Vermont Secretary of State

Office of Professional Regulation

Regulatory Review:

Findings And Recommendations for Vermont's Professional Regulation of Real Estate Brokerage Services

---

26 V.S.A. § 3101 directs the Office of Professional Regulation (OPR) to periodically review regulatory programs to ensure both the continuing need for, and appropriateness of, said regulations. In this report, OPR finds the regulation of real estate brokerage services is necessary for public protection and professional licensure remains the most appropriate system of regulation.

Additionally, the Office of Professional Regulation finds there are gaps in regulatory protections which leave consumers vulnerable, as well as outdated/unnecessary regulatory burdens which should be reduced. OPR makes twelve policy recommendations to accomplish three overarching goals: prohibit conflicts of interest incompatible with fiduciary duty; repair the disconnect between compensation and services rendered; cut bureaucratic red tape by reducing unnecessary rules and regulations.

Executive Summary | *Regulatory Review Findings & Recommendations*

The Office of Professional Regulation is responsible for the periodic review of existing regulatory programs. Review criteria is prescribed by 26 V.S.A. § 3104. This review's findings are based on:

- 2 public hearings totaling over 400 industry participants;
- 1,763 survey participants across 5 distinct Vermont stakeholder groups; and
- 5 public meetings for feedback on the 1st draft of this report and its recommendations.

Review Findings

1. The regulation of real estate brokerage remains necessary for public protection;
2. The regulation of real estate brokerage requires a system of professional licensure;
3. The Real Estate Commission is an effective and efficient regulatory body;
4. There are specific gaps in regulations which leave consumers vulnerable; and
5. There are certain outdated and/or unnecessary regulatory burdens which can be reduced.

Next Steps

Our office is making a series of recommendations which are outlined below and discussed in detail in the following report. These recommendations provide a variety options for the Real Estate Commission to consider in conjunction with our office. Importantly, legislative reform is not required to implement these recommendations: all can be accomplished through administrative rulemaking. Our office embraces the rulemaking process because it enables further stakeholder engagement and will ultimately facilitate a more effective regulatory structure for both our licensees and the public.

Recommendations

I. **Prohibit conflicts of interest incompatible with fiduciary duty:**
   - Prohibit limitation of liability clauses in real estate brokerage representation and purchase and sales contracts.
   - Require real estate brokerage representation contracts to permit consumers to withdraw from the contract within a reasonable window for review of the contract by an attorney (i.e., an attorney review period).
   - Require mandatory consumer disclosures to warn consumers about the inherent conflicts of interest in the designated agency model.
   - Ask the Vermont Attorney General's Office of Consumer Protection to review the designated agency practice model.
   - Require the mandatory consumer disclosure to explain service agreement types and the implications therein.
   - Require the mandatory consumer disclosure, as well as all contracts, to include information for the consumer on how to file a complaint with OPR.

II. **Repair the disconnect between compensation and services rendered:**
   - Require compensation to be dependent on services rendered in a way that satisfies both broker and consumer interests.

- Require all representation contracts to specify a compensation value for the agent's services; fee reimbursement should be negotiable between buyer and seller as with any other contingency.
- Require a termination clause in service agreements that equitably satisfies both broker and consumer interests.

III. Cut *red tape* by reducing unnecessary regulatory burdens:

- Revise the administrative rules and mandatory disclosure to allow the facilitative brokerage service model.
- Revise administrative rules to address the unique characteristics of commercial brokerage.
- Adapt administrative rules to the virtual office.

Table of Contents

Introduction 1

Part 1 | § 3105(a) - Is it necessary to regulate real estate brokerage services? 2

I. Unregulated real estate brokerage services cause non-speculative harm 3
II. The public benefits from an assurance of real estate brokerage competency 3
III. The public cannot be protected by other means 3

Part 2 | §3105(b) - Are services regulated in the least restrictive means necessary? 4

I. When to enact professional regulation rather than stronger civil/criminal sanctions? 4
II. When to regulate businesses vs. individuals? 4
III. When to implement a registration, a certification, or a licensure scheme? 4

Part 3 | § 3104 – Can brokerage regulations and REC operations improve? 5

I. The Real Estate Commission's actions are generally consistent with the public interest 5
- The prohibition on facilitative brokerage is unnecessary and not in public interest 6
- Commercial brokerage regulations are not designed for commercial brokerage 7
- Physical location requirements are not relevant to modern businesses 7

II. The benefits to public protection outweigh the costs of professional regulation 7
III. Gaps in existing regulations leave consumers vulnerable and can be improved 8
- Standard contracts contain unreasonable waivers of consumer rights 8
- Agent fee-splitting practices introduce unnecessary conflicts of interest 9
- Mandatory consumer disclosure fails to disclose designated agency's conflict of interest 11
- The mandatory consumer disclosure fails to explain contract types 13

IV. Professional competency standards are generally consistent with public interest 15
V. REC's enforcement actions are largely effective at protecting the public 16
VI. The REC involves the public and licensees in drafting its rules and regulations 18
VII. The REC gives adequate notice of public meetings and hearings 19
VIII. The REC makes efficient use of funds 19
IX. The REC has sufficient funding 19

Part 4 | Regulatory recommendations for real estate brokerage services 20

I. Prohibit conflicts of interest incompatible with fiduciary duty 20
II. Repair the disconnect between compensation and services rendered 20
III. Cut "red tape" by reducing unnecessary regulatory burdens 20

References 22

Appendices 23

List of Appendices

A. Explanation of the three professional licensure schemes 23

B. Research and outreach methods 24

C. Compilations of unique stakeholder survey feedback by theme 27

D. Survey of Vermont real estate buyers and sellers 50

E. Survey of REC licensees 56

F. Survey of Vermont Bar Association 66

G. Survey of Vermont real estate industry groups 71

H. Survey of Vermont real estate consumer groups 75

I. Limitation of liability contract excerpts 80

J. Review of procuring cause 81

K. Vermont's real estate brokerage mandatory consumer disclosure (MCD) 83

L. REC complaints and discipline data between fiscal years 2013-2022 84

M. USA v. NAR (2020: 1:20-cv-03356-TJK) 85

N. REC budget and fund balance data 107

O. Review of Recent NAR Antitrust Events 108

P. Appeal from the U.S. District Court for the District of Columbia (No. 1:21-cv-02406) 112

Q. U.S. District Court Western District of Missouri Western Division Case No. 19-cv-00332-SRB and Case No. 1:19-cv-01610-ARW 146

Introduction | *Office of Professional Regulation & The Regulatory Review Process*

Pursuant to 26 V.S.A. § 3104(c), the Office of Professional Regulation (OPR or "the Office") gave written notice on December 7, 2018, to the Vermont Real Estate Commission ("the Commission" or "REC") and the Vermont Association of Realtors ("VAR") that the Office intended to conduct a regulatory review. The Office is directed to "give the [REC] a chance to present its position and to respond to any matters raised in the review." *Id*. Likewise, the Office performed extensive outreach to solicit "comments from the public and members of the profession or occupation." *Id*. After receiving feedback from the Commission and stakeholders, the Office must file the report with the legislative committees of jurisdiction, 26 V.S.A. § 3104(d).

Legal Standards and Analytical Structure
The policy and purpose of professional regulation: *(a) It is the policy of the State of Vermont that regulation be imposed upon a profession or occupation* ***solely for the purpose of protecting the public****. The General Assembly believes that all individuals should be permitted to enter a profession or occupation unless there is a demonstrated need for the State to protect the interests of the public by restricting entry into the profession or occupation.* *(b) If such a need is identified, the form of regulation adopted by the State shall be* ***the least restrictive form of regulation necessary*** *to protect the public interest.* *-26 V.S.A. § 3101.* [emphasis added]

The Office of Professional Regulation is responsible for the periodic review of existing regulatory programs for fidelity to the above policy and purpose: *If regulation is imposed, the profession or occupation may be subject to review by the Office of Professional Regulation and the General Assembly to ensure the continuing need for and appropriateness of such regulation,* 26 V.S.A. § 3101.[1]

This Regulatory Review Asks 3 Questions:
Part 1: Is regulation still necessary? Part 2: Are current regulations as limited as possible? Part 3: How can real estate brokerage regulations and REC operations improve?

Part 1: The regulatory review process first requires OPR to assess whether regulation of real estate brokerage services remains necessary to protect the public. This evaluation is based on the same § 3105(a) criteria used for initial regulatory proposals. **OPR finds that continued regulation is necessary.**

Part 2: The Office then considers whether the current regulatory framework satisfies the § 3105(b) criteria for the least restrictive methods necessary. The law identifies three specific methods of regulation, in order of increasing restriction: registration, certification, and licensure. **OPR determines that a system of professional licensure for real estate brokerage professionals remains necessary.**

Parts 3 & 4: Lastly, the Office evaluates real estate brokerage regulations and REC operations with respect to specific § 3104(b) criteria, and in accordance with § 3104(c) requirements for participation from professionals, the consumer public, and other relevant stakeholder groups. **OPR discusses stakeholder feedback and recommendations to improve current regulations.**

[1] The process of periodically reexamining existing regulatory programs for opportunities to improve is known informally as "sunset review," a counterpart to the "sunrise" analysis applied to proposals for new regulation.

Part 1 | § 3105(a) - *Is it necessary to regulate real estate brokerage services?*

Professional regulation is a governmental intervention in the market. When necessary, professional regulation protects the public by safeguarding market efficiency.[2] However, if imposed superfluously, professional regulation's market intervention instead functions as market interference: obstructing economic forces and resulting in inefficient market transactions.

Accordingly, for each profession OPR regulates, the Office must prove market intervention is necessary. **Specifically, 26 V.S.A. § 3105(a) stipulates that the State shall only regulate an occupation when these three criteria are jointly satisfied:**

1. the unregulated occupational services risk non-speculative harm to the public;
2. the public benefits from the assurance of minimum practitioner competence; and
3. the public cannot be protected by other means.

These criteria reflect the theoretical foundation upon which professional regulation is based: as rational actors, consumers will generally not choose to harm themselves or their interests. **Thus, regulatory protection is generally only necessary if consumers cannot determine for themselves the quality of a service**. For this reason, § 3105(a) aims to assess whether consumers can adequately judge the quality of a service, or if there is an asymmetry of information between the consumer and the service provider.[3]

Background: Professional Regulation Mitigates Asymmetric Information[4]
In circumstances of information asymmetry, consumers cannot determine the quality of a good or service. Asymmetric information can result in an economic situation known as a *market failure*: when price is not determined by the law of supply and demand. Economists warn that market competition dwindles when consumers cannot distinguish between low and high quality, because both the price consumers are willing to pay, as well as the demand for the good or service itself, are likely to erode. If not remedied, information asymmetry can further contribute to a negative feedback loop of declining price and service quality, wherein reputable providers inevitably exit the market. In response to information asymmetry, certain occupations underwent what sociologists refer to as *professionalization*: the adoption of a service-based ideology to mollify consumer anxiety. Occupational professionalism pivots from the traditional business model (selling *to customers*) to a service model (working *for clients*). In this way, professionals sell their expertise, assuring for consumers the quality goods and services which they need but cannot judge themselves. This *professional service model* is necessary in professions with fiduciary obligations such as attorneys, accountants, physicians, or investment advisors. Here, a standard business model is incompatible with consumer needs. However, the *professional service model* is only as effective in combatting asymmetric information as the strength of the public's trust in the occupation's adherence to professional norms.[5] Accordingly, professional regulation enforces service quality through entry-level competency qualifications and strict practice standards. While not all regulated occupations require a fiduciary duty, regulatory intervention is necessary wherever information asymmetry poses a risk to the public.

---

[2] *Market efficiency* refers to normal market conditions where price is determined by supply and demand.
[3] *Asymmetric information/information asymmetry* refers to unequal knowledge between parties in a transaction.
[4] Marshall, T.H. (1939), Parsons T. (1939), Wilensky H.L. (1964), Akerlof, G. (1970), Sarfatti Larson (1977), Leland H.E. (1979), Cox and Foster (1990), Auronen L. (2003), Law and Kim (2005), Evetts (2011).
[5] Consider the enduring trope of the used car salesman: a provider who intentionally withholds knowledge and material facts about their goods at the consumer's expense. The consumer public will label an occupation as untrustworthy if, in conditions of information asymmetry, service providers fail to adopt a professional ideology.

I. Unregulated real estate brokerage services cause public harm.

A profession or occupation shall be regulated by the State only when:

(1) it can be demonstrated that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative;

- 26 V.S.A. § 3105(a)(1)

Every state regulates real estate brokerage to some degree. Real estate brokerages are charged with guiding often inexperienced and vulnerable consumers through uniquely high-dollar, high-stress transactions, in which consumers buy or sell the most valuable asset most will ever own — while simultaneously determining where they will live. What's more, these transactions often occur under external pressure provoked by major life changes, such as the birth of a child, a new job, or the disability or death of a loved one. A residential real estate agent may wind up playing some combination of counselor, confidant, combatant, chauffeur, and trustee.

Without regulation, the potential for public harm is undeniable.

II. The public benefits from an assurance of real estate brokerage competency.

(2) the public can reasonably be expected to benefit from an assurance of initial and continuing professional ability;

- 26 V.S.A. § 3105(a)(2)

Consumers not only benefit from the assurance of minimum real estate broker professional competence, but they also depend on it. Consumers of real estate brokerage services are highly vulnerable to information asymmetry: most consumers neither possess the expertise to assess real estate values, nor the skills to effectively represent their interests in the transaction negotiation process.

Further, real estate brokerage is practiced through the role of *agency* in an *adversarial model*: the agent represents their client's interests in negotiations with an opposite and equally self-interested party. There would be significant harm to Vermont's consumer public without the assurance that brokers who represent consumers' interests possess the minimum necessary competencies to do so.

III. The public cannot be protected by other means.

(3) the public cannot be effectively protected by other means.

- 26 V.S.A. § 3105(a)(3)

The demand for real estate brokerage services is a direct result of information asymmetry in the market: because most consumers are unable to adequately represent their own interests in complex real estate transactions, they must instead employ professional brokerage expertise.

Neither civil remedies nor criminal sanctions are sufficient to protect the public from the risks associated with asymmetric information—a limitation which is further discussed in the following section regarding 26 V.S.A. § 3105(b)(1). However, unlike civil remedies and criminal sanctions, professional regulation effectively codifies the service ideology rooted in occupational professionalism. Just as the *professional service model* (p. 2) was specifically adapted to mitigate asymmetric information, professional regulation is therefore uniquely suited to ensuring consumers that brokerage service providers possess the minimum competencies necessary, that services offered meet the minimum standards of practice, and that incompetent or unscrupulous actors are swiftly barred from the market.

Part 2 | §3105(b) - *Are services regulated in the least restrictive means necessary*?

26 V.S.A. § 3105(b) instructs that *if the General Assembly finds that it is necessary to regulate a profession or occupation, the least restrictive method of regulation shall be imposed, consistent with the public interest*. Accordingly, the Office of Professional Regulation must justify the severity of regulatory intervention for each occupation it regulates.

I. When to enact professional regulation rather than stronger civil/criminal sanctions?

(1) If existing common law and statutory civil remedies and criminal sanctions are insufficient to reduce or eliminate existing harm, regulation should occur through enactment of stronger civil remedies and criminal sanctions.

- *26 V.S.A.* § 3105(b)(1)

When an asymmetry of information exists in a market, consumers are inherently vulnerable because they struggle to identify deviations in service quality. While civil and criminal penalties may be effective deterrents for frank misconduct, these measures cannot remove harmful (unscrupulous or incompetent) service providers from the market. Thus, neither common law protections nor statutory civil/criminal remedies are sufficient to protect the public from the risks of asymmetric information. Only professional regulation can assure that real estate brokers possess the minimum competencies necessary, services are provided in accordance with standards of practice, and bad actors are barred from the market.

II. When to regulate businesses vs. individuals?

(2) If a professional or occupational service involves a threat to the public and the service is performed primarily through business entities or facilities that are not regulated, the business entity or the facility should be regulated rather than its employee practitioners.

- *26 V.S.A.* § 3105(b)(2)

Fiduciary agency occurs at both the individual and firm levels of real estate brokerage services. Consequently, public protection requires regulation for both individuals and firms.

III. When to implement a registration, a certification, or a licensure scheme?

(3) if the threat to the public health, safety, or welfare, including economic welfare, is relatively small, regulation should be through a system of registration;
(4) if the consumer may have a substantial interest in relying on the qualifications of the practitioner, regulation should be through a system of certification; or
(5) if it is apparent that the public cannot be adequately protected by any other means, a system of licensure should be imposed.

- *26 V.S.A.* §§ 3105(b)(3)-(b)(5)

Real estate brokerage services pose too great a risk to the public to justify a system of simple registration. Likewise, the public is too reliant on the professional's expertise to allow for a voluntary system of certification, which would preclude the Office from removing bad actors or incompetent service providers from the market. Professional licensure, meaning mandatory regulation and required qualifications, is the only regulatory system that both ensures that brokers possess the minimum competency necessary, and bars incapable or unscrupulous providers from practice.[6]

---

[6] See Appendix A for more information on the distinguishing factors between regulatory systems.

Part 3 | § 3104 – *Can brokerage regulations and REC operations improve?*

Real estate brokerage services satisfy the *§* 3105 requirements for continued regulation through a system of professional licensure.

Specifically, this determination is based on the substantial information asymmetry between consumers and providers of real estate brokerage services: **clients are dependent on brokers to a degree that necessitates fiduciary responsibility, and consequently, regulation.** Having confirmed the continued need for regulation, this review shifts to a 9-point evaluation of the current regulatory framework, guided by § 3104(b). Consistent with outreach requirements in § 3104(c), the Office collected stakeholder feedback through multiple methods.[7]

Stakeholder Outreach
• 2 public hearings, totaling over 400 industry participants both in person and remote; • 1,763 survey participants across 5 distinct Vermont stakeholder groups; and • 5 follow-up meetings for feedback on the 1st draft of this review with REC, VAR, and the public.

Because this review examines the alignment between regulations and public protection, surveys and hearing prompts were exploratory in nature: most questions were designed to elicit open-ended feedback rather than measures of public opinion.[8] This exploratory nature was both necessary and effective at provoking a broad discussion of regulatory issues on the minds of stakeholder participants.

I. The Real Estate Commission's actions are generally consistent with public interest.

> *(1) the extent to which a regulatory entity's actions have been in the public interest and consistent with legislative intent;*
>
> *- 26 V.S.A. § 3104(b)(1)*

As evidenced by the adoption and enforcement of administrative rules to protect against public harm, the Vermont Real Estate Commission's actions are consistent with legislative intent and are generally made in the public interest. For example, Rules 2.4 & 5.1 establish minimum competency criteria for those seeking initial licensure as real estate salespersons. Likewise, in the event of misconduct, Rule 4.2 defines the vicarious responsibility principal brokers/brokers-in-charge have for their supervised professionals.[9]

Likewise, Administrative Rule 4.5 determines the professional's *duty to customers and the public*, including but not limited to disclosures of material facts and permissible conflicts of interest. Similarly, Rule 4.6 requires licensees to present the mandatory consumer disclosure form to potential buyers at the first reasonable opportunity. Notably, consumer advocates regard Vermont's mandatory consumer disclosure as above average among those promulgated by other states: some of which do not require disclosures, or require them later, when they are less useful.[10]

[7] A complete description of research and outreach methodology is available in Appendix B.
[8] Survey questionnaires as well as unique participant response compilations are In Appendices C-H.
[9] REC Administrative rules: https://sos.vermont.gov/media/a5ffbdqb/rec-adopted-rules-eff-dec-1-2015.pdf
[10] Brobeck, Steven (2020).

The Prohibition on Facilitative Brokerage is Unnecessary and Not in the Public Interest

Currently, sellers who wish to list property in the MLS have two choices: (1) a full-service listing broker, typically charging a 5-6% commission, in an exclusive-right contract; or (2) a *listing-only* broker who places a property on the MLS but provides no in-person services. The majority of states, but not Vermont, permit a third option called *facilitative brokerage* (or "transactional brokerage").[11] The current prohibition on facilitative brokerage is an unnecessary restriction on professional service and limits innovation, choice, and competition.

Facilitative brokers represent neither buyer nor seller, instead providing both parties with non-adversarial, expert transaction facilitation. Facilitative brokerage offers less personalized advocacy than conventional agency, but much more transaction assistance than online, listing-only services. Facilitative brokers are typically compensated at closing with a flat fee rather than a commission.[12]

Many survey respondents indicate they would prefer the intermediate model provided by facilitative brokerage.[13] Facilitative brokerage would allow real estate professionals to provide the same substantive professional expertise in a less adversarial arrangement. Customers who feel comfortable advocating for themselves, in turn, could opt for a guide rather than a full-service agent expected to battle on their behalf. Facilitative brokers "face fewer conflicts of interest, have less related legal liability, and have more flexibility to negotiate sales than do fiduciary agents."[14]

"The entire process was set up to make us and the buyer adversaries… The lack of communication and the adversarial structure created a lot of frustration and loss on both sides."
- Consumer Survey Respondent

"I think [facilitative brokerage] is a wonderful idea. The incentive already exists for brokers to pursue closing as an end to itself as that is where broker fees get paid. Why not allow this formula where the parties agree to use it?"
- Attorney Survey Respondent

"If a willing buyer and a willing seller wish to engage a broker as a facilitator or a neutral party, they should have the ability to do so."
- REC Licensee Survey Respondent

"Agency in VT should be expanded. Not all customers want buyer agency. Facilitation is what would make sense to add."
- REC Licensee Survey Respondent

***

Recommendation: Revise the administrative rules and mandatory disclosure to allow the facilitative brokerage service model.

---

[11] According to the Consumer Federation of America, 25 states permit facilitative brokerage. However, due to terminology differences, and a combination of limited agency agreements therein, some form of neutral facilitation is available in at least 30 states, many of which directly allow dual agency.

[12] Note: commissions would create the same conflict with buyers' interests as traditional models, and facilitative brokers do not purport to act as either party's agent, advocate, or fiduciary.

[13] See Appendix C, Table 11 for consumer feedback regarding facilitative brokerage.

[14] Brobeck, Stephen (2019: 7).

Commercial Brokerage Regulations Are Not Designed for Commercial Brokerage

To Vermont law, interests in real property are interests in real property, and there is no distinction between residential and commercial real estate brokerage. In practice, those can be different worlds with different risks to practitioners and clients. For example, it makes a great deal of sense to limit the maximum term of exclusive engagement between a first-time homebuyer and a residential agent. Less so, however, to apply that same limit to a commercial broker's contract with a multinational corporation, wherein the parties may contemplate an indefinite working relationship. For commercial brokers, licensure requires adherence to rules written substantially by, for, and about residential brokers. Commercial brokers should have rules tailored to their standards of practice.

***

Recommendation: Revise administrative rules to address the unique characteristics of commercial brokerage.

Physical Location Requirements Are Not Relevant to Modern Businesses

Licensees participating in this regulatory review have called attention to the need to reconsider administrative rules in light of technological developments and changes in the practice environment.

Broker supervision is an important part of the regulatory structure: it allows for low entry barriers without compromising public protection. However, because of the COVID-19 pandemic and subsequent workforce adaptations, we have learned that supervision can be effective even when a shared physical space does not exist. By updating the relevant rules to reflect the reality of virtual work and mobile brokerage, we can reduce compliance costs on businesses and facilitate innovative practices.

***

Recommendation: Adapt administrative rules to the virtual office.

II. The benefits of public protection outweigh the costs of professional regulation.

> *(2) the extent to which the profession's historical performance, including the actual history of complaints and disciplinary actions in Vermont, indicates that the costs of regulation are justified by the realized benefits to the public;*
>
> *- 26 V.S.A. § 3104(b)(2)*

From 2013 to 2022, the Vermont Real Estate Commission received 599 new professional misconduct complaints. During this time, the REC closed 658 complaint cases, of which 67 resulted in disciplinary resolutions. The nature of misconduct includes but is not limited to fraud, theft, unauthorized practice, acting outside the scope of practice, negligence, breach of confidentiality, violating sexual boundaries, and mishandling trust accounts.[15]

Given the severity of the misconduct, the benefits of protecting Vermont's consumers outweigh the costs of regulating real estate brokerage services.

[15] See Appendix L for more information about REC complaints and discipline from 2013-2022.

III. Gaps in existing regulations leave consumers vulnerable and can be improved.

(3) the extent to which the scope of the existing regulatory scheme for the profession is commensurate to the risk of harm to the public;

- 26 V.S.A. § 3104(b)(3)

Generally, Vermont's real estate brokerage rules and regulations are well-designed and function as intended. Nearly 78% of consumer survey respondents (i.e., Vermont real estate buyers and sellers) report a positive overall experience with Vermont brokers and salespersons. However, survey responses also report that consumers seeking an agent often do so without adequate information: consumers are frequently under-educated about which kind of professional services they want to buy, what price is reasonable for those services, what elements of an agency relationship are negotiable, and what potential conflicts of interest are relevant to their agent's representation.

Standard Contracts Contain Unreasonable Waivers of Consumer Rights

Vermont's real estate agents and real estate attorneys have strikingly different perspectives on the adequacy of consumer protection. While the majority of REC licensee survey participants feel that consumers are adequately protected, the majority of real estate attorney survey participants do not.

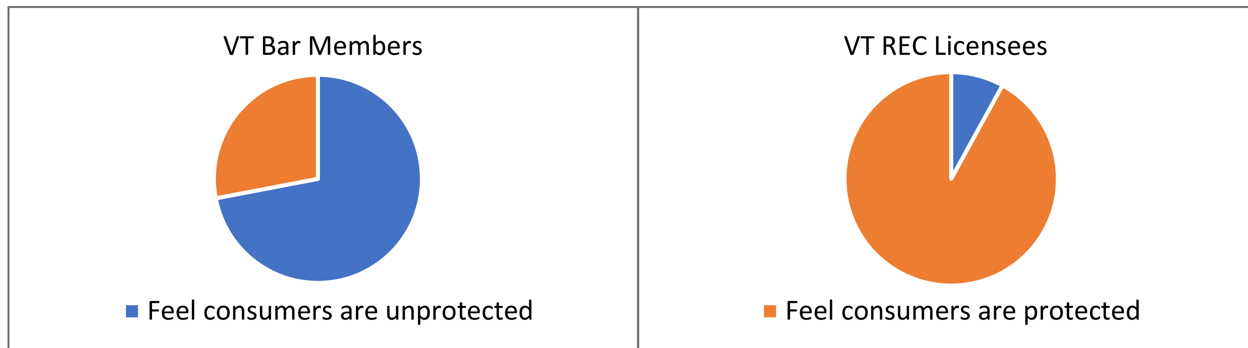


Figure 1: 72% of VT Bar survey respondents feel brokerage clients are unprotected in a significant way, whereas 92% of VT REC licensee respondents feel clients are currently effectively protected.

Specifically, attorneys report that because consumers are not typically represented by an attorney at the point of selecting an agent, they often sign away their rights to recover damages from their brokers.[16] For example, **in the standard contract, consumers are asked to waive away some of their most protective rights**. These waivers are referred to as *limitation of liability* clauses because they limit the professional's liability to the consumer.

> "How can a person review and understand everything…People are signing away their rights…It's a horrible deal for the consumer for whom this is the most expensive purchase they will make."
>
> - Consumer Survey Respondent

Unless the client knows to demand the removal of these provisions, they are standard fare.[17] These limitation of liability clauses are common in both Vermont representation agreements

[16] Vermont real estate attorney feedback regarding limitation of liability clauses is available in Appendix C.

[17] Evidence of consumer frustration over limitation of liability clauses is available in Appendix C.

as well as in purchase and sales contracts.[18] **No matter the act or omission, and no matter how much damage is caused by even the grossest negligence or recklessness**, these clauses waive the consumer's right to recover more than $5,000 in civil damages from any involved agent or brokerage firm.

> "Regs should prohibit waiver of liability provisions...They serve neither the buyer nor the seller and do not protect the public. Lawyers are prohibited from disclaiming liability. If real estate licensees are to be "professionals" with fiduciary responsibilities, they should be held to the same standard."
>
> - Attorney Survey Respondent

By comparison, attorneys are prohibited from attempting such a waiver of liability from an unrepresented party: attorneys would violate of the Rules of Professional Conduct that govern attorneys, even if the limitation were less audacious than those above.[19]

Accordingly, the Office finds that **the limitation of liability clauses in standard Vermont contracts are inconsistent with the fiduciary duty that agents owe their clients**. These liability waivers reflect a gap in consumer protection and Vermont Law.

***

Recommendation: Prohibit limitation of liability clauses in real estate brokerage representation contracts, and in real estate purchase and sales contracts.

Recommendation: Require real estate brokerage representation contracts to permit consumers to withdraw from the contract within a reasonable window for review of the contract by an attorney (i.e., attorney review period).

Agent Fee Splitting Practices Introduce Unnecessary Conflicts of Interest

In survey responses, consumers exhibited little understanding of how real estate brokers are compensated.[20] To summarize: in conventional practice, a seller's agent shares a portion of their commission with the buyer's agent. This inducement is known as a fee "split."

> "I thought the 50-50 split was by law."
>
> "I didn't know that [fee split] was negotiable."
>
> "The commission was not split. The seller paid all."
>
> *- Consumer Survey Respondents*

Even when consumers understand commission splits, they often mistakenly believe the split is always 50/50. In reality, Vermont's fee-sharing conventions vary by region and listing brokerage. Friction periodically arises when a buyer's agent invests effort in a listing before discovering the split offer is lower than expected—sometimes as little as one dollar.[21]

Consumers are largely unaware of this issue because the Vermont Real Estate Commission's administrative rules bolster the practice, stating that [regarding commission

[18] Limitation of liability standard form contract excerpts and discussion are available in Appendix I.

[19] Vermont Rules of Professional Conduct, Rule 1.8(h)(1), provides that "A lawyer shall not [] make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement."

[20] Survey feedback demonstrating consumer confusion about fee splits is available in Appendix C.

[21] Evidence of agent frustration is available in Appendix C, Table 7.

split values] *consent of the client is not required*.[22] Likewise, fee splits can be posted in a non-public section of the Multiple Listing Service so agents can see how much is on offer for bringing a buyer to a particular listing, and can even sort properties on that basis, while public users of the MLS cannot. It is precisely this practice, among others, which are the subject of multiple class action lawsuits and an ongoing federal antitrust case (discussed on the following page).

