, an overwhelming body of case law has developed holding that a business' ADA obligations extend to their electronic spaces. Despite the fact that the DOJ issued notices of proposed rulemaking in 2010 and 2016, but has withdrawn its proposed rulemaking after nearly eight years of review, thus indicating unwillingness to issue additional guidance any time in the near future.
b. Risk Reduction Tips
    i. Ask your website provider about your site's accessibility and indemnification in contracts.
    ii. Consult a website accessibility expert to create a plan for addressing website accessibility issues.
    iii. Include an accessibility statement on your website, along with contact info, where individuals with disabilities may report difficulty accessing the website and seek additional assistance accessing information or services. Feel free review and copy: https://www.nar.realtor/accessibility
c. Resources:
    i. Window to the Law: ADA and Website Accessibility Update: https://www.nar.realtor/window-to-the-law/ada-and-website-accessibilityupdate
    ii. Window to the Law: Accessible Websites and the ADA: https://www.nar.realtor/videos/window-to-the-law-accessible-websites-andthe-ada

CLASS ACTION ANTITRUST LITIGATION

a. Moehrl v. The National Association of REALTORS®, Realogy Holdings Corp., HomeServices of America, Inc., RE/MAX Holdings, Inc., and Keller Williams Realty, Inc. (U.S. Dist. Ct. N.D. Ill., Case No. 1:19-cv-01610), filed March 6, 2019 (consolidated with Sawbill Strategic, Inc. v. The National Association of REALTORS®, HomeServices of America, Inc., Keller Williams Realty, Inc., Realogy Holdings Corp., and RE/MAX Holdings, Inc. (U.S. Dist. Ct. N.D. Ill., Case No. 1:19-cv-02544), filed April 15, 2019).
b. Sitzer and Winger v. NAR et al. (U.S. Dist. Ct. W.D. Mo., Case No. 4:19-cv-00332), filed April 29, 2019.

Plaintiffs filed a putative class action lawsuit against NAR and four real estate corporations alleging home sellers unfairly pay the commissions of buyers' brokers. The complaints mischaracterize NAR rules and MLS policy and question the value buyers' brokers deliver in the home buying and selling process. NAR intends to demonstrate to the courts how the MLS system creates competitive, efficient markets that benefit home buyers and sellers as well as small business brokerages. And buyers' brokers play a very real and critical role in the home buying and selling process.

NAR's motion to dismiss was denied in Missouri, and we are awaiting a judge's ruling on our motion to dismiss for the case in Illinois. We are confident that when the case is ultimately decided, we will prevail. These cases are wrong on the facts, wrong on the law, and wrong on the economics. In the best interests of consumers, NAR will aggressively defend all three lawsuits – and any others that may be filed in the future.

Discussions regarding these lawsuits should be grounded in the bigger picture of the value of REALTORS® and the MLS system to both buyers and sellers.

REALTORS® provide great value to their clients and communities.

- Every REALTOR® must adhere to a strict code of ethics, which is based on professionalism, consumer protection, and the golden rule of treating others the way we wish to be treated.
- REALTORS® use their unmatched knowledge of local markets and industry expertise to help buyers and sellers navigate and negotiate through what are often the most complicated and lengthy financial transactions of their lives.
- REALTORS® are engaged community members and neighbors, committed to building and enhancing the neighborhoods they serve.

MLSs create efficient markets that benefit home buyers and sellers.

- With the vast amount of real estate information available today, it is more crucial than ever to have trained, local brokers helping consumers navigate their options in order to arrive at the best possible decision.
- MLSs create vibrant markets with numerous opportunities for residential buyers and sellers by enabling cooperation between listing and buying brokers.
- With all of this information in one place, MLSs are able to safeguard and manage market information, allowing all parties to complete real estate transactions with confidence and efficiency.

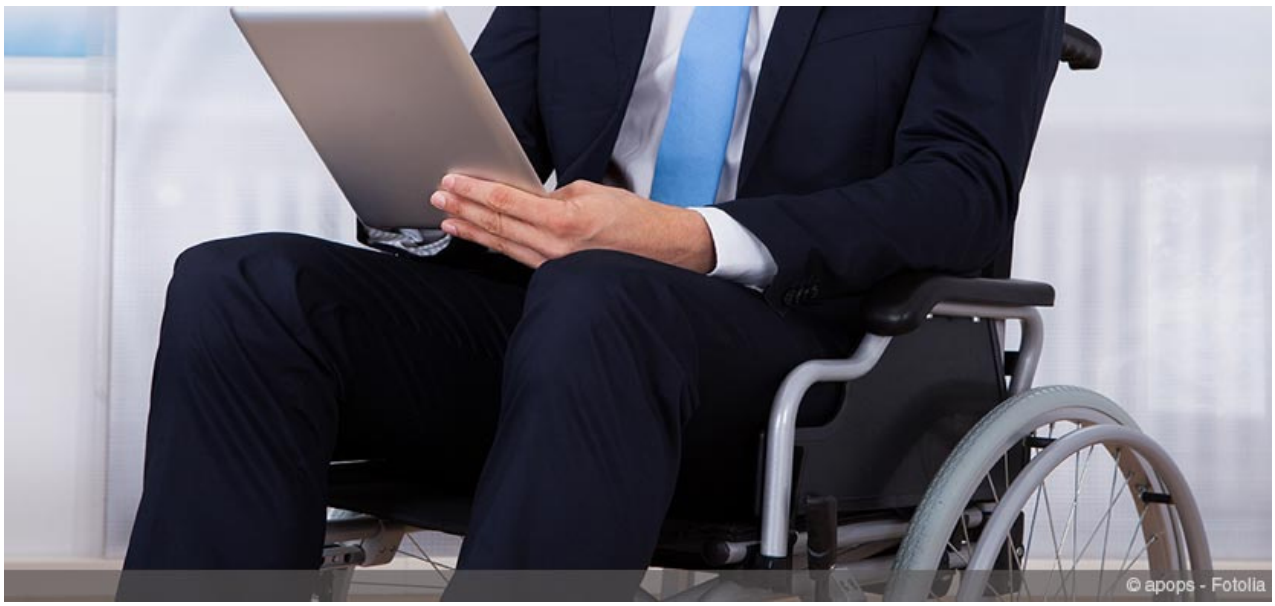
MLSs are pro-competitive and pro-consumer.

- MLSs benefit both buyers and sellers by providing increased exposure for sellers' properties while allowing buyers access to all MLS-listed properties through one broker of their choice.
- Because broker commissions are subject to negotiation, this system creates highly competitive, free markets, which ensure consumers receive superior service.
- Over many years, courts across this country have validated the legality, efficacy and value of the MLS system.

NATIONAL ASSOCIATION of REALTORS®

REALTOR® Magazine

Tuesday, January 14, 2020



Accessibility Is a Broker's Responsibility

Is your office accessible to clients with disabilities? Here are some tips from NAR legal counsel for making sure your brokerage is and continues to be ADA compliant.

January 30, 2015 | by Erica Christoffer

When was the last time you evaluated the accessibility of your office?

Real estate offices are considered places of public accommodation under Title III of the Americans with Disabilities Act. Broker-owners must understand and comply with the law by making sure physical office spaces are accessible to people with disabilities. Compliance not only protects a business against legal action, it also helps ensure that reputable service is being provided to all clients in the community.

In the National Association of REALTORS®' monthly video series, Window to the Law, NAR Associate Counsel Lesley Walker addresses frequently asked questions that NAR receives about the ADA and outlines the responsibilities of a brokerage owner.

Here are elements of Title III that brokers should be mindful of in order to stay aligned with the ADA.

Physical Space

"We recommend that real estate offices and real estate board offices conduct a physical audit of their office spaces to determine the accessibility of the space and what, if any, changes need to be made," Walker says.

She points to the Department of Justice's list of 21 modification examples considered "readily achievable" for places of accommodation – meaning such modifications can be completed without much difficulty or expense. This list includes installing ramps, widening doorways, repositioning office furniture and phones, making cutouts in sidewalks and entrances, installing flashing alarms, lights, and more.

Walker suggests that office managers schedule routine ADA evaluations to ensure ongoing ADA compliance.

Home Offices

Do your salespeople conduct business at home? Make sure they understand how the ADA applies to their home offices.

"Any portion of a home that is used as a home office where business is conducted with customers would also be considered a place of accommodation requiring ADA compliance," Walker says.

If your agents are meeting with clients in their home office, then the home office is considered a place of public accommodation under the ADA just like a brokerage office, and your agents must adhere to the same obligations.

Communication

ADA also requires real estate offices to remove communication barriers by offering auxiliary aids. Walker says it is important to open up a dialog and ask customers what auxiliary aid or service they may require to facilitate effective communication. An example of this would be providing an interpreter for a client with a hearing impairment.

Paying for such accommodations is the broker's responsibility. The brokerage does not necessarily have to provide the exact auxiliary aid requested, Walker says, but must provide one that enables effective communication for the disabled individual.

Real estate offices are not required to provide personal assistance devices, however, such as hearing aids or wheelchairs.

Meetings and Events

Planning to host a conference or special event? It is the responsibility of the business or organization hosting the event to meet ADA obligations. The facility housing the gathering may take on ADA responsibility if it's outlined in the rental contract agreement. Walker says it's important to make sure that the contract indemnifies your business if the facility violates the ADA.

The responsibility of providing auxiliary aids still falls on the host. Walker suggests asking event or meeting attendees in advance if they require any communication aids.

Websites

The question of whether a website is a place of public accommodation under the ADA is still unresolved, Walker says.

"Twenty years ago, when the ADA was first enacted, the Internet existed, but it certainly did not play an integral part of our everyday personal and professional lives the way it does today," Walker says.

Courts' decisions are split on this issue. In January 2010, the Department of Justice took the position that websites are places of public accommodation, and plans to issue proposed regulations on this subject. Issuance of such regulations has been delayed until at least March of this year.

"This would be a good time to begin familiarizing yourself with measures that need to be taken to make a website accessible," Walker says.

Noncompliance?

There are consequences for not complying with the ADA. Private parties can bring lawsuits against your office. The attorney general also has the authority to file a lawsuit when there is a pattern of alleged discriminations or in cases of general public importance. If a real estate office is found to be noncompliant, the company can face monetary and civil penalties, Walker says.

Don't forget to check your state laws as well, Walker says. State law may provide greater protection for people with disabilities than the ADA, requiring brokers to comply with both state and federal laws.

Learn more from NAR's Americans with Disabilities Act Compliance Kit.

Broker-to-Broker is an information network that provides insights and tools with business value through timely articles, videos, Q&As, and sales meeting tips for brokerage owners and managers. Get more Broker-to-Broker content here.

Erica Christoffer

Erica Christoffer is a multimedia journalist and contributing editor with REALTOR® Magazine. In addition to writing print and online articles, Erica oversees the magazine's Broker to Broker content, co-manages the 30 Under 30 program, and manages the YPN Lounge. Connect with her via email: echristoffer@realtors.org.

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November 20th, 2019

DOCKERY & ASSOCIATES LLC
c/o Richard L Dockery
Po Box 459
Three Rivers, TX 78071

Registered Agent for Service of Process:
Robin F Dockery
Po Box 459
Three Rivers, TX 78071

Dear Mr. Dockery:

This correspondence shall serve as a formal demand for violation of the Federal Fair Housing Act of 1988, Title VIII, 42 U.S.C. § 3601 et seq. and the Florida Fair Housing Act, Fla. Stat. §§ 760.20-760.60, (hereinafter "FFHA" or "FHA") respectively.

Our client, **VICTIMS AWARENESS, INC. (hereinafter "VA")**, is a national not-for-profit organization whose membership consists, in part, of persons with disabilities who live throughout the nation, and others who are committed to, *inter alia*, equal access, equal opportunity, and equal rights for protected classes.

While attempting to navigate the Company's (hereinafter "Company") website at www.dockeryandassociates.com (hereinafter "website") using screen-reading software, VA's Tester, who has been trained to test for online accessibility for blind and/or visually disabled people, encountered multiple access barriers which denied full and equal access to information and/or services related to residential real estate offered and made available to the public on the Company's website. The barriers encountered resulted in a discriminatory impact on those who are visually impaired, in violation of the FHA. The discrimination is a direct result of Dockery & Assoc's negligence as the law presumes the Company acted without due care and violated key provisions of the FHA by publishing information on its website which fails to provide reasonable accommodations for blind and visually impaired persons.

The Fair Housing Act, 42 U.S.C.S. § 3601 et seq., ***prohibits making, printing, or publishing, or causing to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on handicap, or an intention to make any such preference, limitation, or discrimination.*** *42 U.S.C.S. § 3604(c). According to the Department of*

Housing and Urban Development regulations, the statute covers all written or oral notices or statements by a person engaged in the sale or rental of a dwelling. 24 C.F.R. § 100.75 (2010).

The Company's violation of the FHA presents unique challenges to members of the blind and visually disabled community in that the violations deprive those within that community of important social, professional and economic benefits that arise from the enjoyment of non-discriminatory housing practices.

Pursuant to 42 U.S.C. § 3606, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, handicap, familial status, or national origin.

Unless the Company agrees to promptly resolve this matter by taking affirmative actions to ensure that its website is fully accessible to, and independently usable by, blind and visually impaired persons within ten business days of this correspondence, we reserve the right to file the attached complaint against Dockery & Associates LLC on behalf of VA, its members, and all similarly situated individuals. As you may know, Congress intended FHA regulations to be enforced by private rights of action in addition to any administrative enforcement by a governmental body. To that end, VA chose to advocate for the enforcement of its members' rights through the hiring of our firm, Legal Justice Advocates.

At this time, on behalf of VA we hereby demand that the Company undertake the actions necessary to make its website readily accessible to and usable by blind and visually impaired individuals so as to permit VA's members and those others similarly situated to be able to navigate and comprehend www.dockeryandassociates.com using assistive technologies such as screen-reading software.

As a direct and proximate result of Company's non-compliance with FHA regulations our client necessarily incurred damages, attorney's fees and costs related to its compliance and enforcement efforts, this include but are not limited to: research into the Company's discriminatory housing practices, its diversion of organizational resources and work performed on behalf of our client by this firm.

Should Dockery & Assoc elect to resolve this matter without litigation, Dockery & Assoc will receive the following:

1. A conditional release from VA provided the Company agrees to remedy the issues discovered on the website within thirty (30) days of resolution;
2. A conditional release from our firm in exchange for reasonable attorney fees and costs, conditioned on compliance within thirty (30) days of resolution; and
3. A WCAG 2.0 & FHA Website Compliance Assessment of the Company's website.

Whether Dockery & Assoc achieves compliance through pre-suit resolution and remediation or protracted litigation rests solely within the Company's discretion. To that end, in the unfortunate circumstance that your Company fails to respond to this demand by December 4th, 2019**,** we reserve the right to seek judicial enforcement through the attached private cause of action in addition to any administrative remedies that maybe available through the Department of Justice and Secretary of Housing and Urban Development without further notice.

Very truly yours,

/s/ Yvette J. Harrell
Yvette Harrell, Esq.
Telephone: (202) 803-4708
yh@legaljusticeadvocates.com
Florida Bar No: 12936
Counsel to Legal Justice Advocates, LLP

November 20th, 2019

[redacted]

Registered Agent for Service of Process:
[redacted]

Dear [redacted]

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Very truly yours,

/s/ Yvette J. Harrell
Yvette Harrell, Esq.
Telephone: (202) 803-4708
yh@legaljusticeadvocates.com
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LONG ISLAND DIVIDED

By Ann Choi, Keith Herbert, Olivia Winslow and project editor Arthur Browne

This project was reported by Ann Choi, Bill Dedman, Keith Herbert and Olivia Winslow and edited by Arthur Browne. Data analysis by Choi. Strategic planning and methodology by Dedman.

Published: Nov. 17, 2019

Newsday has removed its paywall to allow everyone access to this groundbreaking and essential investigative project.

In one of the most concentrated investigations of discrimination by real estate agents in the half century since enactment of America's landmark fair housing law, Newsday found evidence of widespread separate and unequal treatment of minority potential homebuyers and minority communities on Long Island.

The three-year probe strongly indicates that house hunting in one of the nation's most segregated suburbs poses substantial risks of discrimination, with black buyers chancing disadvantages almost half the time they enlist brokers.

Additionally, the investigation reveals that Long Island's dominant residential brokering firms help solidify racial separations. They frequently directed white customers toward areas with the highest white representations and minority buyers to more integrated neighborhoods.

They also avoided business in communities with overwhelmingly minority populations.

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The findings are the product of a paired-testing effort comparable on a local scale to once-a-decade testing performed by the federal government in measuring the extent of racial discrimination in housing nationwide.

Regularly endorsed by federal and state courts, paired testing is recognized as the sole viable method for detecting violations of fair housing laws by agents.

Two undercover testers – for example, one black and one white – separately solicit an agent's assistance in buying houses. They present similar financial profiles and request identical terms for houses in the same areas. The agent's actions are then reviewed for evidence that the agent provided disparate service.

Newsday conducted 86 matching tests in areas stretching from the New York City line to the Hamptons and from Long Island Sound to the South Shore. Thirty-nine of the tests paired black and white testers, 31 matched Hispanic and white testers and 16 linked Asian and white testers.

Meet Newsday's testers

Newsday confirmed that agents had houses to sell when meeting with testers based on analyses provided by Zillow, the online home search site. Zillow draws an inventory of available homes daily from the Multiple Listing Service of Long Island, the computerized system used by agents to select possible houses for buyers. MLSLI said that it does not maintain its own database of past daily inventories, as Zillow does, and so could not provide the same type of tallies. As permitted by law, all tests were recorded on hidden cameras to ensure accuracy in describing interactions between agents and customers.

See the hidden cameras

Newsday relied on two nationally recognized experts in fair housing standards to evaluate the agents' actions. The consultants were:

- Fred Freiberg, who co-founded the Fair Housing Justice Center in 2004. Previously, he had led a national testing program for the Civil Rights Division of the United States Department of Justice, as well as two national paired testing programs for the Urban

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Kentucky College of Law. Schwemm is the author of "Housing Discrimination: Law and Litigation," widely accepted as the definitive treatise of the subject. Schwemm assisted on an unpaid basis.

Newsday separately gave Freiberg and Schwemm summaries of tests that preliminarily appeared to show evidence of unequal treatment; transcripts of relevant remarks made by agents; and maps of the listings suggested to testers, along with the average percentage of white population in the census tracts where the listings fell.

An agent's actions were deemed worthy of citing only after both consultants independently saw evidence of fair housing violations in response to the information provided by Newsday. While their opinions do not represent legal findings, their matching independent judgments provided a measure of apparent disparate treatment by the tested agents.

In fully 40 percent of the tests, evidence suggested that brokers subjected minority testers to disparate treatment when compared with white testers with inequalities rising to almost half the time for black potential buyers.

Black testers experienced disparate treatment 49 percent of the time – compared with 39 percent for Hispanic and 19 percent for Asian testers.

In seven of Newsday's tests – 8 percent of the total – agents accommodated white testers while imposing more stringent conditions on minorities that amounted to the denial of equal service between testers.

"This is something that didn't happen in the deep South," said Greg Squires, professor of public policy at George Washington University in Washington, D.C., who offered advice about structuring the testing program.

"It happened in one of the most educated, most liberal regions of the country. These are significant numbers."

Most commonly in the seven cases, agents refused to provide house listings or home tours to minority testers unless they met financial qualifications that weren't imposed on white counterparts.

"I won't do it," Signature Premier Properties agent Anne Marie Queally Bechand said in refusing to take a black customer to tour houses unless the customer produced evidence that a lender had preapproved a mortgage.

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preapproval, "When can you start looking at houses?"

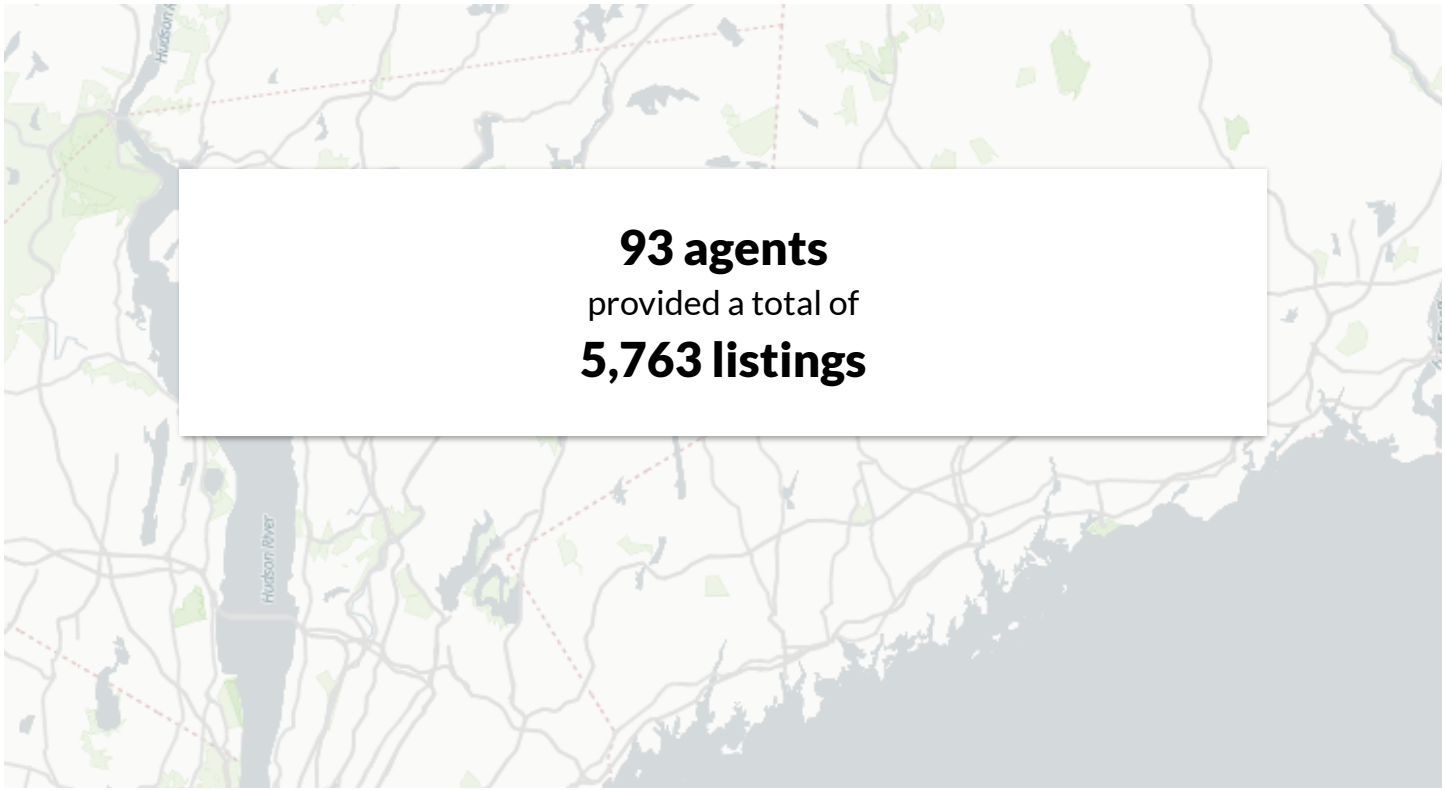
In nearly a quarter of the tests – 24 percent – agents directed whites and minorities into differing communities through house listings that had the earmarks of "steering" – the unlawful sorting of home buyers based on race or ethnicity.

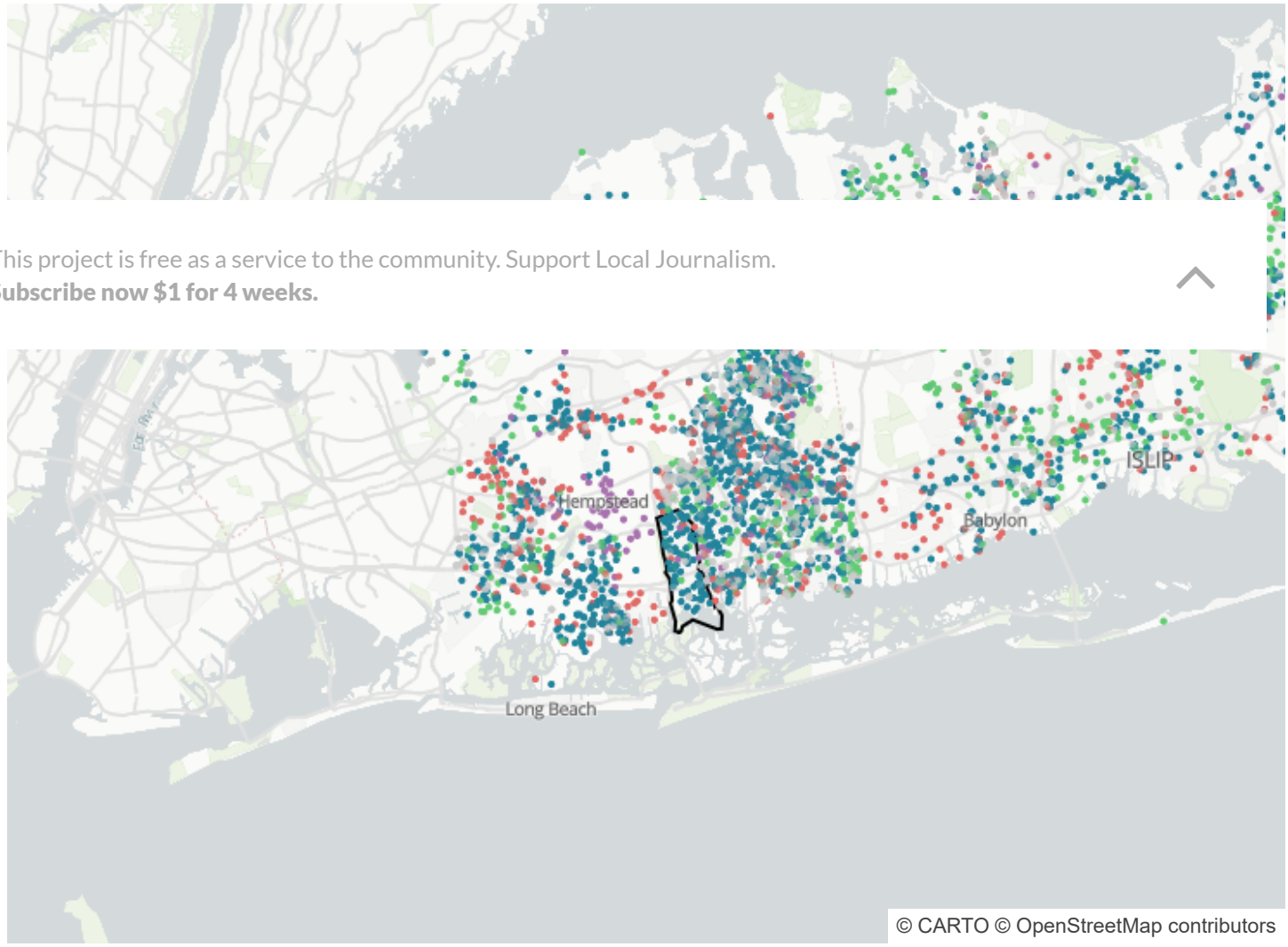
One example: Amid MS-13 gang murders in Brentwood, a 79 percent Hispanic and black community, Le-Ann Vicquery, at the time a Keller Williams Realty agent, told a black customer:

"Every time I get a new listing in Brentwood, or a new client, I get so excited because they're the nicest people." She emailed the paired white customer: "please kindly do some research on the gang related events in that area for safety."

Vicquery declined to comment. Queally Bechand did not respond to requests for comment.

Over the course of Newsday's testing:





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Placed on a map, the addresses showed the communities agents preferred for **white**, **black**, **Hispanic** and **Asian** buyers.

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In some communities, agents provided listings to white and minority buyers matching the population of the areas.

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By a wide margin, for instance, agents chose Merrick for **white** buyers. Eight out of 10 Merrick residents are white.

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Agents gave more than eight out of 10 house choices there to **white** potential purchasers and fewer than two out of 10 to minority testers.

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Altogether, agents provided white testers an average of 50 percent more listings than they gave to black counterparts – 39 compared with 26.

There was no such gap in paired testing for other minorities. Agents gave both Hispanic and white paired testers an average of 42 listings. Asians received 18 compared with 22 given to paired white testers. The averages include cases in which agents provided no listings to one or the other customer.

In some cases, agents keyed on the racial, ethnic or religious makeup of communities when speaking with testers, in all but one sharing the information only with white customers.

Fair housing standards generally bar agents from talking about the backgrounds of people who live in neighborhoods as a form of verbal racial or ethnic steering. The standards also require agents to provide equal guidance to customers about areas in which they may want to live. Century 21 agent Raj Sanghvi, for example, warned a white tester about buying in Huntington, a mainstay of northern Suffolk County.

“But you don’t want to go there. It’s a mixed neighborhood,” Sanghvi said, adding, “You have white, you have black, you have Latinos, you have Indians, you have Chinese, you have Koreans; everything.”

Sanghvi made no similar remarks to an Asian tester and suggested no Huntington houses to either tester.

Speaking to a white tester about one overwhelmingly minority community, RE/MAX agent Joy Tuxson promised, “I’m not going to send you anything in Wyandanch unless you don’t want to start your car to buy your crack, unless you just want to walk up the street.”

Talking to an Asian tester about another largely minority area, Tuxson said she had told a family member, “Do you really want your future children going to Amityville School Districts?”

Sanghvi and Tuxson did not respond to multiple requests for comment.

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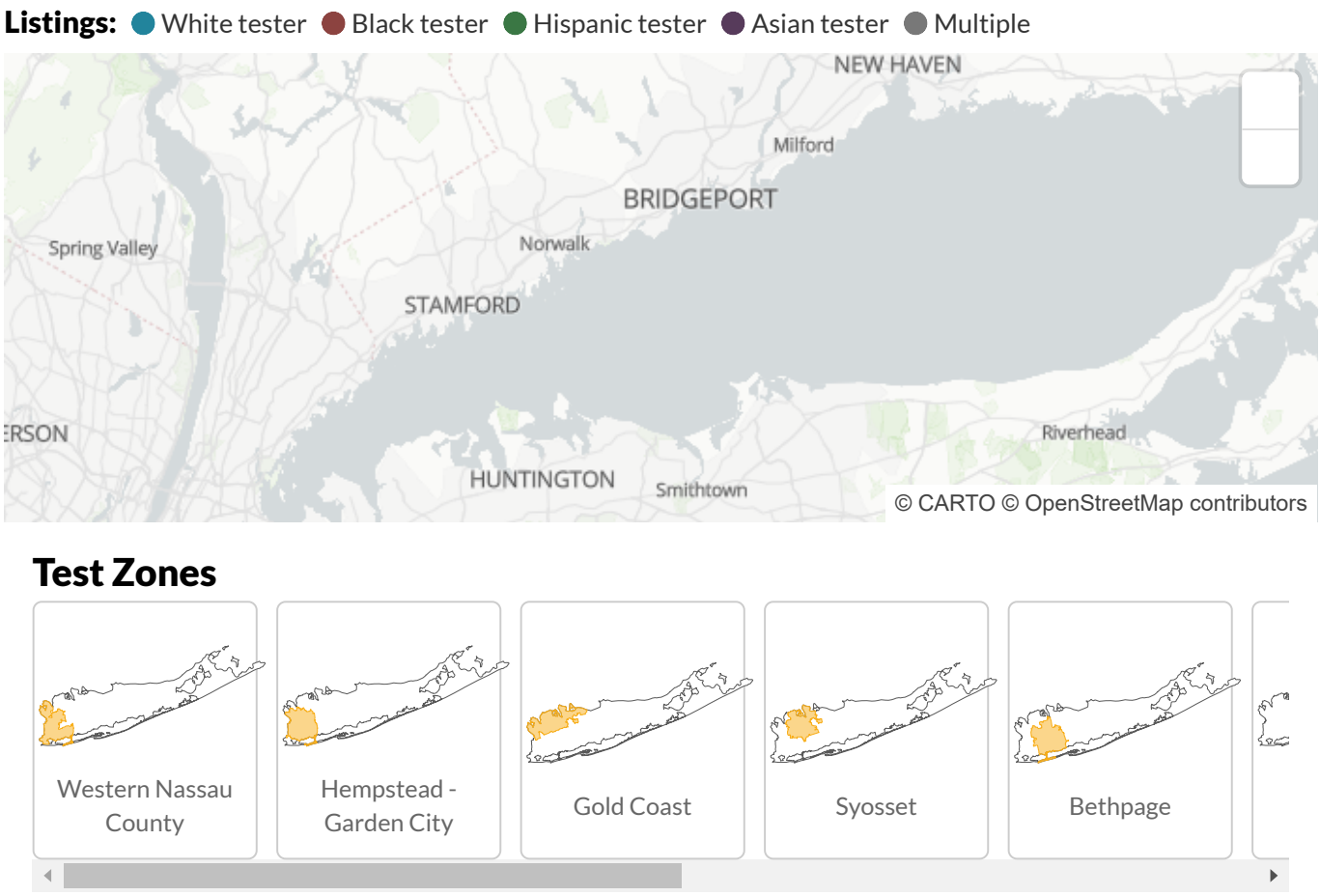
Hamptons.