Allowing a seller's agent to pay a buyer's agent's fees is an effective way to promote buyer representation, and often defended by the industry for this reason.[23] Yet, **fee-splitting conceals from consumers costs of which they pay and therefore should be aware, while also exposing agents to conflicts of interest unseen by their clients.**

Specifically, the fee-splitting model introduces four conflicts of interest:

1. Seller's agents are incentivized to offer unattractive fee splits to buyer's agents;
2. Buyer's agents have incentive to "steer" clients towards high-commission listings;
3. Both seller/buyer fees are based on transaction value, disrupting the adversarial model;
4. Splits enable *Procuring Cause* disputes.[24]

Fee splitting is antithetical to the adversarial representation model, and consumer interest. If buyer agents are compensated based on a proportion of the total transaction value, they are disincentivized from representing their clients' interests in price negotiation. Similarly, if buyer's agents are offered unattractive commission splits for certain listings, they have an incentive to direct clients elsewhere. Lastly, and as survey respondents remind us, commission splitting creates a strong incentive for seller's agents to prefer sales to unrepresented buyers: buyers often do not know to seek the portion of the listing agent's commission that a buyer's agent, if present, would take as the split.[25] **In all cases, these conflicts of interest stem from a disconnect between compensation and services rendered.** Notably, attorneys cannot split fees.[26]

"It should be fair and everyone should know ahead of time. The buyers' agent could influence the buyers not to purchase solely because they don't like the split."

"I think there should be a way of paying the buyer's agent that isn't a percentage of the sales price so that they aren't incentivized to encourage their clients to offer a higher amount than is necessary to close the deal."

"They should only get commission from the party who hired them"

- Consumer Survey Respondents

"I PRAISE THE TREND of having more buyer representation, but often the fee being offset by seller or seller's agents is confusing to a buyer."

"They [rules] encourage Listing agents to try to talk Buyers out of getting their own broker, since that cuts their fees in half."

"In their zeal to keep customers from going out and getting their own representation (thus protecting a listing agents claim to a 100% commission), the agent does not really advance the cause of educating the consumer."

- Attorney Survey Respondents

[22] REC Rule 4.13(d).
[23] In public hearings and in survey feedback, some real estate attorneys, as well as brokers, lauded the increase in buyer representation as an improvement for consumers and public protection. See Appendix C.
[24] Procuring cause disputes are disagreements over claims to commission splits. These disputes exist because broker compensation is not based on services rendered, but a successful transaction. See Appendix J for more.
[25] This phenomenon considerably weakens the dominant justification (above) for splits: that they *encourage* buyer representation. See Appendix C for survey feedback.
[26] The Vermont Rules of Professional Conduct prohibit attorneys from such conflicts of interest: VRCP 1.7-1.8.

"Many firms offer the "real" commission to "sub-agent" or "sub-agent type" on the MLS listing sheet, and a very small commission to a buyer's agent. That small commission is generally fictional, because they will pay the "real" commission to a buyer's agent, if that buyer's agent brings about the sale to a buyer whom the listing agency has not previously shown the house. What they are doing, is using a fictional interagency compensation offer in order to enforce the legally flawed theory that Procuring Cause is established by "first across the threshold," rather than by who has initiated an unbroken chain of events which brought about the sale."

- REC Licensee Survey Respondent

Where the above conflicts of interest alarm *professional regulators*, this fee-splitting model also upsets *antitrust regulators*. In a recent antitrust suit against NAR[27] the Department of Justice (DOJ) argued that in addition to commission concealment practices, the common description of buyer brokerage services as "free" misrepresents consumer costs and has anticompetitive effects.[28] Without coincidence, a jury recently agreed with this same argument in an unrelated federal antitrust class-action suit against the NAR, resulting in multiple class-action settlements.[29]

Simply put, **if sellers are told they must also pay for buyer agent compensation, and buyers believe their representation services are free, neither party knows when or how to negotiate service fees.** Consequently, fees have remained consistent for decades.[30]

***

Recommendation: Require all representation contracts to specify a compensation value for the agent's services; fee reimbursement should be negotiable between buyer and seller as with any other contingency.

The Mandatory Consumer Disclosure Fails to Disclose Designated Agency's Conflict of Interest

The REC attempts to protect inexperienced consumers by providing basic information about the concept of *agency*. The cornerstone of this effort is the Vermont Real Estate Mandatory Consumer Disclosure (MCD): a single-page document with simple headlines.[31] The MCD is meant to explain the function of agency, as well as the two forms of agency available in Vermont.

The MCD is ubiquitous in the real estate market, because regulations require that it be given to a consumer at the first reasonable opportunity, and always before entering into a service agreement or showing a property.[32] Notably, consumer advocates regard Vermont's disclosure as above average among those promulgated by

"I'm an educated and experienced home buyer (this was my sixth real estate transaction) and still the paperwork is unbelievably opaque."

- Consumer Survey Respondent

"In my experience, very few agents fully and thoughtfully explain the VRCI Disclosure, so right out of the gate, the consumer is ignorant to the nuances of designated agency."

- REC Licensee Survey Respondent

[27] The Vermont Association of Realtors (VAR) is a regional branch of the National Association of Realtors (NAR).
[28] United States of America v. National Association of Realtors, 2020: 1:20-cv-03356-TJK. See Appendices M & O-P.
[29] See Appendix O for a review of recent and ongoing antitrust events concerning the NAR.
[30] Consistent with the findings of the Consumer Federation of America and the Brookings Institution, listing agent brokerage rates have held close to 6% for decades.
[31] For the full document, refer to Appendix K.
[32] REC Administrative Rule 4.6.

other states: some of which do not require disclosures, or require them later, when they are less useful.[33]

However, **Vermont's disclosure can be improved both in terms of clarity and purpose**. The MCD tells consumers what they need to know in a technical sense but fails to explain why the information matters. This is particularly consequential in light of Vermont's 2015 adoption of *designated agency*, a representation model which allows one firm to represent buyer and seller in the same transaction.

Here is how the MCD explains the distinction between conventional agency and designated agency:

Brokerage Firms May Offer
NON-DESIGNATED AGENCY or DESIGNATED AGENCY

- **Non-designated agency** brokerage firms owe a duty of loyalty to a client, which is shared by all agents of the firm. No member of the firm may represent a buyer or seller whose interests conflict with yours.
- **Designated agency** brokerage firms appoint a particular agent(s) who owe a duty of loyalty to a client. Your designated agent(s) must keep your confidences and act always according to your interests and lawful instructions; however, other agents of the firm may represent a buyer or seller whose interests conflict with yours.

Although key information is not withheld, only the most astute consumers grasp the conflicts of interest in the designated agency model. Because the firm doubles its revenue by representing both the buyer *and* the seller, a designated agency firm of even the highest integrity faces extraordinary incentives to:

1. sell a property "in-house" without full market exposure on MLS, known as a *pocket listing*;[34]
2. "steer" buyer clients toward the firm's own listings;
3. share confidential information between agents to navigate negotiations more quickly; and
4. favor quick closings rather than prolonged zealous advocacy.

While the MCD was meant to protect consumers, it fails to fully explain basic conflicts of interest in simple terms. Consequently, the MCD currently functions as a symbolic regulatory placation: a signed disclosure that doesn't actually disclose any risks.

Sound regulation requires licensees to avoid the conflicts of interest they can avoid, and to disclose the ones they can't. By contrast, designated agency uses these circumstances as a business model.

"Both agents worked for same agency. Said that's the only reason we got our house."

- Consumer Survey Respondent

"Designated agency in large firms that pay a bonus for in-house sales is counter intuitive to both parties truly being represented properly due to the appearance of a financial benefit to the Agency."

"Sellers who list their property and go under deposit before the property had the benefit of full market exposure and sold in-house. We see numerous property [*sic*] enter the MLS system on day one as pending."

"As a principal broker for a Non-Designated Agency firm I am frequently communicating with consumers who after the fact feel they were 'duped'".

- REC Licensee Survey Respondents

[33] Brobeck, Steven (2020).
[34] See Appendix C for survey feedback regarding the practice of pocket listings.

"…Attorneys from the same firm cannot represent the buyer and the seller due to a possibility or appearance of conflict of interest…"

"Permitting a single agency to represent a seller and a buyer ignores an inherent conflict of interest. The argument brokers have provided to justify the practice has…little to do with protecting the consumer the broker represents."

"Unwillingness to list and aggressively market properties for full value. There should be more transparency with respect to whether or not broker has access to…a stable of buyers that will potentially yield a quick sale."

- Attorney Survey Respondents

Designated agency disadvantages small firms, rewards consolidation, and then calls upon agents to resist the pull of anti-consumer incentives through the exercise of personal virtue.[35] By contrast, Vermont attorneys/law firms are prohibited from practicing like a designated agency.[36]

To be clear, the Office of Professional Regulation believes that most agents take the concepts of agency and fiduciary responsibility very seriously. Many agents are offended by the suggestion that designated agency is harmful to consumers because they always put their clients first and work hard to resist the innate pressures of the model. However, these agents are not under review, the regulations are.

Regulations fail consumers when conflicts of interest are sold as fiduciary duty. **If the practice of designated agency continues, the MCD must be written in terms even the most inexperienced consumers can understand.**

***

Recommendation: Require the mandatory consumer disclosure to warn consumers about the inherent conflicts of interest in the designated agency model.

Recommendation: Ask the Vermont Attorney General's Office of Consumer Protection to review the designated agency practice model.

The Mandatory Consumer Disclosure Fails to Explain Contract Types

Administrative Rules 4.9(a) and 4.10(a) specify three permitted types of brokerage service agreements for buyers and sellers. The MCD fails to explain either the agreement types or their consequences.

The seller service agreement types are:

- NONEXCLUSIVE (Open) AGENCY MARKETING, in which the client may list with other firms or sell the property on the client's own.
- EXCLUSIVE AGENCY MARKETING, in which the client agrees to list only with the party brokerage but may sell on the client's own without liability for a commission or fee.
- EXCLUSIVE RIGHT TO MARKET, in which the client agrees to list only with the party brokerage, and is liable for a commission even if the client sells the property on the client's own.

Likewise, the buyer service agreement types are:

- NONEXCLUSIVE (Open) BUYER AGENCY AGREEMENT, in which the client may obtain brokerage services from other firms or purchase a property on the client's own.

[35] Survey feedback regarding designated agency is available in Appendix C, Table 9.
[36] The Vermont Rules of Professional Conduct prohibit attorneys from such conflicts of interest: VRCP 1.10.

- EXCLUSIVE BUYER AGENCY AGREEMENT, in which the client agrees not to use any other broker but may purchase on the client's own without liability for a commission or fee.
- EXCLUSIVE RIGHT TO REPRESENT BUYER AGREEMENT, in which the client agrees not to use any other broker and is liable for a commission even if the client buys property on the client's own.

The MCD does not address the dramatic distinctions between service agreement types. Instead, the MCD reminds consumers that *if you engage a brokerage firm, you are responsible for compensating the firm according to the terms of your brokerage service agreement*. However, **the terms of brokerage service agreements go mostly unregulated**.

Because consumers do not generally obtain legal representation until later in a real estate transaction, they agree to contract terms that they may not fully understand. Consumer survey respondents were particularly frustrated by exclusive representation agreements—the last and most restrictive of the three options unexplained by the MCD—where **their agent is guaranteed a commission even if the client completes a transaction unassisted**. As discussed in previous sections, this scenario is another consequence of the disconnect between compensation and services rendered.

Industry members defend the terms of exclusive representation agreements for good reason: **agents are almost never compensated based on the time invested in a client**. When entering into a representation agreement, agents do not know if they will have to wait days, or years, before receiving compensation for their time and efforts. As a result of the disconnect between compensation and services rendered, **brokerage firms are gambling that relative to the anticipated commission value, they can satisfy their clients' needs before such a time that the investment of resources in that client is no longer profitable.**

The contract term for exclusive representation agreements is generally 12 months, with contract "tails" for ongoing transactions or other specific circumstances. The agreement's commission guarantee protects brokers from clients who would cancel services once a transaction is nearly finalized. However, **because consumers cannot independently terminate representation agreements, and are required to pay their agent regardless of actual services rendered, brokers benefit from signing as many exclusive representation agreements as possible**.

"With the first realtor, we got conned into signing a one-year exclusive contract to work just with her. We were overwhelmed at the time and couldn't parse all the legalese of what we were signing with her."

"There really needs to be a way for buyers to easily break these exclusive contracts with agents if the agent is not meeting the buyer's needs."

"We waited out our contract with that person and then sold ourselves."

- Consumer Survey Respondents

"It is also too easy for agents to trap clients into representation that they cannot get out of when they want out for justified reasons."

"My firm receives multiple inquiries a year from customers asking us to counsel them on how to get out of representation agreements with Realtors who are not providing good service. We cannot help them. Binding clients to bad representation hurts us all."

- REC Licensee Survey Respondents

"I almost never see the initial agreements signed by the sellers when they get ready to list their house. I actually had a broker refuse to provide me with the agreement."

- Attorney Survey Respondent

In public hearings, industry members acknowledged such a strategy may exist—colloquially referred to as "harpooning" clients—but denied the strategy's probability for success. Instead, professionals more strongly associated success with finding compatible clients for strong working relationships.

Nevertheless, some consumer respondents recounted "waiting out" bad matches with agents whose contractual relationship they could not terminate. **First-time buyers and sellers are vulnerable to contracts that guarantee a commission to the agent—for sellers: exclusive-right-to-market, for buyers: exclusive-right-to represent—without understanding that they have other options.**[37]

***

Recommendation: Require the mandatory consumer disclosure to explain service agreement types and the implications therein.

Recommendation: Require compensation be dependent on services rendered in a way that satisfies both broker and consumer interests.

Recommendation: Require a termination clause in service agreements which equitably satisfies both broker and consumer interests.

IV. Professional competency standards are generally consistent with public interest.

> *(4) the extent to which the profession's education, training, and examination requirements for a license or certification are consistent with the public interest;*
>
> \- 26 V.S.A. § 3104(b)(4)

Vermont's approach to regulating real estate brokerage services is broadly consistent with and typical of that in other states. Most observers would conclude Vermont is moderately more protective of consumers than is average among states. **However, while the State is not an outlier among states, the field *is* an outlier among regulated fields.**

The most common criticism of professional self-regulation in any industry is that it invites incumbent professionals to place barriers in the way of new entrants to the field, resulting in perpetually increasing degree requirements, testing requirements, and continuing education mandates. Real estate regulation stands nearly alone among professional licensing programs in bucking this tendency. Vermont fits among the overwhelming majority of jurisdictions that require just 40 to 90 hours of prelicensure education, a standard the incumbent practitioners rarely agitate to change.

Few professional licenses are as accessible to ambitious Vermonters, or to Vermonters looking for a mid-career change, as real estate licenses. In terms of licensing requirements, the landscape looks very much as Chapter 57 says it should—enough required training to protect the public from incompetence, but scarcely an inch more. **The regulation of real estate practice in Vermont does not harm the public by restricting access to the State's license to practice**.

[37] Some respondents recounted their experiences attempting to terminate representation contracts, and even "waiting out" bad matches. Consumers, REC licensees, and attorneys all recommended shortening the maximum commitment period, or limiting representation contracts to specific properties: Appendix B, Table 3.

V. REC's enforcement actions are largely effective at protecting the public.

(5) the extent to which a regulatory entity's resolutions of complaints and disciplinary actions have been effective to protect the public;

- 26 V.S.A. § 3104(b)(5)

Professional regulation protects consumers by deterring and addressing misconduct. An aggrieved person can quickly and easily file a complaint online or over the phone.[38] In the event the investigation reveals actionable wrongdoing, State Prosecuting Attorneys may bring formal charges against a licensee, asking that the Real Estate Commission take appropriate regulatory action to protect the public. If, after a hearing, the Commission finds unprofessional conduct, it may impose discipline: from issuing a warning, to conditional requirements, or even suspending or revoking the license to practice.

Ultimately, **the Commission's enforcement actions have been effective at protecting the public**. Between fiscal years 2013 and 2022, the Vermont Real Estate Commission received 599 new professional misconduct complaints. During this same time, the REC closed 658 complaint cases, of which 67 resulted in disciplinary resolutions against real estate salespersons and brokers.[39] Within this data sample, there are no instances of the same professional repeatedly committing misconduct after receiving a disciplinary sanction from OPR.

Nevertheless, based on public hearing and stakeholder survey feedback, it is possible that **the efficacy of conduct enforcement may be diminished by inconsistent reporting**:

- Most consumers don't know they can report misconduct;
- Professionals are afraid of retaliation from peers and thus do not report misconduct;
- Licensees feel penalties are not severe enough to deter misconduct; and
- Role and overlap with VAR may blur reporting obligations for licensees.

Nearly all stakeholders agree that **consumers are generally unaware they can file misconduct complaints**. This is a significant finding, as conduct enforcement relies on complaint reports to initiate investigations. Simply put, **if consumers do not file reports, the Office will remain unaware of any potential wrongdoing.**

"Hindsight wish I known [*sic*] about the Complaint option with OPR."

"The How to file a Complain [*sic*] information link should be clearly printed on the closing papers…I didn't even know this information was available."

"Question 14 reminded me that no one else is aware they can make complaints on bad agents."

- Consumer Survey Respondents

"The process to do so is not well known - this should be made part of the broker contract and listing agreements…"

- Attorney Survey Respondent

Likewise, there is significant evidence that **real estate professionals are hesitant to file misconduct complaints against their peers**, with whom they may have to work in the future. REC licensees and attorneys alike suggested that any harm to their relationships with fellow professionals could impair their ability to fully serve their clients, and in turn, harm the professionals' careers. Survey feedback suggests professionals are unaware they may file conduct complaints anonymously.

---

[38] Professional misconduct complaints may be filed at sos.vermont.gov/opr/complaints-conduct-discipline/

[39] See Appendix L for REC complaint and discipline data.

Given that the real estate professions are often referral-based, fear of retaliation is a significant finding. Professionals are more likely to recognize misconduct than consumers, and **if professionals do not report misconduct, the office will remain unaware of any wrongdoing.**

Additionally, REC licensees expressed feelings that enforcement against perceived rule violators is insufficient to deter unprofessional conduct.[40] Yet, regulators are frequently critiqued by all parties: the nature of enforcement is that those seeking it think the system is weak; those subject to it think the system is draconian; and those unfamiliar with it can only say what they've heard.

Yet, 3 V.S.A. § 129a(d)(1) allows the REC to impose an administrative penalty of up to $5,000 per conduct violation (multiple of which may be included in any one misconduct charge). Further, REC administrative rules state that all licensees must work under the supervision of the principal broker/broker in charge, who holds vicarious responsibility for the conduct of all employees (4.2(a-b)). Accordingly, in addition to removing bad actors from the market, the Commission also has authority to impose significant monetary penalties when necessary.

However, **State disciplinary oversight is complicated by a parallel, private system of ethics enforcement administered by NAR and VAR** through regional boards of REALTORS. Because access to the MLS is fundamental to successful brokerage practice in Vermont, and said access is conditional upon NAR/VAR membership, nearly all of Vermont's brokers and salespeople are association members. A core tenet of NAR/VAR association membership is adherence to the *NAR Code of Ethics*, and a contractual obligation to arbitrate disputes within the association's internal review process.

While professional associations are common across all regulated professions, there is a unique power imbalance between NAR/VAR and licensed real estate professionals: **in order to access a necessary tool for the profession (MLS), REC licensees must submit to the independent authority and oversight structure the tool's owners (NAR/VAR) regarding conduct and practices unrelated to the tool itself**. Thus, while REC may restrict access to practice real estate brokerage, the NAR restricts access to the market.

"…when I reported another agent…the back lash I received from the agent wasn't worth it, so I'm not sure I would do it again."

"In commercial real estate. You would never work again if you reported another broker."

"If you are a small agency, you are not going to complain about one of the big agencies. If you do, your listings will be boycotted and not shown."

"There is probably a feeling that agents don't want to turn other agents in because then you can be marked, or your agency can be marked for retaliation."

"As agents, if you file a complaint against another agent, you could negatively impact your future clients…If initial complaints could be submitted without the name of the person filing the complaint, this may change."

-REC Licensee Survey Respondents

"Agents are often the first point of contact for Buyers and Sellers, and if an attorney files a complaint, then the attorney will no longer receive any referrals. I have seen this happen to an attorney, who ended up…getting shunned by all real estate agents by filing a complaint against one."

- Attorney Survey Respondents

[40] See Appendix C, Tables 12 & 13.

"I chair professional standards for VAR and I...have never heard one say that they would go to the state for help."

"Licensed individuals who are realtors are required to work within the Realtor organization's ethics committee to resolve issues."

"As Realtors, we have our own arbitration system [VAR] which we utilize before OPR."

"Depends on how serious the allegation is and how it is handled through the Local Board [VAR] ...Findings can then be referred to OPR if indicated."

"State and national Realtors associations...are self-serving and blur the accessibility and role of VT RE Commission"

-REC Licensee Survey Respondents

The NAR/VAR review boards address member grievances spanning from unethical conduct complaints to decisions regarding compensation in *procuring cause* disputes. Unsurprisingly, many REC licensee survey respondents report confusion about their professional responsibilities with OPR.

In some cases, survey respondents suggested that they are required to submit complaints to their local association board prior to OPR, or that OPR enforcement is better utilized by the public consumer. This is not true.[41]

However, while 3 V.S.A. § 128 requires mandatory misconduct reporting for healthcare professions, there is no such obligation for real estate professionals. Further, there are no administrative rules obligating real estate professionals to report peer misconduct.

The VAR review boards enforce the Association's Code of Ethics, but there is no requirement for coordination of complaints between VAR and the REC. Because OPR and REC rely on complaints to prompt investigation, inconsistent reporting can have serious consequences for the State's ability to protect the public through licensing regulation.

***

Recommendation: Require the mandatory consumer disclosure, as well as all contracts, to include information for the consumer on how to file a complaint with OPR.

VI. The REC involves the public and licensees in drafting its rules and regulations.

(6) the extent to which a regulatory entity has sought ideas from the public and from those it regulates, concerning reasonable ways to improve the service of the entity and the profession or occupation regulated

- 26 V.S.A. § 3104(b)(6)

The Vermont Real Estate Commission convenes once every two months. Under Vermont's Open Meeting Law 1 V.S.A. § 312(a)(1): *All meetings of a public body are declared to be open to the public at all times, except as provided in section 313 of this title*. Each REC meeting allows an opportunity for public attendees to provide feedback either in person at OPR, or remotely. Moreover, while 3 V.S.A.

[41] Note: the complainant is not a party in OPR conduct enforcement proceedings. Conduct enforcement is between the State and the licensee and focuses on addressing licensee actions which have already occurred. OPR conduct enforcement does not mediate or resolve disputes between parties, and OPR cannot order payment of monetary damages, return of deposits, or injunctive relief to complainants.

§ 840 requires Vermont State agencies hold at least 1 public hearing regarding proposed rule changes, OPR requires a minimum of 2 hearings as standard operating procedure.

VII. The REC gives adequate notice of public meetings and hearings.

(7) the extent to which a regulatory entity gives adequate public notice of its hearings and meetings and encourages public participation;

\- 26 V.S.A. § 3104(b)(7)

Under Vermont's Open Meeting Law 1 V.S.A. § 312(d)(1), notice of public meetings must be posted at least 48 hours prior to the start of said meeting. The Office of Professional Regulation posts public meetings on its website's calendar at least one week in advance, per standard operating procedure. Likewise, meeting agendas are posted on the Commission's webpage.

VIII. The REC makes efficient use of funds.

(8) whether a regulatory entity makes efficient and effective use of its funds and meets its responsibilities;

\- 26 V.S.A. § 3104(b)(8)

The Vermont Real Estate Commission makes efficient and effective use of its funds. Like all regulated professions under OPR's *regulatory umbrella*, the Commission relies on the Office of Professional Regulation for licensing administration, as well as misconduct complaint processing, investigations, and prosecution. Consequently, the commission pays a proportionate value of the operational costs of both the Office of Professional Regulation and the Secretary of State's Office. Thus, the onus for an effective use of funds largely falls on OPR and not the REC.

Nevertheless, the Commission has shown responsible use of funds where applicable. For example, the REC withdrew its costly membership from the Association of Real Estate License Law Officials (ARELLO) in 2018. The ARELLO membership cost the Commission $1,500 in annual membership dues, as well as an additional $1,200 annually to send 2 commission members to association events.

IX. The REC has sufficient funding.

(9) whether a regulatory entity has sufficient funding to carry out its mandate.

\- 26 V.S.A. § 3104(b)(9)

The Vermont Real Estate Commission has sufficient funding to carry out its mandate. At the end of the 2023 fiscal year, the Commission's fund balance totaled $1,054,184.[42] The REC's average annual operating cost is approximately $264,000. Act 70 of 2019 increased the REC's license fees to counter a previously low fund balance. However, given the current surplus, OPR recommended a moderate fee decrease for both real estate brokers and salespersons during the 2022-2023 legislative session.

[42] The REC budget and fund balance information is available in Appendix N.

Part 4 | *Regulatory Recommendations for Real Estate Brokerage Services*

In summary, this regulatory review makes three general recommendations, each comprised of specific policy changes.

I. **Prohibit conflicts of interest incompatible with fiduciary duty:**
- Prohibit limitation of liability clauses in real estate brokerage representation and purchase and sales contracts.
- Require real estate brokerage representation contracts to permit consumers to withdraw from the contract within a reasonable window for review of the contract by an attorney (i.e., attorney review period).
- Require the mandatory consumer disclosure to warn consumers about the inherent conflicts of interest in the designated agency model.
- Ask the Vermont Attorney General's Office of Consumer Protection to review the designated agency practice model.
- Require the mandatory consumer disclosure to explain service agreement types and the implications therein.
- Require the mandatory consumer disclosure, as well as all contracts, to include information for the consumer on how to file a complaint with OPR.

II. **Repair the disconnect between compensation and services rendered:**
- Require compensation be dependent on services rendered in a way that satisfies both broker and consumer interests.
- Require all representation contracts to specify a compensation value for agent's services; fee reimbursement should be negotiable between buyer and seller as with any other contingency.
- Require a termination clause in service agreements which equitably satisfies both broker and consumer interests.

III. **Cut *red tape* by reducing unnecessary regulatory burdens:**
- Revise the administrative rules and mandatory disclosure to allow the facilitative brokerage service model.
- Revise administrative rules to address the unique characteristics of commercial brokerage.
- Adapt administrative rules to the virtual office.

Our recommendations aim to address significant and persistent challenges for consumer protection in Vermont's real estate brokerage services market. We believe this can be accomplished in a manner that empowers both consumers and practitioners by providing reliable information to consumers, enforcing heightened standards for agents who choose a fiduciary role, and adding a neutral, non-fiduciary practice model to cut bureaucratic "red tape" currently restricting the profession's scope of practice.

Respectfully submitted to the House and Senate Committees on Government Operations; the Senate Committee on Economic Development, Housing, and General Affairs; and the House Committee on General and Housing.

STATE OF VERMONT
SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION

BY:

August 15, 2024

Dylan D. Bruce — Date
Policy and Research Manager

Acknowledgment: major contributions by Gabriel M. Gilman, Lauren K. Layman, and Jen B. Colin.

APPROVED:

August 15, 2024

Tara P. Grenier — Date
Deputy Director

References

Akerlof, George A. 1970. “The Market for Lemons: Quality Uncertainty and the Market Mechanism.” *Quarterly Journal of Economics* 84, 488-500

Auronen, Lauri. 2003. “Asymmetric Information: Theory and Applications.” Seminar in Strategy and International Business. Tu-91.167.

Barwick, Panel Jia, Pathak, Parag A. and Wong, Maisy. “Conflicts of interest and steering in residential brokerage.” *American Economic Journal: Applied Economics,* 9(3), 2017: 191-222.

Barwick, Panel Jia & Wong, Maisy. “Competition in the real estate industry: A critical review.” *Economic Studies at Brookings.* December 2019.

Brobeck, Steven. “The agency mess: Home buyer and seller confusion and costs related to diverse and poorly enforced state laws about the role and responsibility of real estate agents.” *Consumer Federation of America.* January 2019.

Brobeck, Steven. “Hidden real estate commissions: Consumer costs and improved transparency.” *Consumer Federation of America.* October 2019.

Brobeck, Steven. “Why required real estate agent disclosures about representation fail and how they can be improved.” *Consumer Federation of America.* January 2020.

Brobeck, Steven. “Real estate referral fees: Do they harm consumers?” *Consumer Federation of America.* September 2020.

Evetts, Julia. 2011. “A New Professionalism? Challenges and Opportunities.” *Current Sociology* 59: 406-422.

Federal Trade Commission & U.S. Department of Justice. “Competition in the Real Estate Brokerage Industry.” April, 2007.

Hsieh, C.-T. and E. Moretti. 2003 “Can Free Entry Be Inefficient? Fixed Commission and Social Waste in the Real Estate Industry.” *Journal of Political Economy* 111(5) 1076–1122.

Law, Marc T. & Kim, Sukkoo. 2005. “Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation.” *The Journal of Economic History* 65(3): 723-756.

Leland, Hayne E. 1979. “Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards.” *Journal of Political Economy* 87(6): 1328-1346.

Marshall, T.H. 1939. “The Recent History of Professionalism in Relation to Social Structure and Social Policy.” *Canadian Journal of Economics and Political Science* 5: 325-340

Parsons, Talcott. 1939. “The Professions and Social Structure.” *Social Forces* 17(4): 457-467.

Sarfatti Larson, Magali. “The Rise of Professionalism: A Sociological Analysis.” University of California Press, 1977.

Wilensky, Harold L. 1964. “The Professionalization of Everyone?” *The American Journal of Sociology* 70(2): 137-158.

Appendix A: Explanation of the three professional licensure schemes

The Office of Professional Regulation (OPR) engages in three forms of regulatory market intervention: professional licensure, state certification, and state registration.

Professional licensure is the most restrictive regulatory model. Licensed professions require the individual to prove they have obtained the necessary entry-level qualifications, as well as the maintenance of continuing education over time, in order to practice. No one may practice a licensed profession without an active professional license. **OPR has the authority to revoke any license to practice, and thus remove bad-actors from the market, in the event of professional misconduct.**

State certification is similar to professional licensure in that there are qualification standards, but the individual is not required to have the state certification in order to practice. In other words, **state certification has a protected title, i.e., *state-certified*, but the profession itself is not a restricted service.** For example, in Vermont dietitians are certified by the state, but on a voluntary basis. Anyone may sell dietitian services to the public, regardless of education or qualifications, but only those who are certified by OPR may call themselves *certified* dietitians.

The most significant difference between licensure and certification is control over market access. While OPR may revoke an individual's certification, thereby rescinding the state's endorsement of their practice, OPR cannot remove the individual from the market.

By comparison, the state registration model allows OPR to control market access, but generally does not have any qualification standards. Registered professions require the individual to register with OPR in order to practice. No one may practice a registered profession without an active registration. While there are generally no qualifications needed to register, the simple act of registration provides the means for OPR to remove bad actors from the market in the event of misconduct.

Registration is a more powerful reactive measure than certification because bad actors may be removed from practice. However, when the risk of public harm is minimal, the certification scheme acts as a useful *market signaling device* for informed consumers.

Notably, there are some misnomers among profession titles. For example, *registered nurses* (RN) are actually licensed professionals. RN applicants must meet the minimum education standards and pass the national exam (NCLEX) in order to receive a license to practice.

Appendix B: Research and outreach methods

Research

OPR undertook legal review and research of statutes, rules, litigation, legislation, minutes, and orders related to the regulation of real estate brokers and salespeople, as well as outreach to national consumer groups and direct contact with key stakeholders, such as advocacy groups and think tanks. In this phase, we attempted to situate Vermont's regulatory program relative to those in other states, as well as to gather established recommendations from institutions long engaged in similar discussions, such as the Consumer Federation of America and the Brookings Institution.[1]

Public Hearings

The first phase of fact-finding involved convening two heavily noticed public meetings at the Office of Professional Regulation in Montpelier. Invitations to comment were not only sent to Commission licensees, but also to consumer groups and professionals peripheral to brokers, such as real estate appraisers, attorneys, and property inspectors. Hearings occurred on November 5th and 14th of 2019, with webinar broadcast for the benefit of those who could not travel to Montpelier.

This outreach generated excellent attendance by real estate licensees and thoughtful contributions from licensees who are not regular attendees of Real Estate Commission meetings. Perhaps unsurprisingly, invitations did not drive significant participation from those outside the world of residential real estate brokerage. Nonetheless, licensees, Commissioners, Association leadership, and State regulators enjoyed a rare opportunity for open and unstructured conversation about how regulation could be improved, and much was learned to inform this report. Additionally, invitees were encouraged to share written commentary and criticism to a dedicated email address.

Surveys

Survey outreach became a key source of findings. Because the perspectives of practitioners tend to be very well represented and familiar to regulators—indeed, practitioners dominated public hearings despite outreach to consumers and peripheral providers—this review took pains to seek perspectives not often represented in monthly meetings of the Real Estate Commission or the halls and committee rooms of the Capitol. With grant support from the United States Department of Labor, in the summer of 2020, the Office purchased online advertising through a statewide community bulletin, using this vehicle to reach and solicit feedback from Vermonters with recent experience buying or selling a home.

The Office conducted five individual and targeted surveys of marketplace participants to gauge the perceptions, opinions, and experiences of those in different positions relative to brokerage. On August 12th 2020, OPR requested feedback from four distinct groups. First, OPR surveyed all actively licensed real estate brokers and salespersons in Vermont. Similarly, OPR surveyed other industry members,

[1] Consumer Federation of America reports are linked as follows: report on mandatory disclosures, on representation models, on commission transparency, and on referral fees. Additionally hyperlinked is the Brookings Institution's report by Barwick and Wong (2019) on real estate brokerage competition, available here.

including all actively licensed real estate inspectors, real estate appraisers, land surveyors, and related industry groups such as the Vermont Mortgage Bankers Association, Vermont Bankers Association, and Picket Fence Preview. Another survey was sent to the Vermont Bar Association, requesting feedback from attorneys who specialize in real estate transactions.

Finally, OPR sent questionnaires to Vermont's real estate consumer organizations, including but not limited to Vermont Legal Aid, Vermont Affordable Housing Coalition, the Vermont Attorney General's office, and the Vermont Housing Finance Agency. On August 30th , OPR launched a two-part outreach effort in order to survey Vermont's recent home buyers and sellers. This involved both a two-week advertising campaign on the popular *Front Porch Forum* social media platform, as well postal mailings, which directed consumers to OPR's online survey. Using real estate transfer tax data from the Vermont Department of Taxes, OPR was able to send postal mailings to the 5,000 most recently sold residences in Vermont, where both the buyer and seller had Vermont mailing addresses (in an effort to target Vermont residents, rather than out-of-state owners of second/vacation homes).

Because this regulatory review must focus on the alignment between regulation and the public interest, surveys were exploratory in nature. Unlike forced-choice polls, questions were designed to elicit open-ended feedback about subjects specific to each target demographic. The exploratory nature of the questions was necessary and effective at provoking broad discussion of issues on the minds of survey respondents, not just survey drafters.

Survey Responses

In total, the Office received 1,763 survey responses. This includes partial survey responses, as many participant groups were allowed the freedom to provide feedback on only those topics which they deemed relevant. The decision to maximize feedback through partial survey participation, rather than prioritizing survey completion, was based on this study's qualitative, exploratory design. In our opinion, incomplete submissions are better than none.

Of the REC's 1,990 licensed professionals, 856 participated in the survey (a 43% response rate). Specifically, there was an equal number of broker participants (428/857 total licensed population; 49.9% response rate) and salesperson participants (428/1,133 total licensed population; 37.8% response rate). The survey of real estate industry members yielded 175 responses. A response rate is not available for this survey due to the unknown sample size.[2] The survey of Vermont real estate attorneys yielded 35 responses. Likewise, a response rate is not available for this survey due to the unknown sample size.[3] The survey of consumer groups yielded 2 just responses. A response rate is not available for this survey due to the unknown sample size.[4]

[2] The industry groups survey benefitted from facilitation by the Vermont Mortgage Bankers Association and Vermont Bankers Association. It is unclear how many individuals received survey invitations, and thus neither sample size nor response rate are calculable.
[3] The Vermont Bar Association facilitated the real estate attorney's survey by disseminating the survey invitation among its membership. It is unclear how many attorneys specialize in real estate law, or how many individuals received survey invitations. Thus, neither sample size nor response rate are calculable.
[4] A response rate is not possible because the surveys allowed participants to provide feedback as either individuals working in the industry, or as representatives of their respective organizations (8 total).

Finally, the consumer survey of Vermont real estate buyers and sellers yielded 695 responses. A response rate for this survey is unknown due to unknown sample size.[5] However, based on survey data, certain participant demographic information is available. For example, 55% of all participants reported that their most recent real estate transaction was in the year 2020, 23% reported the year 2019, and in total, 94% of participants reported their most recent transaction occurred within the last 5 years. This data indicates that the feedback from consumers not only refers to recent experiences, but to the current real estate regulations and administrative rules.

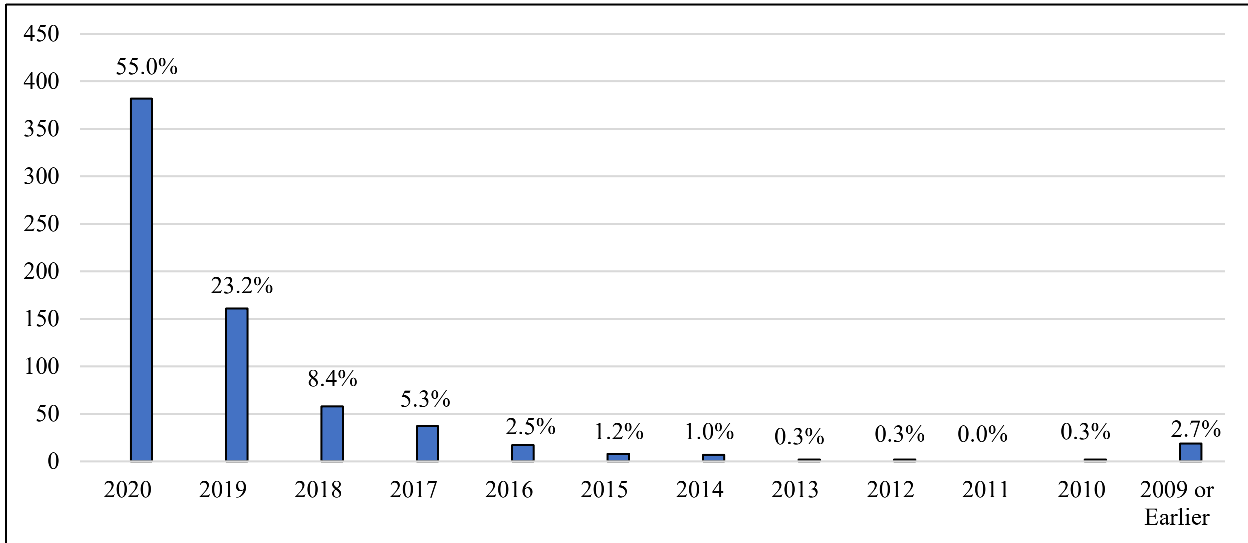


Figure 2**:** Consumer survey participants' self-report data on most recent real estate transaction.

Limitations

As with any study which relies on self-report data, there is the risk of self-reporting bias. However, given the exploratory nature of this review, the focus on qualitative analysis, and generally high response rate, these concerns are largely mitigated. Nevertheless, the survey responses and compendia should not be construed as prevailing opinion within said target groups. While grant-supported outreach offered insight into the experiences of recent homebuyers, home sellers, and other participants in real estate transactions, readers should understand that opinions collected in self-selecting or opt-in settings—open meetings and targeted online surveys are two examples—do not likely represent the distribution of opinions across relevant target groups or in the general population. Those with strong opinions or commercial interests are more likely to participate. This phenomenon can exaggerate the apparent concern and upset about popular topics. Although response rates reported above are exceptional—approaching 50% in some cases—it remains the case that most invitees did not elect to contribute.

With that caveat, it must also be observed that the many Vermont professionals and consumers who participated in review meetings and responded to review surveys tended—even when expressing criticism of the Office or discussing the most contentious issues in their field—to be civil, thoughtful, and giving of their time. This remained true even among anonymous survey respondents.

[5] The consumer survey included outreach advertisements on the *Front Porch Forum* social media platform, as well as 5,000 postal mailers. Thus, neither sample size nor response rate are calculable.

Appendix C: Compilations of unique stakeholder survey feedback by theme

Table 1: Common Feedback on Transparency of Representation Contracts	
Consumer	Omg so much paper work it was like being in a lecture for hours, by the end we signed without realizing what we got ourselves into. We feel that our realtor did all she could to hurry the process so we would sign without asking questions. And we need to ask questions!
Consumer	They were with the second realtor we worked with, the one who ultimately represented us in the purchase of our home. With the first realtor, we got conned into signing a one-year exclusive contract to work just with her. We were overwhelmed at the time and couldn't parse all the legalese of what we were signing with her. Her layperson verbal explanation didn't at all make clear what we were actually getting into by signing it.
Consumer	I am unusually scrupulous about reading fine print. Normal people need something more clear and plain English.
Attorney	Frequently but not always - many attorneys (including me) have found clients to be woefully ignorant of what they agreed to with their realtor or how the purchase or sale process works because the realtor focuses more on the "shiny prize" instead of how to get there

Table 2: Common Feedback Regarding Liability Limitation Clauses	
Consumer	“I didn’t realize that the brokers liability was only $5,000 in the case of a dispute. In my case, the seller lied on the disclosure regarding a water problem with my property. I sued the seller and their broker who advised her to lie, and that is when I learned about the $5,000 limit. Very unfair and not right”
Consumer	“Are you kidding? How can a person review and understand everything they have to sign to close?? Lawyers should explain arbitration clauses, that's a big issue. People are signing away their rights to sue for poor construction etc and don't realize it until their house fails 4 months or a year after they move in. It's a horrible deal for the consumer for whom this is the most expensive purchase they will make.”
Attorney	“Most real estate purchase and sale form contracts immunize brokers from their errors/omissions”
Attorney	“In my opinion paragraph #13 which limits the liability of brokers does not belong in a contract between the parties (or in any contract involving a licensed professional for that matter) and should be replaced with a REQUIRED attorney review provision. The Contract is the most important document in any real estate transaction and should have a provision allowing for attorney review. People often think that because it's a form, it's OK to sign. It's not, but also realtors are drafting a lot of addendums with important provision without a sufficient understanding of contract law. They need more contract law CLE as well.”
Attorney	“Rules do not protect consumers when rules allow real estate licensees to include in their standard contracts, exculpatory language, relieving them from all liability for things such as misrepresentation about the property being sold. Also rules allow a single real estate firm to represent both buyer and seller - an unavoidable conflict - no mater how you try to create an artificial "Chinese Wall."”

Attorney	"Strongly urge that all form real estate purchase and sale agreements delete the limitation of liability paragraph (usually Paragraph # 13) as it offers no protection to the buyers and sellers. Lawyers are forbidden to limit their liability to their clients by contract; Realtors should not be allowed to either. I also recommend the addition of an attorney review clause providing for all signed purchase and sale contracts be subject to attorney review within a specified period as to all provisions except the purchase price."
Attorney	"The purchase and sale of residential property is typically a significant event in the life of a seller or buyer. Sellers and buyers should be given the opportunity to have all proposed contracts reviewed by their own attorney. And, as I stated previously, if a seller or buyer is required to agree to a limitation of liability for a realtor, an attorney review should be a requirement."
Attorney	"Frequently but not always - many attorneys (including me) have found clients to be woefully ignorant of what they agreed to with their realtor or how the purchase or sale process works because the realtor focuses more on the "shiny prize" instead of how to get there"
Attorney	"They are asked to sign a form P&S prepared by the realtor association that includes language limiting the liability of the real estate agent who is not even a party to the contract. It is self serving and when the clients sign they have typically not yet engaged counsel and don't understand what they are waiving in terms of rights. The paragraph should be prohibited."
Attorney	"Section 13 of the standard Vermont Realtor's contract still persists in making the realtors a protected beneficiary to the contract by reducing or eliminating their liability to the parties in the event of negligence or error. While we frequently seek to remove it on a case-by-case basis, most realtors point to nearly exactly identical language in the listing and buyer-broker agreements, all of which reduce protections due for the parties."
Attorney	"Brokers who refused to delete Paragraph 13 of the standard Purchase & Sale Contract is an example of a broker trying to override the legal advice a lawyer gives his/her buyer or seller client. Some brokers insist on drafting the language of Addenda, and then draft language which is vague. Brokers are very good about drafting routine Addenda, but in some instances should either use attorney language or defer to the attorney's suggestions as to the content of an Addendum."
Attorney	"Regs should prohibit waiver of liability provisons in listings and in contracts. They serve neither the buyer nor the seller and do not protect the public. Lawyers are prohibited from disclaiming liability. If real estate licensees are to be "professionals" with fiduciary responsibilities, they should be held to the same standard"
Attorney	"Paragraph #13 of the standard broker contract needs to be removed from the form. Serves only broker interest, has no place in a contract between buyers and sellers."
Attorney	An independent body should approve the standard real estate contract, instead of having the Realtors' Association attorney draft this document

Table 3: Common Feedback on the capture effect in representation contracts	
Consumer	There really needs to be a way for buyers to easily break these exclusive contracts with agents if the agent is not meeting the buyer's needs. We originally worked with an agent whose dismissal of our needs really bordered on negligence and she wouldn't even discuss with us the possibility of making lower offers on houses that had been languishing on the market for a long time. The whole exclusive buyer's agent contract is flawed, especially in that agents can make them last a really long time (like one year) and it's not immediately clear to buyers just what rights they are signing away
Consumer	We actually found and toured the house we purchased on our own and had to pay the realtor the same amount in commission as if he found it. That didn't feel right.
Consumer	Exclusive contracts should have the following limitations: Either they should be limited to no more than 3 months (renewable only by buyer signing again) and should be easy to terminate if there's not a good fit between buyer and agent OR the exclusive agreement should *only* apply to houses the agent actually shows to the buyer (the current wording means that ANY house the buyers purchase while under the exclusive agreement means the buyer's agent is owed a fee)
Consumer	Fees yes. Some of the terms in the contract about what happens if the house sells after the contract expires and the agent getting some commission (section 6, I think it was) were not clear. They need to be simpler.
Consumer	We started with an agent and were not sure how to get out of the contract. We were lucky the agent left the company. The company offered another agent but we had an option to decline. We end up finding a new house an closing the transaction on our own
Consumer	It's complicated. For buying, we represented ourselves with the sellers agent. For selling, we started with an agent, got under contract and then it fell through. We waited out our contract with that person and then sold ourselves.
Consumer	Limit exclusivity to 60-day terms, requiring both parties to opt into a continued relationship on a more regular basis
REC Licensee	It is also too easy for agents to trap clients into representation that they cannot get out of when they want out for justified reasons.
REC Licensee	I don't think buyers understand that when they sign the ERTR how important it is to shorten the time to represent or make the agreement for specific homes. We have had potential buyers that have signed wide open agreements with Brokers that last almost a year. They did not understand that this agreement meant they couldn't look with another agent. The agreement should be for a very limited number of homes. Not for every home on the market.
REC Licensee	I believe buyers and sellers should have the ability to terminate representation with their Realtor. If this is not possible I believe that representation contracts should be shortened. The public is often unaware of the time frame that they are binding themselves to a Realtor. My firm receives multiple inquiries a year from customers asking us to counsel them on how to get our of representation agreements with Realtors who are not providing good service. We cannot help them. Binding clients to bad representation hurts us all.

Table 4: Sample Feedback about Purchase and Sales Agreements	
Consumer	We thought they were clear. As the buyer we would stated the give we'd negotiate and then ended up not being in the contract. Also the contract left off statement that building rights on another property were not part of the sale. Because this was left off the contract and part of the deed, in the end were were legally bound to have the building rights part of the negotiated sale. In other words, we were locked into selling a house and building rights at a much lower price than ever intended.
Attorney	I almost never see the initial agreements signed by the sellers when they get ready to list their house. I actually had a broker refuse to provide me with the agreement. I've also had people uncertain of what their obligations are if a buyer comes along who had no contact with the broker whatsoever (including after the listing was terminated).
Attorney	Standard listing and sales contracts are more complicated than necessary, not clearly understood by public and contain mediation and limited broker liability provisions that are unreasonable given the nature of the subject matter that is the largest asset most customers deal with in their lifetimes. Although opportunity for review by attorney is given with respect to such contracts in some situations, it does not appear to be the rule.
Attorney	Although efforts have been made to address this situation, done deals, i.e. signed contracts, both listing and sales, are the rule as the practice is to get the papers signed and let others work out any issues without sufficient third party input and thought up front.
Attorney	There are too many errors in the P&S agreements that we get. Knowing that someone will need an attorney, it would behoove everyone if as soon as a Realtor has a listing, the Realtor makes sure that the Seller has legal representation. Often, days prior to a closing, we get calls advising a Seller needs an attorney last minute, because they weren't told they needed an attorney.
Attorney	Real estate transactions are almost always conducted in accordance with contracts drafted by attorneys for the realtors. The provision in the contract attempting to protect realtors from liability is of no benefits to the seller or buyer and should not be permitted in the contract. When the buyer and seller attorneys are known or ascertainable at the time of signing the sales agreement, they should be automatically afforded a reasonable time (e.g., 3 business days) to review and comment (e.g., often a Warranty Deed is in appropriate or there are addenda for Common Use which should be attached or occasionally are attached and should be omitted, etc.).
Attorney	A rule should be considered making inclusion of a mandatory contingency to have a purchase and sales agreement reviewed by attorneys.
Attorney	Brokers too often tell buyers not to hire an attorney before the P&S is signed because They just screw up the deal.

Attorney	Many do not recommend attorney review of contracts. Many draft contingencies in addendums which are unclear in terms of who is to do what, when, and what happens if the what isn't OK - and provisions which do not adequately protect either party. One I know of actually drafted a lease.
Attorney	I almost never see the initial agreements signed by the sellers when they get ready to list their house. I actually had a broker refuse to provide me with the agreement. I've also had people uncertain of what their obligations are if a buyer comes along who had no contact with the broker whatsoever (including after the listing was terminated).
REC Licensee	In my opinion, contracts used are inadequate to provide clear and simple explanations, and template forms for protecting buyers and sellers likewise

Table 5: Common Feedback on Mandatory Consumer Disclosures	
Consumer	The disclosures are written like legal documents and as a result, are particularly challenging for the average person to understand.
Consumer	I'm an educated and experienced home buyer (this was my sixth real estate transaction) and still the paperwork is unbelievably opaque.
Consumer	The broker agreements were confusing and we met with different brokers in the beginning and they all struggled to explain it clearly
Consumer	Well...Lots of “boiler plate” stuff not recognizable to the common person.
Consumer	However, I do feel that the "buyer-broker" relationship is unclear, and not sure what advantage or disadvantage that represents for buyers and sellers.
Attorney	I regularly find that Buyers believe the selling agent to be "their" agent, despite mandatory disclosure forms signed by the same Buyers indicating the opposite.
Attorney	Many buyers still don't understand that the broker is not working for them.
REC Licensee	In my experience, very few agents fully and thoughtfully explain the VRCIDisclosure, so right out of the gate, the consumer is ignorant to the nuances of designated agency.

Table 6: Common feedback indicating consumers don’t know agent responsibilities	
Consumer	It did not show that they were negotiable on any document
Consumer	There was a reasonably clear contract about what a buying and selling agent does, but I think a clear disclosure of how information about properties are stored/available to buyers and sellers would be helpful. Consumers Need to be informed about what kinds of information their agent can ethically provide, what they can’t
Consumer	I don’t know. I thought she was supposed to help me, she did not. I thought she was supposed to protect my interests, she did not.
Consumer	Vague, other than our obligation towards choosing that real estate agent

Consumer	Cannot elaborate because I really did not know what the roles entailed.
Consumer	Only because I am in the industry, brokers do a very poor job of clearly (in plain language not legalese) describing their role.
Consumer	I wasn't sure if the broker was working for me or for the seller (the broker was not the listing agent)
Consumer	Originally we thought that they were, but as time went on, and dealings with the seller became more and more hostile, we felt that we were not being fairly represented
Consumer	Perhaps I misunderstood them. When I was interviewing them they each said they would work just for me. That they would look out for my best interest.
Consumer	My broker was very busy and I felt all they did was market my house and I did the rest
Consumer	As an out of state buyer, I do not feel I was fairly represented. The realtor had recommended her friend as a home inspector, and the home inspector did not report issues with electrical, heating or water systems. I did not have heat until the middle of November and went with out water for a week. I paid top asking price for a property that was marketed as "pristine".
Consumer	The broker who sold my house also represented the buyer and in the end she said she was not my salesperson. I had asked first day if she could reprent both and said yes. She mostly ignored my needs and focused on buyers. My agent when i bought my home was great.
Consumer	We did most of the work in finding homes. Broker was poor advocate for our needs in the process. Misrepresented highest priced properties and dissed lower priced properties. Did not follow Covid protocols. Seller brokers rarely showed up for showings.
Consumer	I think the days of a broker honestly earning commission are far gone, brokers are now sales people only with poor property and transactional knowledge. Brokers continue to insist on a 6% commission or more (they frequently pressure sellers into sales concessions). Brokers need to be salaried, fee based and the ethics of how they price homes needs to be seriously evaluated. They slipped out of the regulations of Dodd Frank, and that was a huge miss by the federal government. Brokers are negligent, price fix and manipulate markets (and reap the benefits in all types of markets).
Consumer	Neutral. The whole industry of brokerage seems like a scam to me. 6% customary commission for sales is really preposterous. I did 98% of the work.
Attorney	I'm going to say "I don't know." I almost never see the initial agreements signed by the sellers when they get ready to list their house. I actually had a broker refuse to provide me with the agreement. I've also had people uncertain of what their obligations are if a buyer comes along who had no contact with the broker whatsoever (including after the listing was terminated)
REC Licensee	The problem as I see it is that members of the public generally do not know the "rules of the game," or how to seek redress when needed. This lack of knowledge can cut both ways: It can mean that legal and ethical violations go by unaddressed; but also it is quite common for a member of the public to incorrectly believe that an agent has committed a foul violation, when in fact that agent has vigorously promoted the best interests of his or her client, legitimately. It may be that "eyes glaze over" when reading the Mandatory Disclosure. And that might be acerbated by agents who just treat the disclosure as "paperwork" to be signed "for the file."

Table 7: Common Survey Feedback Regarding Fee Splits	
Consumer	Though as purchasers we were not responsible for them
Consumer	But the buyers realtor on the sale property made me sign a contract to pay him 5% commission. I objected but he insisted or I could not sell.
Consumer	I felt the fees paid to my broker were fair but I did not feel they were fair to the other seller's broker. We did most of the work on our end and she injected a lot of stress and unprofessional behavior into the situation.
Consumer	Especially if the two agents work in the same office, some things might be off the books or unofficial.
Consumer	I never use a broker to buy. I just call the listing agent or I am likely to lose the home to someone else who didn't bring a buyer's broker b/c the selling broker can keep all the commission if there is no other broker involved. I've never lost a purchase yet with this approach, so as they say, you do the math. Selling- Now that one can list on MSL for as little as $199, I post on Zillow and Craigslist (the latter resulting in a scam rental posting about my home), Picket Fence, then MLS. Sale was via Zillow, saving me $33,900 in commissions
Consumer	We saw mention of it in a document, but we had to bring it up, the broker didn't. We were also told conflicting information about what they would get if it were a for sale by owner versus a listed property.
Consumer	I was not aware this is how it works.
Consumer	I thought the 50-50 split was by law
Consumer	I wasnt aware that was they determined that. I thought it was a 50%/50% slip
Consumer	That's between realtors though would hate to see a sale not happen because of conflict between agents
Consumer	They do not determine the splits independent of the seller/clients input.
Consumer	I didn't know that can happen. I thought it was always split down the middle
Consumer	The seller should have input.
Consumer	I did not have a seller's agent, so I determined the buyer's agent commission, although he would not have shown my house if I did not agree to his price.
Consumer	If it isn't equal across tHe board, however, some buyers' agents may steer their clients away from certain Roperties
Consumer	Realtors would steer buyers to properties of other realtors that share more if the commission.
Consumer	I thought this was a standard 50/50 split. That would seem more fair in the long run.
Consumer	I don't understand this questions. We signed the listing agreement which had the commission amount in it.
Consumer	the commission was not split. The seller paid all.
Consumer	I believe that there is the 'potential' for conflict of interest if the Listing Agent determined the commission split in some instances
Consumer	I think there is also a conflict of interest in that the more you purchase a property for, the more commission the agent gets. The buyers' agent is doubly incentivized to get the buyer to pay a higher price. 1. A higher offer is now likely to be accepted so the real estate agent is then done and gets paid. 2. The agent receives more money if the offer is higher.
Consumer	It should be fair and everyone should know ahead of time. The buyers' agent could influence the buyers not to purchase solely because they don't like the split.
Consumer	Does that happen? [do listing agents determine fee split]

Table 7 Continued: Common Survey Feedback Regarding Fee Splits	
Consumer	Could be, if the offered split is low and provides less incentive for them to mention a house to potential buyers. Don't think it was an issue for us
Consumer	It should obviously be 50-50. the listing agent should not determine the split.
Consumer	The realtors are all in each other's pockets. They only want the sale to close so they get paid. The selling agent should not get to monkey with the split. Should be a flat fee. If the selling agent puts a low split, the buyers agent will not show the buyer the property- this is not a fair process for the buyer
Consumer	I didn't know that [fee split] was negotiable.
Consumer	DEFINITELY ! THIS SHOULD END
Consumer	Fees paid on behalf of the buyer should be clear, otherwise it's a license to STEAL!
Consumer	Yes. I think there should be a way of paying the buyer's agent that isn't a percentage of the sales price so that they aren't incentivized to encourage their clients to offer a higher amount than is necessary to close the deal.
Consumer	They should only get commission from the party who hired them
Attorney	Despite receiving mandatory disclosures, they really don't get the difference between client level representation and customer level service. In their zeal to keep customers from going out and getting their own representation (thus protecting a listing agents claim to a 100% commission), the agent does not really advance the cause of educating the consumer. However, rules are limited in their ability to control ethics and over time I can see things improving, slowly. I'm happy with that progress
Attorney	My only concern here is that there are still some old school agents out there who feel like they own their customers and actually end up discouraging them (subtle style) from engaging an agent to represent them as buyer. I PRAISE THE TREND of having more buyer representation, but often the fee being offset by seller or seller's agents is confusing to a buyer
Attorney	Absolutely not. They encourage Listing agents to try to talk Buyers out of getting their own broker, since that cuts their fees in half. They also often suggest cash back to the Buyer from Seller so the purchase price is higher, and then they collect a fee based on the higher price. I push back about this, and have had a couple of brokers who have refused to work with me if I don't allow them the higher commission
Attorney	Again, it depends. Most of the time, a buyer understands that their realtor's commission comes out of the commission the seller pays. But not always.
Attorney	I am convinced they do not recognize the full import of the "split-no split" decision. But this is not the fault of the rules. The rules clearly require agents representing sellers to discuss this decision and then to implement it as part of their service agreement (and ultimately through the MLS). I view all of this as being a logical transition between a time when buyers were left totally in the cold, and the emerging trend to have buyers represented
Attorney	Some do, but many still do not understand either the fee split or what happens when both realtors are form the same firm

Table 7 Continued: Common Survey Feedback Regarding Fee Splits	
REC Licensee	The system allows the Realtors Association to control the commission dispute process. Instead of following the precedent set by the Vermont Supreme Court for the "law of procuring cause", the Realtors Association and the MLS dispute process puts customers and the public at a competitive disadvantage by locking them into relationships for which they did not intend to engage. Most agents will tell a buyer that if they show them a property once under Vermont law they are the "procuring cause" of the sale, which is not the law set by the precedent of the Vermont Supreme Court. The mandatory arbitration makes it so that any firm challenging the Realtors Association and their intentional misinterpretation of the law of procuring cause is silenced by their current dispute process.
REC Licensee	Many firms offer the "real" commission to "sub-agent" or "sub-agent type" on the MLS listing sheet, and a very small commission to a buyer's agent. That small commission is generally fictional, because they will pay the "real" commission to a buyer's agent, if that buyer's agent brings about the sale to a buyer whom the listing agency has not previously shown the house. What they are doing, is using a fictional interagency compensation offer in order to enforce the legally-flawed theory that Procuring Cause is established by "first across the threshold," rather than by who has initiated an unbroken chain of events which brought about the sale. If the buyer calls an agency, makes an appointment on the phone to see their listing, and then decides that they would never make an offer through the listing agent but only through a buyers agent of their own choice: then that " first across the threshold" agent did not initiate an unbroken chain of events leading to the sale, and therefore is not the procuring cause. (In fact, if the first time the buyer sees the mandatory disclose is when they meet the listing agent to see the house, it may be that they had not even realized that they can have a buyer's agent, until after it is too late because they have gone "across the threshold" with the listing agent. It would not be too late if the Commission would actively take measures to correct this common practice of playing with the commission in order to discourage buyer agency.) I suspect that the Commission does not understand the legal doctrine of Procuring Cause, and the Commission clearly looks the other way (perhaps inadvertently) while the MLS interagency compensations offers are being manipulated to restrain trade and discourage & deprive the ability of members of the public to retain their own agent to represent their interests. Has the Commission never wondered why so many listing sheets — from a variety of competing firms -- have very same, low number for the interagency compensation offer to a buyer's agent?