Newsday conducted tests in each zone and plotted the housing choices made by agents in each area, often revealing the communities they favored for buyers of varied backgrounds.

Cumulatively, the 10 zones encompassed 83 percent of Long Island’s population, including 80 percent of the white population and 88 percent of the minority population.

Mapping the listings by test zones



Dots show listings agents chose by tester race or ethnicity. Gray dots indicate listings agents recommended to at least two testers who differed in race or ethnicity.

Overall, the agents gave black customers their smallest share of listings in towns with the highest proportions of white residents and their biggest share where whites were less prevalent.

Where whites composed 20 percent or less of the population, agents provided seven out of 10 listings to minorities. Only when whites hit 56 percent of the population did agents give most of the listings in a

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gatekeepers to housing choices. Industry representatives have contended that proper training is the best way to ensure agents uphold fair housing laws, arguing against more aggressive enforcement through fines, license suspensions or revocations.

To assess the quality of training, Newsday attended six fair housing classes sponsored by the Long Island Board of Realtors. Experts who reviewed the instruction found that only one covered the material adequately and that others were “shockingly thin in content.”

After the testing was completed, Newsday revealed to testers for the first time how their counterparts had fared in visiting agents. The testers heard the comparisons sitting side by side – black beside white, Hispanic beside white, Asian beside white.

Often, they said the test results brought to light evidence of discrimination that had been hidden behind the smiles and handshakes offered by guides to housing in a suburb where the racial lines between many communities are starkly drawn.

Martine Hackett, who is black and a tenured professor of public health at Hofstra University, had met with seven agents and encountered evidence of disparate treatment three times. Her thoughts encapsulated the perspectives of many fellow testers.

“I would have no idea that, without this testing, that there was even a difference between what was provided. My assumption would be that everybody would be provided with the same listings based on their economic and geographic requirements,” Hackett said, adding:

“To sort of have the options to be limited in that way sort of makes me think about what options are available that people might not know about. And who’s making those choices? That’s the other thing that I feel, is that the choice, in terms of the choice of what would be theoretically the best choice for me and my family, was sort of removed.”

Another tester, Alex Chao, an actor who is Asian, learned that an agent had declined to provide him listings of houses for sale, a first step in a home search, but had given listings to his matched white tester. He called the difference in treatment deeply disturbing.

“I don’t think I was treated fairly at all,” he said. “That’s pretty outrageous and, of course, offensive, upsetting to find out. You know you read about these things, you never think they would happen to you.”

Newsday’s investigation focused on 12 brands that represented more than half of the Island’s home sellers in 2017.

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Homes, Keller Williams Realty, The Corcoran Group, Signature Premier Properties, Realty Connect USA and RE/MAX LLC.

Tests of agents associated with two of the firms–The Corcoran Group and Daniel Gale Sotheby’s–produced no evidence of disparate treatment.

Newsday notified the 93 agents by letters that they had been tested and recorded. When Newsday’s two fair housing consultants found evidence suggesting disparate treatment, the letters detailed the facts so agents could review their records, specified the findings, gave agents the opportunity to view videos of their actions and invited them to provide their perspectives in interviews or written statements.

Additionally, Newsday delivered the identical information and opportunities for discussion and comment to the agents’ corporate leaders.

Thirteen agents and 21 corporate representatives came to Newsday and viewed materials for 26 paired tests that involved eight agencies.

Ultimately, fair housing violations are determined by the courts or enforcement agencies. Authorities may choose to file charges based on egregious conduct in a single case. More generally, they bring legal action after subjecting an agent to several paired tests to establish a pattern and to reduce the likelihood that an agent’s choices were either a fluke or soundly guided by the market at the time.

Newsday tested each agent only once. Falling short of proving legal wrongdoing, each result points to evidence of neutral or disparate treatment in a single comparison of customer contacts and offers little insight into an agent’s general professional conduct.

Collectively, however, the individual test results, bolstered by the statistical findings, form a body of evidence suggesting the extent of discriminatory practices by agents in Long Island home sales. Additionally, read side by side, the matched transcripts uniquely revealed the hidden disparities experienced by minority house hunters without their ever knowing they had been disadvantaged.

Segregation's stain can be overcome

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Newsday's investigation revealed evidence that some agents sorted house hunters by race, ethnicity.

> *"Follow the school bus, see the moms that are hanging out on the corners."*
>
> **Rosemarie Marando**
> ***Coldwell Banker Residential Brokerage***

> *"Some of them are not as nice. Elmont, most of Hempstead, Roosevelt, Baldwin, Freeport. You know, maybe not as nice in terms of statistics."*
>
> **Chris Hubbard**
> ***RE/MAX Central Properties***

> *"In East Hampton .. Hispanic communit in – and they really over Springs."*
>
> **Kevin Geddie**
> ***formerly of Douglas Ellim Estate***

Fair housing laws bar agents from directing whites to one community and equally qualified blacks, Hispanics or Asians to other places, a practice known as steering.

Even so, in 21 of 86 Newsday tests – 24 percent – agents located white and minority house hunters in areas that were different enough to suggest evidence of steering.

Watch expert explain steering

Elmont, a predominantly minority community, was suitable for a Hispanic house hunter but not for a comparable white one.

Freeport, an overwhelmingly minority village, could be a good place for a black home seeker but was a risky place to invest for a matching white tester.

Predominantly white Levittown was fit for a white buyer but more diverse East Meadow and Hicksville were appropriate for an African American.

Said one agent when speaking to a white customer: “I don’t want to use the word steer, but I try to edu – I use the word – I educate in the areas.”

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stores.

“Wherever you’re going to buy diapers, you know, during the day, go at 10 o’clock at night, and see if you like the area,” she said, adding:

“There was one fellow who would – like insisted on this house, and the wife was pregnant and had a little one, and I said to him, ‘I can’t say anything, but I encourage you, I want you to go there at 10 o’clock at night with your wife to buy diapers. Go to that 7-Eleven.’ They didn’t buy there.”

“I have to say it without saying it, you know?” Marando confided.

She also counseled: “What I say is always to women, follow the school bus. You know, that’s what I always say. Follow the school bus, see the moms that are hanging out on the corners.”

Finally, Marando remembered hearing similar advice from an agent as a first-time homebuyer three decades ago and thinking, “What a creep.”

Marando made no similar comments when visited by a black tester. She gave both testers comparable listings in similar areas, showing no evidence of steering.

Newsday’s two fair housing consultants found that Marando had used “coded language” or “a euphemism” to describe steering while talking only to the white tester.

Based on information provided by Newsday, Robert Schwemm, law professor at the University of Kentucky College of Law, concluded:

“This agent knows what steering is and has come up with a euphemism for it that she is willing to share only with the white tester, not the black tester.

“Instead of ‘steering,’ she uses ‘location.’ She is saying she learned over time that this is particularly important. She is now displaying the behavior she criticized in her original agent. And not saying the same things to the black homebuyer is really problematic. Does she think minorities don’t want that?”

Fred Freiberg, executive director of the Fair Housing Justice Center, concluded:

“This agent appeared to use coded language to urge the white tester to consider the racial composition of neighborhoods when considering where to buy a home.

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“While both testers were provided home listings in predominantly white areas, some of the statements made by the agent suggest that the agent is not interested in taking buyers to racially diverse neighborhoods.”

Newsday notified Marando of its findings by letter and email, invited her to view recordings of meetings with testers and requested an interview. She did not return phone messages.

Newsday presented its findings by letter to Charlie Young, president and chief executive officer of Coldwell Banker Residential Brokerage. The letter covered the actions of Marando and additional Coldwell Banker agents.

The company’s national director of public relations, Roni Boyles, wrote in an emailed statement:

“Incidents reported by Newsday that are alleged to have occurred more than two years ago are completely contrary to our long term commitment and dedication to supporting and maintaining all aspects of fair and equitable housing.

“Upholding the Fair Housing Act remains one of our highest priorities, and we expect the same level of commitment of the more than 750 independent real estate salespersons who chose to affiliate with Coldwell Banker Residential Brokerage on Long Island. We take this matter seriously and have addressed the alleged incidents with the salespersons.”

Coldwell Banker declined to discuss the company’s responses to specific cases.

A map of the 5,763 house listings gathered by Newsday represents the collective choices made by the tested agents. All things being equal, white and minority listings should appear in roughly 50-50 proportions across the Island.

They did not.

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The map revealed divided racial and ethnic patterns that would help shape both lives and communities, in

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“They’re putting you in a place that they think you belong. They’re telling you that you don’t belong on this side of town because of your race or whatever and it’s not right,” said black tester Johnnie Mae Alston, a retired state worker, adding:

“But just because you think I would rather be here or because I’m a certain race you think that I should be over here. But what about my choices of where I want to live?”

Both blatant and widely accepted before the civil rights revolution, racial steering by real estate agents has receded largely from view.

Where agents once openly shut black buyers out of white communities, some now apply courteous professionalism while sorting buyers based on race or ethnicity.

“The issue of discrimination is very subtle,” said Claudia Aranda, a director of field operations for the Urban Institute, a nonprofit group that oversaw more than 8,000 paired tests in a nationwide study sponsored by the U.S. Department of Housing and Urban Development in 2010.

That study found real estate agents engaged less frequently than in the past in more explicit forms of discrimination, such as not showing available houses to minority buyers. However, the study also showed that agents placed minority buyers in more integrated neighborhoods at a higher rate than white buyers.

“In the absence of treatment that’s more overt, in the absence of particular discriminatory comments, individual home seekers will never have potentially any reason to suspect discrimination,” Aranda said.

Newsday’s tests sought to get behind the smiles and handshakes that can mask evidence of steering by comparing how agents responded to paired buyers while video recorders were running.

See evidence of steering ›

PART 2

THE PERILS OF HOUSE HUNTING WHILE BLACK

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THEY HAD NO IDEA AGENTS...

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Thirty-nine times, black men and women engaged with real estate agents as paired undercover testers in Newsday's investigation. In 19 of those times, the testing suggested they experienced disparate treatment compared with matched white testers. Additionally, one agent warned white and Asian testers to avoid predominantly black communities.

Kelvin Tune, 54, a federal employee, met with nine courteous, professional agents. He had no idea that seven of those meetings produced evidence of unequal service, with one agent in effect shutting him out of considering houses in the bedrock Long Island community of Plainview.

"I wasn't welcomed to Plainview for her," said Tune on learning the results of that test.

Johnnie Mae Alston, 65, a retired state worker, had no idea that an agent refused to provide her service on the same terms offered to a white client.

"I would have never known," Alston said on learning how her experiences as a tester in Newsday's investigation compared with the experiences of her white counterparts.

Speaking of the real estate agents she met, Alston added: "They make you feel like they are treating you like everybody else. That's because you don't see the other side. But once you see the other side, you realize that you aren't treated that well."

All these testers – both minority and white – discovered for the first time how their experiences compared when Newsday brought them together for joint interviews.

Testing found evidence that:

Black testers experienced unequal treatment 49% of the time

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- Newsday's black testers experienced **disparate treatment at higher rates** than did Hispanic (39 percent) and Asian testers (19 percent).
- In 11 cases, **agents directed black testers** to different neighborhoods than white testers in comparisons that showed evidence of steering.
- In five instances, agents **imposed conditions on black testers** that amounted to the denial of equal service compared with conditions requested of white testers.
- In three cases, agents either **spoke about steering** to the white tester but not the black tester or **volunteered information about the ethnic makeup of communities only to white testers.**
- Altogether, **agents provided white testers an average of 50 percent more listings** than they gave to black counterparts – 39 compared with 26, including instances when agents provided no listings to one tester.

There was no such gap in paired testing for other minorities. Agents gave both Hispanic and white testers an average of 42 listings. Asians received 18 compared with 22 given to white testers.

Limiting choices can help guide buyers toward and away from communities.

"Probably the most powerful tool for steering is through information withholding," said Jacob Faber, an assistant professor of sociology at New York University who studies segregation.

"So that job as information conveyors is just really important."

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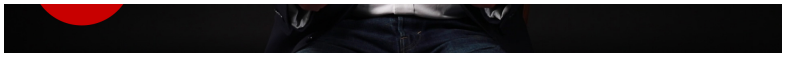

Investigative reporter Keith Herbert details the challenges black testers faced 49% of the time during paired testing.

Before the changes driven by the civil rights movement, real estate agents often refused outright to serve black buyers. Today, experts say discrimination more likely takes the form of subtly directing buyers of different backgrounds toward different communities or requiring minorities to overcome higher financial barriers than whites.

Following are four case histories that show evidence of the disparate treatment hidden in house hunting while black on Long Island a half century after passage of the federal Fair Housing Law. They are accompanied by the findings of fair housing consultants Fred Freiberg, executive director of the Fair Housing Justice Center, and Robert Schwemm, professor at the University of Kentucky College of Law.

The opinions of Freiberg and Schwemm are based on data provided by Newsday. Their judgments are not legal conclusions.

The case histories also include the responses of agents and the companies they represent.

TEST 67 An agent suggests five Plainview homes to a white house hunter – but tells a black home buyer that houses with the same market value there are out of his price range.

TEST 76 An agent takes a white customer on house tours without requesting identification – but asks a black house hunter to show ID.

TEST 96 An agent warns a white home buyer about gang violence in Brentwood – but directs the black house hunter toward the predominantly minority community.

TEST 45 An agent warns a white customer to avoid investing in Freeport – but suggests the predominantly minority village could be a good choice for a black customer.

Explore the test cases ›

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PART 3

PRIVILEGES OF HOUSE HUNTING WHILE WHITE

Agents' conduct showed evidence of denial of equal service to minorities in 8% of Newsday's paired tests.

Serving as gatekeepers to homes, schools and communities, some real estate agents made the key to the front door easier to reach for whites than for minorities.

Typically, these agents provided ready service to white customers they encountered in Newsday's investigation, offering homes to consider and conducting house tours while taking on faith that the white house hunters had the financial capability to purchase.

In contrast, they denied similarly full service to minority customers, refusing to provide listings or tours unless the customers showed proof of financial capability.

In seven of Newsday's 86 paired tests – 8 percent – the agents' conduct produced evidence of unequal treatment amounting to the denial of equal service to minorities.

Black buyers experienced the evident denials most frequently – in five of the tests. One tester was Hispanic. One was Asian.

The five tests that produced evidence of the denial of equal service to black testers occurred among 39 black-white tests – a rate of almost 13 percent.

No agent in any test placed greater obstacles in front of a white buyer than a matched minority customer.

Posing as first-time home buyers, white and minority testers separately asked agents to start their searches by suggesting house listings and by providing tours of properties for sale. No agent flatly refused service to anyone.

Instead, seven agents imposed conditions on minority buyers that were seemingly reasonable until matched

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that a lender has found a buyer creditworthy up to a certain amount based on a credit check and documentation submitted by the buyer. Prequalification indicates that a lender has preliminarily offered a similar judgment without yet conducting a full financial review.

Another condition entailed granting an agent the exclusive right to represent a buyer. Exclusive broker's agreements stipulate that an agent will be a buyer's sole representative and typically guarantee that the agent will be paid a commission, either from the proceeds of a sale or directly by a buyer.

The law permits agents to employ both stipulations equally with all customers. But it bars agents from imposing them only on members of one group and not another.

One example: Although a black customer told Laffey Real Estate agent Nancy Anderson, "My uncle is actually a loan officer so we crunched the numbers with him," Anderson refused to provide house tours, emailing, "I need to have the preapproval before we see the listings."

TEST 92

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Black tester	White tester
Refused house tours without preapproval	**Escorted on house tour without preapproval**

In contrast, she escorted a paired white buyer on house tours after he assured her, “I got a buddy of mine that works at Roslyn Savings & Loan.”

Anderson did not respond to a letter informing her of Newsday’s findings or to invitations by letter and email to view video recordings of her meetings with testers. When reached by telephone, she said, “I have no comment to you at this point.”

Mark Laffey, named on Laffey Real Estate’s website as principal owner, and Philip Laffey, described as overseeing Laffey Real Estate, did not respond to letters, emails and telephone calls requesting interviews or comment.

Experts say real estate agents may more efficiently manage their time if they require buyers to produce a mortgage preapproval or a prequalification letter before providing house listings or taking the customers out on a tour.

“If you are really worried about your time, you’d require everybody to be prequalified,” said Dorothy Brown, a law professor at Emory University School of Law who focuses on issues of race and legal policies.

“White people get turned down for mortgages too, so why wouldn’t you?”

Based on facts presented to them in Anderson's case, Newsday's two fair-housing consultants, Fred Frieberg, executive director of the Fair Housing Justice Center, and Robert Schwemm, professor at the University of Kentucky College of Law, saw evidence of unequal treatment.

Freiberg wrote: "The agent's refusal to provide service to the African American tester is an example of

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Schwemm concluded: "Evidence of blatant discrimination (inferior treatment of the black tester) regarding not showing houses before receiving a preapproval letter."

Newsday's tests compared how agents interacted with people of different races or ethnicities in individual situations and therefore may not necessarily shed light on how any individual agent treats white and minority customers in general.

As one illustration, Realty Connect USA agent Reza Amiryavari provided service to black and white customers without preconditions in a test that Newsday disqualified because recording equipment failed. In a subsequent test, Amiryavari required a Hispanic buyer to meet conditions that indicated a denial of equal service when compared with the white buyer.

Reflecting on what she had learned from serving as a tester, Brittany Silver, who is white and an actress, said:

"A Caucasian person with money coming in to spend it really could never do anything wrong." She added: "I don't think that person will ever be questioned. I think that I am privileged because I'm white."

Following is evidence of disparate treatment at work in four case histories, as affirmed independently by consultants Frieberg and Schwemm, who rendered similar judgments on all seven tests that produced evidence of the denial of equal service to minorities.

The opinions of Freiberg and Schwemm are based on data provided by Newsday. Their judgments are not legal conclusions.

The case histories also include responses of agents and the companies they represent.

TEST 93 An agent refuses to show homes to a black buyer unless the buyer signs an exclusive broker's agreement – just hours before she invites a white buyer on house tours without requiring such an agreement.

TEST 30 An agent offers to drive a white house hunter to tour homes, provides 79 listings and escorts the potential buyer to see four houses without proof of financial standing. The agent tells a black home seeker she must produce mortgage prequalification.

TEST 78 An agent tells a Hispanic house hunter that he helps customers only after they sign an exclusive broker's agreement and secure mortgage preapprovals. The agent provides listings and tours to a white house hunter without requiring either document.

TEST 09 An agent tells black and white house hunters that he provides listings and home tours only to

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Explore the test cases ›

PART 4

THEY LOOKED ALMOST EVERYWHERE ELSE

Agents avoided listings in many of Long Island's minority communities.

Real estate agents associated with Long Island's biggest brokerages had more than 200 opportunities to suggest houses to paired testers in eight overwhelmingly black and Hispanic communities during Newsday's fair housing investigation.

The agents largely avoided the minority communities, recommending homes there only 15 times. But when they did offer listings in minority communities, they sent those listings more often to minority buyers than to whites.

Freeport, Elmont, Hempstead, Brentwood, Central Islip, Uniondale, Roosevelt and Wyandanch fell 211 times a

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The eight predominantly minority communities ranged from 73 percent minority Freeport to 97 percent minority Roosevelt. Although houses were on the market with prices that ranged from $400,000 to $500,000, the agents directed all but a small share of testers to communities with larger proportions of white residents.

“I think what you’ve described is steering based on racial composition of a neighborhood. The fact that everybody is steered away doesn’t make it acceptable,” said Greg Squires, a professor of public policy at George Washington University in Washington who has served as a consultant to fair housing groups and the U.S. Department of Housing and Urban Development.

“You could argue that this does not show discrimination against the home seekers because everybody was steered away from these neighborhoods,” Squires added. “If in fact that’s the case, what it suggests is discrimination against certain neighborhoods because of the racial composition of those neighborhoods.”

Newsday tested agents who worked with the 12 companies that dominate the market: Douglas Elliman Real Estate, Century 21 Real Estate LLC, Charles Rutenberg Realty Inc., Coldwell Banker Residential Brokerage on Long Island, Coach Realtors, Daniel Gale Sotheby’s International Realty, Laffey Fine Homes, Keller Williams Realty, The Corcoran Group, Signature Premier Properties, Realty Connect USA and RE/MAX LLC.

Altogether, they have 218 branch offices in Nassau and Suffolk counties but no offices in the eight communities where most of the Island’s racial minorities live. The average white population in the towns where the top real estate brands have their offices ranges from 75 percent (Century 21) to 86 percent white (Keller Williams).

Asked by letter why they have no presences in the Island’s predominantly minority communities, representatives of only three of the 12 companies responded: Daniel Gale Sotheby’s, Coldwell Banker Residential Brokerage on Long Island and RE/MAX LLC.

Katherine Heaviside, a spokeswoman for Daniel Gale Sotheby’s, said the firm had “grown over the years to over 28 locations. While we are not in every community, we look forward to expanding into many more locations in the years to come.”

Spokeswomen for Coldwell Banker and RE/MAX noted that with the technology available today, customers can connect with agents' services without having to go to a physical office.

The RE/MAX representative, Kerry McGovern, said the company operated a franchise in Freeport from 2000 to 2010 and in Hempstead from 2005 to 2017.

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Coldwell Banker spokeswoman Roni Boyles said the firm's "market share has steadily increased year over year from 2016 through 2018 collectively, in the communities you named: Elmont, Freeport, Hempstead, Roosevelt and Uniondale."

The 12 biggest firms on average have had a smaller market share in the eight minority communities than they do across the Island. They've controlled more than half the listings Islandwide. But in the minority communities, the biggest firms' market share has ranged from about a fifth in Wyandanch to a third in Freeport and Elmont.

Agents associated with smaller, locally based brokerages service most of the listings in the eight minority communities. Roy Clark, an agent with LI Community Realty Inc. in Brentwood, said large brokerages overlook areas like Brentwood, Central Islip and Wyandanch.

"They don't really make advances here," said Clark, who has worked in the area for nearly 15 years.

When agents from the larger firms have contacted him about showing a house hunter one of his listings, Clark added, "I have not experienced any white buyers at all being brought by any large company."

Clark said when he used to work at one of Long Island's largest brokerages, "they didn't really venture too much into areas that were areas of color. I don't know if it was a fear factor or what. I don't know why they didn't."

Lenora W. Long, a broker based in Hempstead for 18 years, said she has noticed trends like those experienced by Clark: white agents working for the Island's biggest firms contacting her about her listings in Hempstead on behalf of a black or Hispanic client.

"I've never had the experience of an agent from the North Shore or South Shore bringing a Caucasian looking for a home in Hempstead," Long said. "It's usually black or Hispanics shuttled into Hempstead."

Jim Blais, who is white and a resident of Hempstead Village's Ingraham Estates development, said he has witnessed the phenomenon described by Long.

“There are roughly five houses in the last two or three years that have gone for sale or have been sold and what I’ve noticed is that you see only black or Hispanics coming to look at the houses,” Blais said. “I have yet to see a white family coming by.”

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PART 5

HISPANICS FACE HURDLES AS POPULATION GROWS

Nearly 40 percent of their tests showed evidence of steering or disparate treatment.

Pedro Jimenez expected to find evidence of some discrimination as a Hispanic searching for a home on Long Island. He found more than he imagined as a member of the Island’s largest minority group.

Jimenez asked eight real estate agents for help buying houses as a paired tester in Newsday’s investigation of discrimination in real estate sales. Five of the eight tests produced evidence that agents had subjected Jimenez to unequal treatment when compared with his white counterparts.

“It is alarming. It is crazy,” he said. “It’s 2018, I cannot stress that enough – this is 50 years after the civil rights marches. I remember all sorts of people saying, well, we’re post racial, we voted a black president. No, we’re not. Obviously, we are not.”

Jimenez, 45, is a computer and internet professional who was born in the Dominican Republic.

As a boy of 5, he followed his mother to immigrate legally to the United States. He grew up in the Corona section of Queens, attended New York City public schools and helped his mother earn income by making belts

in the family's apartment.

Jimenez also remembers that the social surroundings taught him to distinguish between light-skinned and dark-skinned fellow Hispanics, those of darker tones being looked down upon.

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came to learn almost in evolutionary steps there is no basis for those things," Jimenez said. "You don't know these people, how can you cast this light on people you don't know? And not only that, but by having this view I am causing this suffering."

That evolution, Jimenez believes, outpaced the attitudes of real estate agents he encountered as an undercover tester.

"What this says to the Latino population is that, clearly, you're going to be steered, especially if you leave yourself at the mercy of the agent," he said.

Latinos compose 18 percent of the Island's population, according to 2017 census estimates, followed by blacks at 9 percent and Asians at nearly 7 percent. They are spread widely, with 90 percent of the population living in 120 of the Island's 291 communities. The United States Census Bureau defines Hispanics and Latinos as people of Cuban, Mexican, Puerto Rican, South or Central American or other Spanish culture or origin regardless of race.

Jimenez was one of five Hispanic testers who went undercover in Newsday's investigation.

They engaged with agents representing 12 of the Island's largest brokering firms in offices located from Massapequa Park, Brentwood and East Hampton on the South Shore to Great Neck and Northport on the North Shore. Using aliases with Hispanic surnames, they said they were looking for houses with prices that ranged from $400,000 to $3 million.

All told, Newsday's:

five Hispanic testers met evidence of disparate treatment 39% of the time

Jimenez, Ashley Creary, Nana Ponceleon, Liza Colpa and Jesus Rivera went house hunting 31 times while paired with matching white testers. Twelve of the tests showed evidence that agents:

- Provided the group **12 percent fewer listings** than the white buyers in those tests, with

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- **Focused Hispanic testers on houses in 18 census tracts in the Town of Huntington** that took in the downtown area, then stretched north to Halesite and south to Huntington Station, South Huntington and West Hills. They picked listings in these areas for Hispanic testers at double the rate they did for white buyers. Eleven of the 18 tracts show growing Hispanic populations.
- In one case, imposed **more stringent requirements** on a Hispanic tester than a white buyer, amounting to a denial of equal service, according to evaluations by Newsday's fair housing consultants.

Following are three case histories showing evidence that Hispanic house hunters experienced disparate treatment, along with the findings of Newsday's fair housing consultants Fred Freiberg and Robert Schwemm.

The opinions of Freiberg and Schwemm are based on data provided by Newsday. Their judgments are not legal conclusions.

The case histories also include the responses of agents and the companies they represent.

TEST 42 An agent complains to a white house hunter that fair housing laws bar him from warning buyers away from certain communities, offers the customer choices in predominantly white areas and directs a Hispanic house hunter to predominantly minority communities.

TEST 07 An agent tells a white buyer that she would look in areas that surround a predominantly minority community while telling the Hispanic buyer that she would concentrate more on that community.

TEST 87 An agent tells a white customer that he "might be more comfortable in a certain demographic area," says she is barred from talking about demographics – but adds her colleague will educate the customer, whom she describes as a "stand-up guy."

Explore the test cases

PART 6

FEWER HURDLES FOR ASIAN BUYERS

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While searching for homes with prices ranging from $400,000 in the Bay Shore and West Islip area to $7 million on the North Shore Gold Coast, Asian house-hunters met evidence suggesting discrimination less often than black and Hispanic peers in Newsday's paired testing of real estate agents.

The Asian would-be home buyers – one Chinese American, one Korean American, one South Asian American – participated in 16 tests that measured the service agents gave to them against how the agents helped comparable white buyers.

In all but three, agents provided comparable service to Asian and white house hunters. The three exceptions included evidence that one agent denied equal service to an Asian tester compared with his white counterpart and that two agents provided greater information about communities to white testers – even as the agents disparaged those areas.

None of the tests matching Asian and white buyers showed evidence that agents had steered house hunters to different communities.

At three out of 16 tests, the individual Asians experienced evidence suggesting discrimination 19 percent of the time – a frequency far less then met by black (49 percent) or Hispanic (39 percent) testers.

That rate reflected apparent personal discrimination against Asian testers. Two additional tests suggested possible violations of fair housing standards that restrict agents from volunteering the racial, ethnic or religious makeup of communities to customers. In those two tests, agents pointed out a growing Asian presence in an area to potential white buyers.

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statements about racial makeups that are unsolicited by the home seeker."

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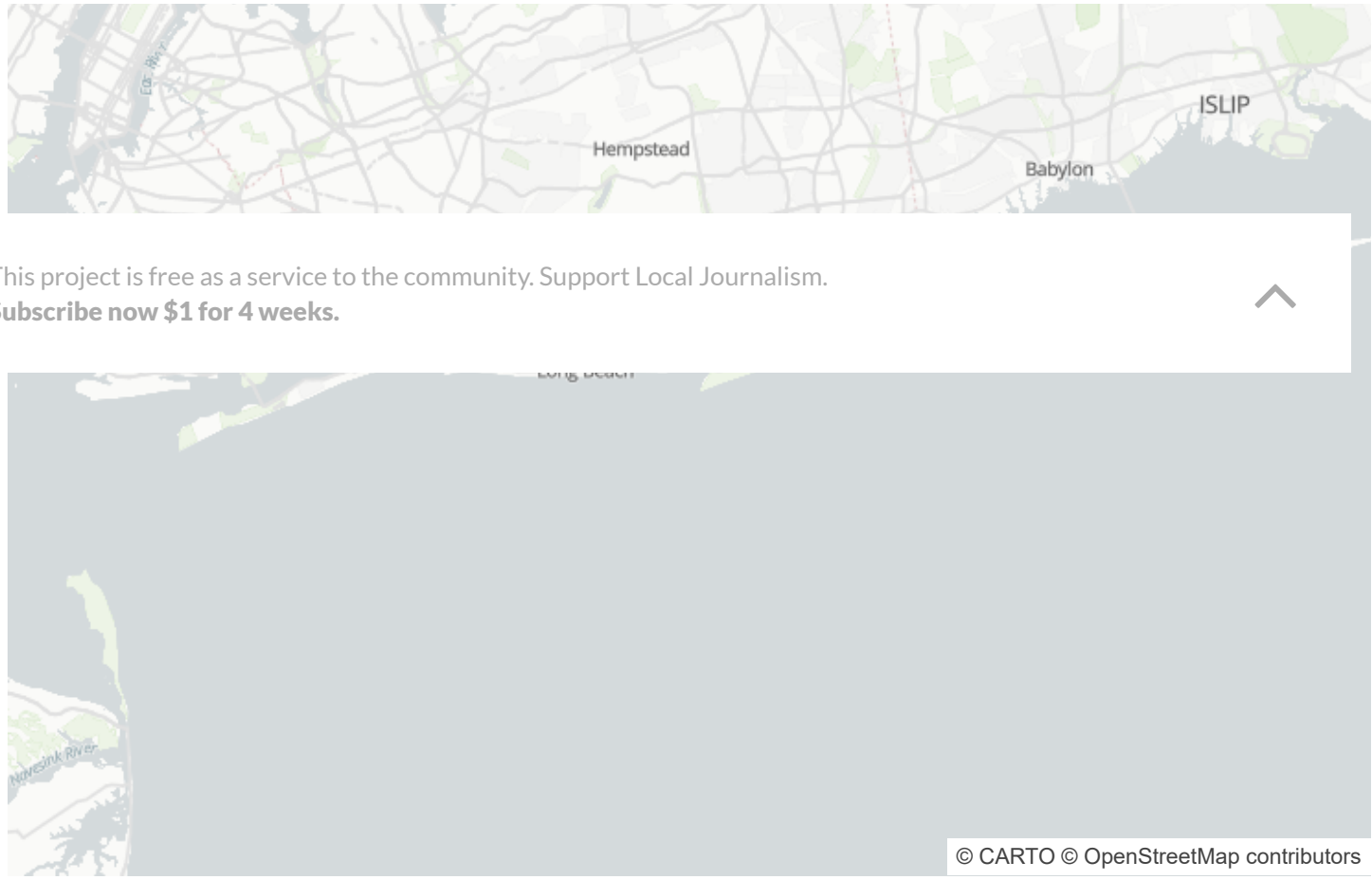
PART 7

AGENTS' TOP CHOICE FOR HISPANICS

Huntington was recommended for them at a much higher rate than for white buyers.