Table 8: Survey Feedback about agent Compensation based on sales price	
Consumer	Not really. When buying, it seems like no one has your interest in mind because everything is contingent on the sale price of the house. Everyone is working for the seller to get the highest price possible. No one is working to support the buyer.
Consumer	Of course all real estate agents end up working for the buyer wanting to please the buyer because that's where the money comes from.
Consumer	General feeling about real estate people is they only know what interests them and have experienced. Our closing had issues and the agent could have and should have explained some things better - in the end it was all about making the sale.
Consumer	They were working in their own interest.
Consumer	She just wanted her commission
Consumer	we felt they were working for a profit and pushed us into accepting the first offer. She even said it would be unethical to wait to another even though we had 48 hours to respond
Consumer	I felt like he was really just representing himself trying to get us to pay the highest price and rush us through the purchase and inspection process. It seemed like he was working with the inspector to just get it all done.
Consumer	It appeared she was was working only with the buyers broker in order to secure their commissions. We were wondering if she was trying to sabotage us at various points. We've bought and sold many properties with ease- This realtor made this sale worse than hell.
Consumer	our real estate agent , did not look after our interest she just wanted house sold
Consumer	The main concern that the broker had was the commission they would earn.
Consumer	They prioritized making the sale go smoothly over addressing my needs.
Consumer	They were working for the seller… But did hint at some information about price negotiations that were helpful to me
Consumer	Frankly, she felt put out only wanting to show a few properties and complained how much work it was to set up. She made me feel like I was being difficult. I was looking at $400,000 homes. And neither she or listing agent (who never showed up) were willing to walk boundary lines on land
Consumer	I didn't feel like he was working for me -- I felt like he was just trying to get his commission and get us to pay a high price and rush the process to get it done.
Consumer	Yes and No. I was an out of state buyer and I bought a house sight unseen and relied on the realtor for an honest representation of the property. Problems arose when bargaining for the sale price. The realtor representing the seller and my realtor were unwilling to try to negotiate a lower price. This led to me buying a house for more than it was worth.
Consumer	In most areas, the real estate agents cooperate with each other so as not to create an adversarial climate. They collaborate and compromise on pricing and then pressure both the buyer and seller to accept the deal. In my case, both agents made extreme efforts to keep me from talking directly to the buyers.
Consumer	Compensation should not be tied to sales price, at least on the buyers side. Fees should not be so high as the job has changed so much Spence they were set
Attorney	Too often, people are just told what they need to sign, and not what it means. The Brokers often encourage clients to sign P&S agreements with cash back for closing costs and then the Broker ends up trying to get commission on the sale price, not the sale price minus the cash back, for example. The commission system means that they get more money if they craft contracts in certain ways.

Table 8: Continued: Survey Feedback about agent Compensation based on sales price	
Attorney	When they charge commission on the total sale price when there is a Seller contribution
Attorney	I am aware of Agents advising clients they can't back out of a P&S (even when there is cause) because the agent wants the commission.
Attorney	Many (but not all) agents believe that their job is done when the Purchase and sale agreement is signed, and take no actions to complete the sale, they just want their commission check.
REC Licensee	Vermont has no guidelines for multiple offers, which are many of the problems. This is where agents can and do really screw people over. I offer Maine guidelines, they have similar agency law....this really needs to be written out.

Table 9: Survey Feedback regarding Designated Agency	
Consumer	I do not feel that brokers should have "both sides" of the deal. I understand that they are obliged to tell the buyer that they represent the seller. But, in my experience, they end up (perhaps unconsciously) wanting/pushing the deal to go through, so that they have both sides of the deal, and this doesn't end up necessarily representing the seller's best interests. In many states, this is prohibited.
Consumer	Both agents worked for same agency. Said that's the only reason we got our house.
Consumer	It was stated up front how commission would be split. In my case all agents were from the same agency. That felt a bit of a conflict. I felt seller brokers deferred to buyer broker. Is he the golden boy in the office?
Consumer	Our seller was the same agency as us (buyers) I felt as though they only had the sellers interest in mind
Consumer	Brokers from the same agency should not rep both buyer and seller.
Attorney	Permitting a single agency to represent a seller and a buyer ignores an inherent conflict of interest. The argument brokers have provided to justify the practice has everything to do with profits and little to do with protecting the consumer the broker represents. The brokers tell that the old rule meant brokers lost an opportunity for profit. Brokers have told me that they are good people and would not be affected by the conflict of interest. Lawyers could make the same argument, and have. I think the real estate commission lacks insight into how conflicts of interest work insidiously, undermining the public's confidence that the broker is working in the best interests of the buyer or the seller.
Attorney	In that you allow the same firm to essentially represent both sides. That allows the large firms to grow while pushing out the smaller firms.

Table 9 Continued: Survey Feedback regarding Designated Agency	
Attorney	Allow a single firm to represent the buyer and and seller is an inherent conflict of interest. A consumer cannot trust a brokerage firm that represents both, especially when the broker is an employee of the firm. This is an example of profits over people. Paragraph 13 of the standard Purchase & Sale Contract distributed by the Association of Realtors is intended to protect brokers from their errors, omissions and misconduct, to the detriment of the seller and buyer who signed the Contract. Sellers sign a listing agreement, which contain protections for the agent and broker. If a buyer enters into a buyer-broker agreement, the agreement contains protection for the broker. Agents should not offer their client a P&S Contract which limits the liability of the other broker. To do so is a disservice to the broker's client. In one instance, when my client objected to Paragraph 13 and asked for its removal, the broker said the Paragraph could not be removed and would not be removed. The P&S Contract is a contract between buyer and seller, and only the buyer and seller should have control over the terms of the Contract.
Attorney	As stated earlier, this practice [dual agency] involves an inherent conflict of interest, especially when one or both of the brokers representing buyer and seller are employees, not owners, of the agency. This is an example of the real estate commission putting profits ahead of customers.
Attorney	They should not be able to represent both sides of a transaction.
Attorney	Much as attorneys from the same firm cannot represent the buyer and the seller due to a possibility or appearance of conflict of interest, designated agency looks like a conflict to many consumers and sometimes results in one, particularly where there is an imbalance of power between the parties (e.g., developer seller with multiple units to sell v. one-time buyer - agent will trend towards the developer due to more fruitful and/or longer relationship).
Attorney	the designated agency model does not serve the interests of either seller or buyer. It appears to only serve the interests of the real estate office engaged in it. Especially in Vermont in where offices are small it is difficult to preserve confidentiality so there is no way to represent both buyer and seller. Similarly it does a disservice to the Seller if information about their property is not distributed to all brokers in the office to sell the property listed with the office.
Attorney	This [designated agency] is an unavoidable conflict of interest. Surprised that this practice is allowed
Attorney	Absolutely not. I have worked with agents in these situations very frequently, and it is typically one agent that seems to handle everything since they are from the same office. Attorneys can't do it, and we get paid much less per transaction than agents. This has always worried me
Attorney	What they [consumers] don't understand is that because the agent only gets paid if the closing happens, there is a high motivation to push to closing by the agents. In certain circumstances this leads to an agent glossing over what might be a real problem.

Table 9 Continued: Survey Feedback regarding Designated Agency	
REC Licensee	Designated Agency is allowing a widespread abuse of Consumer protection advancing only the greed of those practicing it.
REC Licensee	I don't think it has much impact
REC Licensee	With the increasing development of Real Estate "Teams", I believe Ethics and Conduct can be compromised and Clients can be easily misled.
REC Licensee	Designated agency in large firms that pay a bonus for in-house sales is counter intuitive to both parties truly being represented properly due to the appearance of a financial benefit to the Agency.
REC Licensee	Have not seen it to be a negative.
REC Licensee	I also believe especially in a Designated agency "team" members should NOT be able to represent buyers when their team broker has the listing and the sale is reported under the broker. It should be Mandatory when a husband and wife or partner to partner team be disclosed up front and they should not be able to represent buyers on their significant other's listings.
REC Licensee	In my experience, very few agents fully and thoughtfully explain the VRCIDisclosure, so right out of the gate, the consumer is ignorant to the nuances of designated agency.
REC Licensee	The current representation of buyer/seller model I believe adversely affects very small offices
REC Licensee	it just makes it easier to represent a buyer and that's good
REC Licensee	Yes, it also opens up more properties to them. I work from home and dont even know more than 5 agents at my 200 agent company. It wiould be ridiculous to limit my buyers from seeing other KW agents listings, I think this rule is great.
REC Licensee	Some offices having offers on their listings from their agents are not being fair in presenting or advising their sellers correctly in order to keep the sale in house
REC Licensee	The recently adopted Designated and Non-Designated Agency rule has allowed real estate firms to pretend the consumer is being protected. However that not the case. At minimum the consumer is confused by what the terms mean. In reality a fantasy has been created that a buyer and a seller can be fairly represented by two different agents in the same office. That is simply not the case. As a principal broker for a Non-Designated Agency firm I am frequently communicating with consumers who after the fact feel they were "duped".
REC Licensee	The present limit to single agency and designated agency is a distinct disadvantage to small firms and an unfair competitive advantage to larger firms.

Table 9 Continued: Survey Feedback regarding Designated Agency	
REC Licensee	Designated Agency allows for real estate companies to keep more deals "in-house" by being able to offer buyer and seller representation within the company. But this is merely a convenience and money grab for those agencies, and not in the best interest of the consumer. For example, agents have access to their company's seller client files electronically, but they can the represent a Purchaser without any conflict of interest having access to those seller client files...
REC Licensee	brokers are attempting to keep deals 'in house'; which may not be in the best interest of the clients.
REC Licensee	With the increasing development of Real Estate "Teams", I believe Ethics and Conduct can be compromised and Clients can be easily misled. I do not feel Agents on the same team can effectively represent different clients in the same transaction.
REC Licensee	absolutely. It has been a great improvement for consumers.
REC Licensee	Designated agency is not the way Vermont Realtors should be representing our customers or clients. People talk! In an office situation in particular, people talk. Even if inadvertently an agent lets out a bit of information a client's position can be compromised. We would hope that all agents would be scrupulously honest but in a 'Designated' office are not the listing agent and the buyers agent trying to sell that property and make a commission? Our agency has elected to go the route of non-designated agency .... let's avoid the temptation. Please change these agency rules
REC Licensee	Yes, GREAT improvement. It is a much more accurate reflection of who consumers understand the agents to be. "imputed knowledge" was a lawyers term that consumers never got.

Table 10: Feedback on Pocket Listings	
Consumer	My home was under contract before it was ever listed on the MLS and I believe I did not receive fair market value due to a poor BOI and was also pressured into sales concessions.
Attorney	Unwillingness to list and aggressively market properties for full value. There should be more transparency with respect to whether or not broker has access to or knowledge of a stable of buyers that will potentially yield a quick sale. The tails on contracts (additional period of responsibility for fee after listing ends) are not well understood.
REC Licensee	Sellers who list their property and go under deposit before the property had the benefit of full market exposure and sold in-house. We see numerous property enter the MLS system on day one as pending.

Table 11: Common Feedback about Service Options and Compensation Rates	
Consumer	6% is punitive. We attempted to negotiate the fee to no avail. In the digital world brokers offer less value other than access the MLS system
Consumer	Brokers should be required to itemize what goes into their fee and provide paper trail. Buyers should also start paying their broker fee, the tradition of a seller paying all is outdated and aligns with a different time when homes appreciated at a very different rate, home buying today is not a guaranteed money maker and sellers should not foot the entire bill.
Consumer	The internet and our attorney did 95% of the work. Realtor fees need to start reflecting that. it's not 1985 anymore.
Consumer	Times have changed, people find the house they want online and ask the realtor to show them what they've already seen. Percentages are ridiculous considering most work is done by buyer now and everything is online.
Consumer	See previous comment. The VT brokers hold the line on their 6% fee. There simply isn't any price competition in the marketplace other than going FSBO
Consumer	After selling my own home (and tracking my time investment carefully on my phone), I would have to pay myself over $200/hr to justify the commission at 3%. In the case of the purchase, I would never do that again, or if I did, I would negotiate a flat rate. The advice provided was lacking in expertise or knowledge about key building systems, design flaws, and inspection options in our agents primary territory and type of construction.
Consumer	No, we believe it would have been [easy] for us as buyers and sellers to do the process on our own a realtor is nothing more then a middle man that we felt caused hard feelings between sellers and buyers, once we got to know our buyer we realized he was amazing but we got to know him without our realtor knowing it was like they didn't want us to talk to each other it was horrible
Consumer	Given that our house was under contract within 5 days of it being posted, it seemed like the fee was a bit high. I realize it probably averages out but it's not like the house was on the market for months with a lot of potential buyers. Could there be some sort of sliding scale depending on variables?
Consumer	Reduce commissions or make it more transparent and at the choice of seller and buyer. I would willing pay for extras, but only if they delivered value
Consumer	Not sure if this is due to regulations or not, but the entire process was set up to make us and the buyer adversaries. We were not allowed to have any contact or discussion, and many messages that we tried to send to the buyers were never passed along. The lack of communication and the adversarial structure created a lot of frustration and loss on both sides

Table 11 Continued: Common Feedback about Service Options and Compensation Rates

Consumer	I feel that fees should be a la cartel for services performed. Ex. Show me x number of houses, fee is x. Paperwork to sell is x, etc. Then you can select the services that you want and need. There is almost no need in Chittenden county at this point to have a realtor who commands tens of thousands of dollars, when houses fly off the shelves with little to no work
Consumer	Real estate agents commission is OVERpriced for the amount of work they do - its hurting the economy.
Consumer	Reduce commissions or make it more transparent and at the choice of seller and buyer. I would willing pay for extras, but only if they delivered value
Consumer	I wish there was more variance in fee based on the amount of work the brokers put in: ie different for a buyer you have to help for months and months before they find a house, and less for people who do most of their own research and just need help at the end
Consumer	I feel they are very high for the work involved. Given that we (and most folks) are able to peruse the listings online just as well as the agents, and in fact mostly scanned them and then asked for showings ourselves, I feel the agents job responsibilities have shifted since these percentages were set. The percentage of sales price model also encourages both the buyers and sellers agents to settle at a high price, which is definitely against the best interest of the buyers
Consumer	Almost, but the rise in value of a home far exceeds the extra requirements of realtors (comparing to 30 years ago). In fact buyers can look on line and preselect houses saving realtors time. Their knowledge of the details of the paperwork is worth a lot as well.
Consumer	I would much prefer you also have a Transactional Brokerage category as they do in so many states which limits seller and buyer fiduciary.
Consumer	I would prefer a flat rate as is done in NYC and CA increasingly
Consumer	When listing was not 3% our broker asked for remaining amount from us- buyer/client unaware of commission fee on listing
Consumer	They were explained up front but it was still a shock when closing cost me over $11,000
Consumer	Brokerage fees were not explained in detail.
Consumer	Our personal attorney was more helpful than either of the brokers
Consumer	Fees yes. Some of the terms in the contract about what happens if the house sells after the contract expires and the agent getting some commission (section 6, I think it was) were not clear. They need to be simpler.
Consumer	They were separated into so many different categories, I wished that everything for each distinct office/person had been summed up at the end to see where in fact all of the closing costs were going without having to do that mathematical legwork myself. Especially given that the document was probably 15 pages long.
Consumer	Some brokers wanted 6% and would require the buyer to make up 1% if the seller wouldn't pay it. I only signed a broker agreement with an agent that agreed to 5% because of this
Attorney	Clients never seem to know what is included in the fees.

Table 11 Continued: Common Feedback about Service Options and Compensation Rates	
Attorney	There has been a general unwillingness and inflexibility with regard to costs and fees. Percentage fees ought to be negotiable especially where buyer and seller brokers inhabit the same entity. Also the trend to having a seller pay buyer's closing costs - an often ill defined item - is not well understood and burden some, especially when there a mortgage broker fee added in. This cost shifting needs to be better explained and understood before contracts are finalized.
Attorney	There is confusion here and the sellers don't know that fees may be negotiated. Fees are high
Attorney	Generally speaking, but it might be more transparent if the standard P&S included the commission information within the P&S itself and not as part of an addendum. My experience is that realtors don't typically share the commission addendum/statement when sharing the P&S- usually have to ask for it to be able to verify
Attorney	Most listing agreements do spell out a commission rate, but buyers' side and the attorney never see them. The contract itself may or may not spell out commissions and how commissions may change due to seller concessions or fees incurred by the realtor. A simple commission section could be added to the VT Realtor contract to spell out the complete state of commissions and fees for all parties to the contract (and thus the attorneys who prepare the closing statements) to see
Attorney	I think this [transaction brokerage] is a wonderful idea. The incentive already exists for brokers to pursue closing as an end to itself as that is where broker fees get paid. Why not allow this formula where the parties agree to use it?
Attorney	If no compensation if sale does not go through so really working the sale not the best interests of parties
Attorney	I think this could be very useful. It would certainly make things go more smoothly for many transactions, however, I see a problem with it because if an issue does arise, then the neutral would have a conflict as they can't take sides, so how would they get paid? An attorney would need to withdraw completely.
REC Licensee	No competition. Market should be opened up. Beyond just one group. Yes- I 'm a member
REC Licensee	The Associations and MLS fix prices
REC Licensee	I am licensed in more than one state and have experienced transactional brokerage, which is far simpler for the layman to understand and far easier for the agent to navigate. In fact, in some other states single agency (ie, representing a seller or representing a buyer) is not practiced, despite being allowed, due to the liability that comes with it.
REC Licensee	If a willing buyer and a willing seller wish to engage a broker as a facilitator or a neutral party, they should have the ability to do so.

REC Licensee	Agency in VT should be expanded. Not all customers want buyer agency. Facilitation is what would make sense to add

Table 12: Survey Feedback that consumers don't know they can file misconduct complaints	
Consumer	From past experience over the years in Vt. It seems some real estate agents have their own set of rules concerning sales of homes. Hind sight wish I known about the Complaint option with OPR.
Consumer	The How to file a Complain information link should be clearly printed on the closing papers. Therefore if you find a problem "after" the closing, and find out one of the brokers knowing was involved in a "cover up" of the problem you can submit a complaint. I didn't even know this information was available.
Consumer	Question 14 reminded me that no one else is aware they can make complaints on bad agents. Overall I think many agents are probably holding good intentions but I have identified some with bad intent and confirmations from other locals who've had the same experiences. Most other agents I believe need more support to advance and improve this expertise in good practices but do not require punitive action.
Attorney	The process to do so is not well known - this should be made part of the broker contract and listing agreements, much like every mortgage loan package has a notice about how to file a complaint due to unlawful discrimination.

Table 13: Survey Feedback that professionals do not file complaints against brokers/salespersons	
Attorney	The regulatory environment is likely satisfactory, but the lack of enforcement or self-enforcement reduces the public's protections.
Attorney	Agents are often the first point of contact for Buyers and Sellers, and if an attorney files a complaint, then the attorney will no longer receive any referrals. I have seen this happen to an attorney, who ended up changing his practice to focus more on Probate law after getting shunned by all real estate agents by filing a complaint against one.
REC Licensee	We continue to be a self policing industry which can work if the process of issuing a complaint on another agency wasn't so comprehensive and could be anonymous. Smaller firms risk retaliation when issuing a complaint since the larger companies control a large majority of the listings and who's agents seem to have little supervision or guidance when it comes to practice or advertising/self promotion.
REC Licensee	In commercial real estate. You would never work again if you reported another broker.
REC Licensee	If you are a small agency, you are not going to complain about one of the big agencies. If you do, your listings will be boycotted and not shown.
REC Licensee	There is probably a feeling that agents don't want to turn other agents in because then you can be marked, or your agency can be marked for retaliation. How many complaints were filed for agents showing homes to out of staters that should have been quarantined for instance?

REC Licensee	I think that agents often do not file complaints against another agent or Broker because of fear of retribution. I have heard it said, "because we have to work together (on other sales) ..." is the reason.
REC Licensee	As agents, if you file a complaint against another agent, you could negatively impact your future clients if you're submitting offers, etc. and don't have a good working relationship with the other agent. If initial complaints could be submitted without the name of the person filing the complaint, this may change
REC Licensee	I filled out my first complaint in 22 years against another Agent/Broker for breaking the NAR Code of Ethics
REC Licensee	I chair professional standards for VAR and I speak with a lot of folks that have or have had problems and to a person I have never heard one say that they would go to the state for help.
REC Licensee	I hear a lot of complaints, and not once have I heard someone from the public bring their complaint to the OPR. I am not sure if it is because they are afraid or don't want the person to know, or they are not aware of their rights, or aware they can make a claim. I wish more did, as I hear a lot of stories that are very unprofessional
REC Licensee	Depends on how serious the allegation is and how it is handled through the Local Board with presentation to the Grievance Committee and then to Professional Standards Committee for a hearing if complaint deemed actionable. Findings can then be referred to OPR if indicated
REC Licensee	State and national Realtors associations and online services (Zillow, etc) are self-serving and blur the accessibility and role of VT RE Commission
REC Licensee	Licensed individuals who are realtors are required to work within the Realtor organization's ethics committee to resolve issues. I suspect the largest number of complaints originate with part-time agents and brokers.
REC Licensee	I've only had one interaction with the Commission when I reported another agent for many violations and the back lash I received from the agent wasn't worth it, so I'm not sure I would do it again

Table 14: Feedback concerning the disciplinary process	
Consumer	I once did send in a written complaint on an agent who wrote a contract with another purchaser AFTER my offer and contract had been accepted. I was told by agent the sellers changed their mine, and I learned later they turned around and sold to someone else (through my agent) it was a higher price. The regulatory commission did nothing. I, though I guess there was (was there.) some formal process. She got a slap on her wrist and that was it.
REC Licensee	Real estate agents generally know the OPR has recently taken a lackadaisical approach to complaints and otherwise does not take complaints seriously. Indeed OPR broadcast a letter to real estate agents a few years ago stating it was taking a more education based approach to enforcement rather than a punitive approach. That was a great mistake and has led real estate agents to believe they can push the limits of the regulations and in many cases ignore the regulations altogether.

REC Licensee	The resource for filing a complaint I think is well understood. Brokers tend to not file complaints because 1) the impression that competitors complaints can be framed as motivated to create competitive annoyances and 2) the typical punishments resulting from violations (such as "additional professional education") are basically less than a slap on the wrist so perpetrators don't have any real fear of an REC complaint
REC Licensee	As Realtors, we have our own arbitration system which we utilize before OPR. In reading the newsletters which I used to receive from the Commission, and in watching a few meetings, the public seems to utilize OPR to file complaints at times.
REC Licensee	Fines are too low to be a disincentive for poor behavior
REC Licensee	I have never seen or heard of any broker, salesman or agency taken to task for being bad actors. A slap on the wrist and business as usual
REC Licensee	I have witnessed violations that are not punished. The Realtor Association takes action but I have seen how they fail to find justice.
REC Licensee	Even if they are reported there are no consequences, i.e., loss of license to sell real estate. Why not?

Table 16: Common Feedback regarding property disclosures	
Consumer	The house was for sale by owner and the owner was not forthright. I feel the law is not strong enough on requiring disclosures for sales, particularly for unrepresented sellers. The broker and seller should ultimately be responsible for disclosures about the property.
Consumer	The broker and seller should ultimately be responsible for disclosures about the property.
REC Licensee	There are also no real property disclosure requirements, which can harm buyers.
REC Licensee	Seller disclosures should be mandatory, not optional, for ALL properties including vacant land. This document forces the seller to be honest about what they know about the property. So many cases have arisen where the seller was aware of an issue but refused to complete a disclosure and agents/brokers are the ones left dealing with the nightmare days/months after the sale.
REC Licensee	Seller property disclosure requirements should be more comprehensive to protect buyers

Table 17: Common Survey Feedback about Broker and Salesperson Credentials	
REC Licensee	The first years of a licensee's practice benefit greatly from broker supervision
REC Licensee	The Principal Broker system is good
REC Licensee	You wouldn't want a first year "salesperson" running the Company.
REC Licensee	as in any other business/profession, entry-level people have much to learn that is not in the textbook; and this requires the actual on-the-job experience
REC Licensee	Brokers should have a higher level of experience, and education. They should also be able to provide a supervisory function for less experienced agents
REC Licensee	The consumer wants to know they are working with a professional. The title is not important
REC Licensee	Not really. It just means they have taken a course and passed another test. Some Brokers have less experience than salespeople
REC Licensee	Only if the broker is the managing broker or owner
REC Licensee	most people don't know the difference between the two
REC Licensee	don't see much difference.. Have been both
REC Licensee	we all do the same work
REC Licensee	It is antiquated. A salesperson could have more years of experience than a broker. The only reason to have a broker's license would be to own your own practice or to be the managing broker.
REC Licensee	if you're a broker in a firm and not managing, what's the point of being a broker?

Table 18: Common Feedback about CE Courses	
REC Licensee	10% of the educational classes are worthwhile. Brokers keep having to complete more hours of education and the classes keep offering fewer credits. The teachers are now able to make a business out of just giving these classes and they love the fact that the hours required are increased and credits are fewer. It is a broken system. We are brokers are so busy that trying to attend a 4 hour class several times a year has become more of a hurdle compared to helpful. IF we learned anything it might be worthwhile.
REC Licensee	I feel that commercial realtors should be allowed to take CCIM and SIOR certification classes, and have other options, since commercial CE aren't offered
REC Licensee	24 hours for a broker is far to onerous, there are too few options for classes. I find myself taking a lot of the same classes every two years. 12 plus core is plenty
REC Licensee	For some things it is good to have refreshers. But it would be nice to have some new areas

Table 18 Continued: Common Feedback about CE Courses	
REC Licensee	However, after more than 40 years as a licensee, I often end up having to take courses I have already taken multiple times, which is tedious and boring, plus a waste of money
REC Licensee	Huge waste of time. It is a money grab. I compare it to the test you have to pass to get your drivers permit. It is knowledge, but not at all relevant to actually being a good driver. But at least with driving you only have to take it once, not every other year you have a license. If people want to go ahead and take classes on ethics and different obscure topics, that is fine. But I do not believe it should be mandated
REC Licensee	I feel 24 credits are a bit much for Brokers. I have been doing Real Estate for over 45 years and think the cost and time to me is a waste of my time. When new regulations are instigated then i understand the need to take the course. Many of the courses i have taken over and over
REC Licensee	I find the online classes more challenging as you have to take the tests and don't get a certificate by just sitting in a chair for a specified time
REC Licensee	I would like to say yes, as I am a huge advocate of education and of striving to grow, evolve and continuing to be the best you can be in your profession. However, a lot of the classes are only mediocre and most of the most meaningful learning happens on the job and from colleagues. Please do keep offering CE classes, but make sure they are evolved. I would like to recommend one that addresses how important and vital it is to be a respectful "partner" in a transaction. Both the Buyers Agent and the Listing Agent should have an attitude toward each other that they are a team with a similar end goal in mind. That they help to guide their client with the most expertise, ethics and respect and also to try to be respectful and communicative to the other agent and work together toward a positive outcome. At times it feels as though we are in a courtroom and that the other agent has attitude, is rude or belligerent and it is their intention to intimidate you and your client. NOT the way it should be!
REC Licensee	It is needless busywork with no real added value. Any true real estate professional will challenge themselves to continually learn the areas where they have a weakness. Most agents I have to interact with are incompetent. If I died tomorrow, there is only one other agent out of the 140 plus agents in our county that I would be comfortable sending my family to. Most are either incompetent or only focus on their own profitability, not what is in their client's best interest.
REC Licensee	Many times a course would be helpful and does not get CE credits because the speaker can not justify to the VT real estate commission that it helps the consumer. Often I will take these courses for credit in NH and learn a great deal
REC Licensee	not always - not a lot to choose from
REC Licensee	redundant after so many years in the business
REC Licensee	Requirements for retired agents who cannot practice real estate except as referral agents seem not applicable
REC Licensee	Some of the CE is pretty easy to get, and isn't super challenging

Table 18 Continued: Common Feedback about CE Courses	
REC Licensee	Some of the classes are just not relevant in the current marketplace, but we have to take them just to "get credits". I think the mandatory classes are the most important and usually the most relevant, so that should be the only requirement, along with the ethics class
REC Licensee	Sometimes. But we should have a broader range of CE opportunities. This has improved in recent years. Sometimes agents take the courses just to get them done. In our firm, we offer a menu of courses that are relevant to their day to day practice. Not sure what other firms do. I do not think it would be smart to eliminate the requirement
REC Licensee	The education requirements for license renewal have become too extensive at 24 hours. It seems as though the requirements have been raised in recent years because the commission can do it, with little evidence that the additional time and expense does anything
REC Licensee	The number of hours required is extreme
REC Licensee	There should be a differential between Licensed agents and broker who strictly do commercial real estate and those who are residential
REC Licensee	There should be a sliding scale as new agents and brokers need knowledge based reinforcement however much of the content becomes redundant for professionals with many years of practice
REC Licensee	Three comments: 1. Some in-person classes are conducted in an atmosphere of "please don't ask questions or discuss anything because I am just reciting the course material as quickly as possible so that you can get your CE certificate and leave." 2. There is no control over licensees repeating the same course each cycle, rather than learning new material. I don't think you can do much about that, though, as sometime someone might repeat a course because they just need reinforcement. 3. It was a great idea to increase the number of hours required.
REC Licensee	To a certain degree. A lot of the learning is in practice. I would recommend to referring to the first two years as a salesperson as an apprenticeship
REC Licensee	Yes but as a land broker the continuing education offered is inadequate
REC Licensee	Yes, but the "Mandatory" class content should be updated. Less about the history of Act 250 and more about rules, regulations and guidelines that impact Real Estate today.
REC Licensee	Yes, but the Mandatory and Ethics class are the same thing every time. Maybe a few new sections. Continuing Education should be fun and improving you as a Realtor

Appendix D: Survey of real estate buyers and sellers

Vermont Office of Professional Regulation's Regulatory Review Survey: Real Esta Buyers and Sellers

Thank you in advance for taking the time to fill out this anonymous survey.

The Office of Professional Regulation (OPR) is reviewing the quality and effectiveness of State regulation of real estate brokerage, with particular attention to the administrative rules governing real estate practice, which have been in place since 2015. As part of this process, we are seeking feedback from Vermonters who have recently bought or sold a home.

Vermont Office of Professional Regulation's Regulatory Review Survey: Real Esta Buyers and Sellers

* 1. In what year did you most recently buy or sell your home?

* 2. Were you a buyer, a seller, or both?

- Purchase
- Sale
- Both

* 3. Did you use a real estate broker or salesperson to buy or sell your real estate? (If yes for any/all of your recent real estate transactions, please select "yes")

- Yes
- No

Additional comments (optional):

Vermont Office of Professional Regulation's Regulatory Review Survey: Real Esta
Buyers and Sellers

* 4. Overall, was the experience of working with your broker or salesperson positive?