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Huntington was the location most favored by agents for Hispanic house hunters.

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Agents in five tests avoided Huntington for **white** buyers.

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84 percent of the listings they recommended in Huntington, Huntington Station and South Huntington were to **Hispanic** buyers.

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Clustered in northern Suffolk County, more than an hour's commute by train to Manhattan, Huntington and its adjoining communities have long epitomized Long Island's suburban lifestyle. There's a vibrant downtown. There are stately homes on wide leafy streets. There are former beach cottages close to Long Island Sound.

And there is change: The white population has dropped in many census tracts, and the Hispanic population has risen – a phenomenon reflected in house choices by real estate agents in Newsday's investigation of residential sales practices.

The area emerged as the location most favored by agents for Hispanic house hunters on Long Island. In undercover testing that paired white and Hispanic buyers, agents recommended the Huntington surroundings far more often to the Hispanic testers – even though none asked specifically to live in that area.

In five tests, white and Hispanic house hunters sought $450,000 to $500,000 houses within 20 or 30 minutes of Greenlawn or Northport, two communities within driving distances from downtown Huntington, or a $600,000 house within 30 minutes of Syosset, an area also encompassing Huntington.

Collectively, the agents gave the testers 453 listings, recommending 65 percent of them to the Hispanic house hunters. The listings covered a swath of territory that extended from Plainview and Oyster Bay on the west to Hauppauge and Kings Park on the east.

Among those listings, the agents suggested homes in the core Huntington communities of Huntington, Huntington Station and South Huntington 173 times. Here the concentration of houses recommended to Hispanic buyers hit 84 percent – with no agent providing a majority of listings to a white tester.

The gap in the number of home recommendations made to Hispanic and white buyers in three of the tests was large enough that Newsday's two fair housing consultants detected evidence suggesting that agents had steered Hispanic buyers into the Huntington area compared with matched white buyers.

These three agents recommended houses in the Huntington area 78 times to Hispanic house hunters and to

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In contrast, where agents chose Huntington as a place to live in six similar black-white tests, they recommended it to the black buyer 39 percent of the time.

Explore the test cases ›

PART 8

ALMOST EXCLUSIVELY FOR WHITES

Several agents rarely recommended Merrick, Levittown and Rockville Centre for minority house hunters.

No house hunter asked specifically to live in three Long Island communities where white residents dominate the population – but seven real estate agents specifically suggested them almost exclusively to white potential buyers during Newsday's investigation.

Merrick, Levittown and Rockville Centre in Nassau County emerged in the testing as places that these agents

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The agents' choices matched the demographics of the towns: The seven gave their white customers 13 times more listings in the communities than they provided to matching minority buyers. Two suggested homes there only to their white customers.

In all seven tests, Newsday's two fair-housing consultants – Fred Freiberg, executive director of the Fair Housing Justice Center, and Robert Schwemm, professor at the University of Kentucky College of Law – independently detected evidence of steering.

See the evidence ›

PART 9

THE CHALLENGES FACING ENFORCEMENT

Little money at all levels of government for extensive testing to root out discrimination.

In February 2016, Gov. Andrew M. Cuomo invoked Martin Luther King Jr. as he announced a "groundbreaking" drive against discrimination in home sales and rentals.

The governor told an enthusiastic audience at the Convent Avenue Baptist Church in Harlem that the state would sponsor paired testing across New York – a technique that uses undercover investigators – to crack down on real estate agents and landlords who fail to treat white and minority customers equally.

"We're going to investigate it," Cuomo vowed. "We're going to find it. We're going to ferret it out. We're going to punish it and we are going to prosecute it because it is illegal."

Added Cuomo, who formerly served as secretary of the U.S. Department of Housing and Urban Development:

“There will be people who will be unhappy because it’s going to be disruptive to a lot of the big players in the housing industry who like it the way they now have it.”

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The results included a $6,000 fine against a landlord charged with refusing to rent to disabled individuals using emotional support animals; a $15,000 settlement by a landlord charged with refusing to rent to black applicants; and a pending court case against a landlord for allegedly refusing to rent to individuals who use service animals.

Cuomo, who as New York attorney general oversaw 200 tests of real estate industry practices, has not allocated funding for additional testing as governor.

The governor’s enforcement foray illustrates the cost of paired testing investigations, as well as the wide gap between their limited use and the documented prevalence of hidden discrimination.

In a summary of Cuomo’s actions to combat bias in housing, the governor’s office noted that he signed legislation this year banning discrimination based on source of income, such as housing subsidies or child support. In July, he directed the Department of Financial Services to investigate whether Facebook allows housing advertisers to discriminate.

A senior adviser to the governor also said the administration has investigated landlords to deter discrimination on the basis of immigration status and other factors.

“This administration takes housing discrimination very seriously and this Governor has enacted more protections against it than any other governor in history,” Rich Azzopardi, senior adviser to the governor, said in a written statement.

“Every complaint received is thoroughly investigated and we urge any New Yorker who believes they have been the victim of housing discrimination to contact us immediately.”

On paper, real estate agents are subject to investigation and discipline by multiple levels of government. But at each rung on the enforcement ladder, the agencies lack the capacity to use the primary tool for uncovering fair housing law violations by real estate agents.

Surveyed by Newsday, the executive directors of large nonprofit fair housing watchdogs that rely on government funding, including in Detroit, Cleveland, St. Louis, Miami, New Orleans, New York and Houston, unanimously said their budgets are too small to support sustained paired testing of discrimination among residential real estate agents.

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"We do not do any testing."

Why testing is needed ›

PART 10

DIVIDING LINES, VISIBLE AND INVISIBLE

Segregation of blacks, whites built into the history of Long Island.

The segregation of blacks and whites has been embedded on Long Island as firmly as the Meadowbrook Parkway.

Heading north from the South Shore bayfront, the six-lane road divides overwhelmingly minority Freeport from overwhelmingly white Merrick; then overwhelmingly minority Roosevelt from overwhelmingly white

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A swath of asphalt, concrete, grass and trees framed by green space, the parkway forms a barrier between communities that are as little as 1 percent white and as little as 2 percent black. The demarcations are stark even as the road serves as a conduit for more than 70,000 cars daily.

Long Island has 291 communities

Most of its black residents live in just 11

As one of the most segregated suburbs in America, Long Island is crisscrossed by racial barriers. Some, like the Meadowbrook, are visible. Some are the invisible product of historical forces including zoning regulations, mortgage redlining, the boundaries of 124 school districts, housing prices, and racial steering and blockbusting — a tactic used by real estate agents to drive up sales, and commissions, by inducing blacks to move into a white neighborhood and then warning whites that property values were about to plummet.

For three years, Newsday investigated real estate practices on Long Island using a testing system in which whites and minorities, acting as home seekers, were paired to gauge how real estate agents treated them. The probe found that white testers were shown neighborhoods with higher proportions of white residents than black testers were, while the black testers were shown homes in more integrated neighborhoods. It also showed that certain minority areas were largely overlooked for everyone.

The divides are taken for granted even in places where they dictate that black and Hispanic children will learn only with black and Hispanic children, and white children will learn only with white children, in elementary schools a mile apart.

After studying Long Island, Myron Orfield, director of the Institute on Metropolitan Opportunity at the University of Minnesota Law School, sees “hard racial barriers where black communities are next to white communities and they stay very firm.” Orfield adds: “On Long Island, there’s hard walls. It’s a tough, tough wall there. When you see those hard, differential walls, underlying that there’s usually bigotry and prejudice that’s maintaining those hard walls.”

Learn the history ›

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SCHOOLS AS A SELLING POINT

Discussing quality can become a proxy for talking about a community's racial makeup.

Long Island real estate agents sell schools as much as houses.

School district ratings are among the most zealously watched indicators of quality of life by Long Island homeowners, not least because they can influence home values.

In many of Newsday's 86 paired tests, agents applied a laser-like focus on districts, highlighting their perceived quality when recommending places that house hunters should consider buying – or avoid.

As one real estate agent explained it: "So, more important than Syosset is schools, because everything is by schools on Long Island."

That reliance on school ratings as a top selling point can empower Long Island real estate agents to serve as gatekeepers for 124 highly delineated districts whose test scores, graduations rates and ethnic and racial compositions vary sharply. In playing the gatekeeper role, they risk running afoul of fair housing standards because discussing school quality can become a proxy for talking about a community's makeup.

As the National Association of Realtors stated in a 2014 post on its website, "Discussions about schools can raise questions about steering if there is a correlation between the quality of the schools and neighborhood racial composition."

Characterizations about schools with low test scores, for example, or comments that reference a "'community with declining schools' become code words for racial or other differences in the community," the post states. As a result, such comments become "fair-housing issues."

Additionally, fair-housing experts say touting or disparaging schools can put agents in legal jeopardy because many lack the expertise to make such judgments.

“Since when did real estate agents become experts on schools?” asked Fred Freiberg, executive director of the Fair Housing Justice Center, who served as a Newsday consultant.

“It’s ridiculous because they cannot, they should not be trusted to provide objective information about schools and school performance rates,” Freiberg said

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that has nothing to do with test scores, certainly nothing to do with race.”

While some agents tested by Newsday told customers that they were legally barred from talking about schools, fair-housing experts say agents may provide information so long as it is strictly factual – and provided equally to customers.

The National Association of Realtors made clear that agents have a narrow pathway that involves sticking to “objective information,” not their personal opinions.

The author suggested that agents provide prospective homebuyers with school or community websites that provide ratings and data.

“The best thing a Realtor can do is guide them to third-party information, so they can make a decision on their own,” the post recommends.

Some agents touted districts as highly rated. Some denigrated districts as undesirable places to invest in homes. Whether based on facts or simply their own beliefs, some expressed perceptions about district performances that were in line with pointing buyers toward communities with substantial white populations and away from more integrated areas.

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PART 12

INSIDE LI AGENTS' TRAINING

Classes attended by Newsday show inaccurate, incomplete or confusing sessions, experts say.

State-required continuing education classes in real estate law and practices are supposed to cover fair housing regulations and how agents and brokers might deliberately or unintentionally discriminate.

Instead, in five of six classes attended by Newsday reporters, instructors provided information that was sometimes or often inaccurate, incomplete, confusing or lacking in quantity and quality, according to eight fair housing experts who reviewed transcripts and notes of the sessions.

Some instructors made comments about ethnic and religious groups that risked reinforcing discriminatory attitudes, the experts said. One instructor likened fair-housing laws to speed limits faced by a cab driver rushing a customer to the airport, telling students: "You get to choose whether you break the law."

Other instructors filled class time with irrelevant material, such as reviews of television shows and descriptions of funeral rituals.

One described Rockville Centre as "lily white," referred to West Islip as "white Islip" and used derogatory racial and religious terms.

Only one of the six classes included the required three hours of fair-housing law training.

The experts examined the transcripts of four classes in which instructors set no rules against recording or quotation. They also reviewed notes on one class where the instructor barred recording but placed no restrictions on quoting. The instructor in the sixth class said she did not want to be quoted.

The instructors included the president of the Long Island Board of Realtors and three former presidents

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to renew their licenses. The material must include the three hours of instruction in upholding anti-discrimination laws. The state permits up to 10 minutes of break time during each hour of instruction.

Many agents opt to take in-person classes to keep their licenses up to date. LIBOR reported 14,034 registrations for its own classes and 9,703 registrations for online classes in 2017, its most recent available tax filings show. To see how Long Island agents were trained, Newsday reporters registered online for in-person fair-housing classes offered by LIBOR.

“The trainers veered pretty far away from actually covering the important topics that a Realtor or real estate agent would need to understand in order to comply with their obligations,” said Thomas Silverstein, associate counsel with the Fair Housing & Community Development Project at the Lawyers’ Committee for Civil Rights Under Law in Washington, D.C., who reviewed transcripts and notes from three classes.

What happened at trainings ›

PART 13

HOW WE DID IT

Newsday sent 25 people undercover with hidden cameras for months of paired testing.

The young white man was an actor, the young black man a drug store worker. They were going undercover with constructed identities – new families, new ages, new addresses, new incomes, new jobs. The white man was cloaked as a building contractor, the black man as a piano tuner.

Married without children to a working wife with a household income of $125,000, their essential personas were interchangeable – except for the black-and-white distinguishing factor of race.

One month apart in the spring of 2016, each strapped a tiny camera to his chest with a miniature lens that peeked through a button hole of his shirt. Then, with the camera running, each separately met with one of

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ore

worker Ryan Sett led a 25-member platoon of white, black, Hispanic and Asian New Yorkers into Newsday's investigation of residential brokering.

Ordinary folks stocked the platoon: a 20-year-old college student, a 69-year-old lawyer, teachers, a computer tech, actors and more. All were recruited by Newsday to work as paired testers in the hope of measuring how often, if at all, agents provided unequal service to white and minority house hunters.

Collectively, they went undercover with agents for 16 months and recorded 240 hours of video in 109 tests conducted from April 2016 to August 2017. A professional court reporter created typed transcripts of the meetings between testers and agents. Newsday journalists reviewed the transcripts for accuracy and used them to verify that testers had, in fact, presented matching profiles to agents.

This is the story behind the three-year investigation.

Inside our investigation ›

Lead writers: Ann Choi, Keith Herbert and Olivia Winslow **Project editor:** Arthur Browne **Reporters:** Choi, Bill Dedman, Herbert and Winslow **Data analysis and visuals:** Choi **Strategic planning and methodology:** Dedman **Additional reporting:** Maura McDermott and Deborah S. Morris **Contributors:** Rachelle Blidner, Mark Harrington, Bart Jones, Carol Polsky, Chau Lam, David Olson and Nicholas Spangler **Project manager:** Tara Conry **Assistant project manager:** Heather Doyle **Data visuals and additional data reporting:** Will Welch **Additional editing:** Doug Dutton and Robert Shields **Video directors:** Jeffrey Basinger and Robert Cassidy **Video editors:** Basinger, Matthew Golub and Megan Miller **Videographers:** Basinger, Raychel Brightman, Cassidy, Shelby Knowles, Alejandra Villa Loarca, Arnold Miller, Chris Ware and Yeong-Ung Yang **Aerial Photography:** Basinger, Ware and Yang **Motion Graphics:** Basinger **Media Management:** Alexa Coveney, Golub and Greg Inserillo **Photography:** Basinger, Cassidy, Knowles, Villa Loarca, Arnold Miller, William Perlman, Ware, Yang **UX design director** Matthew Cassella **Digital design:** Anthony Carrozzo, Mitch Severe and James Stewart **Director of development:** TC McCarthy **Development:** John Tomanelli and Will Welch **Homepage video:** Miguel Cubillos **Additional project management:** Anthony Bottan **Social media:** Anahita Pardiwalla, Elaine Piniat **Digital Quality Assurance:** Daryl Becker, Sumeet Kaur **Research:** Caroline Curtin, Nyasia Draper, Dorothy Levin, Laura Mann and Judy Weinberg **Editorial support:** Kim Fiorio **Copy editing:** Don Bruce and Leema Thomas **Print graphics:** Gustavo Pabón **Print design:** Seth Mates

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NO. 19-0223

IN THE SUPREME COURT OF TEXAS

DEVIN LAMAR HARRIS AND MEGHAN THERESA HARRIS,

Petitioners,

v.

SAMUEL ADAM AFLALO,

Respondent.

On Petition for Review from the Court of Appeals
Fifth District of Texas, Dallas, Texas;
Court of Appeals No. 05-16-01472-CV

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

STATEMENT OF THE CASE

Nature of the case:	This case arose when Petitioners terminated a written contract for the purchase of Respondent's residential home the day prior to closing. (CR 13-22, 65-73.) Respondent argued that Petitioners' termination breached the contract. Petitioners contended that Respondent failed to satisfy his contractual disclosure obligations by failing to provide Petitioners with an industry-promulgated TAR-1414 form, and that Petitioners were therefore permitted to terminate at any time.
Trial court:	95th Judicial District Court, Dallas County, Texas, Cause No. DC-16-00247, The Honorable Ken Molberg, Presiding Judge.
Course of proceedings:	The parties filed competing motions for summary judgment. (CR 47-274, 301-35.)
Trial court's disposition:	The trial court denied Respondent's motion for summary judgment and granted Petitioners' motion. (CR 336-37, 365-66.) Petitioners then nonsuited their counterclaims. (CR 338-39.) The trial court subsequently awarded Petitioners attorney's fees in the amount of $140,000 through trial, plus contingent appellate fees, as reflected in the trial court's Final Judgment. (CR 367-69.) Respondent's motion to modify the judgment was denied. (CR 370, 377.)
Court of Appeals:	Fifth District Court of Appeals at Dallas, Texas.
Court of Appeals' Disposition:	The Court of Appeals, in an opinion authored by Justice Francis, with Justice Evans dissenting, affirmed the Final Judgment on May 23, 2018. *Aflalo v. Harris*, 2018 WL 2329301 (Tex. App.—

Dallas May 23, 2018, *rev'd*, 2018 WL 6566636) (mem. op.) Respondent's first motion for rehearing to the Court of Appeals was denied, but prompted the issuance of a separate concurring opinion by Justice Boatright. Respondent's subsequent motion for rehearing *en banc* was granted, and the Court withdrew its prior opinion, and, in a new opinion authored by Justice Evans reversed the trial court's judgment by a vote of 9-4. Justice Schenck filed a separate concurring opinion. Justices Francis and Boatright issued separate dissenting opinions. The trial court's judgment was reversed and remanded for further proceedings consistent with the Court's opinion.

Opinion:

The Court of Appeals' *En Banc* Opinion held that Aflalo complied with his contractual obligations to provide the disclosures required by Section 5.008 of the Texas Property Code, and that the neither the statute nor the contract required delivery of the TAR-1414 form. Accordingly, Aflalo complied with his disclosure obligations, and the trial court erred by entering summary judgment to the contrary.

Citation:

Aflalo v. Harris, 583 S.W.3d 236, 2018 WL 6566636 (Tex. App.—Dallas Dec. 13, 2018) (en banc).

STATEMENT OF JURISDICTION

The Dallas Court of Appeals, sitting *en banc*, correctly applied longstanding principles of contract and statutory construction to an unambiguous contract incorporating the provisions of an unambiguous statute. Though neither new nor novel, the Court has jurisdiction under Section 22.001(a) of the Texas Government Code to clarify and reaffirm that an unambiguous contract determines the disclosure requirements of a home seller.

RESPONSE TO ISSUE PRESENTED

The Court of Appeals correctly held that Aflalo complied with his obligations under an unambiguous contract to deliver disclosures required by Section 5.008 of the Texas Property Code. Any other result would render the two-stage termination provision superfluous and upset the well-settled expectations of buyers and sellers based on clerical mistakes or minor omissions in disclosures.

STATEMENT OF FACTS

I. Factual Background

This suit arose when Petitioners Devin and Meghan Harris terminated a written contract for the purchase of Respondent Samuel Aflalo's residential home at 6912 Edelweiss Circle, Dallas, Texas, 75240 (the "Property"). (CR 65-73; Apx. Tab 4.) The Property was to be conveyed pursuant to a standard One to Four Family Residential Contract (Resale) (the "Contract") promulgated by the Texas Real Estate Commission. (CR 65.) The Contract was effective on November 20, 2015 with closing to occur on or before December 18, 2015. (Apx Tab 4.) Under the Contract, in the event of default by the Harrises, Aflalo was entitled to "enforce specific performance, seek such other relief as may be provided by law, or both." (Apx Tab 4; CR 70.)

It is undisputed that the Contract required Aflalo to deliver to the Harrises his "SELLER'S DISCLOSURE NOTICE PURSUANT TO §5.008, TEXAS PROPERTY CODE (Notice)" within three days of the effective date of the Contract. (Apx Tab 4; CR 68.) It is also undisputed that Aflalo timely provided the Harrises with a Seller's Disclosure Notice (the "Notice") on November 20, 2015, utilizing a form promulgated by the Texas Association of Realtors. (CR 75, 195, 219;

Apx. Tab 2.) And it is also undisputed that the Notice did not include, as an attachment, a Texas Association of Realtors Form 1414 (TAR-1414) relating to flood insurance. (CR 47-48, 156, 327-29; Apx. Tab 1.) Finally, it is undisputed that neither the Contract nor Texas Property Code Section 5.008 (Apx. Tab 3.) contain any mention of TAR-1414.

The Contract contained a two-stage termination provision. First, it allowed the Harrises to terminate the Contract at any time prior to closing if Aflalo did not deliver the Notice. (Apx Tab 4; CR 68.) Second, the Contract afforded the Harrises up to seven days to terminate following receipt of Aflalo's Notice. (Id.) As noted above, Aflalo timely delivered the Notice on November 20, 2015, giving the Harrises until November 27, 2015 to terminate the Contract (CR 40-45). The Harrises gave no notice of their intent to terminate the Contract during that period. Then, on December 17, 2015, one day before closing, the Harrises notified Aflalo of their intent to terminate the Contract, claiming "Buyer elects to terminate under Paragraph 7B(2) of the contract relating to the Seller's Disclosure Notice." (CR 141.) The Harrises did not close on the Property or otherwise tender the sales price. (CR 196, 220.) This suit followed.

II. Procedural History: Trial Court

Aflalo brought suit against the Harrises for breach of contract. (CR 13-17.) The Harrises counterclaimed for contrary declaratory relief, arguing that Aflalo should have provided them with the TAR-1414 and that his failure to do so rendered their termination timely. (CR 23-46.) The parties filed competing summary judgment motions on Aflalo's breach of contract claim. (CR 47-153, 154-245.) Aflalo also filed a no-evidence motion as to the Harrises' affirmative defenses. (CR 168-70.) The trial court heard the motions and found in favor of the Harrises, granting their summary judgment motion and denying Aflalo's. (*See generally*, CR 336-37, 365-66.) The Harrises then nonsuited their affirmative claims. (CR 338-39.) The issue of attorney's fees was subsequently tried to the court.

Final judgment was entered September 14, 2016, in which the trial court ordered that Aflalo take nothing on his breach of contract claim, ordered that the Harrises recover their earnest money, and awarded the Harrises $140,000 in attorney's fees through trial, conditional appellate fees, and costs of court. (CR 367-69.) Aflalo filed a

motion to modify the judgment that was denied by written order. (CR 377.) Aflalo timely appealed. (CR 378-79.)

III. Procedural History: Court of Appeals

Initially, the Harrises convinced the Court of Appeals that Aflalo's choice of disclosure form—made prior to the formation of the contract with the Harrises (*cf.* CR 72 *with* CR 79)—either unilaterally modified or (re-)defined Aflalo's disclosure obligations under the Contract (original panel majority) or the Texas Property Code (concurring opinion on rehearing). *Aflalo v. Harris*, 2018 WL 2329301 (Tex. App.—Dallas May 23, 2018, *rev'd*, 2018 WL 6566636) (mem. op.). When the Court reviewed the case *en banc*, however, a majority voting 9-4 recognized this case for the simple contract case that it is.

Noting that the contracted-for disclosure requirements were limited to those required by Section 5.008 of the Texas Property Code, and noting that Section 5.008 did not require or mention TAR-1414, the *En Banc* Majority held that Aflalo's non-disclosure of TAR-1414 could not have constituted a breach of contract as a matter of law, or justified termination of the contract one day before closing. The Court of Appeals reversed the trial court's judgment and remanded the case for further

proceedings consistent with such holding. The Harrises petitioned this Court for review and after reviewing the Harrises' Petition, Aflalo's Response, and a Reply, the Court requested briefing on the merits of this case.

SUMMARY OF THE ARGUMENT

Contrary to the Harrises' hyperbolic assertions, this is no watershed moment for Texas real estate law. (Pet. Br. 17, 22.) Rather, this is a simple breach of contract case where the party in breach seeks to excuse their breach by manufacturing obligations not found in the contract or controlling statute. Simply put, if the Harrises wanted additional disclosures, they should have contracted for it. But it was not important to the Harrises because the contract does not integrate, incorporate, reference, or in any way acknowledge the existence of TAR-1414. Indeed, the Harrises' argument suggests that they did not even know about TAR-1414 until they received TAR-1406. (Pet. Br. 2-3.)

The Harrises' handwringing is further belied by the fact that Section 5.008, as incorporated in the standard contact, provides for a seven-day termination period after receipt of the disclosures, which can be invoked if the buyer is in any way dissatisfied with the seller's

disclosures. Thus, contrary to the Harrises' assertions, affirming the Court of Appeals' judgment will in no way place buyers at the mercy of sellers. Rather, buyers will continue to enjoy the same contractual leverage to incentivize disclosure, regardless of whether the seller considers it superfluous. But if the Harrises prevail, sellers like Aflalo, will be disincentivized to provide anything but the minimum required disclosures for fear of falling into protracted and costly litigation regarding the sufficiency of disclosures. Even worse, sellers would be at the mercy of sellers who could scour the disclosure form and justify termination the day before closing due to minor mistakes or omissions that were apparent when the disclosures were served.

Based on the plain language of the Contract and the statute—neither of which are ambiguous—Aflalo complied with is obligations under the Contract. Consequently, the Harrises breached the Contract by waiting until the day before closing to terminate. The fact that under the Harrises' rationale, they could not know if the contract could be breached in this regard until Aflalo performed only underscores the extent to which they have contorted basic contract law to fit the undisputed facts. The Court should not reward this lay-behind-the-log

approach or create a secondary escape hatch for buyers. For the reasons described herein, the Court should deny the Harrises' Petition for Review, or, if granted, affirm the Court of Appeals' judgment.

ARGUMENT AND AUTHORITIES

I. The Court of Appeals correctly determined that Aflalo was not required to provide a form neither mentioned in the contract nor required by statute.

A. Standard of Review

The granting of a summary judgment motion is reviewed de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). On review of competing motions for summary judgment, where one is granted and one is denied by the trial court, appellate courts should "review the summary judgment evidence presented by both sides and determine all questions presented." *Id.* This Court is empowered to render the judgment that the trial court should have rendered based upon the grounds presented in the motions and evidence in the record. *Id.*; *Davis v. Texas Mut. Ins. Co.*, 443 S.W.3d 260 (Tex. App.–Dallas 2014, pet. denied).

Questions of statutory interpretation and contract construction are also reviewed de novo. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411

(Tex. 2011); *Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 449 (Tex. 2015).

B. Applicable Law

When it comes to construing contracts, the long-standing rule in Texas is that a court must "look solely to the language employed by the parties," and "to only give force and effect to the contract as made, and not to attempt to interpret the contract by extraneous statements, acts, or conduct." *Nicholson v. Whyte*, 236 S.W. 770, 773 (Tex. Civ. App.—Dallas 1921, no writ). Where a contract contains plain language, free of ambiguities, "it must be enforced as written." *Phillips v. Union Bankers Ins. Co.*, 812 S.W.2d 616, 618 (Tex. App.—Dallas 1991, no writ) (emphasis in original). Parties are presumed to have intended the words actually used in the contract, and it is those words—not allegations of the parties' subjective intent—that control interpretation of the agreement. *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126-27 (Tex. 2010).

The same is true for Texas statutes: when free of ambiguities, they are to be construed according to their plain language. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015). Texas courts presume

that the Legislature included each word for a purpose, and that words not present were intentionally omitted. *Id.*; *see also*, *Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 893 (Tex. 2017).

C. Discussion

The Harrises begin by introducing a hypothetical involving a car purchase in an attempt to demonstrate the righteousness of their position. (Pet. Br. 10.) In their analogy, the Harrises equate the TAR-1414 form with the cruise control feature on a new car, where the purchasing party is led through a promotional video to believe that this cruise control feature will come standard with their purchase (Pet. Br. 10.) But, the Harrises' hypothetical only further demonstrates the absurd nature of their alleged injury.

First, cruise control is in no way equivalent to a TAR-1414. The TAR-1414 form provides information about flood insurance, not the subject property.[1] (Apx. Tab 1.) Cruise control, meanwhile, is a valuable

[1] *See* Brief for the Texas Association of Realtors as Amicus Curiae, pp. 8-9, *Aflalo v. Harris*, 583 S.W.3d 236 ("The form is nothing specific to a particular property. Rather, it is generic information about flood zones. It encourages buyers to inspect and investigate the issue. It does not add any information about the specific property subject of a sale."); *see also Aflalo v. Harris*, 583 S.W.3d 236, 244 ("The Harrises are incorrect because TAR-1414 makes no property-specific disclosure about any of those matters, nor does it pose questions to a seller, such as Aflalo, to answer that would have disclosed that information.").

feature that many car drivers enjoy and consider when deciding which vehicle to buy. Moreover and more importantly, Aflalo never represented that the TAR-1414 form would be included prior to contract's formation. Indeed, the TAR-1414 form was not mentioned, referenced, or acknowledged by the Contract. To suggest otherwise, as the Harrises' analogy obliquely does, is to misread and misremember the facts both parties have stated before the Court.

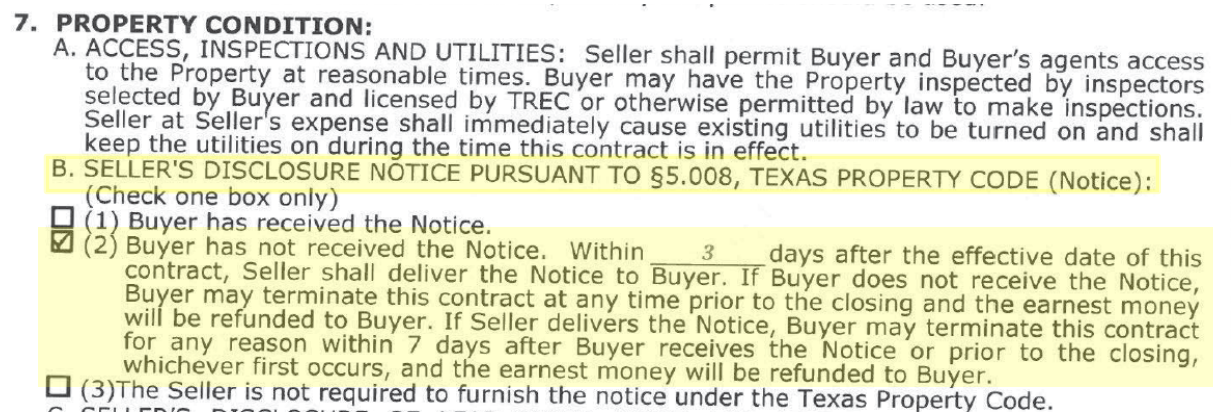
Most importantly, the Contract allowed the Harrises to terminate within seven days of receiving the disclosures. So, under the Harrises' analogy, it would equivalent to them having seven days to terminate after discovering the vehicle did not, in fact, have cruise control but choosing not to. Here, there was no pre-agreement representation regarding TAR-1414, and, even if so, the Contract actually provided a remedy in the event the Harrises were not satisfied with the disclosures. Thus, the Court should look to the Contract's terms and relevant statute, as opposed to indulging inapplicable hypotheticals.

1. Neither the Contract nor the statute required Aflalo to provide the TAR-1414.

Analogies aside, the record dos not show that the TAR-1414 form was required either by contract or statute. Ignoring the need to provide

a record citation, the Harrises continue to argue that Aflalo impliedly assumed some duty to provide more than what the contract required. The Harrises' Brief on the Merits asserts that Section 5.008 provides a "baseline for required disclosures" but does not prevent the parties from agreeing to provide additional disclosures. (Pet. Br. at 23.) But, again, the Harrises do not point to any part of the record establishing or intimating that Aflalo ever assumed this duty because the record does not support their assertion. (CR 68.)

The provision at issue states:



7. PROPERTY CONDITION:

A. ACCESS, INSPECTIONS AND UTILITIES: Seller shall permit Buyer and Buyer's agents access to the Property at reasonable times. Buyer may have the Property inspected by inspectors selected by Buyer and licensed by TREC or otherwise permitted by law to make inspections. Seller at Seller's expense shall immediately cause existing utilities to be turned on and shall keep the utilities on during the time this contract is in effect.

B. SELLER'S DISCLOSURE NOTICE PURSUANT TO §5.008, TEXAS PROPERTY CODE (Notice):
(Check one box only)

☐ (1) Buyer has received the Notice.

☑ (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.

☐ (3)The Seller is not required to furnish the notice under the Texas Property Code.

(CR 68.) TAR-1414 is nowhere to be found. (CR 65-73.)

Instead, Aflalo was obligated to provide the notice required by Section 5.008 of the Texas Property Code, which states:

> A seller of residential real property comprising not more than one dwelling unit located in this state shall give to 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 2018). The notice "must, at a minimum, read substantially similar to" the form provided within Section 5.008(b). Section 5.008 asks the seller to answer "yes" or "no" to whether he is aware of "Present Flood Insurance Coverage," and if so, to "explain" and "[a]ttach additional sheets *if necessary*." *Id.* at (b) (emphasis added).

Aflalo's Notice complied with this minimum disclosure obligation. Specifically, Aflalo answered "yes" to "Present Flood Insurance Coverage" (CR 76), and offered explanation: "I have flood insurance. My lender told me that it was recently added to a flood area." (CR 77.) No additional sheets were necessary to provide that explanation. Accordingly, Aflalo complied with Section 5.008.

The Harrises are correct that the Texas Property Code does not prohibit a seller from committing to provide more than the minimum disclosures under Section 5.008. (Pet. Br. at 23.) The problem for the Harrises is that they did not *contract* for anything more than the disclosures required under Section 5.008. (CR 68.) Choosing to deliver

an industry-promulgated disclosure form to make his Section 5.008 disclosures did not contractually "commit" or otherwise legally obligate Aflalo to make additional disclosures, because it did not modify or change his existing obligation to meet Section 5.008's minimum disclosure requirements. *See Arthur J. Gallagher & Co. v. Dieterich*, 270 S.W.3d 695, 702 (Tex. App.—Dallas 2008, no pet.) (holding that modification requires same elements as original contract, including "a meeting of the minds supported by consideration"). A modification of a contract cannot be established based on the parties' subjective states of mind. *Id*.

2. The Contact called for disclosures required by Section 5.008.

Recognizing this bind, the Harrises attempt to argue that by promising to provide the Seller's Disclosure Notice "pursuant to" Section 5.008, Aflalo created the possible requirement that he provide the TAR-1414 form. Thus, the Harrises' argument requires the phrase "pursuant to" to mean two different things: provision of the standard, minimum notice form, and, in the alternative, also the provision of a more expansive form and any appurtenant forms. Assuming this can be correct, noticeably absent from this section is any contractual

requirement that Aflalo provide any disclosure beyond Section 5.008. In fact, the plain definition of "pursuant to" means "in conformity with", which is precisely what Aflalo delivered.[2]

Giving due accord to the parties' intent as the Harrises ask, it seems absurd to suggest that the Harrises contracted for two different outcomes simultaneously: minimum disclosures and, alternatively, expansive disclosures. (Pet. Br. 22.) It stands to reason that if the Harrises truly intended to contract for anything other than the minimum disclosures the contact calls for, they would not have relied on such an unfavorable phrase in this context.

The Harrises' reasoning is further undermined by the undisputed facts. First, Aflalo could not have "contractually" committed to making additional disclosures by using TAR-1406 because he completed the TAR-1406 before there ever was a Contract. (*Cf.* CR 72 *with* CR 79.) When the TAR-1406 was completed by Aflalo, he did not know, and could not have known, what disclosures would be negotiated with the Harrises months later.

[2] *See* The Merriam-Webster.com Dictionary, Merriam-Webster Inc., https://www.merriam-webster.com/dictionary/pursuant%20to. Accessed 29 November 2019.

Second, the Harrises could not have reasonably relied on receiving TAR-1406 or the TAR-1414, since they did not contract for TAR-1406 or TAR-1414. This Court has repeatedly emphasized that a party cannot claim to have expected one thing when it plainly contracted for another. *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553, 559, (Tex. 2019), *reh'g denied* (Oct. 18, 2019). The Harrises contracted for the disclosures required by Section 5.008. (CR 68.) As a matter of law, they could not have reasonably expected to receive anything else.

This would be true *even if Aflalo had orally represented that he would provide TAR-1406 or TAR-1414*—which is not the case here. The record contains no indication at all that the Harrises knew Aflalo would use TAR-1406, or that they expected to receive TAR-1414, at the time the Contract was formed. And even if they had known, the Harrises would not have been entitled to enforce such disclosure under the Contract where they did not require such disclosure in the Contract.

In sum, by making his contractual disclosures using TAR-1406, Aflalo did not modify, alter, redefine, or in any way supplant his sole contractual disclosure obligation to the Harrises: to provide the minimum disclosures required by Section 5.008. Because Aflalo

answered "yes" to "Present Flood Ins. Coverage" and offered an explanation, for which no additional sheets were necessary, Aflalo satisfied his disclosure obligations under Section 5.008, and by extension, under the Contract. (CR 68, 76-77.) Basic contract law compels affirmance of the Court of Appeals' judgment.

3. Aflalo provided the information required by Section 5.008.

The final flaw in the Harrises' argument is their position that the TAR-1406 form is not "completed" unless the TAR-1414 form is attached. (Pet. Br. 25.) Again, this position is logically and factually incongruent. First, the Harrises provide no support for their position that the inclusion of an optional attachment determines whether disclosures are completed. This seems no more reasonable than asserting that a relative did not give a Christmas gift because they failed to include the receipt. The latter has no bearing on the former.

Second, this argument does not hold water under the terms of the contract itself. The contract provides for two termination periods based on the required notice. One provision allows termination within seven days after receipt of the notice. (CR 68.) The other allows termination at any time prior to closing if the notice is not delivered. (CR 68.) Treating

one empty blank or the failure to attach a form as a total failure to provide the notice would allow termination the day before closing in every case where merely insufficient notice is involved, rendering the first termination period meaningless.

The reasonable resolution here is to treat an insufficient notice as one allowing termination within seven days of receipt. Failure to deliver the notice at all would allow termination at any time prior to closing. This encourages sellers to make the disclosures, while preserving the buyers' right to terminate if dissatisfied with the notice, even if incomplete. Otherwise, any omission or inaccuracy in the disclosures, no matter how slight, would allow buyers to terminate at any time prior to closing. This makes no sense in light of the two-tiered termination regime embodied in the form contract. In other words, listing AT&T as the seller's telephone provider while omitting AT&T's address cannot be the equivalent of failing to deliver any disclosures whatsoever under the Contract. The Court of Appeals wisely declined the Harrises' invitation to hold as much. This Court should do the same.

Even if a minor omission or clerical mistake could be considered a breach of the Contract, the doctrine of substantial compliance would

apply. Substantial compliance with the requirements of a contract is the legal equivalent of full compliance. *Chappell Hill Bank v. Lane Bank Equipment Co.*, 38 S.W.3d 237 (Tex. App.—Texarkana 2001, pet. denied). This doctrine excuses contractual deviations or deficiencies which do not severely impair the purpose underlying a contractual provision. *Burtch v. Burtch*, 972 S.W.2d 882 (Tex. App.—Austin 1998, no pet.); *In Interest of Doe*, 917 S.W.2d 139 (Tex. App.—Amarillo 1996, writ denied). The substantial performance doctrine allows breaching, but not non-breaching, parties who have substantially completed their obligations to recover on a contract. *Tips v. Hartland Developers, Inc.*, 961 S.W.2d 618 (Tex. App.—San Antonio 1998, no pet.).

Assuming for the sake of argument that Respondent was required to include the TAR-1414 form by contract or statute, the doctrine of substantial compliance neatly illustrates the absurd nature of Petitioners' argument. Under Petitioners' rationale, Respondent did not comply with the contract or statute because the TAR-1414 form was not provided. That makes the distinction between the essential and non-essential terms so fine as to be virtually indistinguishable.

Respondent also failed to identify his utility providers on his TAR-1404 form (Apx. Tab 1; CR 44), so under Petitioners' rationale, this technical non-compliance would also constitute a failure to deliver disclosures and allow the Harrises to terminate the day before closing. Such a rule would cause chaos for Texas real estate practice and would put Texas courts in the unenviable position of examining under a microscope which boxes were checked like poll workers looking for hanging chads to determine if a homeowner has substantially complied with his or her disclosure.

Even worse, it upsets the expectations of the parties once the seven-day termination period ends. Sellers believing their contract sound, and disclosures sufficient, would be encouraged to move forward with subsequent contracts to purchase new homes in reliance on the passage of the seven-day termination period. Under Petitioners' theory, many would be surprised to learn that their contracts could be terminated as late as the day before closing due to a minor omission not required or contemplated by contract or statute. This Court should decline Petitioners' invitation to introduce uncertainty into the carefully-balanced and productive residential real estate market.

II. The Court of Appeals' opinion in no way limits freedom of contract.

Contrary to the Harrises' assertion, the Court of Appeals in no way deprives them of any contractual bargain or absolves Aflalo of any responsibility because, as demonstrated above, the parties did not contract for this right. (Pet. Br. 26-27.) They easily could have amended the language to require the inclusion of whatever forms they saw fit but the Harrises did not do so. The more pressing concern impinging freedom of contract is the danger that courts will read into contracts rights and responsibilities that the parties omitted. *See Tenneco Inc. v. Enter. Products Co.*, 925 S.W.2d 640, 646 (Tex. 1996) ("We have long held that courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained.") (citing *Dorroh–Kelly Mercantile Co. v. Orient Ins. Co.,* 104 Tex. 199, 135 S.W. 1165, 1167 (1911); *Great Am. Ins. Co. v. Langdeau,* 379 S.W.2d 62, 65 (Tex. 1964)).

But this would be the result if the Harrises were to prevail before the Court, and it would add undue and deleterious pressure on future buyers to know what forms they shall require before understanding the general nature of the home's qualities. The bottom line is that the

Harrises got what they bargained for. If there were any issues with the disclosures, they had seven days after receipt to terminate. They failed to do so. As noted above, they could have just as easily relied on Aflalo's failure to disclose his television provider as a basis to terminate the day before closing. But the Contract provides one opportunity to terminate for buyers that are dissatisfied with the seller's required disclosures. This Court reject Petitioners' plea for a second.

III. The Court should not adopt a construction that discourages more than minimum disclosures.

Petitioners again allege that Aflalo broke a promise to convey certain information to them, without any citation to the record, and that the *En Banc* Majority Opinion will promote dodgy disclosures. Putting aside the lack of any promise to convey the TAR-1414 form, all buyers, like the Harrises, are free to contract for the disclosures they find necessary.

The contract is supposed to define the parties' rights and obligations, not leave them open based on one party's alleged subjective intent, or future, unilateral conduct. *Gilbert Tex. Constr.*, 327 S.W.3d at 126-27; *Arthur J. Gallagher*, 270 S.W.3d at 702. And, while sellers should be encouraged to disclose as much information as possible, the

Harrises offer a world where voluntarily providing more information not only alters the contract to add additional legal requirements, but also increases uncertainty by keeping sellers in suspense as to whether a sale will occur by allowing buyers to terminate for any disclosure deficiencies as late as the day before closing. Thus, under Petitioners' proposal, a seller would be foolish to provide any more than the *absolute minimum* disclosures required by law. As a policy matter, that undesirable result should be wholly avoided.

The Harrises misconstrue the stipulated facts to suggest that Aflalo promised to convey TAR-1414, though are unable to support this assertion, and use this unfounded fear to call for considerable revisions to Texas real estate law that would chill disclosures and further muddy the duties in these transactions. This case in no way justifies any such change, and the Court should refuse to accept Petitioners' defective solution to a non-existent problem.

CONCLUSION

The Court should deny the petition as the Court of Appeals correctly resolved the issue. In the event the Court does grant the petition, it should clarify that the standard residential contract provides

for the disclosures required by section 5.008 of the Texas Property Code, and the parties are free to agree on more. Further, the Court should confirm that using a comprehensive, standard form does not unilaterally enlarge contractual or statutory obligations.

A seller should not be punished for choosing to provide *more* information than required. To hold otherwise would encourage unnecessary litigation concerning a party's subsequent conduct, and whether such conduct unilaterally altered contractual obligations. It would further create uncertainty over whether a sale will actually occur by allowing buyers to terminate contracts the day before closing based on any mistake or minor omission on the disclosures.

Here, it is undisputed that the Harrises contracted for and received the disclosures required by statute. As a result, they had seven days to terminate the contract to the extent they were dissatisfied with the disclosures. The Harrises declined to do so. Sellers should be incentivized to provide more information, not less. This Court should reject the Harrises' arguments and refuse to penalize sellers for using forms that provide information above and beyond that required by statute.

PRAYER

For these reasons, Respondent Samuel Adam Aflalo respectfully requests that this Court DENY Petitioners' Petition for Review. In the alternative, in the event the Court grants the Petition for Review, Respondent request the that the Court AFFIRM the Court of Appeals' judgment, award Respondent costs of this proceeding, and grant Respondent all other relief to which he is justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this document was delivered pursuant to TEX. R. APP. P. 9.5 to all parties or counsel of record as indicated below on January 2, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that, in accordance with TEX. R. APP. P. 9.4, this document contains 4,733 words as determined by Microsoft Word 2010, which is the software used to generate the document. This word count does not include words contained in the sections of the Brief excluded from the word limit by Rule 9.4(i)(1).

_____

BYRON K. HENRY

INDEX TO APPENDIX

TEXAS ASSOCIATION OF REALTORS®

INFORMATION ABOUT SPECIAL FLOOD HAZARD AREAS

USE OF THIS FORM BY PERSONS WHO ARE NOT MEMBERS OF THE TEXAS ASSOCIATION OF REALTORS® IS NOT AUTHORIZED.
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CONCERNING THE PROPERTY AT 6912 EDELWEISS CIR
DALLAS, TX 75240

A. FLOOD AREAS:

(1) The Federal Emergency Management Agency (FEMA) designates areas that have a high risk of flooding as special flood hazard areas.

(2) A property that is in a special flood hazard area lies in a "V-Zone" or "A-Zone" as noted on flood insurance rate maps. Both V-Zone and A-Zone areas are areas with high risk of flooding.

(3) Some properties may also lie in the "floodway" which is the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge a flood under FEMA rules. Communities must regulate development in these floodways.

B. AVAILABILITY OF FLOOD INSURANCE:

(1) Generally, flood insurance is available regardless of whether the property is located in or out of a special flood hazard area. Contact your insurance agent to determine if any limitations or restrictions apply to the property in which you are interested.

(2) FEMA encourages every property owner to purchase flood insurance regardless of whether the property is in a high, moderate, or low risk flood area.

(3) A homeowner may obtain flood insurance coverage (up to certain limits) through the National Flood Insurance Program. Supplemental coverage is available through private insurance carriers.

(4) A mortgage lender making a federally related mortgage will require the borrower to maintain flood insurance if the property is in a special flood hazard area.

C. GROUND FLOOR REQUIREMENTS:

(1) Many homes in special flood hazard areas are built-up or are elevated. In elevated homes the ground floor typically lies below the base flood elevation and the first floor is elevated on piers, columns, posts, or piles. The base flood elevation is the highest level at which a flood is likely to occur as shown on flood insurance rate maps.

(2) Federal, state, county, and city regulations:

(a) restrict the use and construction of any ground floor enclosures in elevated homes that are in special flood hazard areas.

(b) may prohibit or restrict the remodeling, rebuilding, and redevelopment of property and improvements in the floodway.

(3) The first floor of all homes must now be built above the base flood elevation.

(a) Older homes may have been built in compliance with applicable regulations at the time of construction and may have first floors that lie below the base flood elevation, but flood insurance rates for such homes may be significant.

(b) It is possible that modifications were made to a ground floor enclosure after a home was first built. The modifications may or may not comply with applicable regulations and may or may not affect flood insurance rates.

(c) It is important for a buyer to determine if the first floor of a home is elevated at or above the base flood elevation. It is also important for a buyer to determine if the property lies in a floodway.

(4) Ground floor enclosures that lie below the base flood elevation may be used only for: (i) parking; (ii) storage; and (iii) building access. Plumbing, mechanical, or electrical items in ground floor enclosures that lie below the base flood elevation may be prohibited or restricted and may not be eligible for flood insurance coverage. Additionally:

(a) in A-Zones, the ground floor enclosures below the base flood elevation must have flow-through vents or openings that permit the automatic entry and exit of floodwaters;

(b) in V-Zones, the ground floor enclosures must have break-away walls, screening, or lattice walls; and

(c) in floodways, the remodeling or reconstruction of any improvements may be prohibited or otherwise restricted.

D. COMPLIANCE:

(1) The above-referenced property may or may not comply with regulations affecting ground floor enclosures below the base flood elevation.

(2) A property owner's eligibility to purchase or maintain flood insurance, as well as the cost of the flood insurance, is dependent on whether the property complies with the regulations affecting ground floor enclosures.

(3) A purchaser or property owner may be required to remove or modify a ground floor enclosure that is not in compliance with city or county building requirements or is not entitled to an exemption from such requirements.

(4) A flood insurance policy maintained by the current property owner does not mean that the property is in compliance with the regulations affecting ground floor enclosures or that the buyer will be able to continue to maintain flood insurance at the same rate.

(5) Insurance carriers calculate the cost of flood insurance using a rate that is based on the elevation of the lowest floor.

(a) If the ground floor lies below the base flood elevation and does not meet federal, state, county, and city requirements, the ground floor will be the lowest floor for the purpose of computing the rate.

(b) If the property is in compliance, the first elevated floor will be the lowest floor and the insurance rate will be significantly less than the rate for a property that is not in compliance.

(c) If the property lies in a V-Zone the flood insurance rate will be impacted if a ground floor enclosure below the base flood elevation exceeds 299 square feet (even if constructed with break-away walls).

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E. ELEVATION CERTIFICATE:

The elevation certificate is an important tool in determining flood insurance rates. It is used to provide elevation information that is necessary to ensure compliance with floodplain management laws. To determine the proper insurance premium rate, insurers rely on an elevation certificate to certify building elevations at an acceptable level above flood map levels. If available in your area, it is recommended that you obtain an elevation certificate for the property as soon as possible to accurately determine future flood insurance rates.

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

Receipt acknowledged by:

Signature Date Signature Date

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TEXAS ASSOCIATION OF REALTORS®

SELLER'S DISCLOSURE NOTICE

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Section 5.008, Property Code requires a seller of residential property of not more than one dwelling unit to deliver a Seller's Disclosure Notice to a buyer on or before the effective date of a contract. **This form complies with and contains additional disclosures which exceed the minimum disclosures required by the Code.**

CONCERNING THE PROPERTY AT 6912 EDELWEISS CIR DALLAS, TX 75240

THIS NOTICE IS A DISCLOSURE OF SELLER'S KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED BY SELLER AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE BUYER MAY WISH TO OBTAIN. IT IS NOT A WARRANTY OF ANY KIND BY SELLER, SELLER'S AGENTS, OR ANY OTHER AGENT.

Seller ☒ is ☐ is not occupying the Property. If unoccupied (by Seller), how long since Seller has occupied the Property?
☐ _____ or ☐ never occupied the Property

Section 1. The Property has the items marked below: (Mark Yes (Y), No (N), or Unknown (U).)
This notice does not establish the items to be conveyed. The contract will determine which items will & will not convey.

Item	Y	N	U
Cable TV Wiring	X		
Carbon Monoxide Det.	X		
Ceiling Fans	X		
Cooktop	X		
Dishwasher	X		
Disposal	X		
Emergency Escape Ladder(s)		X	
Exhaust Fans	X		
Fences	X		
Fire Detection Equip.	X		
French Drain			X
Gas Fixtures	X		
Natural Gas Lines	X		

Item	Y	N	U
Liquid Propane Gas:		X	
-LP Community (Captive)			X
-LP on Property			X
Hot Tub	X		
Intercom System			X
Microwave	X		
Outdoor Grill	X		
Patio/Decking	X		
Plumbing System	X		
Pool	X		
Pool Equipment	X		
Pool Maint. Accessories	X		
Pool Heater	X		

Item	Y	N	U
Pump: ☐ sump ☐ grinder			X
Rain Gutters	X		
Range/Stove	X		
Roof/Attic Vents			X
Sauna	X		
Smoke Detector	X		
Smoke Detector – Hearing Impaired			X
Spa	X		
Trash Compactor		X	
TV Antenna			X
Washer/Dryer Hookup	X		
Window Screens		X	
Public Sewer System	X		

Item	Y	N	U	Additional Information
Central A/C	X			☐ electric ☐ gas number of units: 7 units
Evaporative Coolers			X	number of units: _____ Unknown
Wall/Window AC Units	X			number of units: 1
Attic Fan(s)			X	if yes, describe: in guest bedrooms
Central Heat	X			☐ electric ☐ gas number of units: 7 units
Other Heat			X	if yes, describe: Unknown
Oven	X			number of ovens: 2 ☐ electric ☒ gas ☐ other: _____
Fireplace & Chimney	X			☐ wood ☐ gas logs ☐ mock ☐ other: _____
Carport		X		☐ attached ☐ not attached
Garage	X			☒ attached ☐ not attached
Garage Door Openers	X			number of units: 3 number of remotes: 3
Satellite Dish & Controls	X			☐ owned ☐ leased from _____
Security System	X			☐ owned ☐ leased from ADT
Water Heater	X			☐ electric ☐ gas ☐ other: _____ number of units: _____
Water Softener	X			☒ owned ☐ leased from _____
Underground Lawn Sprinkler			X	☐ automatic ☐ manual areas covered: _____
Septic / On-Site Sewer Facility			X	If yes, attach Information About On-Site Sewer Facility (TAR-1407)

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Concerning the Property at 6912 EDELWEISS CIR DALLAS, TX 75240

Water supply provided by: ☒ city ☐ well ☐ MUD ☐ co-op ☐ unknown ☐ other: _____

Was the Property built before 1978? ☐ yes ☐ no ☒ unknown

(If yes, complete, sign, and attach TAR-1906 concerning lead-based paint hazards).

Roof Type: Unknown Age: Unknown (approximate)

Is there an overlay roof covering on the Property (shingles or roof covering placed over existing shingles or roof covering)?

☐ yes ☐ no ☒ unknown

Are you (Seller) aware of any of the items listed in this Section 1 that are not in working condition, that have defects, or are need of repair? ☐ yes ☒ no If yes, describe (attach additional sheets if necessary): _____

Section 2. Are you (Seller) aware of any defects or malfunctions in any of the following?: (Mark Yes (Y) if you are aware and No (N) if you are not aware.)

Item	Y	N
Basement		✓
Ceilings		✓
Doors		✓
Driveways		✓
Electrical Systems		✓
Exterior Walls		✓

Item	Y	N
Floors		✓
Foundation / Slab(s)		✓
Interior Walls		✓
Lighting Fixtures		✓
Plumbing Systems		✓
Roof		✓

Item	Y	N
Sidewalks		✓
Walls / Fences		✓
Windows		✓
Other Structural Components		✓

If the answer to any of the items in Section 2 is yes, explain (attach additional sheets if necessary): _____

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
Aluminum Wiring		✓
Asbestos Components		✓
Diseased Trees: ☐ oak wilt ☐ _____		✓
Endangered Species/Habitat on Property		✓
Fault Lines		✓
Hazardous or Toxic Waste		✓
Improper Drainage		✓
Intermittent or Weather Springs		✓
Landfill		✓
Lead-Based Paint or Lead-Based Pt. Hazards		✓
Encroachments onto the Property		✓
Improvements encroaching on others' property		✓
Located in 100-year Floodplain	✓	
Located in Floodway	✓	
Present Flood Ins. Coverage (If yes, attach TAR-1414)	✓	
Previous Flooding into the Structures		✓
Previous Flooding onto the Property		✓
Located in Historic District		✓
Historic Property Designation		✓
Previous Use of Premises for Manufacture of Methamphetamine		✓

Condition	Y	N
Previous Foundation Repairs	✓	
Previous Roof Repairs	✓	
Other Structural Repairs		✓
Radon Gas		✓
Settling		✓
Soil Movement		✓
Subsurface Structure or Pits		✓
Underground Storage Tanks		✓
Unplatted Easements		✓
Unrecorded Easements		✓
Urea-formaldehyde Insulation		✓
Water Penetration		✓
Wetlands on Property		✓
Wood Rot		✓
Active infestation of termites or other wood destroying insects (WDI)		✓
Previous treatment for termites or WDI		✓
Previous termite or WDI damage repaired		✓
Previous Fires		✓
Termite or WDI damage needing repair		✓
Single Blockable Main Drain in Pool/Hot Tub/Spa*		✓

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Concerning the Property at 6912 EDELWEISS CIR DALLAS, TX 75240

If the answer to any of the items in Section 3 is yes, explain (attach additional sheets if necessary): I have flood insurance. My lender told me that it was recently added to a flood area. I made roof repairs several months ago.

*A single blockable main drain may cause a suction entrapment hazard for an individual.

Section 4. Are you (Seller) aware of any item, equipment, or system in or on the Property that is in need of repair, which has not been previously disclosed in this notice? ☐ yes ☑ no If yes, explain (attach additional sheets if necessary): _____

Section 5. Are you (Seller) aware of any of the following (Mark Yes (Y) if you are aware. Mark No (N) if you are not aware.)

Y	N	
☐	☑	Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at the time.
☐	☑	Homeowners' associations or maintenance fees or assessments. If yes, complete the following: Name of association: _____ Manager's name: _____ Phone: _____ Fees or assessments are: $ _____ per _____ and are: ☐ mandatory ☐ voluntary Any unpaid fees or assessment for the Property? ☐ yes ($ _____) ☐ no If the Property is in more than one association, provide information about the other associations below or attach information to this notice.
☐	☑	Any common area (facilities such as pools, tennis courts, walkways, or other) co-owned in undivided interest with others. If yes, complete the following: Any optional user fees for common facilities charged? ☐ yes ☐ no If yes, describe: _____
☐	☑	Any notices of violations of deed restrictions or governmental ordinances affecting the condition or use of the Property.
☐	☑	Any lawsuits or other legal proceedings directly or indirectly affecting the Property. (Includes, but is not limited to: divorce, foreclosure, heirship, bankruptcy, and taxes.)
☐	☑	Any death on the Property except for those deaths caused by: natural causes, suicide, or accident unrelated to the condition of the Property.
☐	☑	Any condition on the Property which materially affects the health or safety of an individual.
☐	☑	Any repairs or treatments, other than routine maintenance, made to the Property to remediate environmental hazards such as asbestos, radon, lead-based paint, urea-formaldehyde, or mold. If yes, attach any certificates or other documentation identifying the extent of the remediation (for example, certificate of mold remediation or other remediation).
☐	☑	Any rainwater harvesting system located on the property that is larger than 500 gallons and that uses a public water supply as an auxiliary water source.
☐	☑	The Property is located in a propane gas system service area owned by a propane distribution system retailer.

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Concerning the Property at 6912 EDELWEISS CIR DALLAS, TX 75240

If the answer to any of the items in Section 5 is yes, explain (attach additional sheets if necessary):

Section 6. Seller ☐ has ☑ has not attached a survey of the Property.

Section 7. Within the last 4 years, have you (Seller) received any written inspection reports from persons who regularly provide inspections and who are either licensed as inspectors or otherwise permitted by law to perform inspections? ☑ yes ☐ no If yes, attach copies and complete the following:

Inspection Date	Type	Name of Inspector	No. of Pages
		When I bought the house.	
		I don't remember who.	

Note: A buyer should not rely on the above-cited reports as a reflection of the current condition of the Property. A buyer should obtain inspections from inspectors chosen by the buyer.

Section 8. Check any tax exemption(s) which you (Seller) currently claim for the Property:

☑ Homestead ☐ Senior Citizen ☐ Disabled
☐ Wildlife Management ☐ Agricultural ☐ Disabled Veteran
☐ Other: ☐ Unknown

Section 9. Have you (Seller) ever filed a claim for damage to the Property with any insurance provider? ☐ yes ☑ no

Section 10. Have you (Seller) ever received proceeds for a claim for damage to the Property (for example, an insurance claim or a settlement or award in a legal proceeding) and not used the proceeds to make the repairs for which the claim was made? ☐ yes ☑ no If yes, explain:

Section 11. Does the property have working smoke detectors installed in accordance with the smoke detector requirements of Chapter 766 of the Health and Safety Code?* ☑ unknown ☐ no ☐ yes. If no or unknown, explain. (Attach additional sheets if necessary):

**Chapter 766 of the Health and Safety Code requires one-family or two-family dwellings to have working smoke detectors installed in accordance with the requirements of the building code in effect in the area in which the dwelling is located, including performance, location, and power source requirements. If you do not know the building code requirements in effect in your area, you may check unknown above or contact your local building official for more information.*

A buyer may require a seller to install smoke detectors for the hearing impaired if: (1) the buyer or a member of the buyer's family who will reside in the dwelling is hearing-impaired; (2) the buyer gives the seller written evidence of the hearing impairment from a licensed physician; and (3) within 10 days after the effective date, the buyer makes a written request for the seller to install smoke detectors for the hearing-impaired and specifies the locations for installation. The parties may agree who will bear the cost of installing the smoke detectors and which brand of smoke detectors to install.

dotloop signature verification: www.dotloop.com/my/verification/DL-132052312-4-P2S3

Concerning the Property at 6912 EDELWEISS CIR DALLAS, TX 75240

Seller acknowledges that the statements in this notice are true to the best of Seller's belief and that no person, including the broker(s), has instructed or influenced Seller to provide inaccurate information or to omit any material information.

9-16-15

Signature of Seller Date Signature of Seller Date

Printed Name: Printed Name:

ADDITIONAL NOTICES TO BUYER:

(1) The Texas Department of Public Safety maintains a database that the public may search, at no cost, to determine if registered sex offenders are located in certain zip code areas. To search the database, visit www.txdps.state.tx.us . For information concerning past criminal activity in certain areas or neighborhoods, contact the local police department.

(2) If the property is located in a coastal area that is seaward of the Gulf Intracoastal Waterway or within 1,000 feet of the mean high tide bordering the Gulf of Mexico, the property may be subject to the Open Beaches Act or the Dune Protection Act (Chapter 61 or 63, Natural Resources Code, respectively) and a beachfront construction certificate or dune protection permit may be required for repairs or improvements. Contact the local government with ordinance authority over construction adjacent to public beaches for more information.

(3) If you are basing your offers on square footage, measurements, or boundaries, you should have those items independently measured to verify any reported information.

(4) The following providers currently provide service to the property:

Electric:	phone #:
Sewer:	phone #:
Water:	phone #:
Cable:	phone #:
Trash:	phone #:
Natural Gas:	phone #:
Phone Company:	phone #:
Propane:	phone #:

(5) This Seller's Disclosure Notice was completed by Seller as of the date signed. The brokers have relied on this notice as true and correct and have no reason to believe it to be false or inaccurate. YOU ARE ENCOURAGED TO HAVE AN INSPECTOR OF YOUR CHOICE INSPECT THE PROPERTY.

The undersigned Buyer acknowledges receipt of the foregoing notice.

Meghan Theresa Harris dotloop verified 11/30/15 9:56AM CST FXXJ-PORH-UEBV-LB1S

Signature of Buyer Date Signature of Buyer Date

Printed Name: Printed Name:

Devin Lamar Harris dotloop verified 12/01/15 12:09PM CST TWA0-FJX2-1PBY-5P42

Vernon's Texas Statutes and Codes Annotated
Property Code (Refs & Annos)
Title 2. Conveyances
Chapter 5. Conveyances (Refs & Annos)
Subchapter A. General Provisions

V.T.C.A., Property Code § 5.008

§ 5.008. Seller's Disclosure of Property Condition

Effective: September 1, 2019
Currentness

(a) A seller of residential real property comprising not more than one dwelling unit located in this state shall give to 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.