- Yes
- No

Other (please specify)

* 5. Did you feel well represented by your broker or salesperson and that they were working in your best interest?

- Yes
- No

Additional comments (optional):

* 6. Were the role and responsibilities of your broker/salesperson clear?

- Yes
- No

Additional comments (optional):

* 7. Were the disclosures you received prior to buying/selling your home easy to read and understand?

- Yes
- No

Additional comments (optional):

* 8. Do you feel that applicable brokerage fees were transparent and adequately explained?

- Yes
- No

Additional comments (optional):

* 9. Do you feel that the brokerage fees paid by the parties to the transaction fairly reflected the value of the work contributed by the brokers and salespeople involved?

- Yes
- No

Additional comments (optional):

* 10. Were you aware of the commission split—the proportion of brokerage fees awarded to each agent—in your transaction?

- Yes
- No
- There was only one agent in the transaction (one party was not represented)

Additional Comments (optional):

* 11. Do you feel that the brokerage fees paid by the parties to the transaction fairly reflected the value of the work contributed by the brokers and salespeople involved?

- Yes
- No

Additional Comments (optional):

* 12. Do you feel there is a conflict of interest if the listing (selling) agent determines the commission split offered to buyers' agents, independent of the seller's input?

- Yes
- No

Additional Comments (optional):

Vermont Office of Professional Regulation's Regulatory Review Survey: Real Esta Buyers and Sellers

* 13. Do you feel that there are any specific changes which should be made to the regulation of real estate brokers and salespeople?

Yes

No

* 14. Are you aware of the process for submitting misconduct complaints against a real estate broker/salesperson to the State? (If not: How to File a Complaint with OPR)

- Yes
- No

* 15. Additional comments? Please use the space below.

To follow the real estate regulatory review process and for information about any upcoming public hearings and comment periods please visit: www.sos.vermont.gov/real-eastate-brokers-salespersons

Appendix E: Survey of REC licensees

Vermont Office of Professional Regulation's Regulatory Review Survey: REC Licensees

Thank you for taking the time to complete this anonymous survey.

The Office of Professional Regulation (OPR) is reviewing the quality and effectiveness of State regulation of real estate brokerage, with particular attention to the administrative rules governing real estate practice, which have been in place since 2015. As a licensed broker or salesperson, we value your experience and appreciate your participation in this process.

Regulatory reviews help us to understand what policies are working well and poorly, and reviews can provoke to innovative changes and smarter, more efficient government. The process the Office follows for regulatory reviews is further laid out in Vermont statutes.

Vermont Office of Professional Regulation's Regulatory Review Survey: REC Licensees

Section 1: Public Interest and Legislative Intent

* 1. Are you currently licensed as a Real Estate Broker or Salesperson?

- ◯ Broker
- ◯ Salesperson

Additional comments (optional):

* 2. Does the State's current regulation of real estate brokerage effectively protect the public from professional incompetence, misconduct, and commercial exploitation?

- ◯ Yes
- ◯ No

Additional comments (optional):

* 3. Does the current regulatory program unduly restrain competition or prevent real estate firms from serving their customers in the way firms and customers wish?

- ◯ Yes
- ◯ No
- ◯ Sometimes

Additional comments (optional):

* 4. Are real estate clients (buyers or sellers) currently unprotected in any significant way?

- ◯ No
- ◯ Yes

Yes (please explain how)

Vermont Office of Professional Regulation's Regulatory Review Survey: REC Licensees

Section 2: Conduct Enforcement

* 5. Do members of the public and the real estate professionals file complaints with OPR when they become aware of misconduct?

- Always
- Usually
- Sometimes
- Rarely
- Never

Additional comments (optional):

* 6. Are misconduct complaints, investigations, and hearings handled fairly?

- Always
- Usually
- Sometimes
- Rarely
- Never

Additional comments (optional):

* 7. When the Commission sanctions licensees, are the penalties appropriate?

- Always
- Usually
- Sometimes
- Rarely
- Never
- Additional comments (optional):

* 8. Are brokerage firms held accountable for the conduct of their agents?

- Always
- Usually
- Sometimes
- Rarely
- Never

Additional comments (optional):

Vermont Office of Professional Regulation's Regulatory Review Survey: REC Licensees

Section 3: Regulatory Burdens vs Public Protection

* 9. Do you feel that the continuing education requirements improve your practice?

- Yes
- No

Additional comments (optional):

* 10. Do you feel that the available continuing education offerings are relevant to your practice?

- Yes
- No

Additional comments (optional):

* 11. How do you feel about the quantity of continuing education required

- Excessive
- Appropriate
- Insufficient

Additional comments (optional):

* 12. Is broker supervision meaningful and effective in large firms?

- Always
- Usually
- Sometimes
- Rarely
- Never

Additional comments (optional):

* 13. Do we have regulations we do not need?

- No
- Yes (please specify which)

* 14. Do we need regulations we do not have?

- No
- Yes (please specify which)

Vermont Office of Professional Regulation's Regulatory Review Survey: REC Licensees

Section 4: Entry Requirements & Minimum Competency Standards

* 15. Are the entry-level educational and supervision requirements appropriate and necessary to ensure new licensees are ready to practice?

- ◯ Yes
- ◯ No (please specify how)

* 16. Regarding interstate mobility, are qualified salespeople and brokers easily able to endorse to/from Vermont?

- ◯ Always
- ◯ Usually
- ◯ Sometimes
- ◯ Rarely
- ◯ Never

Additional comments (optional):

Vermont Office of Professional Regulation's Regulatory Review Survey: REC Licensees

Section 5: Accessibility

* 17. Do most practitioners understand real estate regulation?

- Yes
- No (please identify common misunderstandings)

* 18. Do most consumers understand real estate regulation?

- Yes
- No (please identify common misunderstandings)

* 19. Do the differences between brokers and salespeople make sense in real-world practice?

Yes, because...

No, because...

Vermont Office of Professional Regulation's Regulatory Review Survey: REC Licensees

Final Questions (Optional)

Please share your views, if any, of the following broad policy questions:

20. Should the Real Estate Commission regulate leasing agents?

21. Should commercial real estate brokers be licensed separately from residential brokers and subject to different rules?

22. Has designated agency effectively protected consumers?

23. Is there any reason not to consider additional representation models?

Thank you for taking the time to complete this survey! To follow the real estate regulatory review process and for information about any upcoming public hearings and comment periods please visit: https://sos.vermont.gov/real-estate-brokers-salespersons/

Appendix F: Survey of Vermont Bar Association

Vermont Office of Profession Regulation's Regulatory Review Survey: Real Estate Attorneys

Thank you in advance for taking the time to fill out this anonymous survey.

OPR will be conducting a full review of the Vermont Real Estate Practice Act, 26 V.S.A. 2211 et seq. and the Administrative Rules of the Vermont Real Estate Commission. We seek input and participation in this regulatory review process, not only from licensed real estate brokers and salespeople, but also from those who work in the industry in other roles, including attorneys.

Vermont Office of Profession Regulation's Regulatory Review Survey: Real Estate Attorneys

* 1. Does the State's current regulation of real estate brokerage effectively protect the public from professional incompetence and misconduct in the field?

- Yes
- No
- Sometimes

Additional comments (optional):

* 2. Does the current regulatory program unduly restrain competition or prevent real estate firms from serving their customers in the way customers wish?

- Yes
- No
- Sometimes

Additional comments (optional):

* 3. Are real estate clients (buyers or sellers) currently unprotected in any significant way

- Yes
- No

Additional comments (optional):

* 4. In your experience, do members of the public and real estate attorneys file complaints with OPR when they become aware of misconduct?

- Always
- Usually
- Sometimes
- Rarely
- Never

Additional comments (optional):

* 5. Are misconduct complaints, investigations, and hearings before the Real Estate Commission handled fairly?

- Always
- Usually
- Sometimes
- Rarely
- Never

Additional comments (optional):

* 6. Does the participation of brokers and salespeople improve client understanding of the transaction process?

- Yes
- No

Additional comments (optional):

* 7. Based on your professional experience, do real estate brokers and salespeople maintain appropriate boundaries between the provision of brokerage services and the provision of legal advice?

◯ Yes

◯ No (When does this occur?)

* 8. Are brokerage fees transparent?

◯ Yes

◯ No

Additional comments (optional):

* 9. Do your real estate clients generally understand the fee split between agents in their transaction?

◯ Yes

◯ No

Additional comments (optional):

* 10. Do real estate clients generally understand the role of an agent?

◯ Yes

◯ No

Additional comments (optional):

* 11. Do agents consistently meet their fiduciary duties to clients?

- ◯ Yes
- ◯ No (when do they fail to do so?)

* 12. Do you find that designated agency—a model in which agents from the same firm may represent buyer and seller in the same transaction—serves the interests of consumers?

- ◯ Yes
- ◯ No

Additional comments (optional):

* 13. Some jurisdictions allow one broker to facilitate real estate transactions, assisting buyers and sellers without representing either. Would a neutral broker of this type, sometimes called a "transaction broker," be desirable in the Vermont real estate market?

- ◯ Yes
- ◯ No

Additional comments (optional):

* 14. Do you have any additional comments or recommendations for regulatory changes? Please use the space below.

To follow the real estate regulatory review process and for information about any upcoming public hearings and comment periods please visit: https://sos.vermont.gov/real-estate-brokers-salespersons/

Appendix G: Survey of Vermont real estate industry groups

Vermont Office of Professional Regulation's Regulatory Review Survey: Real Esta
Industry Groups

Thank you in advance for taking the time to fill out this anonymous survey.

The Office of Professional Regulation will be conducting a full review of the regulations for the real estate sector, specifically the administrative rules impacting brokers and salespeople. We are seeking feedback and input into this regulatory review process from not only licensed real estate brokers and salespeople, but also from those that work in the industry.

Vermont Office of Professional Regulation's Regulatory Review Survey: Real Esta Industry Groups

* 1. What is your role in the real estate sector?

- Appraiser
- Home Inspector
- Land Surveyor
- Other (please specify)
- Mortgage Broker
- Lender

* 2. Overall, do you believe Vermont real estate brokers and salespeople contribute to a fair and efficient market for real property?

Yes (in what way?)

No (in what way?)

* 3. Are there specific areas of representation or sales practice that you find to be problematic?

- No
- Yes (which?)

* 4. Are there specific areas of representation or sales practice that you find work well?

- No
- Yes (which?)

* 5. Have you ever witnessed brokers or salespeople failing to comply with the rules?

- Yes
- No

Additional comments (optional):

* 6. Have the actions taken by brokers or salespeople ever impeded your ability to carry out your job?

- Yes
- No

Additional comments (optional):

* 7. Do you feel the current system of broker and salesperson regulation adequately protects the public?

- Yes
- No

Additional comments (optional):

* 8. Are you aware of regulatory structures or approaches to real estate regulation in other states that should be considered in Vermont?

- Yes
- No

Additional comments (optional):

9. Do you have any additional comments? Please use the space below. (optional)

To follow the real estate regulatory review process and for information about any upcoming public hearings and comment periods please visit: www.sos.vermont.gov/real-eastate-brokers-salespersons

Appendix H: Survey of Vermont real estate consumer groups

Vermont Office of Professional Regulation's Regulatory Review Survey: Real Esta
Consumer Organizations

Thank you in advance for taking the time to fill out this anonymous survey.

The Office of Professional Regulation will be conducting a full review of the regulations for the real estate sector, specifically the administrative rules impacting brokers and salespeople. We are seeking feedback and input in this regulatory review process from not only licensed real estate brokers and salespeople, but also from those who interact with the industry.

Vermont Office of Professional Regulation's Regulatory Review Survey: Real Esta Consumer Organizations

* 1. Do you interact with brokers or salespeople in your operations?

- No
- If yes, in what capacity?

* 2. If you answered yes to Question 1, do you believe that brokers and salespeople contribute positively to fair and efficient real estate transactions?

- Yes
- No
- Other

Additional comments (optional):

* 3. Have you experienced, observed, or heard of instances of professional misconduct by brokers or salespeople?

- Yes
- No

Additional comments (optional):

* 4. Do you feel the public is adequately protected in real estate transactions?

- Yes
- No

Additional comments (optional):

* 5. Are your peers and the consumers with whom you work generally aware that misconduct by real estate brokers and salespeople can be reported to the Office of Professional Regulation? (Complaints may be filed here)

- Yes
- No

Additional comments (optional):

* 6. Are consumers or professionals involved in real estate transactions deterred from making complaints that should be made?

- No

Yes (in what way?)

* 7. Some jurisdictions allow one broker to facilitate real estate transactions, assisting buyers and sellers without representing either. Would a neutral broker of this type, sometimes called a “transaction broker,” be desirable in Vermont?

- Yes
- No

Additional comments (optional):

* 8. Are brokerage fees fair?

- Yes
- No

Additional comments (optional):

* 9. Are brokerage fees transparent to consumers?

- Yes
- No

Additional comments (optional):

* 10. Based on your professional experience, do consumers understand the role of real estate brokers and salespeople?

- Yes
- No

Additional comments (optional):

* 11. Are you aware of approaches to real estate regulation in other states that should be considered in Vermont?

- No
- Yes (please specify)

12. Additional comments or recommendations for improving State regulation of real estate brokerage? Please use the space below.

To follow the real estate regulatory review process and for information about any upcoming public hearings and comment periods please visit: https://sos.vermont.gov/real-estate-brokers-salespersons/

Appendix I: Limitation of Liability Contract Excerpts

The Vermont Association of Realtors (VAR) drafts standard contracts for use by its members. The limitation-of-liability clauses in standard representation agreements and purchase and sale contracts require that consumers, who are not typically represented by an attorney at the point of selecting an agent, sign away their rights to recover damages from real estate brokers, almost unconditionally. A standard representation contract provides:

***13. <u>Limitation of Liability</u>**. In recognition of the relative risks, rewards and benefits of this Agreement to **Owner** and **Listing Agency, Owner** agrees that **Listing Agency**, its agents, associates or affiliates, including designated agents, together with any other brokers, salespersons or brokerage firms acting as Broker's Agents pursuant to this Agreement shall in no event be liable to **Owner** either individually or jointly and severally in an aggregate amount in excess of the compensation to be paid to **Listing Agency** or such broker(s) pursuant to this Agreement or Five Thousand Dollars ($5,000), whichever is greater, by reason of any act or omission, including breach of this Agreement, negligence, misrepresentation, error or omission, breach of any undertaking or any other cause of action or legal theory unless such act or omission amounts to willful or intentional misconduct.*

Similarly, a standard purchase and sale contract provides:

13. ***Limitation of Liability:*** *Seller and Purchaser each agree that the real estate brokers identified in Section 31 hereof have provided both Seller and Purchaser with benefits, services, assistance and value in bringing about this Contract. In consideration thereof, and in recognition of the relative risks, rewards, compensation and benefits arising from this transaction to said real estate brokers,* ***Seller and Purchaser each agree that such brokers, their agents, associates or affiliates, shall in no event be liable to either Purchaser, Seller or both, either jointly, severally or individually, in an aggregate amount exceeding the total compensation to be paid to such brokers on account of this transaction or $5,000, whichever is greater, by reason of any act or omission, including negligence, misrepresentation, errors and omissions, or breach of any undertaking whatsoever, except for intentional or willful acts.*** *This limitation shall apply regardless of the cause of action or legal theory asserted against the real estate brokers unless the claim is for an intentional or willful act. This limitation of liability shall apply to all claims, losses, costs, damages or claimed expenses of any nature whatsoever from any cause or causes, except intentional or willful acts, so that the total aggregate liability of all real estate brokers identified in Section 31 hereof shall not exceed the amount set forth herein. Seller and Purchaser each agree that there is valid and sufficient consideration for this limitation of liability and that the real estate brokers are the intended third-party beneficiaries of this provision.*

Unless the client knows to demand removal of these provisions, they are standard fare. It is expected that one cannot buy or sell residential property in the State of Vermont without waiving the right to recover more than $5,000 in civil damages from any involved real estate agent or brokerage, no matter the act or omission, and no matter how much damage is caused by even the grossest negligence or recklessness. By way of context, consider that $5,000 is the jurisdictional cap in small claims court. An attorney requesting such a waiver of a party without separate representation would be in violation of the Rules of Professional Conduct that govern attorneys—even if the limitation were less audacious than those above.[1]

[1] Vermont Rules of Professional Conduct, Rule 1.8(h)(1), provides that "A lawyer shall not [] make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement."

Appendix J: Review of procuring cause

Procuring cause disputes arise when a broker feels they have a contractual claim to a commission from a client, and/or when multiple brokers feel entitled to the same commission split based on their work with a client. Notably, procuring cause disputes are a direct result of the current broker compensation model: brokers are only paid for successful transaction results, rather than for their time and effort. Additionally, procuring cause disputes are made possible because of the fee splitting practice between buyer and seller brokers. Procuring cause disputes would not exist if clients paid their brokers directly, for the time and efforts of their labor.

Determining procuring cause can be somewhat complex. Black's Law Dictionary defines procuring cause as "the cause originating a series of events which, without break in their continuity, result in accomplishment of the prime objective".[1] In other words, as the National Association of Realtors (NAR) states, "procuring cause in broker to broker disputes can be readily understood as the uninterrupted series of causal events which results in the successful transaction."[2] Accordingly, in Masiello Real Estate Inc. v. Michelle Matteo, the Vermont Supreme Court writes:

> ¶ 15. "Under Vermont law, to be entitled to a commission, a broker must show that he [or she] procured a purchaser ready, willing, and able to purchase at the price and upon the terms prescribed by the seller." Osler v. Landis, 138 Vt. 353, 356, 415 A.2d 1316, 1318 (1980). To shoulder this burden, the broker "must show more than incidental relationship to the resulting sale"—he must "show that his efforts dominated the transaction." Gilmer v. Fauteux, 168 Vt. 636, 638, 723 A.2d 1150, 1152 (1998) (mem.) (quotations omitted). ¶ 16. In Gilmer, for example, the broker called the buyer (Cersosimo) on the phone four times about the property over the course of years, but the buyer did not make an offer. Then, as the broker was negotiating with two other potential buyers, the owner sold the property directly to Cersosimo. This Court held that the broker did not procure the sale, observing that "[e]ven assuming that [broker] first interested Cersosimo in the property, that fact is not enough to demonstrate that he procured the sale." Id.; see also M.E. Walbridge Agency, Inc. v. Rutland Hosp. Inc., 123 Vt. 149, 154, 186 A.2d 179, 183 (1962) ("Although the broker's efforts need not be the sole cause of the sale, it is essential that they dominate the transaction and amount to something more than an incidental or contributing influence.").
>
> ¶ 17. A different result obtained in Ellis-Gould Corp. v. Kelly, 134 Vt. 255, 356 A.2d 497 (1976). There, a broker negotiated with a buyer and arranged several meetings between his brokerage firm's attorney and the buyer relating to zoning regulations and financing. Learning, however, of an imminent offer from another, and in view of the broker's leave on vacation, the buyer contacted the seller directly and bought the property. We held that, notwithstanding the broker's absence at the last minute, the broker procured the sale and therefore earned his commission. Id. at 257, 356 A.2d at 499.

[1] Garner, B. A., & Black, H. C. (2016). Black's law dictionary. Fifth pocket edition. St. Paul, MN, Thomson Reuters.
[2] NAR Arbitration Guidelines, Appendix 2 to Part 10. Available at: https://www.nar.realtor/code-of-ethics-and-arbitration-manual/appendix-ii-to-part-ten-arbitration-guidelines

¶ 18. Under the undisputed facts presented in this case, broker was not the procuring cause of the sale. Broker indeed placed the original advertisement in Farm and Forest, which first drew buyers to the property. Broker also showed the property to Ms. Matteo between August and September 2015. But broker was unable to deliver an offer at that time. Then, between November 2015 and February 2016, broker sent follow-up emails to Ms. Matteo, but buyers were not able to make an offer because they had to sell their Massachusetts house. Broker again engaged buyers and seller when, in June 2016, Ms. Matteo renewed contact with broker. Broker emailed Ms. Matteo after she visited the property alone, but again broker was unable to deliver an offer following this wave of negotiations. Even the direct negotiations between seller and buyers between August and September 2016 did not result in an offer. Buyers were not ready to accept the $400,000 asking price and asked seller to consider a lower price. Additionally, between 7 September and November of that year, Mr. Nelson and Ms. Matteo were actively engaged with another broker and looking at other properties, going so far as making an unsuccessful offer on one of those other properties. It was not until a further wave of negotiations starting in November 2016 that the property was ultimately sold in January 2017.

¶ 19. The successful November 2016 wave of negotiations came after successive breaks in negotiations. They came after buyers had disengaged not only broker but even seller for months and pursued other properties. Before the last wave of negotiations, buyers were not prepared to proceed given the need to sell their Massachusetts home and given the $400,000 asking price on the property. We cannot say under these facts that broker "procured a purchaser ready, willing, and able to purchase at the price and upon the terms prescribed by the seller" within the tail period or that "his efforts dominated the transaction." Gilmer, 168 Vt. at 638, 723 A.2d at 1151-52 (quotations omitted).[3]

[3] Masiello Real Est., Inc. v. Matteo, 2021 VT 81, 215 Vt. 607, 266 A.3d 1243.

Appendix K: Vermont Real Estate Commission Mandatory Consumer Disclosure

[This document is not a contract.]
This disclosure must be given to a consumer at the first reasonable opportunity and before discussing confidential information; entering into a brokerage service agreement; or showing a property.

RIGHT NOW YOU ARE NOT A CLIENT

The real estate agent you have contacted is not obligated to keep information you share confidential. ***You should not reveal any confidential information that could harm your bargaining position.***

Vermont law requires all real estate agents to perform basic duties when dealing with a buyer or seller who is not a client. All real estate agents shall:

- Disclose all material facts known to the agent about a property;
- Treat both the buyer and seller honestly and not knowingly give false or misleading information;
- Account for all money and property received from or on behalf of a buyer or seller; and
- Comply with all state and federal laws related to the practice of real estate.

You May Become a Client

You may become a client by entering into a written brokerage service agreement with a real estate brokerage firm. Clients receive the full services of an agent, including:

- Confidentiality, including of bargaining information;
- Promotion of the client's best interests within the limits of the law;
- Advice and counsel; and
- Assistance in negotiations.

You are not required to hire a brokerage firm for the purchase or sale of Vermont real estate. You may represent yourself.

If you engage a brokerage firm, you are responsible for compensating the firm according to the terms of your brokerage service agreement.

Before you hire a brokerage firm, ask for an explanation of the firm's compensation and conflict of interest policies.

Brokerage Firms May Offer NON-DESIGNATED AGENCY or DESIGNATED AGENCY

- **Non-designated agency** brokerage firms owe a duty of loyalty to a client, which is shared by all agents of the firm. No member of the firm may represent a buyer or seller whose interests conflict with yours.
- **Designated agency** brokerage firms appoint a particular agent(s) who owe a duty of loyalty to a client. Your designated agent(s) must keep your confidences and act always according to your interests and lawful instructions; however, other agents of the firm may represent a buyer or seller whose interests conflict with yours.

THE BROKERAGE FIRM NAMED BELOW PRACTICES DESIGNATED AGENCY

I / We Acknowledge Receipt of This Disclosure

____
Printed Name of Consumer

____
Signature of Consumer Date

[ ] *Declined to sign*

____
Printed Name of Consumer

____
Signature of Consumer Date

[ ] *Declined to sign*

This form has been presented to you by:

____
Printed Name of Real Estate Brokerage Firm

____
Printed Name of Agent Signing Below

____
Signature of Agent of the Brokerage Firm Date

Appendix L: REC complaints and discipline data between fiscal years 2013-2022

Between fiscal years 2013 and 2022, the Vermont Real Estate Commission received 599 new professional misconduct complaints. During this same time, the REC closed 658 complaint cases, of which 67 resulted in disciplinary resolutions against real estate salespersons and brokers. These 67 disciplinary cases are comprised of 282 individual misconduct findings, of which the most frequent are inadequate client care, theft, and fraud.

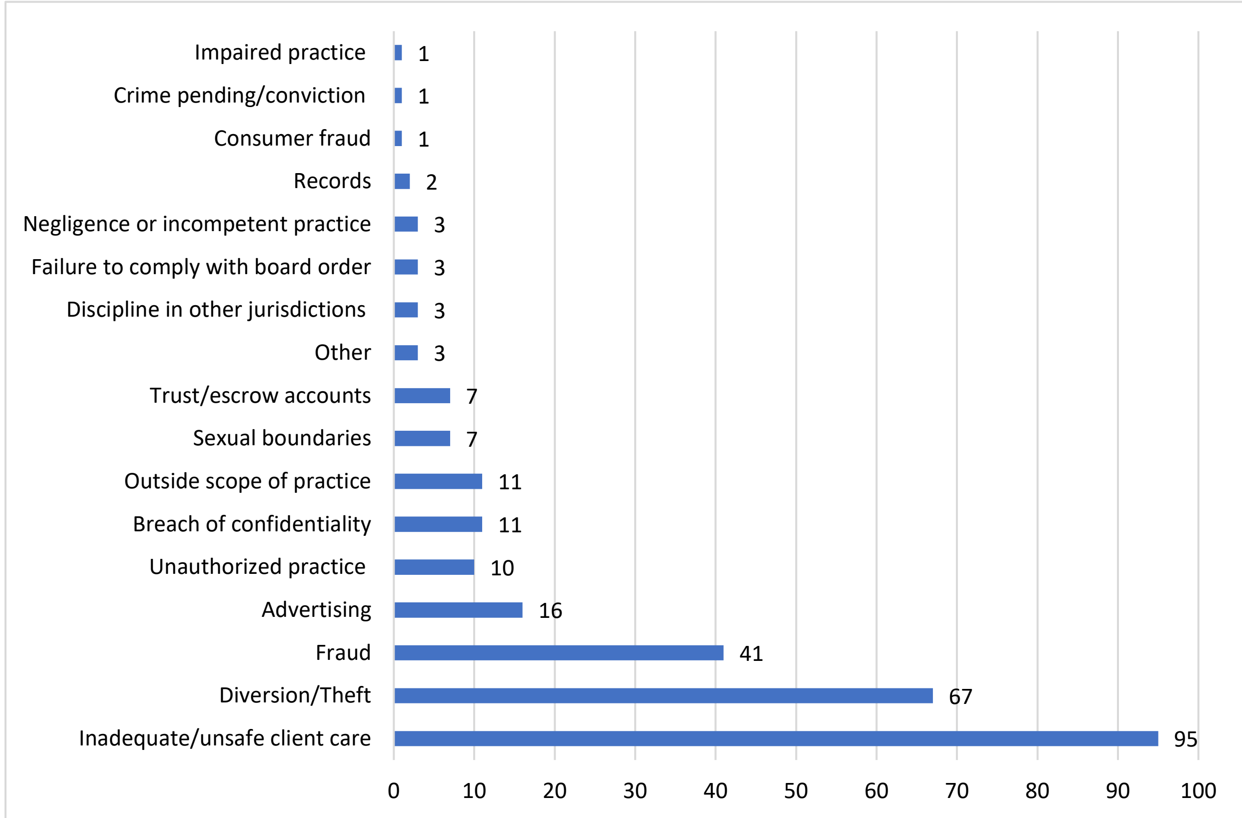
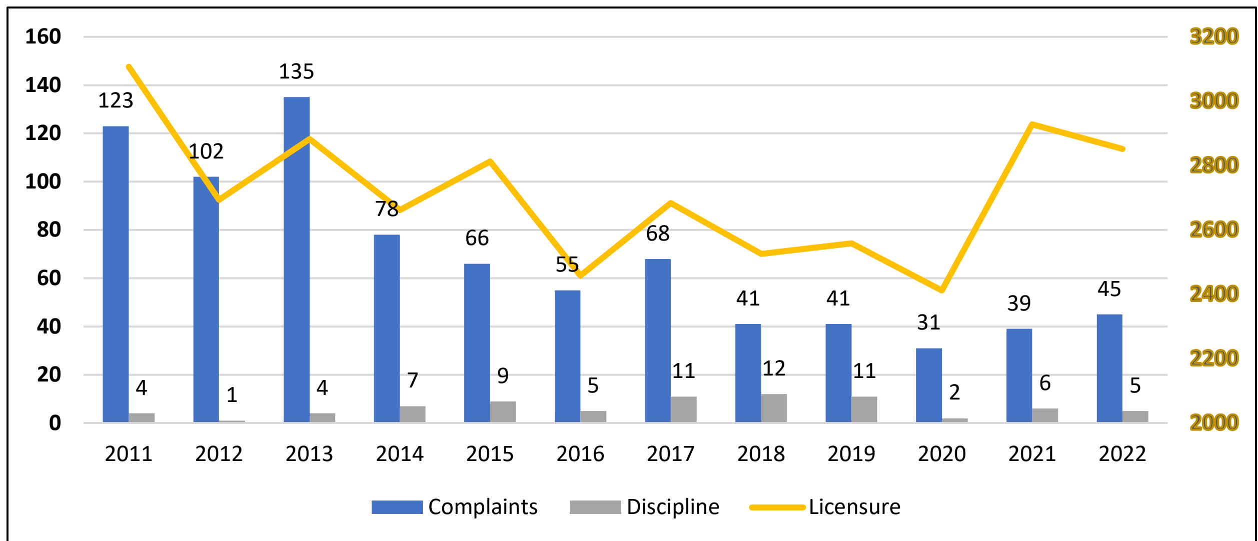


Figure 1: Findings of misconduct in REC discipline cases FY13 – FY22.

Within this data sample, there are no instances of the same professional repeatedly committing misconduct after receiving a disciplinary sanction from OPR.



Appendix M: USA v. NAR (2020: 1:20-cv-03356-TJK)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. NATIONAL ASSOCIATION OF REALTORS®, *Defendant*.	Case No. 1:20-cv-03356-TJK

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) ("APPA" or "Tunney Act"), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On November 19, 2020, the United States filed a civil antitrust Complaint against Defendant National Association of REALTORS® ("NAR") alleging that a series of rules, policies, and practices promulgated by NAR resulted in a lessening of competition among real estate brokers and agents to the detriment of American home buyers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. [Dkt. No. 1.]

The Complaint alleges that certain NAR rules, policies, and practices have been widely adopted by NAR's members, including the multiple listing services ("MLSs") affiliated with NAR that facilitate the publishing and sharing of information about local homes for sale, resulting in a

lessening of competition among real estate brokers and agents to the detriment of American home buyers. These NAR rules, policies, and practices include those that:

a. prohibit MLSs affiliated with NAR from disclosing to potential home buyers the amount of commission that the buyer's real estate broker or agent will earn if the buyer purchases a home listed on the MLS;

b. allow brokers for home sellers ("buyer brokers") to misrepresent to potential home buyers that a buyer broker's services are free;

c. enable buyer brokers to filter the listings of homes for sale via an MLS based on the level of buyer broker commissions offered and exclude homes with lower commissions from consideration by potential home buyers; and

d. limit access to lockboxes, which provide physical access to homes for sale, only to real estate brokers or agents working with a NAR-affiliated MLS.