(b) The notice must be executed and must, at a minimum, read substantially similar to the following:

SELLER'S DISCLOSURE NOTICE

CONCERNING THE PROPERTY AT

(Street Address and City)

THIS NOTICE IS A DISCLOSURE OF SELLER'S KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED BY SELLER AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PURCHASER MAY WISH TO OBTAIN. IT IS NOT A WARRANTY OF ANY KIND BY SELLER OR SELLER'S AGENTS.

Seller __ is __ is not occupying the Property.

If unoccupied, how long since Seller has occupied the Property?

1. The Property has the items checked below:

Write Yes (Y), No (N), or Unknown (U).

_____	Range	_____	Oven	_____	Microwave
_____	Dishwasher	_____	Trash Compactor	_____	Disposal
_____	Washer/Dryer	_____	Window	_____	Rain Gutters
	Hookups		Screens		

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_____	Security System	_____	Fire Detection Equipment	_____	Intercom System
		_____	Smoke Detector		
		_____	Smoke Detector- Hearing Impaired		
		_____	Carbon Monoxide Alarm		
		_____	Emergency Escape Ladder(s)		
_____	TV Antenna	_____	Cable TV Wiring	_____	Satellite Dish
_____	Ceiling Fan(s)	_____	Attic Fan(s)	_____	Exhaust Fan(s)
_____	Central A/C	_____	Central Heating	_____	Wall/Window Air Conditioning
_____	Plumbing System	_____	Septic System	_____	Public Sewer System
_____	Patio/Decking	_____	Outdoor Grill	_____	Fences
_____	Pool	_____	Sauna	_____	Spa
				_____	Hot Tub
_____	Pool Equipment	_____	Pool Heater	_____	Automatic Lawn Sprinkler System
_____	Fireplace(s) & Chimney (Woodburning)			_____	Fireplace(s) & Chimney (Mock)
_____	Natural Gas Lines			_____	Gas Fixtures
_____	Liquid Propane Gas:	_____	LP Community	_____	LP on Property

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		(Captive)			
Garage: _____ Attached		_____	Not Attached	_____	Carport
Garage Door Opener(s):		_____	Electronic	_____	Control(s)
Water Heater:		_____	Gas	_____	Electric
Water Supply: _____ City		_____	Well _____ MUD	_____	Co-op

Roof Type: _____ Age: _____(approx)

Are you (Seller) aware of any of the above items that are not in working condition, that have known defects, or that are in need of repair? __ Yes __ No __ Unknown.

If yes, then describe. (Attach additional sheets if necessary):

2. Does the property have working smoke detectors installed in accordance with the smoke detector requirements of Chapter 766, Health and Safety Code?* __ Yes __ No __ Unknown.

If the answer to the question above is no or unknown, explain. (Attach additional sheets if necessary): _____

*Chapter 766 of the Health and Safety Code requires one-family or two-family dwellings to have working smoke detectors installed in accordance with the requirements of the building code in effect in the area in which the dwelling is located, including performance, location, and power source requirements. If you do not know the building code requirements in effect in your area, you may check unknown above or contact your local building official for more information. A buyer may require a seller to install smoke detectors for the hearing impaired if: (1) the buyer or a member of the buyer's family who will reside in the dwelling is hearing impaired; (2) the buyer gives the seller written evidence of the hearing impairment from a licensed physician; and (3) within 10 days after the effective date, the buyer makes a written request for the seller to install smoke detectors for the hearing impaired and specifies the locations for installation. The parties may agree who will bear the cost of installing the smoke detectors and which brand of smoke detectors to install.

3. Are you (Seller) aware of any known defects/malfunctions in any of the following?

Write Yes (Y) if you are aware, write No (N) if you are not aware.

_____	Interior Walls	_____	Ceilings	_____	Floors
_____	Exterior Walls	_____	Doors	_____	Windows
_____	Roof	_____	Foundation/ Slab(s)	_____	Basement
_____	Walls/Fences	_____	Driveways	_____	Sidewalks
_____	Plumbing/Sewers/ Septics	_____	Electrical Systems	_____	Lighting Fixtures

__ Other Structural Components (Describe):.....

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If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):.....

4. Are you (Seller) aware of any of the following conditions?

Write Yes (Y) if you are aware, write No (N) if you are not aware.

_____ Active Termites (includes wood-destroying insects)

_____ Termite or Wood Rot Damage Needing Repair

_____ Previous Termite Damage

_____ Previous Termite Treatment

_____ Improper Drainage

_____ Water Damage Not Due to a Flood Event

_____ Landfill, Settling, Soil Movement, Fault Lines

_____ Single Blockable Main Drain in Pool/Hot Tub/Spa*

_____ Previous Structural or Roof Repair

_____ Hazardous or Toxic Waste

_____ Asbestos Components

_____ Urea formaldehyde Insulation

_____ Radon Gas

_____ Lead Based Paint

_____ Aluminum Wiring

_____ Previous Fires

_____ Unplatted Easements

_____ Subsurface Structure or Pits

_____ Previous Use of Premises for Manufacture of Methamphetamine

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):.....

*A single blockable main drain may cause a suction entrapment hazard for an individual.

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5. Are you (Seller) aware of any item, equipment, or system in or on the property that is in need of repair? __ Yes (if you are aware) __ No (if you are not aware). If yes, explain (attach additional sheets as necessary). _____

6. Are you (Seller) aware of any of the following conditions?*

Write Yes (Y) if you are aware, write No (N) if you are not aware.

__ Present flood insurance coverage

__ Previous flooding due to a failure or breach of a reservoir or a controlled or emergency release of water from a reservoir

__ Previous water penetration into a structure on the property due to a natural flood event

Write Yes (Y) if you are aware and check wholly or partly as applicable, write No (N) if you are not aware.

__ Located ( ) wholly ( ) partly in a 100-year floodplain (Special Flood Hazard Area-Zone A, V, A99, AE, AO, AH, VE, or AR)

__ Located ( ) wholly ( ) partly in a 500-year floodplain (Moderate Flood Hazard Area-Zone X (shaded))

__ Located ( ) wholly ( ) partly in a floodway

__ Located ( ) wholly ( ) partly in a flood pool

__ Located ( ) wholly ( ) partly in a reservoir

If the answer to any of the above is yes, explain (attach additional sheets as necessary): .....

_____

* For purposes of this notice:

“100-year floodplain” means any area of land that:

(A) is identified on the flood insurance rate map as a special flood hazard area, which is designated as Zone A, V, A99, AE, AO, AH, VE, or AR on the map;

(B) has a one percent annual chance of flooding, which is considered to be a high risk of flooding; and

(C) may include a regulatory floodway, flood pool, or reservoir.

“500-year floodplain” means any area of land that:

(A) is identified on the flood insurance rate map as a moderate flood hazard area, which is designated on the map as Zone X (shaded); and

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(B) has a two-tenths of one percent annual chance of flooding, which is considered to be a moderate risk of flooding.

“Flood pool” means the area adjacent to a reservoir that lies above the normal maximum operating level of the reservoir and that is subject to controlled inundation under the management of the United States Army Corps of Engineers.

“Flood insurance rate map” means the most recent flood hazard map published by the Federal Emergency Management Agency under the National Flood Insurance Act of 1968 (42 U.S.C. Section 4001 et seq.).

“Floodway” means an area that is identified on the flood insurance rate map as a regulatory floodway, which includes the channel of a river or other watercourse and the adjacent land areas that must be reserved for the discharge of a base flood, also referred to as a 100-year flood, without cumulatively increasing the water surface elevation more than a designated height.

“Reservoir” means a water impoundment project operated by the United States Army Corps of Engineers that is intended to retain water or delay the runoff of water in a designated surface area of land.

7. Have you (Seller) ever filed a claim for flood damage to the property with any insurance provider, including the National Flood Insurance Program (NFIP)?* __ Yes __ No. If yes, explain (attach additional sheets as necessary): .....

_____

*Homes in high risk flood zones with mortgages from federally regulated or insured lenders are required to have flood insurance. Even when not required, the Federal Emergency Management Agency (FEMA) encourages homeowners in high risk, moderate risk, and low risk flood zones to purchase flood insurance that covers the structure(s) and the personal property within the structure(s).

8. Have you (Seller) ever received assistance from FEMA or the U.S. Small Business Administration (SBA) for flood damage to the property? __ Yes __ No. If yes, explain (attach additional sheets as necessary): .....

_____

9. Are you (Seller) aware of any of the following?

Write Yes (Y) if you are aware, write No (N) if you are not aware.

_____ Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at that time.

_____ Homeowners' Association or maintenance fees or assessments.

_____ Any “common area” (facilities such as pools, tennis courts, walkways, or other areas) co-owned in undivided interest with others.

_____ Any notices of violations of deed restrictions or governmental ordinances affecting the condition or use of the Property.

_____ Any lawsuits directly or indirectly affecting the Property.

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_____ Any condition on the Property which materially affects the physical health or safety of an individual.

_____ Any rainwater harvesting system located on the property that is larger than 500 gallons and that uses a public water supply as an auxiliary water source.

_____ Any portion of the property that is located in a groundwater conservation district or a subsidence district.

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary): _____

10 . If the property is located in a coastal area that is seaward of the Gulf Intracoastal Waterway or within 1,000 feet of the mean high tide bordering the Gulf of Mexico, the property may be subject to the Open Beaches Act or the Dune Protection Act (Chapter 61 or 63, Natural Resources Code, respectively) and a beachfront construction certificate or dune protection permit may be required for repairs or improvements. Contact the local government with ordinance authority over construction adjacent to public beaches for more information.

11 . This property may be located near a military installation and may be affected by high noise or air installation compatible use zones or other operations. Information relating to high noise and compatible use zones is available in the most recent Air Installation Compatible Use Zone Study or Joint Land Use Study prepared for a military installation and may be accessed on the Internet website of the military installation and of the county and any municipality in which the military installation is located.

Date Signature of Seller

The undersigned purchaser hereby acknowledges receipt of the foregoing notice.

Date Signature of Purchaser

(c) A seller or seller's agent shall have no duty to make a disclosure or release information related to whether a death by natural causes, suicide, or accident unrelated to the condition of the property occurred on the property or whether a previous occupant had, may have had, has, or may have AIDS, HIV related illnesses, or HIV infection.

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

(e) This section does not apply to a transfer:

(1) pursuant to a court order or foreclosure sale;

(2) by a trustee in bankruptcy;

(3) to a mortgagee by a mortgagor or successor in interest, or to a beneficiary of a deed of trust by a trustor or successor in interest;

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(4) by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a deed of trust or a sale pursuant to a court ordered foreclosure or has acquired the real property by a deed in lieu of foreclosure;

(5) by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;

(6) from one co-owner to one or more other co-owners;

(7) made to a spouse or to a person or persons in the lineal line of consanguinity of one or more of the transferors;

(8) between spouses resulting from a decree of dissolution of marriage or a decree of legal separation or from a property settlement agreement incidental to such a decree;

(9) to or from any governmental entity;

(10) of a new residence of not more than one dwelling unit which has not previously been occupied for residential purposes; or

(11) of real property where the value of any dwelling does not exceed five percent of the value of the property.

(f) The notice shall be delivered by the seller to the purchaser on or before the effective date of an executory contract binding the purchaser to purchase the property. If a contract is entered without the seller providing the notice required by this section, the purchaser may terminate the contract for any reason within seven days after receiving the notice.

(g) In this section:

(1) “Blockable main drain” means a main drain of any size and shape that a human body can sufficiently block to create a suction entrapment hazard.

(2) “Main drain” means a submerged suction outlet typically located at the bottom of a swimming pool or spa to conduct water to a recirculating pump.

Credits

Added by Acts 1993, 73rd Leg., ch. 356, § 1, eff. Jan. 1, 1994. Amended by Acts 2005, 79th Leg., ch. 728, § 17.001, eff. Sept. 1, 2005; Acts 2007. 80th Leg., ch. 448, § 1, eff. Jan. 1, 2008; Acts 2007, 80th Leg., ch. 1051, § 11, eff. Sept. 1, 2007; Acts 2007, 80th Leg., ch. 1256, § 22, eff. Sept. 1, 2007; Acts 2009, 81st Leg., ch. 87, § 20.001, eff. Sept. 1, 2009; Acts 2009, 81st Leg., ch. 1178, § 1, eff. Jan. 1, 2010; Acts 2011, 82nd Leg., ch. 578 (H.B. 3389), § 1, eff. Sept. 1, 2011; Acts 2011, 82nd Leg., ch. 621 (S.B. 710), § 1, eff. Sept. 1, 2011; Acts 2011, 82nd Leg., ch. 1311 (H.B. 3391), § 5, eff. Sept. 1, 2011; Acts 2013, 83rd Leg., ch. 695 (H.B. 2781), § 6, eff. Sept. 1, 2013; Acts 2015, 84th Leg., ch. 524 (H.B. 1221), § 1, eff. Jan. 1, 2016; Acts 2017, 85th Leg., ch. 35 (H.B. 890), § 2, eff. Sept. 1, 2017; Acts 2019, 86th Leg., ch. 1307 (H.B. 3815), § 1, eff. Sept. 1, 2019; Acts 2019, 86th Leg., ch. 1337 (S.B. 339), § 1, eff. Sept. 1, 2019.

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Notes of Decisions (20)

V. T. C. A., Property Code § 5.008, TX PROPERTY § 5.008
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

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4-28-2014

EQUAL HOUSING OPPORTUNITY

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

ONE TO FOUR FAMILY RESIDENTIAL CONTRACT (RESALE)

NOTICE: Not For Use For Condominium Transactions

1. PARTIES: The parties to this contract are *Samuel Adam Aflalo* (Seller) and *Devin Lamar Harris and Meghan Theresa Harris* (Buyer). Seller agrees to sell and convey to Buyer and Buyer agrees to buy from Seller the Property defined below.

2. PROPERTY: The land, improvements and accessories are collectively referred to as the "Property".

A. LAND: Lot *5* Block *C7425*, *Beauregard Addition* Addition, City of *Dallas*, County of *Dallas*, Texas, known as *6912 Edelweiss Circle* *75240* (address/zip code), or as described on attached exhibit.

B. IMPROVEMENTS: The house, garage and all other fixtures and improvements attached to the above-described real property, including without limitation, the following **permanently installed and built-in items,** if any: all equipment and appliances, valances, screens, shutters, awnings, wall-to-wall carpeting, mirrors, ceiling fans, attic fans, mail boxes, television antennas, mounts and brackets for televisions and speakers, heating and air-conditioning units, security and fire detection equipment, wiring, plumbing and lighting fixtures, chandeliers, water softener system, kitchen equipment, garage door openers, cleaning equipment, shrubbery, landscaping, outdoor cooking equipment, and all other property owned by Seller and attached to the above described real property.

C. ACCESSORIES: The following described related accessories, if any: window air conditioning units, stove, fireplace screens, curtains and rods, blinds, window shades, draperies and rods, door keys, mailbox keys, above ground pool, swimming pool equipment and maintenance accessories, artificial fireplace logs, and controls for: (i) garage doors, (ii) entry gates, and (iii) other improvements and accessories.

D. EXCLUSIONS: The following improvements and accessories will be retained by Seller and must be removed prior to delivery of possession: _____.

3. SALES PRICE:

A. Cash portion of Sales Price payable by Buyer at closing ..... $ *290,000*

B. Sum of all financing described below (excluding any loan funding fee or mortgage insurance premium) ..... $ *1,160,000*

C. Sales Price (Sum of A and B)..... $ *1,450,000*

4. FINANCING (Not for use with reverse mortgage financing): The portion of Sales Price not payable in cash will be paid as follows: (Check applicable boxes below)

☑ A.THIRD PARTY FINANCING: One or more third party mortgage loans in the total amount of $ *1,160,000* (excluding any loan funding fee or mortgage insurance premium).

(1) Property Approval: If the Property does not satisfy the lenders' underwriting requirements for the loan(s) (including, but not limited to appraisal, insurability and lender required repairs), Buyer may terminate this contract by giving notice to Seller prior to closing and the earnest money will be refunded to Buyer.

(2) Credit Approval: (Check one box only)

☑ (a) This contract is subject to Buyer being approved for the financing described in the attached Third Party Financing Addendum for Credit Approval.

☐ (b) This contract is not subject to Buyer being approved for financing and does not involve FHA or VA financing.

☐ B. ASSUMPTION: The assumption of the unpaid principal balance of one or more promissory notes described in the attached TREC Loan Assumption Addendum.

☐ C. SELLER FINANCING: A promissory note from Buyer to Seller of $_____, secured by vendor's and deed of trust liens, and containing the terms and conditions described in the attached TREC Seller Financing Addendum. If an owner policy of title insurance is furnished, Buyer shall furnish Seller with a mortgagee policy of title insurance.

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DocuSign Envelope ID: 78E30893-657A-47DC-96EE-CC10B0671FF9

5. EARNEST MONEY: Upon execution of this contract by all parties, Buyer shall deposit $10,000 as earnest money with ~~Reliant Title - Jessica Endsley~~ TRACEY McCALLA as escrow agent, at ~~2850 Shoreline Trail Suite 201~~ HEXTER FAIR - 3838 OAK LAWN #520 (address). Buyer shall deposit additional earnest money of $ _____ with escrow agent within _____ days after the effective date of this contract. If Buyer fails to deposit the earnest money as required by this contract, Buyer will be in default.

6. TITLE POLICY AND SURVEY:

A. TITLE POLICY: Seller shall furnish to Buyer at ☑ Seller's ☐ Buyer's expense an owner policy of title insurance (Title Policy) issued by ~~Reliant Title~~ HEXTER FAIR (Title Company) in the amount of the Sales Price, dated at or after closing, insuring Buyer against loss under the provisions of the Title Policy, subject to the promulgated exclusions (including existing building and zoning ordinances) and the following exceptions:
(1) Restrictive covenants common to the platted subdivision in which the Property is located.
(2) The standard printed exception for standby fees, taxes and assessments.
(3) Liens created as part of the financing described in Paragraph 4.
(4) Utility easements created by the dedication deed or plat of the subdivision in which the Property is located.
(5) Reservations or exceptions otherwise permitted by this contract or as may be approved by Buyer in writing.
(6) The standard printed exception as to marital rights.
(7) The standard printed exception as to waters, tidelands, beaches, streams, and related matters.
(8) The standard printed exception as to discrepancies, conflicts, shortages in area or boundary lines, encroachments or protrusions, or overlapping improvements: ☐(i) will not be amended or deleted from the title policy; ☑(ii) will be amended to read, "shortages in area" at the expense of ☑Buyer ☐Seller.

B. COMMITMENT: Within 20 days after the Title Company receives a copy of this contract, Seller shall furnish to Buyer a commitment for title insurance (Commitment) and, at Buyer's expense, legible copies of restrictive covenants and documents evidencing exceptions in the Commitment (Exception Documents) other than the standard printed exceptions. Seller authorizes the Title Company to deliver the Commitment and Exception Documents to Buyer at Buyer's address shown in Paragraph 21. If the Commitment and Exception Documents are not delivered to Buyer within the specified time, the time for delivery will be automatically extended up to 15 days or 3 days before the Closing Date, whichever is earlier. If, due to factors beyond Seller's control, the Commitment and Exception Documents are not delivered within the time required, Buyer may terminate this contract and the earnest money will be refunded to Buyer.

C. SURVEY: The survey must be made by a registered professional land surveyor acceptable to the Title Company and Buyer's lender(s). (Check one box only)

☑(1) Within 5 days after the effective date of this contract, Seller shall furnish to Buyer and Title Company Seller's existing survey of the Property and a Residential Real Property Affidavit promulgated by the Texas Department of Insurance (T-47 Affidavit). **If Seller fails to furnish the existing survey or affidavit within the time prescribed, Buyer shall obtain a new survey at Seller's expense no later than 3 days prior to Closing Date.** If the existing survey or affidavit is not acceptable to Title Company or Buyer's lender(s), Buyer shall obtain a new survey at ☑Seller's ☐Buyer's expense no later than 3 days prior to Closing Date.

☐(2) Within _____ days after the effective date of this contract, Buyer shall obtain a new survey at Buyer's expense. Buyer is deemed to receive the survey on the date of actual receipt or the date specified in this paragraph, whichever is earlier.

☐(3) Within _____ days after the effective date of this contract, Seller, at Seller's expense shall furnish a new survey to Buyer.

D. OBJECTIONS: Buyer may object in writing to defects, exceptions, or encumbrances to title: disclosed on the survey other than items 6A(1) through (7) above; disclosed in the Commitment other than items 6A(1) through (8) above; or which prohibit the following use or activity: _____.

Buyer must object the earlier of (i) the Closing Date or (ii) 5 days after Buyer receives the Commitment, Exception Documents, and the survey. Buyer's failure to object within the time allowed will constitute a waiver of Buyer's right to object; except that the requirements in Schedule C of the Commitment are not waived by Buyer. Provided Seller is not obligated to incur any expense, Seller shall cure the timely objections of Buyer or any third party lender

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within 15 days after Seller receives the objections and the Closing Date will be extended as necessary. If objections are not cured within such 15 day period, this contract will terminate and the earnest money will be refunded to Buyer unless Buyer waives the objections.

E. TITLE NOTICES:

(1) ABSTRACT OR TITLE POLICY: Broker advises Buyer to have an abstract of title covering the Property examined by an attorney of Buyer's selection, or Buyer should be furnished with or obtain a Title Policy. If a Title Policy is furnished, the Commitment should be promptly reviewed by an attorney of Buyer's choice due to the time limitations on Buyer's right to object.

(2) MEMBERSHIP IN PROPERTY OWNERS ASSOCIATION(S): The Property ☐ is ☑ is not subject to mandatory membership in a property owners association(s). If the Property is subject to mandatory membership in a property owners association(s), Seller notifies Buyer under §5.012, Texas Property Code, that, as a purchaser of property in the residential community identified in Paragraph 2A in which the Property is located, you are obligated to be a member of the property owners association(s). Restrictive covenants governing the use and occupancy of the Property and all dedicatory instruments governing the establishment, maintenance, or operation of this residential community have been or will be recorded in the Real Property Records of the county in which the Property is located. Copies of the restrictive covenants and dedicatory instruments may be obtained from the county clerk. **You are obligated to pay assessments to the property owners association(s). The amount of the assessments is subject to change. Your failure to pay the assessments could result in enforcement of the association's lien on and the foreclosure of the Property.**
Section 207.003, Property Code, entitles an owner to receive copies of any document that governs the establishment, maintenance, or operation of a subdivision, including, but not limited to, restrictions, bylaws, rules and regulations, and a resale certificate from a property owners' association. A resale certificate contains information including, but not limited to, statements specifying the amount and frequency of regular assessments and the style and cause number of lawsuits to which the property owners' association is a party, other than lawsuits relating to unpaid ad valorem taxes of an individual member of the association. These documents must be made available to you by the property owners' association or the association's agent on your request.
If Buyer is concerned about these matters, the TREC promulgated Addendum for Property Subject to Mandatory Membership in a Property Owners Association(s) should be used.

(3) STATUTORY TAX DISTRICTS: If the Property is situated in a utility or other statutorily created district providing water, sewer, drainage, or flood control facilities and services, Chapter 49, Texas Water Code, requires Seller to deliver and Buyer to sign the statutory notice relating to the tax rate, bonded indebtedness, or standby fee of the district prior to final execution of this contract.

(4) TIDE WATERS: If the Property abuts the tidally influenced waters of the state, §33.135, Texas Natural Resources Code, requires a notice regarding coastal area property to be included in the contract. An addendum containing the notice promulgated by TREC or required by the parties must be used.

(5) ANNEXATION: If the Property is located outside the limits of a municipality, Seller notifies Buyer under §5.011, Texas Property Code, that the Property may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality. Each municipality maintains a map that depicts its boundaries and extraterritorial jurisdiction. To determine if the Property is located within a municipality's extraterritorial jurisdiction or is likely to be located within a municipality's extraterritorial jurisdiction, contact all municipalities located in the general proximity of the Property for further information.

(6) PROPERTY LOCATED IN A CERTIFICATED SERVICE AREA OF A UTILITY SERVICE PROVIDER: Notice required by §13.257, Water Code: The real property, described in Paragraph 2, that you are about to purchase may be located in a certificated water or sewer service area, which is authorized by law to provide water or sewer service to the properties in the certificated area. If your property is located in a certificated area there may be special costs or charges that you will be required to pay before you can receive water or sewer service. There may be a period required to construct lines or other facilities necessary to provide water or sewer service to your property. You are advised to determine if the property is in a certificated area and contact the utility service provider to determine the cost that you will be required to pay and the period, if any, that is required to provide water or sewer service to your property. The undersigned Buyer hereby acknowledges receipt of the foregoing notice at or before the execution of a binding contract for the purchase of the real property described in Paragraph 2 or at closing of purchase of the real property.

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(7) PUBLIC IMPROVEMENT DISTRICTS: If the Property is in a public improvement district, §5.014, Property Code, requires Seller to notify Buyer as follows: As a purchaser of this parcel of real property you are obligated to pay an assessment to a municipality or county for an improvement project undertaken by a public improvement district under Chapter 372, Local Government Code. The assessment may be due annually or in periodic installments. More information concerning the amount of the assessment and the due dates of that assessment may be obtained from the municipality or county levying the assessment. The amount of the assessments is subject to change. Your failure to pay the assessments could result in a lien on and the foreclosure of your property.

(8) TRANSFER FEES: If the Property is subject to a private transfer fee obligation, §5.205, Property Code, requires Seller to notify Buyer as follows: The private transfer fee obligation may be governed by Chapter 5, Subchapter G of the Texas Property Code.

(9) PROPANE GAS SYSTEM SERVICE AREA: If the Property is located in a propane gas system service area owned by a distribution system retailer, Seller must give Buyer written notice as required by §141.010, Texas Utilities Code. An addendum containing the notice approved by TREC or required by the parties should be used.

7. PROPERTY CONDITION:

A. ACCESS, INSPECTIONS AND UTILITIES: Seller shall permit Buyer and Buyer's agents access to the Property at reasonable times. Buyer may have the Property inspected by inspectors selected by Buyer and licensed by TREC or otherwise permitted by law to make inspections. Seller at Seller's expense shall immediately cause existing utilities to be turned on and shall keep the utilities on during the time this contract is in effect.

B. SELLER'S DISCLOSURE NOTICE PURSUANT TO §5.008, TEXAS PROPERTY CODE (Notice): (Check one box only)

☐ (1) Buyer has received the Notice.

☑ (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.

☐ (3)The Seller is not required to furnish the notice under the Texas Property Code.

C. SELLER'S DISCLOSURE OF LEAD-BASED PAINT AND LEAD-BASED PAINT HAZARDS is required by Federal law for a residential dwelling constructed prior to 1978.

D. ACCEPTANCE OF PROPERTY CONDITION: "As Is" means the present condition of the Property with any and all defects and without warranty except for the warranties of title and the warranties in this contract. Buyer's agreement to accept the Property As Is under Paragraph 7D(1) or (2) does not preclude Buyer from inspecting the Property under Paragraph 7A, from negotiating repairs or treatments in a subsequent amendment, or from terminating this contract during the Option Period, if any. (Check one box only)

☑ (1) Buyer accepts the Property As Is.

☐ (2) Buyer accepts the Property As Is provided Seller, at Seller's expense, shall complete the following specific repairs and treatments: _____

_____.

(Do not insert general phrases, such as "subject to inspections" that do not identify specific repairs and treatments.)

E. LENDER REQUIRED REPAIRS AND TREATMENTS: Unless otherwise agreed in writing, neither party is obligated to pay for lender required repairs, which includes treatment for wood destroying insects. If the parties do not agree to pay for the lender required repairs or treatments, this contract will terminate and the earnest money will be refunded to Buyer. If the cost of lender required repairs and treatments exceeds 5% of the Sales Price, Buyer may terminate this contract and the earnest money will be refunded to Buyer.

F. COMPLETION OF REPAIRS AND TREATMENTS: Unless otherwise agreed in writing: (i) Seller shall complete all agreed repairs and treatments prior to the Closing Date; and (ii) all required permits must be obtained, and repairs and treatments must be performed by persons who are licensed to provide such repairs or treatments or, if no license is required by law, are commercially engaged in the trade of providing such repairs or treatments. At Buyer's election, any transferable warranties received by Seller with respect to the repairs and treatments will be transferred to Buyer at Buyer's expense. If Seller fails to complete any agreed repairs and treatments prior to the Closing Date, Buyer may exercise remedies under Paragraph 15 or extend the Closing Date up to 5 days if necessary for Seller to complete the repairs and treatments.

G. ENVIRONMENTAL MATTERS: Buyer is advised that the presence of wetlands, toxic substances, including asbestos and wastes or other environmental hazards, or the presence of a threatened or endangered species or its habitat may affect Buyer's intended use of the

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Property. If Buyer is concerned about these matters, an addendum promulgated by TREC or required by the parties should be used.

H. RESIDENTIAL SERVICE CONTRACTS: Buyer may purchase a residential service contract from a residential service company licensed by TREC. If Buyer purchases a residential service contract, Seller shall reimburse Buyer at closing for the cost of the residential service contract in an amount not exceeding $ 800 . Buyer should review any residential service contract for the scope of coverage, exclusions and limitations. **The purchase of a residential service contract is optional. Similar coverage may be purchased from various companies authorized to do business in Texas.**

8. BROKERS' FEES: All obligations of the parties for payment of brokers' fees are contained in separate written agreements.

9. CLOSING:

A. The closing of the sale will be on or before 12/18/2015 , or within 7 days after objections made under Paragraph 6D have been cured or waived, whichever date is later (Closing Date). If either party fails to close the sale by the Closing Date, the non-defaulting party may exercise the remedies contained in Paragraph 15.

B. At closing:

(1) Seller shall execute and deliver a general warranty deed conveying title to the Property to Buyer and showing no additional exceptions to those permitted in Paragraph 6 and furnish tax statements or certificates showing no delinquent taxes on the Property.

(2) Buyer shall pay the Sales Price in good funds acceptable to the escrow agent.

(3) Seller and Buyer shall execute and deliver any notices, statements, certificates, affidavits, releases, loan documents and other documents reasonably required for the closing of the sale and the issuance of the Title Policy.

(4) There will be no liens, assessments, or security interests against the Property which will not be satisfied out of the sales proceeds unless securing the payment of any loans assumed by Buyer and assumed loans will not be in default.

(5) If the Property is subject to a residential lease, Seller shall transfer security deposits (as defined under §92.102, Property Code), if any, to Buyer. In such an event, Buyer shall deliver to the tenant a signed statement acknowledging that the Buyer has received the security deposit and is responsible for the return of the security deposit, and specifying the exact dollar amount of the security deposit.

10. POSSESSION:

A Buyer's Possession: Seller shall deliver to Buyer possession of the Property in its present or required condition, ordinary wear and tear excepted: ☑ upon closing and funding ☐ according to a temporary residential lease form promulgated by TREC or other written lease required by the parties. Any possession by Buyer prior to closing or by Seller after closing which is not authorized by a written lease will establish a tenancy at sufferance relationship between the parties. **Consult your insurance agent prior to change of ownership and possession because insurance coverage may be limited or terminated. The absence of a written lease or appropriate insurance coverage may expose the parties to economic loss.**

B. Leases:

(1) After the Effective Date, Seller may not execute any lease (including but not limited to mineral leases) or convey any interest in the Property without Buyer's written consent.

(2) If the Property is subject to any lease to which Seller is a party, Seller shall deliver to Buyer copies of the lease(s) and any move-in condition form signed by the tenant within 7 days after the Effective Date of the contract.

11. SPECIAL PROVISIONS: (Insert only factual statements and business details applicable to the sale. TREC rules prohibit licensees from adding factual statements or business details for which a contract addendum, lease or other form has been promulgated by TREC for mandatory use.)

Buyers request a response by 5:00 pm on 11/19/2015 or this offer may be considered null and void.

12. SETTLEMENT AND OTHER EXPENSES:

A. The following expenses must be paid at or prior to closing:

(1) Expenses payable by Seller (Seller's Expenses):

(a) Releases of existing liens, including prepayment penalties and recording fees; release of Seller's loan liability; tax statements or certificates; preparation of deed; one-half of escrow fee; and other expenses payable by Seller under this contract.

(b) Seller shall also pay an amount not to exceed $ _____ to be applied in the

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following order: Buyer's Expenses which Buyer is prohibited from paying by FHA, VA, Texas Veterans Land Board or other governmental loan programs, and then to other Buyer's Expenses as allowed by the lender.