At the same time the Complaint was filed, the United States filed a Stipulation and Order and proposed Final Judgment, which are designed to remedy the anticompetitive effects alleged in the Complaint. [Dkt. No. 4.] On November 20, 2020, the Court entered the Stipulation and Order. [Dkt. No. 5.]

Under the proposed Final Judgment, NAR is required to repeal, eliminate, or modify its rules, practices, and policies that the Division alleges in the Complaint violate the Sherman Act. Specifically, NAR and NAR-affiliated MLSs must not (1) adopt, maintain, or enforce any rule, practice, or policy or (2) enter into any agreement or practice that directly or indirectly:

a. prohibits, discourages, or recommends against an MLS or real estate broker or agent working with a NAR-affiliated MLS ("MLS Participant[1] or REALTOR®") publishing or displaying to consumers any MLS data specifying the compensation offered to other MLS Participants, such as buyer brokers;

b. permits or requires MLS Participants, including buyer brokers, to represent or suggest that their services are free or available to a home buyer at no cost to the home buyer;

[1] Under the proposed Final Judgment, an "MLS Participant" is defined as "a member or user of, a participant in, or a subscriber to an MLS." (*See* Proposed Final Judgment, Section II – Definitions.)

c. permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer broker or the name of the brokerage or brokers or agents; or

d. prohibits, discourages, or recommends against allowing any licensed real estate broker or agent to access, with approval from the home seller, the lockboxes of properties listed on an MLS.

As discussed in further detail below, the proposed Final Judgment requires NAR to take affirmative steps to remedy the competitive harm alleged in the Complaint. The Stipulation and Order requires NAR to abide by and comply with the provisions of the proposed Final Judgment until the proposed Final Judgment is entered by the Court or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment. [Dkt. No. 5.]

The United States and NAR have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof. [Dkt. No. 4-2.]

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendant and its Members

Defendant NAR is a trade association organized under the laws of Illinois with its principal place of business in Chicago. NAR is the leading national trade association of real estate brokers and agents. Among NAR's members are licensed residential real estate brokers, including brokers who provide real estate brokerage services to home sellers, home buyers, or both.

Among other activities, NAR establishes and enforces rules, policies, and practices that are then adopted by NAR's more than 1,400 local associations (also known as the "Member Boards") and their affiliated MLSs. These rules, policies, and practices govern the conduct of the

approximately 1.4 million MLS Participants or REALTORS® affiliated with NAR who are engaged in residential real estate brokerages across the United States.

An MLS is a joint venture among competing brokers to facilitate the publishing and sharing of information about homes for sale in a geographic area. The membership of an MLS is generally comprised of nearly all residential real estate brokers and their affiliated agents in an MLS's service area. In each area an MLS serves, the MLS will include or "list" the vast majority of homes that are for sale through a residential real estate broker in that area. In most areas, the local MLS provides the most up-to-date, accurate, and comprehensive compilation of the area's home listings. Listing brokers use the MLS to market sellers' properties to other broker and agent participants in the MLS and, through those other brokers and agents, to potential home buyers. By virtue of nearly industry-wide participation and control over important data, MLSs possess and exercise market power in the markets for the provision of real estate brokerage services to home buyers and sellers in local markets throughout the country.

As alleged in the Complaint, NAR's member brokers and agents compete with one another in local listing broker and buyer service markets to provide real estate brokerage services to home sellers and home buyers. The geographic coverage of the MLS serving an area normally establishes the geographic market in which competition among brokers occurs, although meaningful competition among brokers may also occur in smaller areas, like a particular area of a city, in which case that smaller area may also be a relevant geographic market.

NAR, through its Member Boards, controls a substantial number of the MLSs in the United States. NAR promulgates rules, policies, and practices governing the conduct of NAR-affiliated MLSs that are set forth annually in the *Handbook on Multiple Listing Policy* ("Handbook"). Under the terms of the Handbook, affiliated REALTOR® associations and MLSs "must conform their

governing documents to the mandatory MLS policies established by [NAR's] Board of Directors to ensure continued status as member boards and to ensure coverage under the master professional liability insurance program." (National Association of REALTORS®, Handbook on Multiple Listing Policy 2020 (32nd ed. 2020), at iii).[2]

NAR and its affiliated REALTOR® associations and MLSs enforce the Handbook's rules, policies, and practices as well as the rules, policies, and practices set forth in NAR's Code of Ethics. NAR's Code of Ethics states that "[a]ny Member Board which shall neglect or refuse to maintain and enforce the Code of Ethics with respect to the business activities of its members may, after due notice and opportunity for hearing, be expelled by the Board of Directors from membership" in NAR. (National Association of REALTORS®, Procedures for Consideration of Alleged Violations of Article IV, Section 2, Bylaws).[3]

B. Description of the Challenged Rules, Policies, and Practices and their Anticompetitive Effects

NAR's Handbook and NAR's Code of Ethics impose certain rules, policies, and practices on NAR-affiliated MLSs that affect competition for the provision of buyer broker services among those participating in a given MLS. In addition, some MLSs employ certain practices that are not directly required by a NAR rule or policy, but that similarly affect competition for the provision of buyer broker services among those participating in an MLS.

These rules, policies, and practices, discussed in more detail below, include: prohibiting an MLS from disclosing to potential home buyers the amount of commission that the buyer broker

[2] Available at *cdnr.nar.realtor/sites/default/files/document/NAR-HMLP-2020-v2.pdf*. (Last visited on 12/2/2020).
[3] Available at *https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/duty-to-adopt-and-enforce-the-code-of-ethics#:~:text=Any%20Member%20Board%20which%20shall,membership%20in%20the%20National%20Association.* (Last visited on 12/2/2020).

will earn if the buyer purchases a home listed on the MLS ("NAR's Commission Concealment Rules"); allowing buyer brokers to mislead potential home buyers into thinking that buyer broker services are free ("NAR's Free-Service Rule"); enabling buyer brokers to filter MLS listings based on the level of buyer broker commissions offered and to exclude homes with lower commissions from consideration by potential home buyers ("NAR's Commission-Filter Rules and Practices"); and limiting accesses to lockboxes that provide licensed brokers physical access to a home that is for sale to only those real estate brokers who are members of a NAR-affiliated MLS ("NAR's Lockbox Policy").

These rules, policies, and practices constitute agreements that reduce price competition among brokers and lead to lower quality service for American home buyers and sellers.

1. ***NAR's Commission-Concealment Rules***

NAR's Commission-Concealment Rules recommend that MLSs prohibit disclosing to potential home buyers the total commission offered to buyer brokers. All or nearly all of NAR-affiliated MLSs have adopted a prohibition on disclosing commissions offered to buyer brokers. This means that while buyer brokers can see the commission that is being offered to them if their home buyer purchases a specific property – a commission that will ultimately be paid through the home purchase price that the home buyer, represented by the buyer broker, pays – MLSs conceal this fee from potential home buyers.

NAR's Commission-Concealment Rules lessen competition among buyer brokers by reducing their incentives to compete against each other by offering rebates. These rules also make potential home buyers both less likely and less able to negotiate a rebate off the offered commission. NAR's Commission-Concealment Rules encourage and perpetuate the setting of

persistently high commission offers by sellers and their listing agents. This contributes to higher prices for buyer broker services.

As alleged in the Complaint, NAR's Commission-Concealment Rules can also lead to other anticompetitive effects. Because of the Commission-Concealment Rules, buyer brokers may steer potential home buyers away from properties with low commission offers by filtering out, failing to show, or denigrating homes listed for sale that offer lower commissions than other properties in the area. When potential home buyers can't see commission offers, they can't detect or resist this type of steering. Steering not only results in higher prices for buyer broker services, it also reduces the quality of the services that are rendered to the potential home buyer, making it less likely that the buyer will ultimately be matched with the optimal home choice. Fear of having potential home buyers steered away from a property is a strong deterrent to sellers who would otherwise offer lower buyer broker commissions, which further contributes to higher prices for buyer broker services.

2. <u>NAR's Free-Service Rule</u>

Because commissions are offered by home sellers – and home buyers do not pay their buyer brokers directly – it can be difficult for buyers to appreciate that they are nevertheless sharing with the seller the cost of the buyer broker's services. NAR's Free-Service Rule, which has been widely adopted by NAR-affiliated MLSs, compounds this problem by allowing buyer brokers to mislead buyers into thinking the buyer broker's services are free and hide the fact that buyers have a stake in what their buyer brokers are being paid. Under NAR's Code of Ethics, "Unless they are receiving no compensation from any source for their time and service, REALTORS® may use the term 'free' and similar terms in their advertising and in other representations only if they clearly and conspicuously disclose: (1) by whom they are being, or expect to be, paid; (2) the amount of

the payment or anticipated payment; (3) any condition associated with the payment, offered product or service, and; (4) any other terms relating to their compensation." (NAR Code of Ethics, Standard of Practice 12-1.[4])

Buyer broker fees, though nominally paid by the home's seller, are ultimately paid out of the funds from the purchase price of the house. If potential home buyers are told that buyer broker services are "free," buyers are less likely to think to negotiate a lower buyer-broker commission or to view the buyer broker rebate offers as attractive. In these ways, NAR's Fee-Service Rule likely leads to higher prices for services provided by buyer brokers.

3. NAR's Commission-Filter Rules and Practices

NAR's Commission-Filter Rules and Practices allow buyer brokers to filter MLS listings that will be shown to potential home buyers based on the level of buyer broker commissions offered. Once this filtering is performed, some MLSs further permit buyer brokers to affirmatively choose not to show certain homes to potential home buyers if the buyer broker will make less money because of lower commissions. Homes may be filtered out in this manner even if they otherwise meet the buyer's home search criteria. For example, buyer brokers or agents may use an MLS's software to filter out any listing where buyer brokers will receive less than 2.5% commission on the home sale. The buyer broker would then provide to his home buyer customer only those listings where the buyer broker would be paid a 2.5% commission or more if the home sale is completed.

According to Policy Statement 7.58 of NAR's Handbook, for example, "[p]articipants may select the IDX listings they choose to display based only on objective criteria

[4] Available at *https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/2021-code-of-ethics-standards-of-practice*. (Last visited on 12/2/2020).

including…cooperative compensation offered by listing brokers." (Handbook, at 24, Policy Statement 7.58; *see* NAR's VOW Policy, *id.* at 43 ("A VOW may exclude listings from display based only on objective criteria, including…cooperative compensation offered by the listing broker, or whether the listing broker is a Realtor®."))[5]

NAR's Commission-Filter Rules and Practices, which have been widely adopted by NAR-affiliated MLSs, are anticompetitive because they facilitate steering by helping buyer brokers conceal from potential home buyers any property listings offering lower buyer broker commissions. The practice of steering buyers away from homes with lower buyer broker commissions likely reduces the quality of buyer broker services and raises prices for buyer broker services, both at the expense of buyers.

4. <u>NAR's Lockbox Policy</u>

Lockboxes hold the keys to a house to allow brokers and potential home buyers to access homes for sale, with permission from the selling home owner, while continuing to keep the homes secure. Such lockboxes are typically accessed by a real estate broker using a numerical code or digital Bluetooth® "key" enabling the real estate broker to show buyer homes that are listed for sale.

NAR and its affiliated MLSs have adopted a policy and practice that limits access to lockboxes to only those real estate brokers who are members of NAR and subscribe to the NAR-affiliated MLS. (*See* Handbook, Policy Statement 7.31).[6] Licensed, but non-NAR-affiliated brokers are not allowed to access the lockboxes. Because only real estate brokers that are members

[5] Available at *cdnr.nar.realtor/sites/default/files/document/NAR-HMLP-2020-v2.pdf*. (Last visited on 12/2/2020).
[6] Available at *cdnr.nar.realtor/sites/default/files/document/NAR-HMLP-2020-v2.pdf*. (Last visited on 12/2/2020).

of NAR and subscribe to the NAR-affiliated MLS are permitted access to lockboxes, this policy and practice effectively deprives licensed real estate brokers that are not members of NAR from accessing properties for sale to show potential home buyers. This lessens competition for buyer broker services as real estate brokers that are not members of NAR cannot access lockboxes and show properties to their clients.

C. The Challenged Rules, Policies, and Practices Violate the Antitrust Laws

NAR's challenged rules, policies and practices violate Section 1 of the Sherman Act, 15 U.S.C. §1, which prohibits unreasonable restraints on competition. NAR's real estate broker members are direct competitors for the provision of listing broker and buyer broker services. NAR and its affiliated MLSs have widely adopted the challenged rules, policies, and practices. Adoption by NAR and its affiliated MLSs of these rules, policies, and practices reflects concerted action between horizontal competitors and constitutes agreements among competing real estate brokers that reduce price competition among brokers and lead to higher prices and a lower quality of service for American home buyers. *See, e.g., Realcomp II, Ltd. v. FTC,* 635 F.3d 815, 828-29 (6th Cir. 2011) (holding that association of real-estate brokers was a contract, combination, or conspiracy with respect to allegedly anticompetitive policies).

When adopted by NAR Member Boards, the NAR rules, policies, and practices alleged above and challenged in this action are horizontal agreements that govern and enforce the conduct of competing MLS brokers and agents that deny potential home buyers access to relevant information resulting in higher prices and lower quality for buyer broker services.

The NAR rules, policies, and practices challenged in this action have anticompetitive effects in the relevant market for local listing broker and buyer broker services in the United States

that outweigh any purported pro-competitive benefits. Accordingly, they unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment prohibits NAR and its Member Boards from undertaking certain conduct and affirmatively requires NAR to take certain actions to remedy the antitrust violations alleged in the Complaint.

A. Prohibited and Required Conduct

1. Commission-Concealment Rules

Paragraph IV.1 of the proposed Final Judgment prohibits NAR and its Member Boards from adopting, maintaining, or enforcing any rule, or from entering into or enforcing any agreement or practice, that directly or indirectly "prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS data specifying the compensation offered to other MLS Participants."

Paragraphs V.C.-E. of the proposed Final Judgment further require NAR to adopt new rules, the content of which must be approved by the United States, that:

a. repeal any rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS data specifying compensation offered to other MLS Participants;

b. repeal any rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS data specifying compensation offered to other MLS Participants; or

c. require all MLS Participants to provide to their clients with information about the amount of compensation offered to other MLS Participants.

These provisions, as set forth in the proposed Final Judgment, are designed to resolve the competitive concerns related to NAR's Commission-Concealment rules as alleged in the Complaint.

2. *Free-Service Rule*

Paragraph IV.2 of the proposed Final Judgment prohibits NAR and its Member Boards from adopting, maintaining, or enforcing any rule, or from entering into or enforcing any agreement, that directly or indirectly "permits or requires MLS Participants, including buyer Brokers, to represent or suggest that their services are free or available to a Client at no cost to the Client."

Paragraph V.F. of the proposed Final Judgment further requires NAR to adopt new rules, the content of which must be approved by the United States, that:

a. repeals any rule that permits all MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to their clients;

b. requires all Member Boards and MLSs to repeal any rule that permits MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to their clients; and

c. prohibits all MLSs and MLS Participants, including buyer Brokers, from representing that their services are free or available at no cost to their clients.

These provisions, as set forth in the proposed Final Judgment, are designed to resolve the competitive concerns with NAR's Free-Service Rule as alleged in the Complaint.

3. *Commission-Filter Rules and Practices*

Paragraph IV.3 of the proposed Final Judgment prohibits NAR and its Member Boards from adopting, maintaining, or enforcing any rule, or from entering into or enforcing any agreement that directly or indirectly "permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent."

Paragraph V.G. of the proposed Final Judgment further requires NAR to adopt new rules, the content of which must be approved by the United States that:

a. prohibits MLS Participants from filtering or restricting MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent; and

b. repeals any rule that permits or enables MLS Participants to filter or restrict MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker, or by the name of the brokerage or agent.

These provisions, as set forth in the proposed Final Judgment, are designed to resolve the competitive concerns with NAR's Commission-Filter Rules and Practices as alleged in the Complaint.

4. <u>Lockbox Policy</u>

Paragraph IV.4 of the proposed Final Judgment prohibits NAR and its Member Boards from adopting, maintaining, or enforcing any rule, or from entering into or enforcing any agreement or practice, that directly or indirectly "prohibits, discourages, or recommends against the eligibility of any licensed real estate agent or agent of a Broker, from accessing, with seller approval, he lockboxes of those properties listed on an MLS."

Paragraph V.H. of the proposed Final Judgment further requires NAR to adopt one or more rules, the content of which must be approved by the United States, that "requires all Member Boards and MLSs to allow any licensed real estate agent or agent of a Broker, to access, with seller approval, the lockboxes of those properties listed on an MLS."

These provisions, as set forth in the proposed Final Judgment, are designed to resolve the competitive concerns with NAR's Lockbox Policy as alleged in the Complaint.

B. <u>Other Provisions</u>

<u>Notice to Member Boards, MLS Participants and Public</u>. Paragraph V.I. of the proposed Final Judgment requires NAR to furnish notice of this action to all of its Member Boards and MLS Participants through (1) a communication, in a form to be approved by the United States, that must contain the Final Judgment, the new rules NAR proposes to issue to comply with the proposed

Final Judgment, and this Competitive Impact Statement; and (2) the creation and maintenance of a page on NAR's website, to be posted for no less than one year, that contains links to the Final Judgment, the new rules NAR proposes to issue to comply with the proposed Final Judgment, this Competitive Impact Statement; and the Complaint. Notification to NAR's Member Boards and MLS Participants is required to ensure compliance with the Final Judgment by NAR and its Member Boards and MLS Participants, while publication of this action on NAR's website will provide notice to the public of all prohibited and required conduct.

Antitrust Compliance Officer. The proposed Final Judgment also contains provisions designed to promote compliance and make enforcement of the Final Judgment as effective as possible. Paragraph VI requires NAR to appoint an Antitrust Compliance Officer who is responsible for, among other things, annually briefing NAR's management on the meaning and requirements of the Final Judgment and the antitrust laws, providing NAR's management and employees with reasonable notice of the meaning and requirements of the Final Judgment, and obtaining and maintaining certification from all members of NAR's management that they understand and agree to abide by the terms of the Final Judgment. The Antitrust Compliance Officer is also required to (1) annually communicate to NAR's management and employees that they must disclose to the Antitrust Compliance Officer any information concerning any potential violation of the Final Judgment of which they are aware and (2) file a report with the United States describing that NAR has met its obligations under the Final Judgment.

Enforcement of Final Judgment. Paragraph IX.A. provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of this paragraph, NAR has agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States

regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that NAR has waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph IX.B. provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to remedy the competition the United States alleges was harmed by the challenged conduct. NAR agrees that it will abide by the proposed Final Judgment and that it may be held in contempt of the Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph IX.C. of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that NAR has violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph IX.C. provides that, in any successful effort by the United States to enforce the Final Judgment against NAR, whether litigated or resolved before litigation, NAR will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

Paragraph IX.D. states that the United States may file an action against NAR for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the

Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Expiration of Final Judgment. Paragraph X of the proposed Final Judgment provides that the Final Judgment will expire seven years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and NAR that the continuation of the Final Judgment is no longer necessary or in the public interest.

Reservation of Rights. Paragraph XI of the proposed Final Judgment reserves the rights of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any rule, policy, or practice adopted or enforced by NAR or any of its Member Boards and that nothing in the Final Judgment shall limit those rights.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against NAR.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the *Federal Register*.

Written comments should be submitted to:

Chief, Media, Entertainment and Professional Services Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, Suite 8000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against NAR. The United States could have continued the litigation and sought preliminary and permanent injunctions against NAR for the challenged conduct. The United States is satisfied, however, that the prohibited and required conduct described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, increasing competition for buyer broker services in the United States. Thus, the proposed Final Judgment is designed to achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 117 (8th Cir. 1976) ("It is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest."); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "'make *de novo* determination of facts and issues.'" *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quoting *United States v. Mid-Am. Dairymen, Inc.*, No. 73 CV 681-W-1, 1977 WL 4352, at *9 (W.D. Mo. May 17, 1977)); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he balancing of competing social and

political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Id.* at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*; *see also United States v. Mid-Am. Dairymen, Inc.*, No. 73 CV 681-W-1, 1977 WL 4352, at *9 (W.D. Mo. May 17, 1977) ("It was the intention of Congress in enacting [the] APPA to preserve consent decrees as a viable enforcement option in antitrust cases.").

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.") (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A

district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case"); *see also Mid-Am. Dairymen*, 1977 WL 4352, at *9 ("The APPA codifies the case law which established that the Department of Justice has a range of discretion in deciding the terms upon which an antitrust case will be settled"). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co*., 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[n]othing in

this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 10, 2020

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

_/s/ Samer M. Musallam___________________

SAMER M. MUSALLAM (DC Bar # 986077)
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW, Suite 3110
Washington, DC 20530
Tel: (202) 598-2990
Fax: (202) 514-9033
Email: samer.musallam@usdoj.gov

Appendix N: REC Budget and Fund Balance

Fiscal Year	Receipts	Direct Expenses	Indirect Expenses	Total Expense	Fund Balance
FY2018	$523,818	$13,674	$311,345	$325,019	$634,588
FY2019	$44,080	$11,963	$227,709	$239,672	$438,996
FY2020	$712,075	$6,075	$189,514	$195,589	$955,482
FY2021	$106,750	$1,700	$317,904	$319,604	$742,627
FY2022	$803,640	$6,340	$296,828	$303,168	$1,243,100
FY2023	$63,735	$400	$252,251	$252,651	$1,054,184

A Brief History of the NAR, MLS, and Past Antitrust Events

In the real estate brokerage profession, there is an unusual juxtaposition of low barriers to entry with low practice-model innovation: a consequence of close industry control of the preeminent digital marketplace for residential property listings, called the Multiple Listing Service or MLS. The National Association of REALTORS^{R} (NAR) and its state and regional affiliates own and administer the MLS, which is actually a network of almost 700 regional services woven together under NAR rules. The Vermont Association of REALTORS (VAR) is the state affiliate of the NAR.

For practical purposes, it is nearly impossible to practice residential real estate brokerage without joining a NAR affiliate as a REALTOR--the trademarked name for a licensed real estate agent who is an NAR member --thereby receiving full access to relevant MLSs. The MLS for Vermont is administered by the New England Real Estate Network (NNEREN), a corporation with offices in Concord, New Hampshire, whose shareholders are 24 REALTOR boards throughout New England.

The NAR's control of the MLS places the Association in ongoing conflict with the Federal Trade Commission (FTC) and private plaintiffs over whether non-members may access the MLS and on what terms.[1] And MLS access is a fulcrum for broader ethics and conduct enforcement. The near universality of NAR membership among residential agents means that, unseen to legislators, courts, and the general public, a significant portion of *de facto* practice governance—what people outside the industry expect would be the Real Estate Commission's prerogative—is actually occurring privately through industry-association rules and arbitration.

In the 1990s, private plaintiffs found limited success challenging the bundling of NAR membership and access to MLSs. In 2006, the FTC brought a series of administrative antitrust complaints against regional MLSs throughout the United States, including the Northern[2] New England Real Estate Network. In its complaint against the New Hampshire-based MLS, the FTC charged that "NNEREN adopted a rule that limited the publication of certain listing agreements on popular internet real estate web sites, in a manner that injured real estate brokers that use such listing agreements to offer lesser services at a lower price compared to the full-service package."[3]

The FTC's 2006 enforcement cases and a consent decree that followed somewhat improved marketplace access for brokers offering unconventional listing models. Today, consumers can select a "listing only" brokerage that will place a property on the MLS for a flat fee, leaving the seller to do the rest, including negotiating with buyer's agents who expect compensation for bringing a buyer.

[1] Litigation support is so central to the Association's service offering that it offers an online scorecard to help members and observers keep track. See, https://www.nar.realtor/about-nar/grants-and-funding/legal-action-program/legal-action-case-support-scorecard.
[2] The Northern New England Real Estate Network dropped *Northern* from its name in 2015, following several mergers of shareholder boards.
[3] See FTC Complaint, *In the Matter of Northern New England Real Estate Network, Inc.*, Docket No. C-4175, available at:
https://www.ftc.gov/sites/default/files/documents/cases/2006/12/0510065complaint061128.pdf; Decision and Order available at:
https://www.ftc.gov/sites/default/files/documents/cases/2006/12/0510065do061128.pdf.

The purpose of OPR's regulatory review is to assess the *State's* regulation of real estate brokerage and how it might be optimized, taking for granted that federal antitrust enforcement is beyond our control. The Vermont Real Estate Commission is but one player on a field also occupied by an exceptionally engaged national industry association in a decades-long negotiation with federal regulators and competing commercial interests over the extent to which the association may leverage its control over the digital marketplace for real estate.

This context explains a great deal of what we see at the state level. For example, association arbitration of disputes and ethics complaints almost certainly reduces complaints to the Commission; the centrality of the MLS as a proprietary walled garden influences the kind of continuing education available to Commission licensees; and industry anxiety about service unbundling manifests directly in State regulations that carefully define permissible and impermissible agency models, insisting on fiduciary responsibilities some agents do not want to offer and some clients do not want to buy. While OPR and the REC may restrict access to the profession, NAR and the MLS restrict access to the market.

United States of America v. National Association of Realtors (2020)

In November 2020, the United States Department of Justice (DOJ) simultaneously filed suit against the NAR and filed a proposed settlement of that suit. The Complaint alleged that NAR rules, policies, and practices have a cumulative anticompetitive effect and restrain trade in violation of the Sherman Act.

The original proposed consent judgment, to which NAR agreed, addressed four problematic practices related to the compensation of buyer's agents; specifically:

> NAR and its Member Boards must not adopt, maintain, or enforce any Rule, or enter into or enforce any Agreement or practice, that directly or indirectly:
>
> 1. prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying the compensation offered to other MLS Participants;
> 2. permits or requires MLS Participants, including buyer Brokers, to represent or suggest that their services are free or available to a Client at no cost to the Client;
> 3. permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent; or
> 4. prohibits, discourages, or recommends against the eligibility of any licensed real estate agent or agent of a Broker, from accessing, with seller approval, the lockboxes of those properties listed on an MLS.[4]

Put simply, the settlement would have targeted aspects of agent compensation by improving transparency about commission splits, prohibiting misleading claims that buyer agents do not cost buyers anything, reducing automated sorting by commission, and requiring that MLSs offer lockbox access to all licensed agents a seller approves, not just MLS members.

[4] Proposed Final Settlement, p. 4; See Appendix M. Also available at: https://www.justice.gov/opa/press-release/file/1338631/download.

In 2021, the DOJ withdrew the proposed consent judgment, dismissed its complaint against NAR, and reopened its investigation into NAR practices. NAR contested the DOJ's issuance of new Civil Investigation Demands ("CIDs"), which are similar to subpoenas, arguing that the DOJ investigation into the specific NAR policies had been closed as a condition of the prior settlement. The U.S. District Court for the District of Columbia agreed with NAR that the settlement barred the CIDs. However, the U.S. Court of Appeals for the D.C. Circuit disagreed and reversed the lower court decision. NAR petitioned for rehearing in May 2024, and in July the appeals court denied NAR's petition for rehearing.

Two additional NAR practices which the DOJ Antitrust Division is investigating are the *Participation Rule* and the *Clear Cooperation Policy*. As the D.C. Circuit Court of Appeals explains:

> DOJ served its first CID — CID No. 29935 ("CID No. 1") — in April 2019. That CID sought information regarding various practices and procedures adopted by NAR, including a longstanding policy known as the "Participation Rule." Under the Participation Rule, which NAR first implemented in the 1970s, listing brokers must offer the same commission to all buyer-brokers when listing a property on an MLS. *See* NAR, *Handbook on Multiple Listing Policy* 34 (2018), https://perma.cc/AA7S-UFSB. According to DOJ, the Participation Rule restrains price competition among buyer brokers and causes them to steer customers to higher commission listings.
>
> In June 2020, DOJ served its second CID — CID No. 30360 ("CID No. 2") — which sought information from NAR about a newly adopted rule called the "Clear Cooperation Policy." That policy requires listing brokers to post a property on an MLS within one day of when they begin to market the property. *See* NAR, *Handbook on Multiple Listing Policy* 32 (2020), https://perma.cc/8BPG-UBGT. DOJ believes that the Clear Cooperation Policy restricts home-seller choices and precludes competition from new listing services.[5]

Presumably the DOJ investigation is proceeding.

Recent Antitrust Class Action Settlement

The Settlement Agreement ("Settlement Agreement") was entered into in March 2024 to settle multiple class action suits brought against the National Association of REALTORS and other defendants by class action plaintiffs who asserted defendants colluded to inflate broker commissions in the real estate industry. As in most lawsuit settlements, NAR and the other defendants do not admit liability. The parties have agreed to a negotiated resolution of costly litigation. The settlement addresses the issue of offers of representation by the seller agents licensed through the NAR. NAR rules required a seller's agent make an offer of commission to a buyer's agent. Those commissions were negotiable for home sellers in name only, which effectively required sellers to pay unnecessary fees to close the sale. Ultimately, the intent of this settlement is that sellers' agents will no longer be able to make offers of commission to buyers' agents on most of the databases where homes are listed for sale.

[5] NATIONAL ASSOCIATION OF REALTORS v. UNITED STATES OF AMERICA (1:21-cv-02406) Full decision from the DC Appeals Court available in Appendix P. Also available online at https://www.cadc.uscourts.gov/internet/opinions.nsf/0A80D98F48172B4C85258AF6004EAE07/$file/23-5065-2048352.pdf

The Settlement Agreement provides for a $418 million-dollar monetary settlement along with changes to various NAR practices, including:

1. Eliminating and prohibiting any NAR or MLS requirement "that listing brokers or sellers must make offers of compensation to buyer brokers or other buyer representatives (either directly or through buyers), and eliminate and prohibit any requirement that such offers, if made, must be blanket, unconditional, or unilateral;"
2. Prohibiting offers of compensation on MLS to buyer brokers or disclosing on MLS listing broker compensation or total broker compensation;
3. Eliminating and prohibiting requirements that membership in MLS is conditioned on offering or accepting offers of compensation to buyer brokers or other buyer representative;
4. Prohibiting representations to clients/customers that brokerage services are free (unless the broker will receive no financial compensation from any source for the service);
5. Requiring full written disclosure and agreement by seller of any payment or offer of payment to another broker, agent or representative acting for buyers;
6. Requiring conspicuous disclosure to prospective sellers and buyers that commissions are not set and are fully negotiable[6]

It is important to note, the practice changes concern NAR and its member Realtors. The changes, therefore, are the responsibility of the NAR and its affiliate state branches. The practice changes will be implemented beginning in mid-August 2024.