(2) Expenses payable by Buyer (Buyer's Expenses): Appraisal fees; loan application fees; adjusted origination charges; credit reports; preparation of loan documents; interest on the notes from date of disbursement to one month prior to dates of first monthly payments; recording fees; copies of easements and restrictions; loan title policy with endorsements required by lender; loan-related inspection fees; photos; amortization schedules; one-half of escrow fee; all prepaid items, including required premiums for flood and hazard insurance, reserve deposits for insurance, ad valorem taxes and special governmental assessments; final compliance inspection; courier fee; repair inspection; underwriting fee; wire transfer fee; expenses incident to any loan; Private Mortgage Insurance Premium (PMI), VA Loan Funding Fee, or FHA Mortgage Insurance Premium (MIP) as required by the lender; and other expenses payable by Buyer under this contract.

B. If any expense exceeds an amount expressly stated in this contract for such expense to be paid by a party, that party may terminate this contract unless the other party agrees to pay such excess. Buyer may not pay charges and fees expressly prohibited by FHA, VA, Texas Veterans Land Board or other governmental loan program regulations.

13. PRORATIONS: Taxes for the current year, interest, maintenance fees, assessments, dues and rents will be prorated through the Closing Date. The tax proration may be calculated taking into consideration any change in exemptions that will affect the current year's taxes. If taxes for the current year vary from the amount prorated at closing, the parties shall adjust the prorations when tax statements for the current year are available. If taxes are not paid at or prior to closing, Buyer shall pay taxes for the current year.

14. CASUALTY LOSS: If any part of the Property is damaged or destroyed by fire or other casualty after the effective date of this contract, Seller shall restore the Property to its previous condition as soon as reasonably possible, but in any event by the Closing Date. If Seller fails to do so due to factors beyond Seller's control, Buyer may (a) terminate this contract and the earnest money will be refunded to Buyer (b) extend the time for performance up to 15 days and the Closing Date will be extended as necessary or (c) accept the Property in its damaged condition with an assignment of insurance proceeds and receive credit from Seller at closing in the amount of the deductible under the insurance policy. Seller's obligations under this paragraph are independent of any other obligations of Seller under this contract.

15. DEFAULT: If Buyer fails to comply with this contract, Buyer will be in default, and Seller may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money as liquidated damages, thereby releasing both parties from this contract. If Seller fails to comply with this contract, Seller will be in default and Buyer may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money, thereby releasing both parties from this contract.

16. MEDIATION: It is the policy of the State of Texas to encourage resolution of disputes through alternative dispute resolution procedures such as mediation. Any dispute between Seller and Buyer related to this contract which is not resolved through informal discussion will be submitted to a mutually acceptable mediation service or provider. The parties to the mediation shall bear the mediation costs equally. This paragraph does not preclude a party from seeking equitable relief from a court of competent jurisdiction.

17. ATTORNEY'S FEES: A Buyer, Seller, Listing Broker, Other Broker, or escrow agent who prevails in any legal proceeding related to this contract is entitled to recover reasonable attorney's fees and all costs of such proceeding.

18. ESCROW:

A. ESCROW: The escrow agent is not (i) a party to this contract and does not have liability for the performance or nonperformance of any party to this contract, (ii) liable for interest on the earnest money and (iii) liable for the loss of any earnest money caused by the failure of any financial institution in which the earnest money has been deposited unless the financial institution is acting as escrow agent.

B. EXPENSES: At closing, the earnest money must be applied first to any cash down payment, then to Buyer's Expenses and any excess refunded to Buyer. If no closing occurs, escrow agent may: (i) require a written release of liability of the escrow agent from all parties, (ii) require payment of unpaid expenses incurred on behalf of a party, and (iii) only deduct from the earnest money the amount of unpaid expenses incurred on behalf of the party receiving the earnest money.

C. DEMAND: Upon termination of this contract, either party or the escrow agent may send a release of earnest money to each party and the parties shall execute counterparts of

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the release and deliver same to the escrow agent. If either party fails to execute the release, either party may make a written demand to the escrow agent for the earnest money. If only one party makes written demand for the earnest money, escrow agent shall promptly provide a copy of the demand to the other party. If escrow agent does not receive written objection to the demand from the other party within 15 days, escrow agent may disburse the earnest money to the party making demand reduced by the amount of unpaid expenses incurred on behalf of the party receiving the earnest money and escrow agent may pay the same to the creditors. If escrow agent complies with the provisions of this paragraph, each party hereby releases escrow agent from all adverse claims related to the disbursal of the earnest money.

D. DAMAGES: Any party who wrongfully fails or refuses to sign a release acceptable to the escrow agent within 7 days of receipt of the request will be liable to the other party for liquidated damages in an amount equal to the sum of: (i) three times the amount of the earnest money; (ii) the earnest money; (iii) reasonable attorney's fees; and (iv) all costs of suit.

E. NOTICES: Escrow agent's notices will be effective when sent in compliance with Paragraph 21. Notice of objection to the demand will be deemed effective upon receipt by escrow agent.

19. REPRESENTATIONS: All covenants, representations and warranties in this contract survive closing. If any representation of Seller in this contract is untrue on the Closing Date, Seller will be in default. Unless expressly prohibited by written agreement, Seller may continue to show the Property and receive, negotiate and accept back up offers.

20. FEDERAL TAX REQUIREMENTS: If Seller is a "foreign person," as defined by applicable law, or if Seller fails to deliver an affidavit to Buyer that Seller is not a "foreign person," then Buyer shall withhold from the sales proceeds an amount sufficient to comply with applicable tax law and deliver the same to the Internal Revenue Service together with appropriate tax forms. Internal Revenue Service regulations require filing written reports if currency in excess of specified amounts is received in the transaction.

21. NOTICES: All notices from one party to the other must be in writing and are effective when mailed to, hand-delivered at, or transmitted by facsimile or electronic transmission as follows:

To Buyer at:		**To Seller at:**	Clay Stapp
cc agent: kris.goggans@ppnrealty.com			
Telephone:		Telephone:	
Facsimile:		Facsimile:	
E-mail:	meghan1180@hotmail.com	E-mail:	clay@claystapp.com

22. AGREEMENT OF 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
- ☐ Seller Financing Addendum
- ☐ Addendum for Property Subject to Mandatory Membership in a Property Owners Association
- ☐ Buyer's Temporary Residential Lease
- ☐ Loan Assumption Addendum
- ☐ Addendum for Sale of Other Property by Buyer
- ☐ Addendum for Reservation of Oil, Gas and Other Minerals
- ☐ Addendum for "Back-Up" Contract
- ☐ Addendum for Coastal Area Property
- ☐ Environmental Assessment, Threatened or Endangered Species and Wetlands Addendum
- ☐ Seller's Temporary Residential Lease
- ☐ Short Sale Addendum
- ☐ Addendum for Property Located Seaward of the Gulf Intracoastal Waterway
- ☑ Addendum for Seller's Disclosure of Information on Lead-based Paint and Lead-based Paint Hazards as Required by Federal Law
- ☐ Addendum for Property in a Propane Gas System Service Area
- ☐ Other (list):

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23. TERMINATION OPTION: For nominal consideration, the receipt of which is hereby acknowledged by Seller, and Buyer's agreement to pay Seller $ 500.00 (Option Fee) within 3 days after the effective date of this contract, Seller grants Buyer the unrestricted right to terminate this contract by giving notice of termination to Seller within 10 days after the effective date of this contract (Option Period). If no dollar amount is stated as the Option Fee or if Buyer fails to pay the Option Fee to Seller within the time prescribed, this paragraph will not be a part of this contract and Buyer shall not have the unrestricted right to terminate this contract. If Buyer gives notice of termination within the time prescribed, the Option Fee will not be refunded; however, any earnest money will be refunded to Buyer. The Option Fee ☑ will ☐ will not be credited to the Sales Price at closing. **Time is of the essence for this paragraph and strict compliance with the time for performance is required.**

24. CONSULT AN ATTORNEY BEFORE SIGNING: TREC rules prohibit real estate licensees from giving legal advice. READ THIS CONTRACT CAREFULLY.

Buyer's Attorney is:	Seller's Attorney is:
Telephone:	Telephone:
Facsimile:	Facsimile:
E-mail:	E-mail:

EXECUTED the _____ day of November 20, 2015, _____ (EFFECTIVE DATE).
(BROKER: FILL IN THE DATE OF FINAL ACCEPTANCE.)

Devin Lamar Harris — dotloop verified 11/18/15 1:33PM EST HXLJ-RTGR-NM46-M9U8	DocuSigned by: Sammy Allala — November 18, 2015
Buyer	Seller
Meghan Theresa Harris — dotloop verified 11/18/15 1:38PM EST NXWJ-JQZU-I2VS-HFJ8	
Buyer	Seller

The form of this contract has been approved by the Texas Real Estate Commission. TREC forms are intended for use only by trained real estate licensees. 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. 20-12. This form replaces TREC NO. 20-11.

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BROKER INFORMATION
(Print name(s) only. Do not sign)

Keller Williams Realty — 0535327	CLAY STAPP + CO — 9003460
Other Broker Firm — License No.	Listing Broker Firm — License No.
represents ☑ Buyer only as Buyer's agent ☐ Seller as Listing Broker's subagent	represents ☐ Seller and Buyer as an intermediary ☑ Seller only as Seller's agent
Tommy Flood — 972-772-7000	Clay Stapp — 214-906-7789
Name of Associate's Licensed Supervisor — Telephone	Name of Associate's Licensed Supervisor — Telephone
Kris Goggans — 903-439-8795	
Associate's Name — Telephone	Listing Associate's Name — Telephone
2701 Sunset Ridge Dr Ste 109	1933 Cedar Springs — 214-855-0780
Other Broker's Address — Facsimile	Listing Broker's Office Address — Facsimile
Rockwall — TX — 75032	Dallas — TX — 75201
City — State — Zip	City — State — Zip
kris.goggans@kw.com	clay@claystapp.com
Associate's Email Address	Listing Associate's Email Address
	Selling Associate's Name — Telephone
	Name of Selling Associate's Licensed Supervisor — Telephone
	Selling Associate's Office Address — Facsimile
	City — State — Zip
	Selling Associate's Email Address

Listing Broker has agreed to pay Other Broker 3% of the total sales price when the Listing Broker's fee is received. Escrow agent is authorized and directed to pay other Broker from Listing Broker's fee at closing.

OPTION FEE RECEIPT

Receipt of $_____ (Option Fee) in the form of _____ is acknowledged.

Seller or Listing Broker — Date

CONTRACT AND EARNEST MONEY RECEIPT

Receipt of ☐ Contract and ☐ $ 10,000 Earnest Money in the form of _____ is acknowledged.

Escrow Agent: ~~Reliant Title - Jessica Endsley~~ HEXTER FAIR - TRACEY McCAHH Date: _____

By: _____
Email Address

Address — Telephone _____

City — State — Zip — Facsimile: _____

EXHIBIT A

FILED
19-0223
11/13/2019 6:10 PM
tex-38477731
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 19-0223

In the Supreme Court of Texas

Devin Lamar Harris and Meghan Theresa Harris,
Petitioners,

v.

Samuel Adam Aflalo,
Respondent

On Petition for Review from the Court of Appeals
Fifth District of Texas, Dallas, Texas
Court of Appeals No. 05-16-01472-CV

PETITIONERS' BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

STATUTES

ARTICLES

STATEMENT OF THE CASE

Nature of the Case:	This is a breach of contract case arising from the attempted sale of a single family home in Dallas, Texas. The lawsuit was filed by the home's owner, Respondent/Plaintiff Samuel Adam Aflalo ("Aflalo"), against Petitioners/Defendants Devin Lamar Harris and Meghan Theresa Harris (collectively, the "Harrises"), who had initially agreed to purchase the home but cancelled the sale pursuant to the contract's express terms due to Aflalo's failure to timely and properly disclose certain required information related to possible flooding.
Trial Court:	The 95th District Court, Dallas County, Texas, Cause No. DC-16-00247, the Honorable Ken Molberg presiding (the "Trial Court").
Trial Court Disposition:	After receiving cross-motions for summary judgment, the Trial Court entered Final Summary Judgment against Aflalo and in favor of the Harrises on September 14, 2016.
Court of Appeals Panel:	Court of Appeals for the Fifth District of Texas at Dallas (the "Court of Appeals"), Cause No. 05-16-01472-CV, before a panel of Justices Francis (author), Evans, and Boatright. The panel did not hear oral argument.
Panel Disposition:	In an opinion issued on May 23, 2018, a panel of the Court of Appeals affirmed the Trial Court's summary judgment against Aflalo and in favor of the Harrises. The decision is unpublished. Justice Evans authored a Dissenting Opinion. The panel subsequently denied Aflalo's Motion for Rehearing before the panel on July 16, 2018, with Justice Boatright issuing an opinion concurring in the denial of rehearing.

Court of Appeals En Banc:	The full Dallas Court of Appeals ultimately agreed to rehear the appeal. Without hearing oral argument and without receiving additional briefing, on December 13, 2018 the Court of Appeals issued an *En Banc* Opinion authored by Justice Evans. *Aflalo v. Harris*, No. 05-16-01472-CV, 2018 Tex. App. LEXIS 10334, at *29 (Tex. App.—Dallas Dec. 13, 2018, no pet. h.) (en banc).
Court of Appeals En Banc Disposition:	Sitting *en banc*, on December 13, 2018, the Court of Appeals reversed both the panel's opinion and the Trial Court's judgment and remanded the case to the Trial Court for further proceedings. The *en banc* proceedings gave rise to four separate opinions: the 9-4 majority opinion; a concurrence from Justice Schenck; Justice Francis' dissent joined by Chief Justice Wright and Justice Brown; and a dissent from Justice Boatright.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the judgment and *en banc* opinion of the Court of Appeals under Texas Government Code § 22.001(a) because the issue it presents—whether the seller of a home must timely and properly complete his self-selected, contractual disclosure form pursuant to Texas Property Code Section 5.008—is a potentially re-occurring one in thousands of residential real estate transactions, and is thus important to the jurisprudence of the state. In handling this appeal, the Dallas Court of Appeals—both as a panel and while sitting *en banc*—fractured badly, issuing a total of ***seven separate opinions***, including multiple concurring and dissenting opinions, over the course of this one issue appeal. Against this backdrop, this Court should exercise its jurisdiction over issues of statewide importance and thereby prevent confusion in future residential real estate transactions.

ISSUE PRESENTED

If the seller of a house fails to fully complete and timely provide his self-selected Seller's Disclosure Notice form to the purchaser pursuant to Texas Property Code Section 5.008, is the purchaser nonetheless required to move forward with closing on the purchase of the home? Or, rather, is the purchaser released from the contract to buy the house by the seller's admitted failure to provide all the information required by his self-selected Seller's Disclosure Notice form?

STATEMENT OF FACTS

A. Aflalo Fails to Comply with His Contractual Obligations and Files Suit after the Harrises Terminate the Parties' Contract.

This case arises out of the attempted sale of a home in Dallas, Texas at 6912 Edelweiss Circle (the "Property") that fell through because the seller, Plaintiff-Respondent Samuel Aflalo ("Aflalo"), failed to provide to the prospective buyers, Defendants-Petitioners Meghan and Devin Harris (the "Harrises"), all of the information required by his self-selected Seller's Disclosure Notice form.

In 2015, the Harrises and Aflalo entered into a contract for the purchase of the Property (the "Contract"), effective November 20, 2015, with Aflalo as the "Seller" and the Harrises as putative "Buyers" of the Property. C.R. 19, 31, 38. The Harrises agreed to purchase the Property for $1,450,000.00. C.R. 19, 31. During the parties' negotiations and leading up to the December 2015 closing date, it is undisputed that the Harrises complied with all their contractual obligations, including depositing $10,000.00 in escrow as earnest money. C.R. 32, 39, 238.

As in any residential real estate transaction, Section 7(B)(2) of the Contract required Aflalo to provide a Seller's Disclosure Notice "pursuant to" Section 5.008 of the Texas Property Code ("Section 5.008") within three days after the effective date of the Contract. C.R. 34. If Aflalo failed to provide the notice, the Harrises could then terminate the Contract prior to closing and have their earnest money

returned to them. *Id.* If Aflalo delivered the notice, the Harrises could terminate for any reason within seven days after receiving the notice, or prior to the Contract closing, whichever occurred first, and have their earnest money returned to them. *Id.*

Although Texas Property Code Section 5.008 provides its own sample notice form, Aflalo—not the Harrises—instead voluntarily elected to use the pre-prepared Seller's Disclosure Notice form promulgated by the Texas Association of Realtors ("TAR"). C.R. 40-44. Because it is one of a number of pre-prepared forms made available by TAR, this particular form is designated as "TAR-1406." C.R. 40. At the top of TAR-1406, in bold writing, it states: "**This form complies with and contains additional disclosures which exceed the minimum disclosures required by the [Property] Code**." C.R. 40. Importantly, Aflalo then failed to fully and accurately complete his self-selected TAR-1406 form.

Property Code Section 5.008 requires the seller—here, Aflalo—to disclose if he is aware of numerous conditions on the property being sold, including whether: (a) it is located in a 100-year floodplain; and (b) the property currently has flood insurance coverage. TEX. PROP. CODE § 5.008(b)(4). If the seller responds affirmatively to any of these conditions, he must explain and "[a]ttach additional sheets if necessary." *Id.* Aflalo's chosen form, TAR-1406, was substantially similar to Section 5.008's notice provision and required disclosure of the following

conditions: (a) "Located in 100-year Floodplain;" (b) "Located in Floodway;" and (c) "Present Flood Ins. Coverage **(*If yes, attach TAR-1414*)**." C.R. 41 (emphasis added).

Aflalo's Seller's Disclosure Notice revealed—for the first time—that the Property was located in a floodway and had flood insurance coverage. C.R. 41. As a result of these disclosures, Aflalo's TAR-1406 form required him to "attach TAR-1414" to complete the floodplain and flood insurance notice, but it is undisputed that Aflalo failed to attach either the TAR-1414 form or any additional explanatory pages.

Upon learning that their prospective new home was in a floodplain, the Harrises were surprised and concerned, and their real estate agent therefore almost immediately requested that Aflalo provide the missing but required TAR-1414 form. C.R. 63. However, despite being given this chance and express request to cure his initial omission of form TAR-1414 from his Seller's Disclosure Notice, Aflalo never provided this critical and required form to the Harrises. C.R. 146. Nor did Aflalo provide the "additional sheets" contemplated by both Texas Property Code Section 5.008(b)(4) and TAR-1406. *Id.* In short, having selected TAR-1406 as his Seller's Disclosure Notice, Aflalo failed to complete it, and then failed to cure this omission when given the chance by the Harrises.

After Aflalo failed to provide the completed Seller's Disclosure Notice, the

Harrises validly and timely invoked their termination rights under the Contract on December 17, 2015. C.R. 46. Not only did the Harrises lose out on their preferred new home as a result of Aflalo's failure, but Aflalo then also refused to return the Harrises' $10,000.00 earnest money—which, to this day, has still not been repaid to the Harrises. C.R. 64. Aflalo put the Property back on the market and, at the same time, demanded that the Harrises perform under the Contract before filing the underlying lawsuit on January 11, 2016. C.R. 13-17, 63, 152-53.

B. Aflalo's Appeal of the Trial Court's Judgment Leads to Seven Appellate Opinions.

Aflalo filed suit against the Harrises for breach of contract in the Trial Court, Judge Molberg presiding, seeking specific performance and alleging that he provided all disclosures required under the Contract. C.R. 13-17.

Both the Harrises and Aflalo moved for summary judgment. C.R. 47-245. The Harrises argued that Aflalo was contractually obligated to provide the TAR-1414 form and that Aflalo had indisputably failed to do so. C.R. 47-153. The Trial Court granted the Harrises' motion for summary judgment and denied Aflalo's cross-motion. C.R. 367-68.[1]

Aflalo filed a Notice of Appeal on December 13, 2016. C.R. 378-79. Although the parties requested oral argument, the Dallas Court of Appeals panel,

[1] The Trial Court also awarded the Harrises attorneys' fees in the amount of $140,000. App. 2.

comprised of Justices Francis, Evans, and Boatright, declined to hear oral argument. App. 22-23. Relying on the summary judgment record and the parties' briefs, the panel issued a Memorandum Opinion affirming Judge Molberg's summary judgment on May 23, 2018. *Aflalo v. Harris*, No. 05-16-01472-CV, 2018 Tex. App. LEXIS 3659, at *11 (Tex. App.—Dallas May 23, 2018, no pet. h.) (mem. op.) *withdrawn*, *Aflalo v. Harris*, No. 05-16-01472-CV, 2018 Tex. App. LEXIS 10334 (Tex. App.—Dallas Dec. 13, 2018, no pet. h.) (en banc) (App. 24-31). Justice Evans issued a Dissenting Opinion alongside the panel's Memorandum Opinion. *Id.* (App. 32-44).

Following the Memorandum Opinion, Aflalo filed a Motion for Rehearing on June 22, 2018, which the panel denied on July 16, 2018. App. 45-57; 58. Justice Boatright issued an Opinion Concurring in Denial of Rehearing. *Aflalo v. Harris*, No. 05-16-01472-CV, 2018 Tex. App. LEXIS 5393, at *1 (Tex. App.—Dallas July 16, 2018, no pet. h.) *withdrawn*, *Aflalo v. Harris*, No. 05-16-01472-CV, 2018 Tex. App. LEXIS 10334 (Tex. App.—Dallas Dec. 13, 2018, no pet. h.) (en banc) (App. 59-60).

Aflalo also sought Rehearing En Banc. App. 61-121. At the request of the Court of Appeals, the Harrises responded in opposition to Aflalo's Motion for Rehearing En Banc, but the parties were not requested to, and therefore did not engage in, any further briefing to the en banc Court of Appeals. App. 122-45.

Without hearing oral argument, the Court of Appeals issued an en banc Opinion on December 13, 2018 (the "En Banc Opinion"), reversing both Judge Molberg's summary judgment and the panel's Memorandum Opinion, and remanding the case to the Trial Court for further proceedings. *Aflalo v. Harris*, No. 05-16-01472-CV, 2018 Tex. App. LEXIS 10334, at *29 (Tex. App.—Dallas Dec. 13, 2018, no pet. h.) (en banc) (App. 146-65). In addition to the En Banc Opinion, Justice Schenk issued a Concurring Opinion joining in the result only, Justice Francis authored a Dissenting Opinion joined by Chief Justice Wright and Justice Brown, and Justice Boatright authored his own Dissenting Opinion. *Id.* App. 166-68; 169-77; 178-81.

After issuance of seven different appellate opinions without a single oral argument and with only one round of briefing, the Harrises filed a Motion for Rehearing En Banc on January 14, 2019. App. 182-356. This motion was denied on January 30, 2019. App. 357. The Harrises timely filed their Petition for Review on March 18, 2019. On August 30, 2019, this Court asked the parties to file briefs on the merits in this case. Accordingly, the Harrises now file their Brief on the Merits.

SUMMARY OF ARGUMENT

This case will define the level of transparency that sellers of residential real estate must exhibit to their potential buyers. Given the many thousands of home sales that happen every year in Texas, as well as the importance of such real estate transactions to everyday Texans, this case presents an issue of statewide importance. While the case is important, the principle it embodies is simple: When the seller of a home elects to use a Seller's Disclosure Notice form other than the sample form provided in the Texas Property Code itself, the seller is obligated to fully and accurately complete his self-selected disclosure form.

Like thousands of other Texans, the Harrises sought to buy a family home. Having identified a house that they desired, they entered into the Contract to purchase it from Aflalo. Upon execution of the Contract but prior to closing, the Harrises were entitled to certain disclosures related to the condition of the Property. Such disclosures enable Texas home buyers to evaluate the condition of a property before closing on it. Texas Property Code Section 5.008 sets a floor, but not a ceiling, for these disclosures, and the parties may agree to require additional disclosures beyond the minimum mandated by the statute. That is precisely what happened here, as Aflalo elected to use TAR-1406 rather than the simpler and shorter Seller's Disclosure Notice form provided in Section 5.008 itself.

Having selected TAR-1406, Aflalo bound himself to fully and accurately complete it as his Seller's Disclosure Notice, but it is undisputed that he did not. And even when the Harrises gave Aflalo the opportunity to cure this failure, he again failed to provide the required information, which led to the Harrises terminating the Contract and walking away from the purchase of the home they had desired.

This modest-sized breach of contract case thus presents a simple, but manifestly important, legal question: whether the seller of a home in Texas must provide ***all*** information required by his self-selected disclosure form, even if the information required by that form exceeds the minimum disclosures required by Section 5.008. Backed by the basic tenets of both contract and statutory interpretation, the Trial Court correctly found that Aflalo was not free to simply ignore the disclosure requirements of his TAR-1406 form, and that the Harrises were permitted to walk away from the Contract due to Aflalo's failure to provide the required floodplain and flood insurance related information. The panel of the Court of Appeals affirmed Judge Molberg's common-sense finding and held that Aflalo and the Harrises were free to agree to—and did agree to—disclosure requirements that went beyond the bare minimum of Section 5.008.

Against this backdrop, the En Banc Opinion is fundamentally inconsistent with both the plain language of Section 5.008 and the terms of the parties' Contract. Aflalo had both a contractual and statutory obligation to provide a completed

disclosure notice and voluntarily chose to use form TAR-1406. Further, the En Banc Opinion fails to recognize that the Contract did not merely require Aflalo to provide the minimum disclosures under Section 5.008; instead, the Contract required a disclosure notice form "pursuant to" Section 5.008. Stated another way, the Contract required a Seller's Disclosure Notice and, in turn, the notice provided by Aflalo *also* required TAR-1414, which he admittedly failed to attach. Aflalo's failure breached the Contract and deprived the Harrises of important information regarding the danger of flooding, thereby releasing the Harrises from their obligation to complete the purchase of the Property.

ARGUMENT

The two largest purchases that most Texans make are their home and their motor vehicle. To be sure, this case involves the sale of a home, not a car or truck. But the examining a hypothetical car purchase reveals the fundamental error in reasoning that plagues the En Banc Opinion issued by the Dallas Court of Appeals in this home purchase case.

In both home and car transactions, regulations exist to protect the buyer. In the context of cars, the National Highway Traffic Safety Administration ("NHTSA") has a legislative mandate to impose safety standards and regulations to which motor vehicle manufacturers must conform and certify compliance. But in addition to conforming with the NHTSA's minimum requirements, motor vehicle

manufacturers often include—and advertise the inclusion of—additional safety features and technologies as a selling point for their vehicles.

Imagine you visit a car dealership in search of a family-friendly vehicle and the salesman shows you a 2019 Toyota Camry, a midsize sedan recognized for its safety features.[2] After listening to the salesman describe the "Toyota Safety Sense" package—including adaptive cruise control, forward collision warning, and lane keep assist[3]—and taking the Camry for a quick spin around the block, you sign a contract for the purchase of the vehicle. During your drive home, you decide to test the adaptive cruise control on the highway, but the cruise control does not work. You return to the dealership and inform the salesman that your car lacks the cruise control that you believed it came equipped with, but he responds that the dealership will not install cruise control or unwind the sales transaction on the basis that cruise control is not required by the minimum NHTSA safety standards.

Similar to this hypothetical car dealer justifying the sale of a vehicle without the promised cruise control based on its compliance with the NHTSA's minimum safety standards, the En Banc Opinion holds that Aflalo did not have to complete his self-selected seller's disclosure form because he had provided the minimum

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[2] Cherise Threewitt, *25 Safest Cars of 2019*, U.S. NEWS & WORLD REPORT (Sept. 23, 2019), https://cars.usnews.com/cars-trucks/safest-cars-of-the-year.

[3] *Id.*

disclosures required by Texas Property Code Section 5.008. This holding contradicts both the purpose of Section 5.008 and Texas' strong freedom of contract principles.

Under the En Banc Opinion, home buyers are only entitled to the minimum disclosures required by Section 5.008, regardless of disclosure form used by the seller, and the seller is empowered to unilaterally determine which portions of his self-selected form are "substantially similar" to the Legislature's form notice in Section 5.008 and complete only those portions. The En Banc Court's interpretation decreases transparency in the home-buying process and increases the risk of dishonesty, consumer confusion, and fraud at the hands of unscrupulous sellers and real estate agents. Conversely, the Harrises offer a common-sense approach to disputes regarding required disclosures in residential real estate transactions: If the seller promised to provide certain information during the transaction, he must provide it. That is exactly what Aflalo did here, and, as the Trial Court and the Panel both held, Aflalo should be held to the increased disclosure requirements to which he committed himself.

I. Aflalo Failed to Provide a Seller's Disclosure Notice in Compliance with Section 5.008 and the Contract

Aflalo's incomplete and self-selected seller's disclosure form, TAR-1406, failed to comply with both the plain terms of the Contract and Section 5.008. This

Court has held that when interpreting a written contract, courts should capture the true intentions of the parties as expressed in the contract itself. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). Each word should be given its plain or generally accepted meaning—unless the contract gives a word different meaning in a technical or different sense—and a contract is unambiguous if its language can be given definite meaning. *Plains Exploration & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 305 (Tex. 2015). Similarly, statutes should be construed according to the language used by the Legislature in order to give effect to every word, clause, and sentence. *In re Office of Attorney Gen.*, 422 S.W.3d 623, 629 (Tex. 2013).

The En Banc Opinion failed to give effect to the plain language of both the Contract and Section 5.008 because (1) Section 5.008 does not prohibit a seller from committing to provide additional information, (2) the parties contracted for a Seller's Disclosure Notice "pursuant to" Section 5.008 instead of the minimum statutory disclosures, and (3) Section 5.008(d) requires the seller to complete his disclosure notice, regardless of form.

A. Section 5.008 establishes the *minimum* disclosures a seller must make, but does not prohibit a seller from committing to provide additional information.

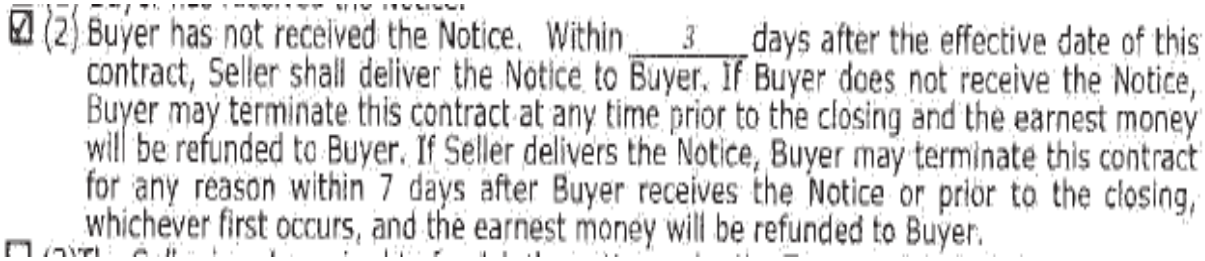
Section 5.008 requires sellers of residential real property to disclose "a written notice as prescribed by this section or a written notice substantially similar to the

notice prescribed by this section which contains, *at a minimum*, all of the items in the notice prescribed by the section." TEX. PROP. CODE § 5.008 (emphasis added). Importantly, the Code does not state that a seller must only disclose the items identified in Section 5.008's sample form, nor does it prohibit a seller from committing to provide more than these minimum disclosures—whether through express contractual terms or via the plain language of the seller's chosen disclosure form. Although Section 5.008 provides a baseline for required disclosures, it does not limit what the parties may agree to. Accordingly, a seller may provide a notice form that requires certain information beyond the minimum disclosures prescribed by Section 5.008, and the buyer is entitled to expect such information if it is promised.

B. The parties contracted for a Seller's Disclosure Notice "pursuant to" Section 5.008, meaning Aflalo had to provide a complete notice containing at least certain statutory information.

The en banc majority in the Court of Appeals ignored the plain language of the Contract and Section 5.008 by cherry-picking the information required by Aflalo's self-selected form TAR-1406 to conform to the minimum disclosures required by Section 5.008. App. 154-55. But the parties were free to agree to require—and Aflalo voluntarily chose to provide—disclosures beyond the minimum requirements of Section 5.008. Here, Section 7 of the Contract, entitled "**PROPERTY CONDITION**," required Aflalo to provide a Seller's Disclosure

Notice "pursuant to" Section 5.008, and listed three subsections with checkboxes to indicate whether the Harrises had received such notice, or whether Aflalo would not be required to furnish the notice. C.R. 34. The Harrises checked subsection 7(B)(2), which states:


☑ (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.