[6] Case No. 19-cv-00332-SRB. Settlement Agreement available in Appendix Q.

Appendix P: Appeal from the U.S. District Court for the District of Columbia (No. 1:21-cv-02406)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 1, 2023 Decided April 5, 2024

No. 23-5065

NATIONAL ASSOCIATION OF REALTORS,
APPELLEE

v.

UNITED STATES OF AMERICA, ET AL.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-02406)

Frederick Liu, Attorney, U.S. Department of Justice, argued the cause for appellants. On the briefs were *Daniel E. Haar*, *Nickolai G. Levin*, and *Steven J. Mintz*, Attorneys.

Christopher G. Michel argued the cause for appellee. With him on the brief were *Michael D. Bonanno*, *William A. Burck*, and *Rachel G. Frank*.

Andrew R. Varcoe, *Djordje Petkoski*, and *Jacob Coate* were on the brief for *amicus curiae* Chamber of Commerce of the United States of America in support of appellee.

Before: HENDERSON, WALKER and PAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* PAN.

Dissenting opinion filed by *Circuit Judge* WALKER.

PAN, *Circuit Judge*. The Antitrust Division of the United States Department of Justice ("DOJ") opened an investigation of potentially anticompetitive practices in the real-estate industry that were implemented by the National Association of Realtors ("NAR"). In November 2020, DOJ and NAR settled the case. In addition to filing a Proposed Consent Judgment in the district court, DOJ sent a letter to NAR stating that DOJ had closed its investigation of certain NAR practices and that NAR was not required to respond to two outstanding investigative subpoenas. Eight months later, in July 2021, DOJ exercised its option to withdraw the Proposed Consent Judgment, reopened its investigation of NAR's policies, and issued a new investigative subpoena. NAR petitioned the district court to set aside the subpoena, arguing that its issuance violated a promise made by DOJ in the 2020 closing letter. The district court granted NAR's petition, concluding that the new subpoena was barred by a validly executed settlement agreement. We disagree. In our view, the plain language of the disputed 2020 letter permits DOJ to reopen its investigation. We therefore reverse the judgment of the district court.

I.

NAR is a trade organization with 1.4 million members who work in the real-estate industry. For decades, NAR has promulgated a "Code of Ethics," along with other related rules, which set policies that NAR members must follow when brokering real-estate transactions.

In 2018, DOJ's Antitrust Division opened a civil investigation into certain NAR policies, after receiving a

complaint from an industry participant. As part of the investigation, DOJ issued two subpoenas, or Civil Investigative Demands ("CIDs"),[1] seeking information and documents related to NAR's operation of "multiple-listing services" ("MLSs"). An MLS is an online, subscription-based database that lists properties that are on the market in a particular geographic area. Brokers representing sellers (or "listing brokers") post information about homes that are for sale on an MLS, where buyer-brokers can view that information. There are hundreds of MLSs operating in the United States, and some MLSs have tens of thousands of participants, comprised primarily of members of NAR's local associations and boards.

DOJ served its first CID — CID No. 29935 ("CID No. 1") — in April 2019. That CID sought information regarding various practices and procedures adopted by NAR, including a longstanding policy known as the "Participation Rule." Under the Participation Rule, which NAR first implemented in the 1970s, listing brokers must offer the same commission to all buyer-brokers when listing a property on an MLS. *See* NAR, *Handbook on Multiple Listing Policy* 34 (2018), https://perma.cc/AA7S-UFSB. According to DOJ, the Participation Rule restrains price competition among buyer-brokers and causes them to steer customers to higher-commission listings.

In June 2020, DOJ served its second CID — CID No. 30360 ("CID No. 2") — which sought information from NAR about a newly adopted rule called the "Clear Cooperation

[1] A CID is a type of administrative subpoena. *See FTC v. Ken Roberts Co.*, 276 F.3d 583, 585 (D.C. Cir. 2001). The Antitrust Civil Process Act authorizes DOJ to issue a CID whenever it "has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation." 15 U.S.C. § 1312(a).

Policy." That policy requires listing brokers to post a property on an MLS within one day of when they begin to market the property. *See* NAR, *Handbook on Multiple Listing Policy* 32 (2020), https://perma.cc/8BPG-UBGT. DOJ believes that the Clear Cooperation Policy restricts home-seller choices and precludes competition from new listing services.

NAR expressed its desire to settle the case. Thus, in July 2020, the parties began proposing "the outlines of a possible resolution." J.A. 243. During the negotiations, NAR asked DOJ to agree to refrain from investigating the Participation Rule for ten years.[2] DOJ refused, stating that "a commitment to not challenge NAR rules and policies in the future [was] a nonstarter, especially in light of longstanding Department policies concerning settlements that affect future potential investigations." *Id*. at 248. Thereafter, DOJ reiterated during the negotiations that it would not "commit to never challeng[ing] NAR rules and policies in the future in light of longstanding Department policies on such commitments." *Id*. at 252 (July 29, 2020, letter); *see also id*. at 258–59 (Aug. 12, 2020, letter).

The parties ultimately agreed to enter a Proposed Consent Judgment, which specifically addressed four NAR policies other than the Participation Rule and the Clear Cooperation Policy.[3] The Proposed Consent Judgment also included a

[2] NAR requested that DOJ (1) "stipulate that NAR's Participation Rule would not be subject to further investigation any time in the next ten years"; and (2) "send a closing letter to NAR confirming that it has no obligation to provide additional information or documents in response to CID No. [1] or CID No. [2]." J.A. 247.

[3] The policies addressed in the Proposed Consent Judgment were: (1) NAR's "Commission-Concealment Rules," under which affiliated brokers could conceal from homebuyers the unilateral

"Reservation of Rights" clause that generally preserved DOJ's ability to bring actions against NAR in the future. The Reservation of Rights clause provided that "[n]othing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule or practice adopted or enforced by NAR or any of its Member Boards." J.A. 176. NAR agreed to that language, which was proposed by DOJ, but only on the condition that DOJ provide a "closing letter" concerning the then-pending investigation of the Participation Rule and the Clear Cooperation Policy. *Id*. at 126 ("NAR will only agree to sign a consent decree including this [Reservation of Rights] provision if DOJ provides written confirmation, prior to the execution of the decree, that it will issue a closing letter."). NAR asked that the closing letter confirm that DOJ closed the existing investigation and that NAR had no obligation to respond to the two outstanding CIDs. DOJ agreed, stating that it would send the requested closing letter "once the consent decree is filed." *Id*. at 128 (Oct. 28, 2020, email).

On November 19, 2020, the government did two things: (1) It filed the signed Proposed Consent Judgment in the district court, along with a Complaint and a "Stipulation and Order"; and (2) it sent the closing letter to NAR's counsel. None of the documents filed in court mentioned the Participation Rule or the Clear Cooperation Policy. DOJ's

blanket commission offered to buyer-brokers; (2) NAR's "Free-Service Rule," under which buyer-brokers were permitted to represent to homebuyers that their services were free; (3) NAR's "Commission-Filter Rules and Practices," under which brokers could filter properties on an MLS by the rate of commission; and (4) NAR's "Lockbox Policy," which prohibited non-NAR brokers from accessing the lockboxes that contain the keys to listed properties.

Complaint alleged that the four other NAR policies that were the subject of the Proposed Consent Judgment violated Section 1 of the Sherman Act, while the Proposed Consent Judgment contained settlement terms related to those four other policies. *See supra* note 3 (describing the NAR policies covered by the Proposed Consent Judgment). The Stipulation and Order stated that NAR would "abide and comply" with the Proposed Consent Judgment, pending the entry of a final judgment in the case by the district court. J.A. 148. It also provided that "[t]he United States may withdraw its consent at any time before the entry of the proposed Final Judgment." *Id.* at 147.

The closing letter sent to NAR's counsel ended the then-pending investigation of the Participation Rule and the Clear Cooperation Policy, stating:

> Dear Mr. Burck [NAR's counsel]:
>
> This letter is to inform you that the Antitrust Division has closed its investigation into [NAR's] Clear Cooperation Policy and Participation Rule. Accordingly, NAR will have no obligation to respond to CID Nos. 29935 and 30360 issued on April 12, 2019 and June 29, 2020, respectively.
>
> No inference should be drawn, however, from the Division's decision to close its investigation into these rules, policies or practices not addressed by the consent decree.
>
> Sincerely,
>
> /s/ Makan Delrahim [Assistant Attorney General, Antitrust Division]

J.A. 178.

DOJ published the Complaint, the Proposed Consent Judgment, and a Competitive Impact Statement in the Federal Register, as mandated by the Tunney Act. *See United States v. National Association of REALTORS® Proposed Final Judgment and Competitive Impact Statement*, 85 Fed. Reg. 81,489 (Dec. 16, 2020); 15 U.S.C. § 16(b). The Competitive Impact Statement included a "description of events" giving rise to the allegations in the Complaint, and explained the parties' Proposed Consent Judgment, the remedies available to potential private litigants, the procedures available to modify the negotiated terms, alternatives to settlement that the government considered, and the standard of review governing the court's approval of the Proposed Consent Judgment. *See* J.A. 179–200. The Tunney Act requires that the United States "receive and consider any written comments" pertaining to the published materials during a mandatory 60-day period. 15 U.S.C. § 16(d). Thereafter, the district court must determine whether the proposed consent judgment is in the "public interest" before issuing a final judgment. *Id*. § 16(e).

In July 2021, after an unsuccessful negotiation to modify the parties' settlement agreement, DOJ exercised its option to withdraw the Proposed Consent Judgment. The government voluntarily dismissed the Complaint and filed a notice informing the district court of the withdrawal of its consent. Five days later, DOJ issued a new subpoena — CID No. 30729 ("CID No. 3") — which requested information from NAR regarding the Participation Rule and the Clear Cooperation Policy, as well as several policies addressed in the withdrawn Proposed Consent Judgment.

NAR petitioned the district court to set aside CID No. 3, arguing that its issuance contravened the parties' binding

settlement agreement, which included DOJ's promise in the November 2020 closing letter to close its investigation of the Participation Rule and the Clear Cooperation Policy. Specifically, NAR argued that it had satisfied its obligations under the settlement agreement by beginning to perform the requirements of the Proposed Consent Judgment, and that DOJ breached the overall agreement by issuing CID No. 3 in contravention of the closing letter. The district court granted NAR's petition, agreeing with NAR that CID No. 3 was barred by "a validly executed settlement agreement." *Nat'l Ass'n of Realtors v. United States*, 2023 WL 387572, at *3 (D.D.C. Jan. 25, 2023). The court concluded that the parties' settlement agreement included the November 2020 closing letter; and that "the government breached the agreement by reopening the investigation into those same rules and serving the new CID." *Id*. at *4.[4] DOJ timely appealed. We have jurisdiction under 15 U.S.C. § 1314(e) and 28 U.S.C. § 1291.

II.

The Antitrust Civil Process Act ("ACPA") authorizes courts to "set[] aside" a CID based on "any failure of such demand to comply with the provisions of [the ACPA], or upon any constitutional or other legal right or privilege." 15 U.S.C. § 1314(b). The parties agree that a CID is unenforceable if it is barred by a valid settlement agreement. *See* NAR Br. 18; DOJ Br. 28. The party served with a CID bears the burden of

[4] NAR also petitioned the district court to modify CID No. 3 because it "ma[de] demands that are overly broad, unduly burdensome, and irrelevant to any permissible investigation." J.A. 15. The district court declined to address NAR's breadth and burdensomeness objections because it set aside the CID in full. Because the district court did not rule on NAR's request for modification, we decline to reach the issue.

demonstrating that it should be set aside. *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991).

A settlement agreement is a contract. *See Vill. of Kaktovik v. Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982). The "[i]nterpretation of the plain language of a contract is a question of law subject to de novo review by this court." *LTV Corp. v. Gulf States Steel, Inc. of Ala.*, 969 F.2d 1050, 1055 (D.C. Cir. 1992); *see also Armenian Assembly of Am., Inc. v. Cafesjian*, 758 F.3d 265, 278 (D.C. Cir. 2014) (de novo review for the question of whether a contract is ambiguous). We give deference, however, to the district court's factual findings if they are at issue on appeal. *See United States v. Microsoft Corp.*, 147 F.3d 935, 945 n.7 (D.C. Cir. 1998). In determining the meaning of federal contracts, we apply "federal common law," which looks to the Restatement of Contracts. *United States v. Honeywell Int'l Inc.*, 47 F.4th 805, 816 (D.C. Cir. 2022); *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 93 n.6 (D.C. Cir. 2001).

The district court determined that the Proposed Consent Judgment and the closing letter were components of a single, binding settlement agreement. *See Nat'l Ass'n of Realtors*, 2023 WL 387572, at *4. The parties have not meaningfully briefed the potential unenforceability of the closing letter due to the withdrawal of the Proposed Consent Judgment, and both parties agree that "[t]he key question is . . . whether DOJ's promise [in the closing letter] to close the investigation and rescind the CIDs left it free to resume the investigation and reissue the CIDs based solely on its preference to do so." NAR Br. 14; *see also* Oral Arg. Tr. at 3:13–16, Nat'l Ass'n of Realtors v. United States (No. 23-5065) (counsel for the government stating that "[t]he question is whether in addition to agreeing to close its investigation the Division made a commitment not to reopen it. The answer is no.").

We therefore accept the parties' apparent assumption that the closing letter is a binding agreement that remains enforceable, notwithstanding the withdrawal of the Proposed Consent Judgment. *See, e.g*, NAR Br. 43 n.11; Oral Arg. Tr. at 11:16–12:6. We adopt the framing of the dispute that is advanced by the parties because "[i]n our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). In other words, "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008).[5]

[5] Nevertheless, we observe that the closing letter likely became unenforceable when the Proposed Consent Judgment was lawfully withdrawn because both documents were essential parts of the parties' settlement agreement: NAR agreed to enter the Proposed Consent Judgment on the condition that DOJ issue the closing letter, J.A. 126; and NAR contends that the terms of the closing letter are in effect because it had begun performing its obligations under the Proposed Consent Judgment "in reliance on the terms of the settlement," NAR Br. 8 (citing J.A. 23–24). The closing letter and Proposed Consent Judgment thus do not appear to be severable. *See Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 85 (D.C. Cir. 2005) (holding that an unenforceable term is severable from an agreement if it is "not [] essential to a contract's consideration" (citing *Restatement (Second) of Contract*s § 184 (Am. L. Inst. 1981)) (additional citations omitted)). Moreover, we note that the closing letter, viewed on its own, appears to be a unilateral promise unsupported by consideration or partial performance, which typically would be unenforceable as a matter of contract law. *See Restatement (Second) of Contracts* § 71 (Am. L. Inst. 1981) ("To constitute consideration, a performance or a return promise must be bargained for.").

III.

As framed by the parties, the issue before us is narrow. DOJ argues only that the plain language of the closing letter does not bar it from reopening its investigation and issuing a new CID regarding the Participation Rule and the Clear Cooperation Policy. We agree.

A.

"Under general contract law, the plain and unambiguous meaning of an instrument is controlling." *WMATA v. Mergentime Corp.*, 626 F.2d 959, 960–61 (D.C. Cir. 1980). Thus, if the text of the closing letter is unambiguous, "that is the end of the matter" and we need not address the parties' negotiation history or any other extrinsic evidence. *Brubaker v. Metro. Life Ins. Co.*, 482 F.3d 586, 590 (D.C. Cir. 2007); *Iberdrola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1304 (D.C. Cir. 2010).

The disputed language of the closing letter states:

> [T]he Antitrust Division has closed its investigation into [NAR's] Clear Cooperation Policy and Participation Rule. Accordingly, NAR will have no obligation to respond to CID Nos. 29935 and 30360 issued on April 12, 2019 and June 29, 2020, respectively.

J.A. 178.

The plain meaning of that provision is that DOJ closed its then-pending investigation and relieved NAR of its obligation to respond to two specifically identified CIDs. We discern no commitment by DOJ — express or implied — to refrain from either opening a new investigation or reopening its closed

investigation, which might entail issuing new CIDs related to NAR's policies. Put simply, the fact that DOJ "closed its investigation" does not guarantee that the investigation would stay closed forever. The words "close" and "reopen" are unambiguously compatible. *See Close*, Merriam-Webster Dictionary ("to bring to an end or period"); *Reopen*, Merriam-Webster Dictionary (legal definition) ("to resume the discussion or consideration of (a *closed* matter)" (emphasis added)). Thus, DOJ's decision to "reopen" the investigation and to issue CID No. 3 was consistent with the closing letter's "plainly expressed intent." *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435 (2015) (cleaned up).

Our interpretation of the operative language is supported by another provision in the closing letter, as well as an interpretive canon of construction. First, DOJ included a "no inference" clause in the closing letter, which states that "[n]o inference should be drawn . . . from the Division's decision to close its investigation into these rules, policies or practices not addressed by the consent decree." J.A. 178. That clause confirms that DOJ did not intend to imply any additional terms in the letter, such as one prohibiting a reopened investigation. Second, the unmistakability principle, a canon of construction, instructs that "a contract with a sovereign government [should] not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act . . . , nor [should] an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power." *United States v. Winstar Corp.*, 518 U.S. 839, 878 (1996) (plurality op.). In other words, we will not interpret a contract to cede a sovereign right of the United States unless the government waives that right unmistakably. The closing letter contains no "unmistakable term" ceding DOJ's power to reopen its investigation: To the contrary, it includes a "no inference clause" that explicitly disclaims any

intent to include unstated terms. We therefore decline to read an unwritten term into the agreement that limits the government's prosecutorial authority. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982).[6]

We note that NAR should not have been misled by the words used in the closing letter because investigations are routinely "closed" and then later "reopened." For example, in *Schellenbach v. SEC*, the National Association of Securities Dealers ("NASD"), a self-regulatory organization, "reopen[ed]" a securities-law investigation after initially issuing a letter "signaling the end of [its] investigation." 989 F.2d 907, 909–11 (7th Cir. 1993). The Seventh Circuit held that "even if the . . . letter signaled that the NASD had closed its investigation of [the petitioner], the NASD was perfectly free to reconsider the matter." *Id.* at 911. In fact, the court found no "support [for] the proposition that the NASD may not reopen [the] investigation" following the issuance of the closing letter. *Id.* Although NAR distinguishes *Schellenbach* by arguing that the letter in that case was not part of a contract,

[6] Although the government did not raise the unmistakability principle before the district court, that principle cannot be forfeited because it is a "canon of contract construction." *Winstar*, 518 U.S. at 860. We can consider "interpretive canons" even if a party "intentionally left them out of [its] brief." *Guedes v. BATFE*, 920 F.3d 1, 22 (D.C. Cir. 2019) (per curiam). But even if the doctrine were forfeitable, it was not forfeited here because NAR itself put the doctrine at issue before the district court in citing an Office of Legal Counsel opinion discussing *Winstar* and the rule against waiver of sovereign power. *See* Resp. to the Gov't's Opp. to NAR's Pet. 3, *Nat'l Ass'n of Realtors v. United States*, Civ. No. 21-02406 (D.D.C. Nov. 12, 2021), ECF No. 21-2 (citing *Auth. of the U.S. to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion*, 23 Op. OLC 126 (June 15, 1999)). NAR therefore cannot claim to be surprised by our consideration of the unmistakability principle.

that fact does not cast doubt on our conclusion that the plain meaning of the word "close" does not preclude DOJ from "reopening" its investigation.

Investigations initiated by the government are no different. For example, in *Marinello v. United States*, the Supreme Court noted that between 2004 and 2009, the IRS "opened, then closed, then reopened an investigation into the tax activities of Carlo Marinello." 138 S. Ct. 1101, 1105 (2018). And in *J. Roderick MacArthur Foundation v. FBI*, we emphasized that the FBI had an interest in retaining certain intelligence it had gathered because "information that was once collected as part of a now-closed investigation may yet play a role in a new or reopened investigation." 102 F.3d 600, 604 (D.C. Cir. 1996); *see also Senate of the Commonwealth of P.R. on Behalf of Judiciary Comm. v. DOJ*, 823 F.2d 574, 586 (D.C. Cir. 1987) (noting that a "DOJ investigation . . . was closed officially on April 16, 1980, and did not reopen until August 1983").

In sum, the closing letter unambiguously permits DOJ to reopen its investigation of the Participation Rule and the Clear Cooperation Policy. Our interpretation is supported by the letter's plain language, its inclusion of the "no-inference" clause, and our application of the unmistakability principle.

B.

NAR's counterarguments do not persuade us. As a textual matter, NAR argues that we should adopt the district court's reasoning that, in plain English, "[o]pening an investigation is the opposite of closing one." *Nat'l Ass'n of Realtors*, 2023 WL 387572, at *4. Based on that logic, the district court held that reopening the investigation of the disputed policies violated DOJ's promise to close it. *See id*. As discussed above, the words "close" and "reopen" are not mutually exclusive, and we reject NAR's argument that the closing letter imposed any

future obligation on DOJ. Rather, the letter stated only that "NAR will have no obligation to respond" to the CIDs identified in the closing letter — namely, "CID Nos. 29935 and 30360 issued on April 12, 2019 and June 29, 2020, respectively." J.A. 178.

NAR also analogizes the closing letter to a parent instructing a child to "close the door when you leave for school," arguing that the parent "would surely feel misunderstood if the child closed the door and then immediately reopened it before departing for the day." NAR Br. 22 (citing *Biden v. Nebraska*, 143 S. Ct. 2355, 2376–82 (2023) (Barrett, J., concurring)). But a hypothetical parent instructing a child to "close the door when you leave for school" does not intend that the child never open the door again, and the approximately eight months that elapsed between the issuance of the closing letter and the reopening of the investigation do not factually support a claim of an "immediate" reopening.

Next, NAR urges us to consider extrinsic evidence to support its interpretation of the closing letter. Specifically, NAR relies on the parties' negotiating history, DOJ's "course of performance," and NAR's own priorities and incentives to support its argument that DOJ agreed not to "reopen" the investigation of the Participation Rule and Clear Cooperation Policy. Those arguments have no traction because, as we have discussed, we do not consider extrinsic evidence where the plain text of an agreement is unambiguous. *See NRM Corp. v. Hercules, Inc.*, 758 F.2d 676, 682 (D.C. Cir. 1985) ("Only if the court determines as a matter of law that the agreement is ambiguous will it look to extrinsic evidence of intent to guide the interpretive process."); *Iberdrola*, 597 F.3d at 1304. In any event, NAR's extrinsic evidence is unconvincing.

First, NAR asserts that the parties' agreement to omit any mention of the Participation Rule and Clear Cooperation Policy in the Proposed Consent Judgment "make[s] clear that DOJ's promise in the Closing Letter was a deliberate carveout from the reservation-of-rights provision in the consent decree." NAR Br. 25. But the text of the Reservation of Rights clause supports DOJ's position that it retained the right to investigate the Participation Rule and the Clear Cooperation Policy: The clause generally preserves the government's authority to investigate and bring actions "concerning *any* Rule or practice adopted or enforced by NAR or any of its Member Boards." J.A. 176 (emphasis added). Moreover, during the parties' negotiations, DOJ explicitly declined to accept any agreement that constrained future investigations — and did so on three separate occasions.[7] Thus, the negotiating history of the Reservation of Rights provision is inconclusive.

Second, NAR contends that DOJ's "course of performance" — *i.e.*, its eventual withdrawal of the Proposed Consent Judgment — demonstrates that DOJ "understood that the Closing Letter 'prevented' it from investigating NAR's Participation Rule and Clear Cooperation Policy." NAR

[7] First, when NAR requested that DOJ "stipulate that NAR's Participation Rule would not be subject to further investigation any time in the next ten years," J.A. 247, DOJ responded that any "commitment to not challenge NAR rules and policies in the future," was "a nonstarter." *Id.* at 248. Second, when NAR proposed that "any changes to the Participation Rule and/or the Clear Cooperation Policy . . . will completely address all of the Division's concerns and that the Division will close its investigation," *id.* at 251, DOJ again responded that "we cannot commit to never challenge NAR rules and policies in the future." *Id.* at 252. And third, when DOJ agreed to send NAR a closing letter, it reiterated that "the Division cannot commit to never investigating or challenging NAR's rules and policies in the future." *Id.* at 259.

Br. 28. According to NAR, DOJ withdrew the Proposed Consent Judgment because it wished to reopen its investigation of those policies but recognized that it could not do so without modifying the overall settlement agreement. But we decline to allow NAR to take contradictory positions with respect to the relationship between the Proposed Consent Judgment and the closing letter. NAR may not implicitly assume that these are separate agreements such that the closing letter remained enforceable despite the withdrawal of the Proposed Consent Judgment, *see supra* note 5, while also arguing that the two documents were part of the same settlement agreement for purposes of interpreting the meaning of the closing letter. "Simply put, [NAR] cannot have it both ways." *See United States v. Philip Morris USA Inc.*, 840 F.3d 844, 853 (D.C. Cir. 2016) (rejecting defendant's contradictory positions about the effect of a district court order); *Nat'l Ass'n of Crim. Def. Laws., Inc. v. DOJ*, 182 F.3d 981, 985 (D.C. Cir. 1999) (noting that "a party may not blow hot and cold" in taking inconsistent positions).

Lastly, NAR argues that it would not have agreed to the Proposed Consent Judgment without a commitment from DOJ not to investigate the Participation Rule and the Clear Cooperation Policy in the future. According to NAR, without such a commitment, "the agreement contemplated only a letter worth nothing but the paper on which it was written." NAR Br. 24 (quoting *Nat'l Ass'n of Realtors*, 2023 WL 387572, at *4). We disagree. Contrary to NAR's contention, NAR gained several benefits from the closing of DOJ's pending investigation in 2020. Most obviously, NAR was relieved of its obligation to respond to the two outstanding CIDs, which required the production of substantial information. Moreover, NAR gained some value from the possibility that DOJ would not reopen its investigation at all, or for a substantial period of time. In addition, NAR avoided the risk that its responsive

documents would be publicized in conjunction with a potential future complaint filed by DOJ.

Significantly, NAR also used the closing letter to its advantage in other, private litigation that was pending when the closing letter was negotiated and issued. Plaintiffs in the private litigation asserted claims under the Sherman Act and California's Cartwright Act, stemming from NAR's adoption of the Clear Cooperation Policy. *See PLS.com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 831 (9th Cir. 2022). One day after DOJ issued the closing letter, NAR submitted the letter to the court presiding over the private litigation as evidence that DOJ was no longer investigating NAR's policy. *See* NAR's Response to Plaintiff's Notice of Supplemental Authority at Ex. B, *PLS.com, LLC v. Nat'l Ass'n of Realtors*, 516 F. Supp. 3d 1047 (C.D. Cal. 2021) (Case No. 2:20-cv-04790), ECF No. 88 (filed on Nov. 20, 2020). NAR's filing asserted that "for the Clear Cooperation Policy at issue in [the private litigation], on the same day it commenced the Tunney Act proceedings, the Department of Justice sent NAR a closing letter, attached hereto as Exhibit B, . . . 'clos[ing] its investigation into the . . . Clear Cooperation Policy and Participation Rule.'" *Id.* at 1 (quoting J.A. 178). NAR thus used the closing letter to bolster its litigating position in the private lawsuit, thereby plainly benefitting from the letter's issuance.

C.

We agree with our dissenting colleague that DOJ promised to "close" its investigation of the Participation Rule and Clear Cooperation Policy, in exchange for NAR's concessions regarding four other policies, embodied in the Proposed Consent Judgment. *See* Dissenting Op. at 1–2. But the dissent goes on to assert that it would be a violation of the settlement agreement if DOJ "*immediately*" reopened the investigation it

had agreed to close, while NAR was still bound by the contract. *Id*. at 1 (emphasis in original); *see also id*. at 5 n.7 ("So as DOJ sees things, it had the right to reopen the investigation (immediately) even if the contract remained in force."). We take no position on the hypothetical situation addressed by the dissent. In the case before us, DOJ exercised its option to withdraw the Proposed Consent Judgment, thereby releasing NAR from its obligations under the agreement; only then did DOJ reopen its investigation and issue a new CID for information related to the Participation Rule and Clear Cooperation Policy — and that reopening occurred eight months after the original settlement agreement was reached. Because the reopening was not "immediate" and there was never a time when NAR was bound by the settlement agreement while DOJ was not, the dissent's analysis is inapposite.[8]

[8] As we have noted, *supra* pp. 9–10 & n.5, we confined our opinion to the meaning of the closing letter, as the parties asked us to do. The dissent, however, interprets the overall settlement agreement, including the *quid pro quo* in which NAR signed the Proposed Consent Judgment in exchange for DOJ's issuance of the closing letter. *See generally* Dissenting Op. As we explained, *supra* note 5, consideration of the overall agreement would likely lead to the conclusion that DOJ's withdrawal from the Proposed Consent Judgment had the effect of canceling the entire deal — *i.e.*, the closing letter would not be enforceable if the Proposed Consent Judgment were withdrawn because the two components of the agreement are not severable. DOJ, however, chose not to rely on that argument, and instead asked us to interpret the language in the closing letter as if it were enforceable. *See supra* pp. 9–10 & n.5; Oral Arg. Tr. at 11. The dissent apparently misunderstands DOJ's position — it transforms DOJ's decision not to argue that both parts of the deal were canceled into a concession that the court may interpret the overall settlement agreement while ignoring DOJ's withdrawal from the Proposed Consent Judgment. *See* Dissenting

The dissent contends that DOJ "unilaterally reneged" on the settlement agreement, and states that "[for] purposes of this appeal, it doesn't matter that DOJ withdrew the consent decree when it reopened the investigation." Dissenting Op. at 3 & n.5. Those statements overlook that NAR agreed to the term of the settlement agreement that gave DOJ the unfettered right to withdraw its consent at any time. *See* J.A. 147. When DOJ exercised that option, it put the parties back to where they were before they entered the settlement — *i.e.*, it restored the status quo ante. Thus, DOJ did nothing nefarious or underhanded when it withdrew from the settlement, as NAR had agreed it could do.

Finally, we cannot agree with the dissent that "the sole question [in this appeal] is whether DOJ is correct that it could have immediately reopened its investigation of the Realtors' two remaining policies after contracting to close that investigation." Dissenting Op. at 4. As the dissent acknowledges, the facts before us do not demonstrate an "immediate" reopening of the investigation after it was closed. *See id*. at 3 (stating that "about eight months after contracting to close its investigation into the two remaining policies, DOJ reopened the investigation"). We therefore have no occasion to consider that scenario and we decline to opine on whether such conduct by DOJ would constitute a breach of the agreement.