Id. Accordingly, the Harrises contracted to receive the Seller's Disclosure Notice that Aflalo committed to provide.

Writing in dissent below, Justice Francis recognized the En Banc Opinion's flawed reasoning, noting that it was inaccurate to interpret the Contract as only requiring Aflalo to make the disclosures required by Section 5.008 because "[the Contract] specifically required Aflalo to provide the Harrises with a *seller's disclosure notice* 'pursuant to' section 5.008, meaning Aflalo had to provide a notice containing at least certain statutory information." App. 174. The Contract did not limit the information Aflalo was to provide in such notice and Aflalo's failure to complete the Seller's Disclosure Notice constituted a breach of the Contract, which allowed the Harrises to terminate.

C. Section 5.008(d) required Aflalo to *complete* the disclosure form or indicate why it could not be completed, which he failed to do.

Subsection (d) of Section 5.008 of the Texas Property Code provides: "The notice shall be ***completed*** to the best of seller's belief and knowledge as of the date the notice is completed and signed by the seller. If the information required by the notice is unknown to the seller, the seller shall indicate that fact on the notice, and by that act is in compliance with this section." (Emphasis added). This provision is unambiguous because it does not differentiate between completing a statutory form notice and, as here, a "substantially similar" notice chosen by the seller. Whether using the form provided in the Property Code itself or another disclosure form, it must be "***completed***" by the seller.

Aflalo did not attach TAR-1414 to his notice as it required, and he did not indicate why he was unable to provide TAR-1414. Here, upon indicating that the home had flood insurance coverage, Aflalo's self-selected form required him to also attach TAR-1414, providing details of that insurance coverage. C.R. 41. He did not do so. Hence, by failing to provide TAR-1414, Aflalo failed to "complete" his seller's disclosure notice as required by the plain language of Section 5.008(d). After Aflalo failed to complete the disclosure form he selected, the Harrises' real estate agent gave Aflalo the opportunity to cure his deficiency by requesting form TAR-1414. C.R. 52. But Aflalo still failed to comply. *Id.* Due to Aflalo's failures to

provide a completed notice form of his own choosing, the Harrises (1) were deprived of material information regarding the potentially flood-prone Property, and (2) validly invoked their right to terminate the Contract.

II. Texas' Strong Public Policy in Favor of Preserving Freedom of Contract Entitles the Harrises to the Benefit of Their Bargain

As Justice Francis recognized in her dissent from the En Banc Opinion below, Aflalo contractually committed to make disclosures to the Harrises beyond the minimum required by Section 5.008. This Court has a long history of recognizing Texas' strong public policy in favor of preserving freedom of contract, and enforcing those contracts. *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008) (citing TEX. CONST. art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.")); *see also Wood Motor Co., Inc. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951). This freedom to contract should not be interfered with lightly:

> If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.

Wood Motor Co., 238 S.W.2d at 185 (quoting *Printing & Numerical Registering Co. v. Sampson*, 19 L.R.-Eq. 462, 465 (1875)). The Court has also recognized that the

"indispensable partner" to freedom of contract is contract enforcement. *Fairfield Ins. Co.*, 246 S.W.3d at 664.

Consistent with freedom of contract principles, Aflalo and the Harrises had the fundamental right to contract beyond the bare minimum of what may be required by law. Section 5.008 conforms with this Texas public policy by allowing the seller to choose his own disclosure form so long as it substantially complies with the statutory notice, including providing the minimum statutory disclosures. Aflalo exercised his right to freedom of contract by voluntarily choosing form TAR-1406 in order to satisfy Section 5.008 and his contractual obligations despite TAR-1406 requiring additional disclosures; now, Aflalo's position that providing the minimum disclosures required by Section 5.008 satisfies both the Property Code and the Contract—regardless of what the parties contracted for and the form Aflalo chose—compromises the parties' freedom of contract. This Court should preserve the strong Texas public policy in favor of freedom of contract by enforcing Aflalo's commitment to provide a completed disclosure notice in the form of his choosing.

III. The Rule Proposed by the Harrises is a Common-Sense Approach to Disputes Regarding Required Disclosures in Residential Real Estate Transactions

The Harrises offer a practical approach to analyzing whether a residential real estate seller has complied with his statutory and contractual obligations when selling a home: If the seller promised to provide certain information during the transaction,

he must provide it. Failure to provide this information is a misleading omission and leads to less transparency and inefficiencies in the home-buying process. Under Aflalo's rule, home buyers will only be entitled to the minimum disclosures required by Section 5.008, regardless of form, and the seller will unilaterally determine which portions of his self-selected form are "substantially similar" to the Legislature's form notice in Section 5.008 and complete only those portions. This rule creates opportunity for dishonesty, consumer confusion, and fraud in the hands of unscrupulous sellers and real estate agents; conversely, the rule proposed by the Harrises—at worst—may occasionally allow home buyers to terminate their contracts if the seller fails to provide complete disclosures. However, sellers are free to choose their Seller's Disclosure Notice form so long as it is substantially similar to the form notice provided in Section 5.008, and may therefore limit their disclosures to those prescribed by the statute.

The En Banc Opinion muddles the disclosure requirements when selling a home in Texas because it allows the seller to only fill out his self-selected disclosure form to whatever extent he deems sufficient—regardless of the language and requirements on the face of that form. This decision undermines both the purpose of Section 5.008, which is to provide more transparency to purchasers of residential real estate regarding a property's condition, and Texas' freedom of contract principles. The En Banc Opinion will create confusing real estate transactions that

lack transparency—for both sellers and buyers—and effectively authorizes sellers to provide incomplete disclosure forms. Accordingly, the Harrises ask the Court to reverse the En Banc Opinion and prevent this dangerous and confusing precedent for future home sales in Texas.

CONCLUSION AND PRAYER

The Judgment of the Trial Court as affirmed by the Panel of the Court of Appeals should be restored. For all the reasons presented above, Petitioners Devin Harris and Meghan Harris respectfully request that the Supreme Court reverse the En Banc Court of Appeals' Judgment and Opinion, restore the Trial Court's Judgment as affirmed by the Panel, and hold that the Harrises validly terminated their Contract to purchase the Property from Aflalo.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Petition for Review complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains 4,259 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

DATED: November 13, 2019

CERTIFIED BY: */s/ Christopher D. Kratovil*
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this brief was served on the following counsel via e-filing in accordance with Texas Rules of Appellate Procedures on November 13, 2019.

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No. 19-0223

IN THE SUPREME COURT OF TEXAS
AT AUSTIN, TEXAS

DEVIN LAMAR HARRIS AND MEGHAN THERESA HARRIS,

Petitioners,

v.

SAMUEL ADAM AFLALO,

Respondent.

On Petition for Review from the Fifth Court of Appeals at Dallas, Texas
No. 05-16-01472-CV

BRIEF OF AMICUS CURIAE TEXAS REALTORS®
IN SUPPORT OF RESPONDENT SAMUEL ADAM AFLALO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTEREST OF AMICUS CURIAE

Amicus Curiae Texas REALTORS® is a statewide trade association made up of 75 local associations and more than 126,000 REALTORS® located across the state. Based in Austin, Texas REALTORS® has more than 70 employees.

Texas REALTORS® represent REALTORS'® interests in all segments of the industry. Texas REALTORS® provides education and accreditation through certifications and designations for its members. By enforcing ethics and adjudicating grievances against members, Texas REALTORS® strives to elevate the standards of professional conduct for REALTORS®.

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

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

As the trade organization for Texas REALTORS®, and as the drafter of the forms at issue in this appeal, Texas REALTORS® has a strong interest in preserving the use of its carefully drafted forms used across the state in residential real-estate

transactions and in preserving the long-established law that terms cannot be unilaterally added to a contract.

Texas REALTORS®'s comments in this Amicus Curiae Brief highlight the detrimental impact if this Court reverses the *en banc* opinion of the Dallas Court of Appeals could have on the industry, as well as on Texans in residential real-estate transactions.

Amicus Curiae Texas REALTORS® is the source of the only fee for preparing this Brief.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Texas REALTORS® submit this Amicus Curiae Brief in Support of Respondent Samuel Adam Aflalo. Texas REALTORS® join Aflalo in requesting that the Court to deny the petition for review or alternatively, if granted, affirm the Dallas Court of Appeals' *en banc* opinion.

INTRODUCTION

If adopted, the Harrises' argument that the failure to comply with a non-contractual term constitutes a breach of contract would have a negative impact on the real-estate industry and Texas consumers. The Harrises' argument and the dissenting opinions below encourage sellers to disclose less information about their properties, create uncertainty in residential real-estate transactions by giving buyers a non-contractual right to terminate a contract, and increase the likelihood of litigation over non-disclosed issues and belatedly terminated contracts.

This is a straight-forward breach-of-contract case. The parties contracted for Aflalo to provide the statutory seller's disclosure notice. Aflalo used a Texas REALTORS® Form-1406 that goes beyond the statutory disclosure minimums. Form-1406 requires production of Form-1414, a generic informational document, if the property is in a flood plain or if the seller had flood-insurance coverage. Aflalo completed Form-1406 and satisfied his contractual obligation for disclosure by giving notice that the property was in a flood plain and explaining the issue but did

not provide Form-1414. The parties' contract did not incorporate or even mention Form-1406 or Form-1414.

The Harrises received the only disclosure notice for which they contracted, yet they terminated the contract the day before closing for Aflalo's failure to provide Form-1414. Aflalo sued to enforce the contract.

The *en banc* Dallas Court of Appeals applied long-standing contract law to enforce the parties' contract as written, refused to add terms to it, and reversed the trial court's summary judgment for the Harries. *Aflalo v. Harris*, 583 S.W.3d 236, 239 (Tex. App.—Dallas 2018, pet. pending).

In this Court, the Harrises contend that Aflalo "promised to provide certain information," but fail to point to any evidence in the record of such promise. Pet. Br. at 11, 17. That Aflalo used a standard-form document to comply with his disclosure obligation that went beyond the statutory minimum was not a promise to do anything and did not modify the contract.

Texas REALTORS® urge this Court to deny the Harrises' petition, or alternatively, if granted, affirm the Dallas Court of Appeals' *en banc* opinion, and hold that the use of a Texas REALTORS® seller disclosure notice does not modify the parties' contract or expand the statutory disclosure requirements.

ARGUMENT

I. There will be negative consequences to the real-estate industry and consumers if the Dallas Court's *en banc* opinion is reversed.

If the Court reverses the Dallas Court of Appeals and adopts the Harrises' argument that the failure to comply with a non-contractual term constitutes a breach of contract there will be several problems.

First, the Harrises' argument decreases the level of transparency in residential real-estate transactions. Their argument and the dissent below discourages sellers from providing any additional disclosure beyond the statutory minimum for fear that any additional information will be considered an amendment to an existing contract. If adopted, the Harrises' argument will make sellers more reluctant to be forthcoming with details of their properties beyond the statutory disclosure minimums in Property Code Section 5.008. That means, less information for buyers when making the one of their largest financial decisions.

By statute, sellers must disclose certain information about their property in the process of a sale. TEX. PROP. CODE § 5.008(a). The statute recognizes, but not does not require, additional disclosures. *Id.* (the notice must contain "at a minimum" the items prescribed by this section). As this Court has observed, a seller of real estate is "under a duty of disclosing material facts which would not be discoverable by the exercise of ordinary care and diligence on the part of the purchaser, or which

a reasonable investigation and inquiry would not uncover." *Smith Nat'l Resort Communities, Inc.*, 585 S.W.2d 655, 658 (Tex. 1979).

The purpose of Property Code Section 5.008 is for sellers to inform potential buyers of the details of the property—most importantly, defects or problems of which the seller is aware and that buyers, even using due diligence, are not. Many of the items that the statute requires to be disclosed are issues that develop over time and thus would be uniquely within the seller's knowledge. *See* TEX. PROP. CODE § 5.008(b) (*e.g.*, termites, wood rot, water damage, drainage issues, and soil movement or settling).

Form-1406, the "Seller's Disclosure Notice," complies with Property Code Section 5.008 but states that it "contains additional disclosures which exceed the minimum disclosures required by the Code." CR40-44. The additional disclosures on Form-1406 benefit buyers by giving more information to aid in the decision to purchase a property. The disclosures alert buyers to issues relating to the property and let the buyer more fully investigate to allay their concerns or timely terminate the contract.

Form-1406 also provides an easy and uniform format for a seller to make certain additional disclosures. REALTORS® across Texas routinely use Form-1406 to satisfy the disclosure requirement in Property Code Section 5.008.

That Form-1406 includes additional disclosures, however, does not require a seller to surpass the statutory seller disclosure obligations in Property Code Section 5.008, nor does not modify the terms of the TREC form sales contract.

If the Court adopts the Harrises' argument, sellers will no longer provide any information beyond the bare minimum in Section 5.008. Otherwise, sellers risk creating additional contract terms that a buyer could claim were violated to terminate a contract. The reality is that the forms will be changed to have sellers disclose only the bare minimum.

Further, as agents of their clients, REALTORS® similarly will have little incentive to discuss a property with a buyer's agent and risk that a comment about a property could be construed as an amendment to a contract and provide a buyer grounds to terminate.

Second, the Harrises' argument that a non-contractual "promise" creates a binding obligation on a seller creates uncertainty in real estate transactions.

The standard form residential sales contract incorporates the statute's deadlines for the seller to provide the disclosure notice and the statute's option for the buyer terminate. TEX. PROP. CODE § 5.008(f). The disclosure provision gives a buyer two ways to terminate a contract relating to a seller's disclosure notice. First, if a seller fails to provide the notice, the buyer can terminate "at any time prior to the closing." CR68. Second, if the seller delivers the notice, a buyer can terminate "for

any reason within 7 days" after receipt of the notice or before the closing, whichever occurs first. *Id.*

The disclosure notice deadlines motivates sellers to timely deliver the statutory disclosure notice and protects buyers by allowing a week to back out after receiving the disclosures for any reason. The buyer's deadline protects a seller who may be relying on the closing of one property for the purchase another. That is, a seller can be confident that a transaction will close if the buyer has not terminated seven days out.

Under the Harrises' argument, sellers will have no certainty until the transaction actually closes. Their argument allows a buyer to game the system by declaring a purported deficiency in a disclosure notice but waiting until the eve of closing to raise it by claiming the notice was not "completed."

Finally, the Harrises' argument if adopted is likely to increase in litigation. Less information disclosed by sellers will lead to more disputes and more opportunity for buyers to claim a defect discovered after purchasing a home was not disclosed. Also, allowing a non-contractual basis to support termination of a contract could increase litigation by sellers suing buyers who belatedly terminate like the Harrises.

Further, if a seller's agent were involved in a communication that was construed as creating an additional contract term, there will be an increase in disputes between sellers' agents and their clients.

II. Aflalo complied with his contractual and statutory disclosure requirements.

The Aflalo-Harris contract obligated Aflalo to comply with the disclosures in Property Code Section 5.008. CR260. The contract did not mention Form-1406 or Form-1414. CR257-69; *Aflalo*, 583 S.W.3d at 243.

As the *en banc* Dallas Court observed, nothing prevented the parties from contracting for Aflalo to provide additional disclosures beyond those in Property Code Section 5.008, or for him to provide a Form-1414 or Form-1406. *Aflalo*, 583 S.W.3d at 249-50. The parties simply did not do so. CR257-69. Further, the court observed that the forms are not require by Property Code Section 5.008 but could be if the Legislature chose to do so. *Aflalo*, 583 S.W.3d at 249.

Aflalo complied with Property Code Section 5.008 and met his contractual obligation by using Form-1406. He gave notice that the property was in a flood plain and explained the issue. CR270-74. That is all the parties bargained for and all that Property Code Section 5.008 requires.

That Aflalo used a form that provided *more* information than the statute requires that mentioned another form, Form-1414, does not modify the parties' contract or require him to provide a form that was not part of the contract. Realize

too that Aflalo completed Form-1406 *before* the parties entered the sales contract. CR274 (disclosure signed September 16, 2015); CR264 (contract executed November 20, 2015).

As the Dallas Court concluded, Aflalo disclosed everything the Property Code required and he had no obligation to provide any non-contractual forms. *Aflalo*, 583 S.W.3d at 249-50. As the *en banc* Majority noted, this is a breach-of-contract case, not a "breach of form" case. *Id.* at 246.

The dissent, without authority, concluded that a seller's decision to provide additional information and use a form—both beyond the contract's terms—were grounds for breach of contract. *Id.* at 255-56. The dissent further concluded that using Form-1406 obligated Aflalo to provide Form-1414. *Id.* at 255.

The Harrises' argument and the dissent ignore long-standing contract law. It is well-established Texas law that, when there is a dispute over a contract's meaning, the instrument alone expresses the intent of the parties, not the parties' subjective intent. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005); *Matagorda Cnty. Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 740 (Tex. 2006).

Courts "presume parties intend what the words of their contract say." *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010). Courts interpret contract language according to its "plain, ordinary, and

generally accepted meaning unless the instruct directs otherwise." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996).

As here, with an unambiguous contract, the Court must construe the language used in the Aflalo-Harris contract and enforce it as written. *See In re Davenport*, 522 S.W.3d 452, 456-57 (Tex. 2017) (orig. proceeding). As this Court instructed: "we cannot make new contracts between the parties and must enforce the contract as written." *Id.* at 457. "Courts may not rewrite the parties' contract, nor should courts add to its language." *Id.*

The Harrises' argument and the dissent violate these well-established principles and add terms—that Aflalo was obligated to comply with Form-1406 and provide Form 1414—that are nowhere in the sales contract.

An example demonstrates the problem with the Harrises' argument that failure to comply with a non-contractual term constitutes a breach of contract. Suppose a seller emails her agent and states that she will give the buyer all of the owner's manuals for the various mechanical items in the house. The seller's agent forwards the email to the buyer's agent. Is the statement in the email a contract term such that the failure to provide every owner's manual is a breach of contract that permits the buyer to terminate the contract?

Under the Harrises' argument it would be.

This example shows precisely why the terms in the signed, written contract control and not what one party thought, hoped, or wished to be a term in a contract.

Finally, consider the contents of Form-1414. CR327-29. The form provides nothing specific about a particular property. Rather, it is generic information about flood zones and flood insurance. It encourages buyers to inspect and investigate the issue for themselves.

III. The Harrises' freedom of contract policy argument is flawed.

The Harrises correctly point out that they and Aflalo had the right to contract beyond the bare statutory minimum disclosures. Pet. Br. at 17. But the Harrises fail to point to a single word in the Aflalo-Harris contract that shows they did so. Pet. Br. at 16-17.

As the Dallas Court aptly concluded, the "Harrises' post-contract, unilateral desire for the information in TAR-1414 does not make it part of the contract or Aflalo's non-delivery of TAR-1414 a breach of their contract." *Aflalo*, 583 S.W.3d at 249.

Courts can only enforce the parties' contract as written. As written, the Harrises and Aflalo contracted only for compliance with Property Code Section 5.008 and nothing more.

PRAYER

FOR THESE REASONS and those set out in Respondent Samuel Adam Aflalo's Brief, Amicus Curiae Texas REALTORS® urges this Court to deny the petition for review. Alternatively, if the Court grants the petition, Texas REALTORS® urges this Court affirm the Dallas Court of Appeals' *en banc* opinion.

Respectfully submitted,

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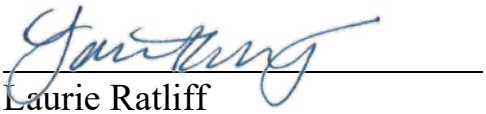
CERTIFICATE OF COMPLIANCE WITH TRAP 9.4(i)(3)

I hereby certify that this *Brief of Amicus Curiae Texas REALTORS® in Support of Respondent Samuel Adam Aflalo* contains a total of 2,195 words excluding the parts exempted under TEX. R. APP. P. 9.4(i)(1), as verified by Microsoft Word 2013.

Dated: February 3, 2020



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CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of the *Brief of Amicus Curiae Texas REALTORS® in Support of Respondent Samuel Adam Aflalo*, was served on the following counsel of record on this 3rd day of February 2020:

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IN THE COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS AT EASTLAND, TEXAS

A.E. NELSON, JR. d/b/a NELSON FARM & RANCH PROPERTIES,

Appellant,

v.

McCALL MOTORS, INC.

Appellee.

Appeal from the 350th Judicial District Court, Taylor County, Texas
Trial Court Cause No. 10811-D

BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF REALTORS® IN SUPPORT OF APPELLANT A.E NELSON, JR. d/b/a NELSON FARM & RANCH PROPERTIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTEREST OF AMICUS CURIAE

Amicus Curiae Texas Association of REALTORS® ("the Association") is a statewide trade association made up of 75 local associations and more than 123,000 REALTORS® located across the state. Based in Austin, the Association has more than 70 employees.

The Association represents REALTORS'® interests in all segments of the industry. The Association provides education and accreditation through certifications and designations for its members. By enforcing ethics and adjudicating grievances against members, the Association strives to elevate the standards of professional conduct for REALTORS®. The Association also provides assistance with real-estate transactions by providing property information and forms. The Association supports legislation that protects private-property-ownership rights of all Texans. Finally, as in this case, the Association advocates in litigation on issues that have statewide impact for its members.

As the statewide trade organization for Texas REALTORS®, the Association is interested in the correct application of the law to ensure that liability is not expanded in ways that are harmful to buyers, sellers, and its members. In addition, the Association has a strong interest in preserving Texas law that limits liability of real estate agents for the conduct of their clients.

The Association is the source of the only fee for preparing this Brief.

TO THE HONORABLE ELEVENTH COURT OF APPEALS:

Amicus Curiae the Association submits this Amicus Brief in Support of Appellant A. E. Nelson, Jr. d/b/a Nelson Farm & Ranch Properties ("Nelson"). The Association joins Nelson in asking this Court to reverse the trial court's judgment and render a take-nothing judgment.

INTRODUCTION

This appeal raises an important issue with broad impact for the real-estate industry and Texas consumers. The trial court below imposed liability on a listing agent for a seller's representations. The seller represented that there were no surfaces leases "at the time of closing." It is undisputed that:

- the listing agent made no direct or oral representations to the buyer about the surface lease;
- the only representations made to the buyer about the surface lease Came in the Farm and Ranch contract that only the seller signed;
- the title commitment expressly identified the surface lease;
- the buyer acknowledged in writing that he had received a copy of the title commitment and had the opportunity to read it; and
- the buyer ignored the existence of the surface lease and closed on the property.

Yet the trial court imposed fraud liability on the listing agent based solely on the seller's representation made in the sales contract.

The trial-court judgment is contrary to long-standing Texas law. First, listing agents owe no fiduciary duty to a non-client/buyer. Second, listing agents have no duty to independently verify a seller's information or the characteristics of a property. Finally, listing agents have no liability for representations made by their clients in a real-estate contract.

The implications of this case extend beyond the representation of the existence of a surface lease in a sales contract. If affirmed, this Court's opinion could open the door for other courts across the state to impose liability on listing agents for *any* representations made by sellers. The Association highlights the importance of this issue to the real-estate industry, as well as to Texans in residential real-estate transactions, and urges this Court to reverse the trial-court judgment and refuse to extend the duties and liability of listing agents.

ARGUMENT

I. A listing agent has no duty to advise a non-client/buyer.

Nelson had no duty to McCall regarding the existence of the Vulcan Lease. Texas law provides that a listing agent has no duty to: 1) a non-client, 2) disclose the contents of written documents, or 3) give legal advice.

There is no fiduciary duty to a non-client. Nelson owed no fiduciary duty to McCall. As a listing agent, Nelson's only duty was to the seller, Brian Parmelly.

As provided in the applicable Canons of Professional Ethics and Conduct, a

real estate agent, while acting as an agent for another, is a fiduciary. 22 TEX. ADMIN. CODE § 531.1. The general rule is that a real estate agent's fiduciary duties extend only to *their client.* *Van Duren v. Chife*, __ S.W.3d __, 2018 WL 2246213, at *9-10 (Tex. App.—Houston [1st Dist.] May 17, 2018, no pet.) (citing 22 TEX. ADMIN. CODE § 531.1).

An agent's fiduciary relationship "demand[s] that the primary duty of the real estate agent is to represent the interests of the *agent's client*, and the agent's position, in this respect, should be clear to all parties concerned in a real estate transaction; that, however, the agent, in performing duties to the client, shall treat other parties to a transaction fairly." 22 TEX. ADMIN. CODE § 531.1(1) (emphasis added). Further, a real estate agent cannot place her interest above that of the *agent's client*. *Id.* at § 531.1(3) (emphasis added).

Courts have rejected the argument that Section 531.1(1)'s requirement for real estate agents to "treat other parties to a transaction fairly," creates a fiduciary duty to a non-client. *Van Duren.* at *9. "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." *Id*. at *10 (citing *Kubinsky v. Van Zandt Realtors*, 811 S.W.2d 711, 715 (Tex. App.—Fort Worth 1991, writ denied)).

And that makes sense. Otherwise, the listing agent would be violating her fiduciary duty to her client, the seller, if the listing agent had a fiduciary duty to a non-client/buyer.

The fiduciary duties of real estate agents and to whom those duties run are expressly disclosed to parties in a real-estate transaction in the Texas Real Estate Commission ("TREC") form sales contract.

In the "Information About Brokerage Services" provision in the form contract, both parties are put on notice that "the duties of a broker depend on whom the broker represents." 1CR30-31; Nelson Br. App. 5, Bates 00012-13. The contract goes on to explain that even if a listing broker assists the buyer, that broker "does not represent the buyer and must place the interests of the owner first." 1CR30-31; Nelson Br. App. 5, Bates 00012-13. Similarly, if a buyer's broker assists the seller, that broker does not represent the seller and must "place the interests of the buyer first." 1CR30-31; Nelson Br. App. 5, Bates 00012-13.

Here, Nelson expressly disclosed to McCall that Nelson's fiduciary duties ran only to Parmelly. By his signature on the Information About Brokerage Services, McCall acknowledged that he had received this disclosure. 1CR31; Nelson Br. App. 5, Bates 00013.

Accordingly, Nelson's only fiduciary duty ran to Parmelly; Nelson had no fiduciary duty to McCall.

There is no duty to disclose the contents of a written document. Nelson had no duty to disclose the contents of the title documents to his own client Parmelly, much less to McCall, a non-client. Texas law presumes that a party who signs a document consents to its terms and is charged with knowledge of its legal effect.

A case is instructive. In *First City Mortgage v. Gillis*, Gillis applied for a loan and requested a variance in the amortization and payment provisions. 694 S.W.2d 144, 146 Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). The loan commitment, however, did not contain Gillis's requested changes. *Id.* The trial court held that Gillis's broker had a duty to disclose that the loan commitment did not contain the requested revisions. *Id.*

In reversing the trial court, the court of appeals observed that a broker is a "fiduciary required to exercise fidelity and good faith towards his principal, and that this requirement not only forbids conduct on the part of the broker which is fraudulent or adverse to his principal's interest, but also imposes the duty of communicating all information he may possess which is material to his principal." *Id.* at 146.

But the court of appeals recognized an exception for information contained in written documents. The court held that a broker does not have a duty to disclose the contents of a written agreement that her principal was obligated to read before signing. *Id.* at 147.

According to the court, the contents of a written contract are not the type of information that a broker is required to disclose. *Id.* at 146. The amortization and payment provisions in the loan commitment were "clear and unambiguous." *Id.* That Gillis was not aware that his requested changes had been refused was due to a "failure to adequately review the commitment before signing." *Id.* at 146-47.

The court reasoned that it is "well settled that the parties to a contract have an obligation to protect themselves by reading what they sign. Unless there is some basis for finding fraud, the parties may not excuse themselves from the consequences of failing to meet that obligation." *Id.* at 147. "If no fraud is involved, one who signs an agreement without knowledge of its contents is *presumed* to have consented to its terms and is charged with knowledge of the agreement's legal effect." *Id.* (emphasis added).

Here, there was more than a presumption that McCall consented to and was charged with knowledge of the terms of the title commitment. McCall signed a written acknowledgement that he had received a copy of the title commitment, had been instructed regarding its significance, and had the opportunity to review it. Mx37; 5RR148. Nelson was entitled to rely on McCall's representations made at closing.

Further, it is undisputed that the title commitment clearly and unambiguously identified the Vulcan Lease and that McCall acknowledged that he had received it.

There is no duty to give legal advice. Finally, as it relates to the contents of title documents, Texas law places the duty to provide legal advice on other real-estate professionals. Attorneys perform title searches and analyze and interpret those documents to form an opinion about title. *See* TEX. GOV'T CODE §§ 81.051; 81.102. If a non-licensed individual interpreted title documents it would constitute the unauthorized practice of law. *See* TEX. GOV'T CODE § 81.101.

Thus, Nelson, as a non-lawyer, had no duty to counsel Parmelly or McCall on the contents or meaning of the title commitment.

II. A listing agent has no duty to independently verify either a seller's representations or a property's characteristics.

Contrary to the trial court's judgment, Nelson had no duty to independently verify Parmelly's representations about the existence of surface leases or any other characteristic of the property. Instead, Texas law permits real estate agents to rely on information provided by sellers without conducting an independent investigation.

In *Kubinsky v. Van Zandt Realtors*, the issue was whether a listing real estate agent had a legal duty to inspect the listed property for defects "over and above asking the sellers if such defects exist." 811 S.W.2d at 714. The court held that no such duty existed.

In that case, buyers of a home sued seller and seller's agent after discovering foundation problems. Buyers argued that the seller's agent had a duty to inspect the home, and after receiving an inspection report that indicated the foundation had

shifted, the agent "should have made sufficient and adequate inquiries of the Sellers concerning the foundation movement." *Id.* The buyers supported their argument with the licensing provision that permits TREC to suspend or revoke a license if an agent makes a material misrepresentation or fails to disclose defects that are known to the listing agent. *Id.*

The court of appeals rejected the buyer's argument and concluded that the licensing provision did not impose a "duty to inspect listed properties or to make an affirmative investigation for possible defects." *Id.* Inspecting real estate requires an entirely different license than a real estate agent's license and the Real Estate License Act prohibits the blending of broker and inspection functions. *Id.* at 714-15.

According to the court, a real estate agent's primary duty is to "represent the interests of his clients" and that the agent's fiduciary duties "ran to the Sellers of the home." *Id.* at 715. That a listing agent must treat others in the transaction fairly only required the listing agent to disclose to a potential buyer defects "*known to the broker*." *Id.* (emphasis added).

Thus, Nelson had no duty to verify Parmelly's statements about the existence of surface leases or any other characteristic of the property.

III. A listing agent has no liability for representations made by a seller.

Contrary to the trial court's judgment, Nelson had no liability for Parmelly's representations about the Vulcan Lease. Nelson was not party to the contract. Plx6;

Nelson Br. App. 5. The statements in the contract about the existence of a surface lease were those of Parmelly, the party who signed the contract. The effect of the trial court's judgment is to treat Nelson as though he were a signatory on the contract.

The Property Code, however, makes clear that the property disclosures are those of the seller not the listing agent. A *seller* shall give the buyer written notice of the various aspects and characteristics of a property. TEX. PROP. CODE § 5.008(a). Further, the "notice shall be completed to the best of the *seller's* belief and knowledge as of the date the notice is completed and signed *by the seller.*" *Id.* § 5.008(d) (emphasis added). Section 5.008 only mentions the seller's agent in one provision relating to certain information that is not to be disclosed. *Id.* § 5.008(c).

In *Van Duren*, the issue was whether a listing agent could be liable for representations made in the Seller's disclosure notice. The court of appeals observed that for the Seller's Disclosure Notice, "the law imposes a duty on the sellers of real property, *not their agents*, to make the statutorily-required disclosures." *Van Duren v. Chife*, __ S.W.3d __, 2018 WL 2246213, at *7 (emphasis added); 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*." *Van Duren*, 2018 WL 2246213 at *7 (emphasis added). Only if the listing agent knows a disclosure is false or inaccurate, then liability could be imposed. *Id.* at *8; TEX. OCC. CODE § 1101.805(e).

A general principle of agency law provides that a principal is liable for the acts of its agent when the agent has authority to act or when the principal ratifies the agent's acts. *See Spring Garden 79U, Inc. v. Stewart Title Co.*, 874 S.W.2d 945, 948 (Tex. App.—Houston [1st Dist.] 1994, no pet.). The law does not recognize the reverse: an agent is not liable for the acts of the principal.

As Nelson points out, an agent's liability only attaches for the *agent's own conduct*. Nelson Rep. Br. 2-3; *Pleasant v. Bradford*, 260 S.W.3d 546, 550 (Tex. App.—Austin 2008, pet. denied) (listing agent's liability based on agent's own conduct or representations).

As set out above, Nelson made no representations about the surface lease. The statements of the principal (Parmelly) are not attributable to the agent (Nelson). Thus, by imposing liability on Nelson for the actions of Parmelly the trial court turns principal-agency law on its head.

IV. Numerous safeguards protect buyers in real-estate transactions.

Industry practices provide safeguards for all parties. Creating additional duties on listing agents to advise non-clients, to verify information from sellers, and to independently investigate properties, violates Texas law and is unnecessary given the available protections and remedies.

First, both buyers and sellers have the opportunity to be represented by real-estate professionals to guide them through a real-estate transaction. Among other

matters, real estate agents inform their own clients of the: 1) importance of reading and understanding documents, 2) need to hire an attorney for title issues if discrepancies arise, and 3) option to cancel a contract if necessary.

Second, virtually every real-estate transaction has an option period that gives buyers time to conduct inspections, have title policies prepared, and independently conduct their own due diligence on issues that are important to them. The option period provides buyers with the right to terminate the contract for any reason—such as the existence of an undisclosed surface lease—or for no reason at all.

Third, buyers and sellers can read the various closing documents and ask questions. This simple step—had McCall actually done it—would have eliminated the need for the underlying lawsuit.

Finally, if a seller makes a representation about a property that turns out to be incorrect, or otherwise violates the contract, the law provides remedies—the buyer can rescind the contract and/or pursue a lawsuit against the seller. That is what the buyer did here. McCall sued Parmelly and was compensated through a settlement.

V. If the trial-court judgment is affirmed, there are broad implications for the industry and consumers.

As Nelson points out, the issue in this appeal is not limited to the identification of a surface lease in a title commitment. Nelson Rep. Br. 3. If this Court agrees with the trial court and imposes a duty on a listing agent to advise the buyer or to verify information provided by a seller, or imposes liability on a listing agent for a seller's

representation that turns out to be incorrect, the decision would have far-reaching implications.

First, if a listing agent has a duty to a buyer to counsel or advise during a transaction or at a closing, the listing agent will be breaching her fiduciary duties to her client. Placing a listing agent in this situation of owing duties to both the seller and buyer will increase disputes and litigation. Further, if a listing agent is sued for a seller's representations that turn out to be incorrect, listing agents will have to consider the possibility of suing their own client.

Second, if a listing agent could be liable for a seller's representations that were contradicted in a title commitment, then that opens the door to imposing liability for *any* representation by a seller that turns out to be incorrect. Listing agents will have to independently verify every representation made by a seller. That means all representations included in a Seller's Disclosure Statement, if incorrect, could subject the listing agent to liability. That will require a listing agent to hire other real estate professionals—inspectors, appraisers, and attorneys to confirm all characteristics of the property. These additional expenses will increase in cost of doing business for a listing agent and will be passed through to consumers in terms of higher commissions.

Finally, because listing agents are not qualified to verify title documents or give a legal opinion about them, a listing agent's only option will be to hire an

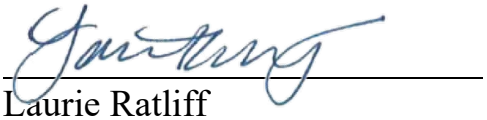
attorney to analyze real-property records before listing a property. The cost to hire an attorney, would ultimately be passed on to consumers, either through an increase in the commissions or a line-item expense at closing. The better result would be to place the burden on the buyer to read the documents he signs at closing and analyze the title commitment provided.

PRAYER

FOR THESE REASONS and those set out in Appellant A.E. Nelson, Jr. d/b/a Nelson Farm & Ranch Properties's briefs, Amicus Curiae Texas Association of REALTORS® urges this Court to reverse the trial-court judgment on liability and render a take-nothing judgment.

Respectfully submitted,

LAURIE RATLIFF LLC



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CERTIFICATE OF COMPLIANCE WITH TRAP 9.4(i)(3)

I hereby certify that this *Brief of Amicus Curiae Texas Association of REALTORS® in Support of Appellant A.E. Nelson, Jr. d/b/a Nelson Farm & Ranch Properties* contains a total of 3192 words excluding the parts exempted under TEX. R. APP. P. 9.4(i)(1), as verified by Microsoft Word 2013.

Dated: March 13, 2019

Laurie Ratliff
Counsel for Amicus Curiae
Texas Association of REALTORS®

CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of the *Brief of Amicus Curiae Texas Association of REALTORS® in Support of Appellant A.E. Nelson, Jr. d/b/a Nelson Farm & Ranch Properties.*, was served on the following counsel of record on this 13th day of March 2019:

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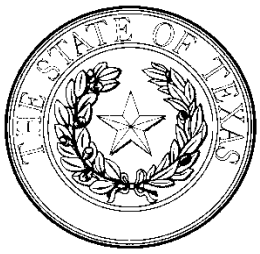
Opinion issued March 13, 2014



In The

Court of Appeals

For The

First District of Texas

NO. 01-13-00068-CV

CAPCOR AT KIRBYMAIN, L.L.C., Appellant

V.

MOODY NATIONAL KIRBY HOUSTON S, L.L.C. D/B/A MOODY NATIONAL KIRBY HOUSTON, L.L.P. AND MOODY NATIONAL TITLE COMPANY, L.P., Appellees

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On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2011-32904

O P I N I O N

This appeal concerns the fiduciary responsibilities of a title insurer as escrow agent for a commercial real estate transaction. Appellant Capcor at KirbyMain, L.L.C., argues that the escrow agent—appellee Moody National Title Company,

L.P.—breached its fiduciary duties by refusing to accept a cashier's check to close Capcor's purchase of a tract of unimproved land. Capcor also contends that the trial court erred in refusing a requested jury instruction on material breach of contract by the seller, appellee Moody National Kirby Houston, L.L.P.

Finding no reversible error, we affirm.

Background

Moody National Kirby Houston, L.L.P. (Moody Kirby) owned a vacant lot near the Texas Medical Center. Moody Kirby had fallen behind on its loan payments, and its bank agreed to forgive a substantial portion of the principal in exchange for the proceeds of a sale. Capcor agreed to purchase the land from Moody Kirby using a standard "Unimproved Property Contract" promulgated by the Texas Real Estate Commission. The contract specified a definite date for closing and provided that "At closing . . . Buyer shall pay the Sales Price in good funds acceptable to the escrow agent." If a party failed to close the sale by the closing date, the other party was entitled to exercise its contractual remedies, which included terminating the contract and receiving the earnest money as liquidated damages.

The parties agreed to use Moody National Title Company, L.P. (Moody Title), a company wholly owned by Moody Kirby's sole owner, Brett Moody, as

title company. Pursuant to the contract, Capcor deposited $25,000 in earnest money with Moody Title.

As the last day for closing under the contract was the Sunday of Memorial Day weekend, the parties agreed to shift the date for closing to the following Tuesday. The day prior to closing, Moody Title escrow agent Kay Street informed Capcor's lawyer that Moody Title needed to receive the purchase funds in the form of a wire transfer. She informed Capcor's principal, Josh Aruh, of the same requirement when he arrived at Moody Title's office the next morning to sign closing documents.

That afternoon, Street became concerned. Although the portion of the purchase price Capcor was borrowing from its bank had arrived by wire transfer, she had not received a wire for the additional amount that Capcor was paying itself. She sent an email to Aruh stating: "Please advise once the wire has been sent. We need to fund today and our outgoing wire cutoff is 3:30." She also spoke on the phone with Capcor's attorney, who called and asked if she had received the wire. When she replied that she had not received it, he said, "Let me see what's going on." She still had not received a wire at 3:05 when she sent another email to Aruh: "The purchaser funds are still outstanding. Please be advised that this transaction is not closed until all funds are received."

At 4:26, Street received an email from Capcor's bank informing her that a Capcor principal was on his way to the bank to obtain a cashier's check. This is the first communication to Street clearly established in the record that Capcor intended to use a cashier's check, and no evidence was presented to affirmatively establish that Capcor had provided such notice to Street at any time prior to that. Street reacted by contacting her underwriter, Fidelity National Title, to ask whether she could accept the cashier's check. Fidelity had sent a bulletin to its agents cautioning them about counterfeit cashier's checks. Street eventually spoke to two Fidelity representatives who both informed her that she could not accept a cashier's check.

Street next sent an email to Capcor's bank, which stated: "They need to be stopped. We cannot accept a cashier's check for that amount it has to be a wire." She sent a further email to the bank, copying it to Capcor's attorney: "Underwriting will not allow a cashiers check for that amount. It needs to be a wire." About this time, she also called the Texas Department of Insurance, which informed her that as long as she did not accept types of funds prohibited by its regulations, Moody Title was free to set its own policies as to what funds it would accept.

Sometime after 5:00, Capcor principal Avi Ron arrived at Moody Title with a cashier's check. When Street told Ron that she was leaving for the day and could

not accept the check, he threw it on her desk. At this point it was no longer possible for Capcor's bank to conduct a wire transfer.

Street later testified as to her reasons for refusing to accept the cashier's check. Not only had Fidelity's representatives told her not to accept the check, but she avowed that she had had "an absolute responsibility to follow the directive of the underwriting counsel" at Fidelity. Violating this responsibility, she believed, would have resulted in loss of her escrow officer's license.

Aside from the limitations imposed by her underwriter, Street had been directed by Capcor's bank not to disburse its funds unless she was in a position to issue a title policy. And Street could not issue a title policy until consideration had passed. As she expressed the limitation, "[A]ny transaction that's on the last day of the contract has got to close and fund that day. And it's not closed till it's funded. And I'm in a position to issue a title policy." When asked what type of funds were needed, Street responded, "Collected funds, a wire."

Street clarified that cashier's checks are not considered "collected funds" because they are subject to a three-day recall. She also explained that because she would not have been able to deposit the check until the next day, the funds were not available for transfer on the day of closing. Simply "floating" the money, i.e., using Moody Title's own funds to complete the transaction on behalf of the buyer while awaiting fulfillment of the cashier's check, was not possible due to Moody

Title's limited resources and the need to strictly separate sums in trust accounts from an escrow agent's own assets.

The morning after the failed closing, Capcor's attorney offered to immediately substitute a wire transfer for the cashier's check. Moody National, however, sent notice that it was terminating the contract.

Capcor refused to sign a release of the earnest money, and it sued Moody Kirby on the sales contract, later adding claims against Moody Title for tortious interference with the contract and breach of fiduciary duty. Moody Kirby counterclaimed, seeking the earnest money and contractual liquidated damages. When the case was tried, the jury found that Capcor had breached the contract, while Moody Kirby had not. The jury further found that Moody Title had not breached its fiduciary duties to Capcor.

The trial court entered judgment awarding Moody Kirby's attorney's fees, the escrowed funds, and contractual liquidated damages in an amount three times greater than the earnest money. After its motions for JNOV and new trial were overruled by operation of law, Capcor timely appealed.

Analysis

Capcor argues that the evidence was factually insufficient to support the jury's verdict that Moody Title did not breach its fiduciary duties. It contends that the great weight and preponderance of the evidence showed that Moody Title, as

represented by Street, breached its fiduciary duties by failing to disclose material facts concerning the applicable policies regarding cashier's checks and by imposing a requirement that funds be provided by wire transfer. It similarly claims that the great weight and preponderance of the evidence demonstrated that Moody Title tortiously interfered with the contract. Separately, Capcor also argues that the trial court erred in refusing to submit an instruction on material breach of the contract.

I. Fiduciary duty claim against Moody Title

"When a party attacks the factual sufficiency of an adverse finding on an issue on which [it] has the burden of proof, [it] must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). A "court of appeals must consider and weigh all of the evidence, and can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Id.* The jury is the sole of judge of witnesses' credibility and may give credence to one witness rather than another. *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). As it is the jurors' role to resolve conflicts in the evidence, our review assumes that they did so in a manner consistent with their verdict. *Id.* at 820.

An escrow agent acts as a neutral party to the transaction and owes a fiduciary duty to both parties. *Gonzales v. Am. Title Co. of Hous.*, 104 S.W.3d 588, 598 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). "This fiduciary duty consists of: (1) the duty of loyalty; (2) the duty to make full disclosure; and (3) the duty to exercise a high degree of care to conserve the money and pay it only to those persons entitled to receive it." *Trevino v. Brookhill Capital Res., Inc.*, 782 S.W.2d 279, 281 (Tex. App.—Houston [1st Dist.] 1989, writ denied). An escrow agent must "act with utmost good faith and avoid self-dealing that places its interest in conflict with its obligations to the beneficiaries." *Gonzales*, 104 S.W.3d at 598.

"The elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant, (2) a breach by the defendant of his fiduciary duty to the plaintiff, and (3) an injury to the plaintiff or benefit to the defendant as a result of the defendant's breach." *Dernick Res., Inc. v. Wilstein*, 312 S.W.3d 864, 877 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (citing *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied)).

A. Duty of disclosure

Capcor argues that the great weight and preponderance of the evidence showed that Moody Title breached its fiduciary duties by failing to timely disclose that it would not accept a cashier's check at closing. It further contends that if the

reason Street rejected the cashier's check was that her underwriter would not allow her to accept it, then she had a duty to disclose the policies of her underwriter regarding cashier's checks.

"A fiduciary relationship imposes a duty on the fiduciary to render full and fair disclosure of facts material to the relationship giving rise to the duty." *Wilstein*, 312 S.W.3d at 877. "A fact is material if it would likely affect the conduct of a reasonable person concerning the transaction in question." *Fleming v. Curry*, 412 S.W.3d 723, 736 (Tex. App.—Houston [14th Dist.] 2013, pet. filed) (applying definition to alleged breach of fiduciary duty by attorney); *see also Custom Leasing, Inc. v. Tex. Bank & Trust Co. of Dall.*, 516 S.W.2d 138, 142 (Tex. 1974) (outlining same definition of "material" in context of fraud). "Materiality thus centers on whether a reasonable person would attach importance to and would be induced to act on the information in determining his choice of actions in the transaction in question." *Fleming*, 412 S.W.3d at 737. Which facts are material to a transaction will vary with circumstances—a fact that is pertinent in one context may be inapposite in another—and absent a legal rule to the contrary, materiality is an issue of fact for the jury.[*] *See id.* (holding that whether attorney complied with

[*] After it filed its brief in this case, Capcor retained new counsel. Its new counsel filed a letter brief the day before oral argument contending that Moody Title had breached its fiduciary duty of full disclosure *as a matter of law*. We granted a motion to strike the letter. Regardless of whether this line of argument was fairly subsumed within the factual sufficiency arguments presented in its original brief,

fiduciary duty to disclose all material information was question of fact); *Santanna Natural Gas Corp. v. Hamon Operating Co.*, 954 S.W.2d 885, 892 (Tex. App.—Austin 1997, pet. denied) ("Determining what a reasonable person would have done or should have known are normally questions of fact."). As explained below, we conclude that the jury heard evidence from which a reasonable factfinder could have concluded that the facts Capcor claims Moody Title should have disclosed were not material to the transaction.

Street testified that she informed Capcor's lawyer the day before closing that a wire would be required for payment and that she imparted the same information to Capcor's principal, Aruh, on the morning of closing. Although Capcor argues that there is no documentary evidence to support Street's claim and that she sometimes spoke of wiring "instructions" rather than a wiring requirement, nonetheless the jury could have reasonably credited her testimony: "I know I did tell him [Capcor's attorney] that we had to have a wire;" and "I absolutely most definitely told him [Aruh] I had to have a wire at the closing table."

Street and Brett Moody testified, based on their long experience in the title and real estate businesses, about the customary expectations and assumptions of

> Capcor has provided us no authority, at oral argument or otherwise, that an escrow agent is required to make the disclosures at issue as a matter of law. Thus, whether or not Capcor's argument that Moody Title breached its fiduciary duties as a matter of law is properly before us, for the reasons explained above and in the absence of contrary authority, we decline to hold that the escrow agent in this case was so obligated as a matter of law.

parties to a commercial real estate transaction of this type. Moody testified that he had participated in "a thousand deals," yet he had never seen a cashier's check used in a commercial closing. He added that cashier's checks are not used in this context because of the delay associated with their deposit and collection. According to him, the lull in the availability of funds conveyed by cashier's check prevents a title company from immediately delivering the purchase price to the seller, a precondition to the title company releasing the seller's deed to the purchaser.

When Street was cross-examined as to whether it was "important" for her to inform her clients of her underwriter's policies regarding cashier's checks, she explained, "Just for the sake of talking about it? No. Whenever a wire is expected, no." Later in the same colloquy, she similarly stated, "And no, I wouldn't find it necessary to inform the buyer of that unless that came up . . . ." In this regard, the parties do not contend, and we have found no record evidence to suggest that the possibility of using a cashier's check was brought to Street's attention by the parties prior to the email Street received from Capcor's Bank at 4:26 PM on the day of closing. Street's testimony that it would not be important to inform a buyer about the acceptability of a cashier's check is congruent with the testimony of Brett Moody on the rarity of cashier's checks in commercial real estate transactions

Considering this evidence, we do not agree with Capcor that the jury's finding that Moody Title complied with its duty of full disclosure is against the great weight and preponderance of the evidence. Regardless of whether the evidence showed that Street rejected the check solely because of her underwriter's policies, the testimony of Street and Moody would have permitted a reasonable jury to find that disclosure of policies on cashier's checks was immaterial to the transaction because their use would not be ordinarily contemplated in transactions of this kind and there had been no indication a party would attempt to use one until late in the afternoon on the day of closing. Alternatively, a reasonable jury could have concluded that Street fulfilled her duties by informing Capcor on the day before closing, and again on the day of closing, that a wire was required.

In other words, the jury reasonably could have inferred from Street's and Moody's testimony that cashier's checks were so rarely used in commercial real estate transactions, and wire transfers so commonly used, that whether Moody Title would accept them was not a material fact. The jury also could have reasonably concluded that telling Capcor that a wire was required on the day before closing was adequate and timely disclosure, especially in light of the testimony tending to show that a wire transfer would have been the expected form of payment. Although Capcor argues that Moody Title did not make "timely disclosure," it offers no reasons why informing Capcor of the wire requirement on

the day before or the morning of closing would have afforded inadequate time to act on the information.

As a sub-argument, Capcor contends that Moody Title at least should have informed it of the conditions under which its underwriter would have accepted a cashier's check once it became apparent on the afternoon of closing that use of a cashier's check was intended. Capcor points to testimony that the underwriter would have been willing to accept a properly verified cashier's check and argues that Street, in her testimony, acknowledged that whether she would accept a cashier's check hinged on the directives of her underwriter. However, there was other evidence that delivery of a cashier's check, even in a form acceptable to the underwriter, still would have been futile for the purposes of completing the closing that day. Both Street and Moody testified that collected funds—that is, funds available for immediate disbursement—were needed to close the transaction on the last day of closing, that cashier's checks were subject to a three-day hold, and that at the late hour when Capcor's principal arrived with the cashier's check it was impossible to deposit the check. As such, the evidence was factually sufficient to support the jury's implied finding that the conditions under which the underwriter would accept a cashier's check also were not facts material to the transaction during the late afternoon on the closing date.

Capcor emphasizes testimony of Street to the supposed effect that the underwriter's policies were the sole reason she rejected the cashier's check. For example, Street testified, "I was not consummating the transaction because underwriting forbade me to accept the cashier's check," and "It wasn't my decision not to accept. It was Fidelity National Title's, the underwriter." Street's denial that she had a choice to accept the cashier's check did not render it unreasonable for the jury to believe her other explanations as to why she could not have accepted a cashier's check, verified or otherwise, at the time Capcor indicated its intention to use one. Having heard Street's testimony as a whole, the jury reasonably could have disagreed with Capcor's view of the evidence that Street's sole reason for refusing to accept the check was her underwriter's policies. *See Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) ("In reviewing a factual sufficiency point, the court of appeals must weigh *all* of the evidence in the record.").

Accordingly, Capcor's claim that the evidence was factually insufficient to support the jury's finding that Moody Title complied with its fiduciary duty of full disclosure of material information is overruled.

B. Requirement of wired funds

Capcor argues that even if Moody Title did not breach its fiduciary duties by failing to disclose its policies (or its underwriter's policies) respecting cashier's checks, requiring wired funds was itself a breach of fiduciary duty and constituted

tortious interference with the contract. It claims that the jury's finding to the contrary was against the great weight and preponderance of the evidence.

A tortious interference claim has four elements: (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) the act was a proximate cause of the plaintiff's damages; and (4) actual damage or loss. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 207 (Tex. 2002).

The sales contract stated, "Buyer shall pay the Sales Price in good funds acceptable to the escrow agent." Capcor argues that the definition of "good funds" contained in Rule P-27 of the *Basic Manual of Rules, Rates, and Forms for the Writing of Title Insurance in the State of Texas*, a set of regulations promulgated by the Texas Department of Insurance, required that Moody Title accept a cashier's check as good funds. *See* 28 TEX. ADMIN. CODE § 9.1 (2013) (Tex. Dep't of Ins., Basic Manual of Rules, Rates, and Forms for the Writing of Title Insurance in the State of Texas) (adopting manual by reference). We disagree.

Rule P-27 is titled, "Disbursement From Escrow or Trust Fund Accounts." Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas § IV, P-27. Among other forms of payment, it lists cashier's checks as a form of "good funds." *Id.* § IV, P-27(A)(1)(b). It does not, however, require that a title insurer accept all enumerated types of good funds. *See id.* § IV, P-27. Rather, the Rule prohibits a title insurer from disbursing funds until "good funds"

are received and deposited: "Good funds in an amount equal to all disbursements must be received and deposited before any disbursement may be made." *Id.* § IV, P-27(B)(1). Nothing in the Rule limits a title insurer's authority to refuse particular forms of payment that qualify as good funds, *see id.* § IV, P-27; there is only a prohibition on disbursements before good funds have been received and deposited. *See id.* § IV, P-27(B)(1). The Rule's narrow effect is consistent with the statute that it implements, which is a simple prohibition on disbursements from trust accounts until sufficient good funds have been received and deposited to fund the disbursements. *See* TEX. INS. CODE. ANN. § 2651.202 (West 2009).

The sales contract vested Moody Title with discretion to determine which good funds it would accept: "Buyer shall pay the Sales Price in good funds acceptable to the escrow agent." *See generally Tribble & Stephens Co. v. RGM Constructors, L.P.*, 154 S.W.3d 639, 652 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) ("It is well established that a contract may require performance by one party to be subject to the satisfaction of . . . a designated thirty party . . . . Generally, a satisfaction clause will be upheld . . . ." (citations omitted)). As an escrow agent, Moody Title had to exercise this discretion in a manner consistent with its fiduciary duties. *See Home Loan Corp. v. Tex. Am. Title Co.*, 191 S.W.3d 728, 733 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (citing *Meyer v.*

Cathey, 167 S.W.3d 327, 330–31 (Tex. 2005), and clarifying that an escrow agent's fiduciary duties arise as a matter of law).

Street explained at trial why she did not accept the cashier's check but instead required wired funds. She testified that her underwriter instructed her not to accept the check and that failure to comply with these instructions would have placed her escrow officer's license at risk.

Apart from her underwriter's instructions, Street explained that she needed the purchase price to be delivered in collected funds, funds that were immediately available for transfer to the seller. Unless she could deliver funds to the seller, she could not release the seller's deed and issue a title policy. Moreover, without a title policy, Street claimed that Capcor's bank would not allow its escrowed money to be released to pay the portion of the purchase price Capcor was borrowing.

Substantiating her account of her actions, Street explained that she could not have deposited Capcor's cashier's check at the late hour she received it and that in any event, cashier's checks are subject to a three-day hold. Finally, she explained that using Moody Title's own funds in lieu of the delayed proceeds of the cashier's check was not possible given the proper role of an escrow agent and in light of Moody Title's limited resources.

The reasons that Street furnished for requiring wired funds were corroborated in multiple respects by Brett Moody's testimony. He testified that, in

practice, a title company would never release a seller's deed until it had delivered the purchase price to the seller, that a lender providing financing for a purchaser would always instruct the title company not to release its funds until a title policy was in place, and that funds drawn by a cashier's check are subject to an initial hold that keeps them from being accessible for immediate distribution.

Capcor, in its attempt to show that the evidence conclusively demonstrates a breach, relies upon record evidence that Brett Moody was reluctant to sell the property, that he had received better offers for the property, that he owned Moody Title, and that he, in Street's words, "may have" told Street that he did not want to close the deal if wired funds were not timely received. Relying on this evidence, Capcor argues, "One might infer that Street did not disclose these facts because her boss wanted the deal to fall through." Even if that inference were possible, it was implicitly rejected by the jury, which may have instead credited Street's testimony that she was "absolutely" independent when acting as an escrow agent, as well as her description of the procedures she uses to segregate her affairs from other Moody businesses so as to comply with Texas law.

Under the applicable standard of review, the jury is entitled to resolve conflicts in the evidence unless its conclusions are so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. *See City of Keller*, 168 S.W.3d at 820–21; *Dow Chem. Co.*, 46 S.W.3d at 242. The adverse

inferences advocated on appeal by Capcor were rejected by the jury. The testimony of Street and Moody would have permitted a reasonable jury to conclude that Moody Title required wired funds from Capcor in good faith, in a permissible exercise of its business judgment, and with valid, neutral reasons.

Capcor's claim that the great weight and preponderance of the evidence showed that mandating payment by wire transfer violated Moody Title's fiduciary duties and represented tortious inference with the contract is thus overruled.

II. Breach of contract claim against Capcor

Capcor argues that the trial court erred by refusing its proposed jury instruction on material breach of the contract, because there was evidence at trial to support a finding that its failure to deliver good funds acceptable to Moody Title on the day of closing was not a material breach.

A trial court's decision to submit or refuse a particular instruction is reviewed under an abuse of discretion standard. *Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006) (per curiam). If an instruction might aid the jury in answering the issues presented to them, or if there is any support in the evidence for an instruction, the instruction is proper. *Thota v. Young*, 366 S.W.3d 678, 687 (Tex. 2012). "An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence." *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 855 (Tex. 2009).

We conclude that the rejected instruction would not have been relevant to the jury's conclusions. The contract states that "[i]f either party fails to close the sale by the Closing Date, the non-defaulting party may exercise the remedies contained in Paragraph 15." Moody Kirby's remedies in Paragraph 15 included "terminat[ing] the contract and receiv[ing] the earnest money as liquidated damages."

It is black-letter contract law that "when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance." *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004) (per curiam). Timely performance may be a material term: "if it is clear the parties intend that time is of the essence to a contract, timely performance is essential to a party's right to require performance by the other party." *Id.* However, time is not ordinarily of the essence. *Kennedy Ship & Repair, L.P. v. Pham*, 210 S.W.3d 11, 19 (Tex. App.—Houston [14th Dist.] 2006, no pet.). The mere fact that a contract states a date for performance does not imply that time is of the essence. *Id.* Rather, "the contract must expressly make time of the essence or there must be something in the nature or purpose of the contract . . . making it apparent that the parties intended that time be of the essence." *Id.*; *accord Deep Nines, Inc. v. McAfee, Inc.*, 246 S.W.3d 842, 846 (Tex. App.—Dallas 2008, no pet.). "In other words, the parties' contract may make time essential without

including the magic words 'time is of the essence.'" 2 MILTON R. FRIEDMAN & JAMES CHARLES SMITH, FRIEDMAN ON CONTRACTS AND CONVEYANCES OF REAL PROPERTY § 7:3.2 (7th ed. 2005).

A finding that time is of the essence "is particularly likely when the provision consists of a right to cancel the contract." *Id.* "Contracts often contain language making one party's performance by a specified date a condition of the other party's duty, and courts will usually honor such language if it is clear." E. ALLAN FARNSWORTH, CONTRACTS § 8.18, at 573–74 (4th ed. 2004). For example, in *Mailloux v. Dickey*, 523 A.2d 66 (N.H. 1986), the Supreme Court of New Hampshire interpreted a real estate sales contract that "contained a clause indicating the agreement would terminate upon the failure of the parties to close the transaction" by the date specified. 523 A.2d at 67. It held that the termination clause was "even more specific" than use of the phrase "time is of the essence" and entitled the defendant to terminate the contract when the transaction did not close by the named date. *Id.* at 69.

Closer to home, the Amarillo Court of Appeals reached a comparable result in *Limestone Group, Inc. v. Sai Thong, L.L.C.*, 107 S.W.3d 793 (Tex. App.—Amarillo 2003, no pet.). In that case, the parties entered an agreement to convey a tract of land. *Limestone Grp.*, 107 S.W.3d at 795. When the parties were unable to consummate the deal, Limestone sued for specific performance. *Id.* Sai Thong

argued that Limestone was not entitled to specific performance because it was in default, having failed to pay $75,000 in earnest money on a date specified in the contract. *Id.* Limestone argued that its failure to pay the earnest money should only preclude the remedy of specific performance if that failure amounted to a material breach of the contract. *Id.* at 796–97.

The court of appeals recognized the general principle that "only a material breach prevents one from pursuing specific performance." *Id.* (citing *Hudson v. Wakefield*, 645 S.W.2d 427 (Tex. 1983), and *Cowman v. Allen Monuments, Inc.*, 500 S.W.2d 223 (Tex. Civ. App.—Texarkana 1973, no writ)). However, it found that principle inapplicable to the case before it because the contract contained a "provision [that] expressly addresses Limestone's right to specific performance." *Id.* at 796. In order for Limestone to pursue specific performance, the contract required that Limestone, "not be in default." *Id.* The court stressed that the parties only used the word "default" and did not attach "words of qualification or measure to it, such as substantial or material." *Id.* at 797.

Having examined the language of the contract, the Amarillo court concluded that Limestone could not obtain specific performance regardless of the materiality of its breach. It relied on two well-established principles of Texas contract law: (1) "parties to an agreement may contractually specify the remedies available . . . and, thereby, modify the legal and equitable remedies generally applicable," *id.*

(citing *GT & MC, Inc. v. Tex. City Ref., Inc.*, 822 S.W.2d 252, 256 (Tex. App.—Houston [1st Dist.] 1991, writ denied)); and (2) language in a contract must ordinarily be afforded its plain, everyday meaning, *id.* (citing *Tex. City Ref.*, 822 S.W.2d at 256).

As a matter of contractual terms, just as Limestone's default unequivocally barred it from seeking specific performance, Capcor's failure to deliver good funds acceptable to the escrow agent by the last day the contract fixed for closing unequivocally permitted Moody Kirby to terminate the contract and obtain the earnest money. *See Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) ("If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law."); *Weaver v. Jamar*, 383 S.W.3d 805, 812 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("Parties to a contract are free to limit or modify the remedies available for breach of their agreement."); *Limestone Grp.*, 107 S.W.3d at 797 ("[B]ecause the plain meaning of the word ["default"] connotes a mere failure, omission, or breach . . . . we eschew attempt to affix words of qualification or measure to it, such as substantial or material." (footnote omitted)).

Capcor's argument assumes the following scenario: If the jury had received the rejected instruction, it could have found that Capcor's failure to deliver the full purchase price by wire on the day of closing was not a material breach. The jury

then could have found that Moody Kirby, by giving notice the next day that it was terminating the contract, was the first party to materially breach. If that were the case, Capcor contends that its failure to authorize disbursement of the earnest money would be excused by prior material breach.

The contract, however, affirmatively bestowed upon Moody Kirby the right to terminate if Capcor defaulted by failing to timely deliver good funds acceptable to the escrow agent. Whether or not Capcor's breach would otherwise be considered material is irrelevant to the outcome of the case. *Cf. Limestone Grp.*, 107 S.W.3d at 796–97 (whether plaintiff's breach of real estate sales contract was material was irrelevant to whether plaintiff could obtain specific performance when terms of contract disqualified a breaching party from obtaining that remedy). It is enough for us to say that if Capcor failed to close, then Moody Kirby had the right to terminate. The trial court did not err in refusing the proposed instruction; Capcor's issue is overruled.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Huddle.