Op. at 5 n.7 ("DOJ disavowed the argument that its unilateral withdrawal had anything to do with this case."); *id*. ("So as DOJ sees things, it had the right to reopen the investigation (immediately) even if the contract remained in force.").

* * *

For the foregoing reasons, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

So ordered.

WALKER, *Circuit Judge*, dissenting: The National Association of Realtors made a contract with the Antitrust Division of the Department of Justice. As in every contract, each side gained something, and each side gave something up. The Realtors agreed to give up four policies that DOJ considered anticompetitive. In exchange, DOJ promised that it had "closed" its investigation into two other policies.

DOJ doesn't deny that it made a contract. Nor is there any dispute about what it gained. Instead, the sole question is — what did DOJ give up when it "closed" the investigation?

Nothing, if we believe DOJ. As it sees things, it could *immediately* reopen its investigation because anything "closed" can be reopened at any time.

No court identified by DOJ has endorsed such a reading. Nor should we. Because DOJ misreads one isolated word ("closed") to nullify what the Realtors gained from an otherwise comprehensive and comprehensible contract, I respectfully dissent.

I

In 2019, the Antitrust Division of the Department of Justice opened a civil investigation into the National Association of Realtors' policies. In 2020, several months into the investigation, each side came to the bargaining table. DOJ identified six policies that it wanted changed. The Realtors expressed a willingness to change four of them. But the Realtors repeatedly insisted that they would "not agree" to change those four policies "without prior written assurances" that DOJ "has closed its investigation" into the other two. JA 109 (Realtors expressing these demands via email to DOJ); *see*

also JA 126 (Realtors attaching these demands to DOJ's draft reservation of rights provision).[1]

Eventually, DOJ decided that securing changes to the four anticompetitive policies outweighed the risks of bringing a lawsuit that might change *none* if DOJ took the case to court and lost.[2] So DOJ finally acquiesced to the Realtors' demand. And with that, they had a deal.

The parties captured their deal in a settlement agreement. The agreement detailed the extensive changes the Realtors would need to immediately undertake. JA 165-74.[3] As for DOJ's promise to close, one page of the agreement stated:

> **[T]he Antitrust Division has closed its investigation into the [two remaining policies]. Accordingly, [the Realtors] will have no obligation to respond to [two Civil Investigative Demands regarding those two remaining policies].**

---

[1] When describing what happened in 2019 and 2020, I will refer to the government as "DOJ" or "the Antitrust Division of the Department of Justice," rather than DOJ's preferred nomenclature: "the previous leadership of the Division." DOJ Br. at 11.

[2] *Cf. United States v. United States Sugar Corp.*, 73 F.4th 197 (3d Cir. 2023) (failed DOJ civil antitrust suit); *United States v. UnitedHealth Group Inc.*, 630 F. Supp. 3d 118 (D.D.C. 2022) (same); *United States v. Booz Allen Hamilton Inc.*, No. CCB-22-1603, 2022 WL 16553230 (D. Md. Oct. 31, 2022) (same).

[3] This portion of the settlement agreement is called the "consent decree."

JA 178 (emphasis added).[4]

With that agreement in place, the Realtors immediately began to comply. But unexpectedly, DOJ later insisted on modifying the agreement. When the Realtors refused, DOJ unilaterally reneged. In July 2021, about eight months after contracting to close its investigation into the two remaining policies, DOJ reopened the investigation.[5]

The Realtors sued, arguing that the reopened investigation is not what they bargained for. *National Association of Realtors v. United States*, No. 21-2406, 2023 WL 387572, at *2 (D.D.C. Jan. 25, 2023). The district court agreed with the Realtors. It explained that the "government, like any party, must be held to the terms of its settlement agreements." *Id.* at *5; *cf. United States v. Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law."). It also noted that "the government itself understood the broader settlement to require closure of the investigation" — a "common-sense interpretation of the parties' settlement" that DOJ does not dispute. *National Association of Realtors,* 2023 WL 387572, at *4. So, as the district court said, "it is not hard

---

[4] This portion of the settlement agreement is called the "closing letter."

[5] For the purposes of this appeal, it doesn't matter that DOJ withdrew the consent decree when it reopened the investigation. *See* Maj. Op. at 16-17 (rejecting course of performance arguments in this case). That's because the contract's meaning depends on what it unambiguously says, not on what happened eight months after its formation. And as DOJ repeatedly insists, the meaning of "closed" *at the time of contract formation* is the sole issue before the Court. *See infra* n.6.

4

to conclude that the new [reopening] violates the agreement." *Id.*

DOJ appealed.

II

The question presented is not whether DOJ's promise to close an investigation means the investigation must stay closed forever. Nor is the question whether DOJ can reopen an investigation eight months after it contracts to close it, as DOJ did here. Rather, the sole question is whether DOJ is correct that it could have immediately reopened its investigation of the Realtors' two remaining policies after contracting to close that investigation.[6]

---

[6] DOJ readily admits that this is its one and only argument. *See* Oral Arg. Tr. at 4 (Question: "If we disagree with you about [the meaning of closed], do you have another theory where you can win; or do you concede that's the case?" DOJ: "That is our theory in this Court which is that when the Antitrust Division made the commitment to close, that did not apply any additional commitment to refrain from reopening, and that's clear throughout the record."); *id.* at 8 (Question: "[D]o you have any concern that what DOJ is doing here will make it harder for future DOJs to convince parties in [the Realtors'] shoes that when DOJ says it will close an investigation, it will stay closed for more than a half minute?" DOJ: "No, because we made clear throughout the process that we weren't making that commitment."); *id.* at 12 (Question: "So, you're just relying on your interpretation of the closing letter[?]" DOJ: "Correct. Correct."); *see also* DOJ Reply Br. at 8 (arguing that DOJ is permitted to reopen investigations "at any time").

Because DOJ's sole argument is wrong, I would affirm the district court on the narrow grounds presented to us by DOJ's appeal.[7]

---

[7] Some readers may wonder, "Should DOJ lose just because their only argument is unpersuasive?" Yes. "But shouldn't they win if we can come up with a winning argument for them?" Not usually, and not here. "We adopt the framing of the dispute that is advanced by the parties because 'in our adversarial system of adjudication, we follow the principle of party presentation.'" Maj. Op. at 10 (quoting *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020)) (cleaned up).

Here's what that means: DOJ disavowed the argument that its unilateral withdrawal had anything to do with this case. Oral Arg. Tr. at 11 (Question: "And it seems to me that there is a plausible argument that this closing letter, if it's part of an overall agreement that included the consent decree, was withdrawn when the consent decree was withdrawn. Are you not making that argument?" DOJ: "We're not pressing that argument as a standalone argument here . . . ."). So any arguments about unilateral withdrawals don't matter — even if they might otherwise have been winning ones. *See* Maj. Op. at 9 ("The parties have not meaningfully briefed the potential unenforceability of the closing letter due to the withdrawal of the Proposed Consent Judgment . . . ."). *But see id.* at 19 ("In the case before us, DOJ exercised its option to withdraw the Proposed Consent Judgment, thereby releasing [the Realtors] from [their] obligations under the agreement . . . eight months after the original settlement agreement was reached. Because the reopening was not 'immediate' and there was never a time when [the Realtors were] bound by the settlement agreement while DOJ was not, the dissent's analysis is inapposite.").

So as DOJ sees things, it had the right to reopen the investigation (immediately) even if the contract remained in force. That is the *only* argument DOJ made on appeal. *See supra* n.6. And if that argument isn't a winner, DOJ's appeal can't be a winner. *But see* Maj. Op. at 20 ("Finally, we cannot agree with the dissent that 'the sole question [in this appeal] is whether DOJ is correct that it could have

6

A

Let's start with some common ground. DOJ says "closed" and "reopen" are not mutually exclusive. And sometimes that's true. In the abstract, a promise to close something does not always include a promise to keep it closed forever.

But this abstract understanding of "closed" and "reopen" is only the starting point of our analysis. That's because "context matters." *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 414 (2012). And depending on the context, a promise to close something might mean the closer cannot immediately reopen it. *See* Oral Arg. Tr. at 6 (DOJ: "context is critical").

A hypothetical presented by the Realtors illustrates the point. Consider the following:

A parent tells a child,
"Close the door."

Without context, we can't know *when* the child may reopen the door. Read literally, the child may close the door and then immediately reopen it. But a "good textualist is not a literalist." *See* Antonin Scalia, A Matter of Interpretation 24 (1997). So to know more, we need context.

Now imagine:

A parent says,
"Close the door when you leave for school."

---

immediately reopened its investigation of the Realtors' two remaining policies after contracting to close that investigation.'").

In that case, even if DOJ's literalist reading works in the abstract, it fails to capture the command's true meaning. Perhaps Dennis the Menace would close the door and then immediately reopen it before he runs toward the school bus and mockingly calls back, "You didn't say to *keep* it closed!" But an obedient child would not.

We encounter situations like this all the time, both in life and the law. Consider the following:

A gate agent tells a late passenger,
"Sorry, I've closed the jet bridge."

A sign on a barricade says,
"Road Closed."

The late passenger understands that the gate agent means, "I've closed the jet bridge and I won't reopen it for your flight." And if the "Road Closed" sign is on Glacier Park's Going-to-the-Sun Road in December, the sign means the road ahead is closed for the rest of the season. As these examples illustrate, "ultimately, context determines meaning." *Caraco*, 566 U.S. at 413-14 (cleaned up); *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) ("To strip a word from its context is to strip that word of its meaning.").

So to sum up, I accept DOJ's abstract contention that "closed" and "reopen" are sometimes compatible. But because "context may drive such a statement in either direction," a promise to close something may at times preclude an immediate reopening. *Pulsifer v. United States*, 601 U.S. at __ (2024) (slip op. at 12 n.5). "Really, it all depends." *Id*. at __ (slip op. at 15).

8

B

By context, I mean the rest of the contract's text. And here, the text suggests a quid-pro-quo bargain that precludes DOJ's sole argument.[8]

Start with the terms of the quid pro quo. The *quid* was DOJ's closure of its investigation into the two remaining policies, promised in the one-page "closing letter" portion of the contract. The *quo* was the Realtors' surrender of the four anticompetitive policies. That surrender was described in painstaking detail across 15 pages. For example, the agreement required the Realtors to immediately "undertake certain actions and refrain from certain conduct for the purpose of remedying the anticompetitive effects" of the four policies. JA 162. The agreement then listed the Realtors' "prohibited conduct," "required conduct," "antitrust compliance," and requirements for "compliance inspection." JA 165-74 (cleaned up).

Read together, it's apparent from the four corners of the contract that the Realtors' extensive commitments about the four anticompetitive policies came at a cost to DOJ, and this

[8] I do not rely on extrinsic evidence outside the contract's four corners because "closed" is unambiguous when read in context. *See Iberdrola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1304 (D.C. Cir. 2010) ("If a contract is not ambiguous, extrinsic evidence cannot be used as an aid to interpretation.") (quoting *Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1544 (D.C. Cir. 1985)). In any event, the extrinsic evidence is something of a wash. DOJ said it would never promise what the Realtors wanted, and the Realtors said they would never settle without that promise — so the extrinsic evidence just tells us that someone was bluffing. *See* Maj. Op. at 4-5, 15-18.

bargained-for cost is the context that must inform the meaning of "closed."[9]

So when properly read in the context of the entire comprehensive agreement, DOJ's promise to close is best understood to mean:

DOJ has closed its investigation into two remaining policies *in exchange for* the Realtors' promise to change four anticompetitive policies.

I again emphasize "in exchange for" — the *pro* in quid pro quo — because the nature of the parties' exchange is what moves us beyond abstract propositions like "[t]he words 'close' and 'reopen' are unambiguously compatible." Maj. Op. at 12. When construing one side's promise in a quid pro quo, we "avoid constructions of contracts that would render promises illusory." *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 440 (2015). And here, that fundamental and well-settled contract principle means we must construe "closed" to preclude "immediately reopen." *See, e.g.*, *Irwin v. United States*, 57 U.S. 513, 519 (1853) (our "court can make no new contract for the parties").

This reading is also entirely logical. In any bargain, you give up something in order to get *something* in return. That's what separates a contract from a commandment, and a compromise from a ukase. *See Appalachian Power Co. v.*

[9] Recall that none of the following contextual points are disputed: The settlement agreement is a binding contract. Maj. Op. at 9. The contract includes DOJ's letter promising to close its investigation into the two remaining policies. *Id.* And DOJ's promise to close the investigation was in exchange for the Realtors' promise to change the four anticompetitive policies. *Id.* at 5-6.

EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (a provision "reads like a ukase" because it "commands," "requires," "orders," and "dictates"). So both sides of the exchange in this agreement must have real meaning.

Under the Realtors' reading, both do: The Realtors gave up something (the four anticompetitive policies) to get something (non-illusory relief from DOJ's investigation into the two remaining policies). In contrast, DOJ's reading invests one side of the exchange with no real meaning at all. It says that the Realtors gave up something (a lot, actually) in exchange for nothing more than a promise by DOJ to close an investigation it could immediately reopen — in other words, for a promise "worth nothing but the paper on which it was written." *National Association of Realtors v. United States*, No. 21-2406, 2023 WL 387572, at *4 (D.D.C. Jan. 25, 2023).

C

Several counterarguments were made in DOJ's brief and by its exceptionally able counsel at oral argument. But none can change this bottom line: DOJ needs you to believe that the Realtors gave away something for nothing.

First, DOJ says the Realtors actually did benefit from DOJ closing the investigation, including from the inertia that kept it closed for eight months. Sure, but DOJ isn't arguing for an eight-month rule; rather, it argues that it can reopen a closed investigation immediately. The Realtors would have received no benefit from *that*. So DOJ's theory still depends on reading its promise as meaningless — a reading prohibited by basic contract principles. *See M & G Polymers USA*, 574 U.S. at 440; *Irwin*, 57 U.S. at 519.

Second, DOJ cites other cases where the government reopened investigations that it previously closed. *See* Maj. Op. at 13-14. But DOJ has not cited a single precedent allowing it to reopen an investigation after contracting to close it in exchange for consideration. It relies instead on immaterial precedents about unilateral promises, not binding contracts. *See Marinello v. United States*, 584 U.S. 1 (2018) (describing no settlement negotiations whatsoever); *J. Roderick MacArthur Foundation v. FBI*, 102 F.3d 600 (D.C. Cir. 1996) (same); *Schellenbach v. SEC*, 989 F.2d 907, 910 (7th Cir. 1993) ("Petitioner and NASD officials discussed a settlement, but they could not agree").[10]

Third, DOJ cites the "unmistakability" principle. It disfavors interpretations that "cede a sovereign right of the United States unless the government waives that right unmistakably." Maj. Op. at 12. But that principle doesn't apply here where DOJ did unmistakably cede its right to immediately reopen its investigation into the two remaining policies — for the reasons explained above.

Finally, DOJ points to a sentence in one part of the settlement agreement that states: "No inference should be drawn" from DOJ's "decision to close its investigation into these rules, policies or practices not addressed by the consent decree." JA 178.[11]

---

[10] *See also* Oral Arg. Tr. at 29 (Question: "[C]an you point me to a precedent where the Government has made a promise in exchange for consideration to close an investigation and the Court has said that the Government can reopen the investigation?" DOJ: "Not in a case where we made a promise to do it . . . .").

[11] Recall that the consent decree described the Realtors' contractual obligations.

12

That sentence provides no answer to the one question in this case: Whether DOJ promised to refrain from immediately reopening its "closed" investigation (not whether we should "infer[ ]" something beyond that promise). Once we identify the scope of DOJ's promise, then "under the law of contract [DOJ] was not free to unilaterally change the terms of the settlement agreement by adding an ambiguous sentence to a letter designed to simply confirm that it had upheld its side of the deal." *National Association of Realtors*, 2023 WL 387572, at *5.

So much for what DOJ's "ambiguous sentence" did *not* do. As for what it *did* do, consider that several of the Realtors' policies were being challenged in court by third parties seeking a class action verdict in excess of a billion dollars.[12] The "ambiguous sentence" is best read to "inform *third parties* that the government had not found one way or the other that the [two remaining policies] were lawful." *Id.* That message — if you want to keep suing the Realtors yourselves, go for it — does not conflict with DOJ's promise not to immediately reopen its own "closed" investigation.

[12] *See Burnett v. National Association of Realtors*, 19-cv-0332, ECF 1294 (W.D. Mo. Oct. 31, 2023) (jury verdict awarding class plaintiffs approximately $1.79 billion in damages against all defendants); National Association of Realtors, National Association of Realtors Reaches Agreement to Resolve Nationwide Claims Brought by Home Sellers (Mar. 15, 2024), https://perma.cc/86TR-YBRD (Realtors announcing a $418 million settlement of the class claims against them); *Burnett*, 19-cv-0332, at ECF 1399-1 (W.D. Mo. Mar. 18, 2024) (judgment accepting the settlement).

13

*   *   *

The Antitrust Division of the Department of Justice bargained for a binding contract. That bargain required DOJ to close an investigation, and it did not allow DOJ to immediately reopen the "closed" investigation. In arguing otherwise, DOJ has invited our court to go where no court has gone before — or at least no court identified by DOJ.

For the sake of DOJ's credibility, I wish it had not done so. And for the sake of citizens who find themselves on the other side of the bargaining table, I wish our court had not agreed.[13]

After today, behind the facade of its promise to close an investigation, the government can lure a party into the false comfort of a settlement agreement, take what it can get, and then reopen the investigation seconds later.

So if you ever find yourself negotiating with the Antitrust Division of the Department of Justice, let today's case be a lesson:

Buyer Beware.

[13] *Cf.* Makan Delrahim, Assistant Attorney General, Antitrust Division of the Department of Justice, Remarks at Bocconi University in Milan (May 25, 2018), https://perma.cc/8EBM-DJFU ("To ensure that businesses can enter contracts, make investments, and plan for the future, we must provide a stable and predictable environment that is free of arbitrary government action and characterized by transparent and fair procedures.").

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, HOLLEE ELLIS, FRANCES HARVEY, and JEREMY KEEL, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX, LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	Case No. 19-cv-00332-SRB

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHRISTOPHER MOEHRL, MICHAEL COLE, STEVE DARNELL, JACK RAMEY, DANIEL UMPA and JANE RUH on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, THE LONG & FOSTER COMPANIES, INC., RE/MAX, LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	Case No. 1:19-cv-01610-ARW

CORRECTED SETTLEMENT AGREEMENT

This Settlement Agreement ("Settlement Agreement") is made and entered into this 15th day of March, 2024 (the "Execution Date"), by and between defendant the National Association of REALTORS® and plaintiffs Rhonda Burnett, Jerod Breit, Jeremy Keel, Hollee Ellis, Frances Harvey, Christopher Moehrl, Michael Cole, Steve Darnell, Jack Ramey, Daniel Umpa, Jane Ruh, Don Gibson, Lauren Criss, and John Meiners (collectively "Plaintiffs"), who filed suit in the above captioned actions and in *Daniel Umpa v. The National Association of Realtors, et al.*, No. 23-cv-945 (W.D. Mo.), and *Don Gibson v. The National Association of Realtors, et al.*, No. 23-cv-00788 (W.D. Mo.) (all four actions collectively, "the Actions"), both individually and as representatives of one or more classes of home sellers. Plaintiffs enter this Settlement Agreement both individually and on behalf of the Settlement Class, as defined below.

WHEREAS, in the Actions, Plaintiffs allege that the National Association of REALTORS® participated in a conspiracy to raise, fix, maintain, or stabilize real estate commissions in violation of Section 1 of the Sherman Act and corresponding state laws;

WHEREAS, the National Association of REALTORS® denies Plaintiffs' allegations in the Actions and has asserted defenses to Plaintiffs' claims;

WHEREAS, the parties in Burnett proceeded to a jury trial, and the jury returned a verdict in favor of the plaintiffs in that action;

WHEREAS, the National Association of REALTORS® has filed post-trial motions in Burnett pursuant to Federal Rules of Civil Procedure 50 and 59 and a motion to decertify the class, and joined in post-trial motions filed by Keller Williams, Inc., HomeServices of America, Inc., BHH Affiliates, LLC, and HSF Affiliates, LLC, which are pending;

WHEREAS, the National Association of REALTORS® has filed a motion in Moehrl pursuant to Federal Rule of Civil Procedure 56;

WHEREAS, extensive arm's-length settlement negotiations have taken place between Plaintiffs' Co-Lead Counsel and counsel for the National Association of REALTORS®, including several telephonic mediations with a nationally recognized and highly experienced mediator, two mediations with a retired federal district judge, and a mediation with a federal magistrate judge;

WHEREAS, the Actions will continue, including against certain other defendants, unless Plaintiffs separately settle with those defendants;

WHEREAS, Plaintiffs have conducted an extensive investigation into the facts and the law regarding the claims asserted in the Actions, including more than four years of fact and expert discovery, and have concluded that a settlement with the National Association of REALTORS® according to the terms set forth below is fair, reasonable, and adequate and in the best interest of Plaintiffs and the Settlement Class;

WHEREAS, the National Association of REALTORS® believes that it is not liable for the claims asserted and has good defenses to Plaintiffs' claims and meritorious summary judgment and post-trial motions, but nevertheless has decided to enter into this Settlement Agreement to avoid further expense, inconvenience, and the distraction of burdensome and protracted litigation, to obtain the nationwide releases, orders, and judgment contemplated by this Settlement Agreement, and to put to rest with finality all claims that Plaintiffs and Settlement Class Members have or could have asserted against the Released Parties, as defined below; and

WHEREAS, the National Association of REALTORS®, in addition to the settlement payments set forth below, has agreed to cooperate in discovery and at trial with Plaintiffs and to implement certain practice changes, each as set forth in this Settlement Agreement.

NOW, THEREFORE, in consideration of the agreements and releases set forth herein and other good and valuable consideration, and intending to be legally bound, it is agreed by and between the National Association of REALTORS® and the Plaintiffs that the Actions be settled,

compromised, and dismissed with prejudice as to the National Association of REALTORS® only, without costs to Plaintiffs, the Settlement Class, or the National Association of REALTORS® except as provided for herein, subject to the approval of the Court, on the following terms and conditions:

A. Definitions

The following terms, as used in this Settlement Agreement, have the following meanings:

1. "Burnett" means the case pending in the United States District Court for the Western District of Missouri, Case No. 4:19-cv-00332-SRB.

2. "Burnett MLSs" means the multiple listing services identified as "Subject MLSs" in Burnett.

3. "Co-Lead Counsel" means the following law firms:

KETCHMARK AND MCCREIGHT P.C.
11161 Overbrook Road, Suite 210
Leawood, KS 66211

BOULWARE LAW LLC
1600 Genessee, Suite 416
Kansas City, MO 64102

WILLIAMS DIRKS DAMERON LLC
1100 Main Street, Suite 2600
Kansas City, MO 64105

HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101

COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW, Fifth Floor
Washington, DC 20005

SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067

4. "Court" means the United States District Court for the Western District of Missouri.

5. “Effective” means that all conditions set forth below in the definition of “Effective Date” have occurred.

6. “Effective Date” means the date when both: (a) the Court has entered a final judgment order approving the Settlement set forth in this Settlement Agreement under Rule 23(e) of the Federal Rules of Civil Procedure and a final judgment dismissing the Actions against the National Association of REALTORS® with prejudice has been entered; and (b) the time for appeal or to seek permission to appeal from the Court’s approval of the Settlement and the entry of a final judgment has expired or, if appealed, approval of the Settlement and the final judgment have been affirmed in their entirety by the court of last resort to which such appeal has been taken and such affirmance is no longer subject to further appeal or review; excluding, however, any appeal or other proceedings unrelated to this Settlement Agreement initiated by any Non-National Association of REALTORS® Defendant, and any such appeal or other proceedings shall not delay this Settlement Agreement from becoming final and shall not apply to this Paragraph. This Paragraph shall not be construed as an admission that such parties have standing or other rights of objection or appeal with respect to this Settlement. It is agreed that neither the provisions of Federal Rule of Civil Procedure 60 nor the All Writs Act, 28 U.S.C. § 1651, shall be considered in determining the above-stated times.

7. “REALTOR® Member Boards” means local or state/territory real estate boards or associations of REALTORS®, all of whose members are also members of the National Association of REALTORS® through those boards or associations.

8. “Moehrl” means the case pending in the Northern District of Illinois Case No. 1:19-cv-01610-ARW.

9. “Moehrl MLSs” means the multiple listing services identified as “Covered MLSs” in Moehrl.

10. "MLS PIN" means the multiple listing service identified in United States District Court for the District of Massachusetts, Case No. 1:20-cv-12244-PBS, which is currently pending.

11. "REALTOR® MLS" means: (a) any separately incorporated multiple listing service that is owned exclusively by one or more REALTOR® Member Boards as of the Execution Date (and not in whole or part by any non-Member Board Person); or (b) any other multiple listing service that is not separately incorporated from and is operated exclusively by a Member Board.

12. "Non-National Association of REALTORS® Defendant" means any defendant in the Actions excepting the National Association of REALTORS®.

13. "Opt-Outs" means members of the Settlement Class who have timely exercised their rights to be excluded from the Settlement Class or have otherwise obtained Court approval to exercise such rights.

14. "Participant" means a principal broker or a brokerage firm participating in a multiple listing service.

15. "Person" means an individual, corporation, partnership, limited partnership, association, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, any business or legal entity, and such individual's or entity's spouse, heirs, predecessors, successors, representatives, affiliates, and assignees.

16. "Principal" means licensed or certified individuals who are sole proprietors, partners in a partnership, officers or majority shareholders of a corporation, or office managers (including branch office managers) acting on behalf of principals of a real estate firm.

17. "Released Claims" means any and all manner of claims, regardless of the cause of action, arising from or relating to conduct that was alleged or could have been alleged in the Actions based on any or all of the same factual predicates for the claims alleged in the Actions, including but

not limited to commissions negotiated, offered, obtained, rebated, or paid to brokerages in connection with the sale of any residential home.

18. "Released Parties" means:

a. the National Association of REALTORS®, and all of its respective past, present, and future, direct and indirect, subsidiaries, predecessors, successors, affiliates (all as defined in SEC rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), institutes, societies, councils, and all of their officers, directors, managing directors, employees, agents, contractors, independent contractors, attorneys, legal or other representatives, accountants, auditors, experts, trustees, trusts, heirs, beneficiaries, estates, executors, administrators, insurers, and assigns.

b. Any REALTORS® (members of the National Association of REALTORS®), REALTOR-Associate® Members, and REALTOR® Member Boards that do not operate an unincorporated multiple listing service, and all of their respective past and present, direct and indirect, predecessors, successors (all as defined in SEC rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), and all of their officers, directors, managing directors, employees, agents, contractors, independent contractors, attorneys, legal or other representatives, accountants, auditors, experts, trustees, trusts, heirs, beneficiaries, estates, executors, administrators, insurers, and assigns, that (i) is a member of the National Association of REALTORS® on the date of Class Notice; and (ii) complies with the practice changes reflected in Paragraphs 58(vi)-(x) of this Settlement Agreement and agrees to provide proof of such compliance if requested by Co-Lead Counsel; and (iii) does not assert any claims in the time period specified in Paragraph 59 they may have against the National Association of REALTORS®, any REALTOR® Member Boards, or any REALTOR® MLS based on any or all of the same factual predicates for the claims alleged in the Actions or the

practice changes in this Settlement Agreement. Any Settlement Class Member shall have the right to inquire of the National Association of REALTORS® as to whether a Person is a REALTOR®, REALTOR-Associate® Member, or REALTOR® Member Board and has satisfied the conditions for being a "Released Party," and the National Association of REALTORS® shall promptly provide this information.

c. Any REALTOR® MLS (including a REALTOR® Member Board that operates an unincorporated multiple listing service), including its respective past and present, direct and indirect, subsidiaries, predecessors, successors (all as defined in SEC rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), and all of their officers, directors, managing directors, employees, agents, contractors, independent contractors, attorneys, legal or other representatives, accountants, auditors, experts, trustees, trusts, heirs, beneficiaries, estates, executors, administrators, insurers, and assigns, but only if that REALTOR® MLS (i) complies with the procedures and requirements reflected in Paragraph 66 of this Settlement Agreement; (ii) complies with the practice changes reflected in Paragraph 68 of this Settlement Agreement and agrees to provide proof of such compliance if requested by Co-Lead Counsel; and (iii) does not assert any claims in the time period specified in Paragraph 59, they may have against the National Association of REALTORS®, any REALTOR® Member Boards, or any REALTOR® MLS based on any or all of the same factual predicates for the claims alleged in the Actions or the practice changes in this Settlement Agreement.

d. Any non-REALTOR® MLS, including its respective past and present, direct and indirect, subsidiaries, predecessors, successors (all as defined in SEC rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), and all of their officers, directors, managing directors, employees, agents, contractors, independent contractors,

attorneys, legal or other representatives, accountants, auditors, experts, trustees, trusts, heirs, beneficiaries, estates, executors, administrators, insurers, and assigns, but only if that non-REALTOR® MLS (i) complies with the procedures and requirements reflected in Paragraph 67 of this Settlement Agreement; (ii) complies with the practice changes reflected in Paragraph 68 of this Settlement Agreement and agrees to provide proof of such compliance if requested by Co-Lead Counsel; (iii) does not assert any claims, in the time period specified in Paragraph 59, they may have against the National Association of REALTORS®, any REALTOR® Member Boards, or any REALTOR® MLS based on any or all of the same factual predicates for the claims alleged in the Actions or the practice changes in this Settlement Agreement; and (iv) pays the Settlement Class pursuant to the procedures in Appendix D.

e. Any real estate brokerage with a calendar year 2022 Total Transaction Volume for residential home sales of $2 billion or less, including all of their respective past, present, and future, direct and indirect, subsidiaries, predecessors, successors (all as defined in SEC rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), and all of their franchisees, officers, directors, managing directors, employees, agents, contractors, independent contractors, attorneys, legal or other representatives, accountants, auditors, experts, trustees, trusts, heirs, beneficiaries, estates, executors, administrators, insurers, and assigns, but only if that brokerage (i) has a REALTOR® as a Principal with membership in the National Association of REALTORS® on the date of Class Notice; (ii) has a Principal who was a Participant in any MLS (including a Member Board that operates an unincorporated multiple listing service) at any time during the time period covered by the Settlement Class; (iii) complies with the practice changes reflected in Paragraphs 58(vi)-(x) of this Settlement Agreement and agrees to provide proof of such compliance if requested by

Co-Lead Counsel; and (iv) does not assert any claims, in the time period specified in Paragraph 59, they may have against the National Association of REALTORS®, any REALTOR® Member Boards, or any REALTOR® MLS based on any or all of the same factual predicates for the claims alleged in the Actions or the practice changes in this Settlement Agreement. Any Settlement Class Member shall have the right to inquire of the National Association of REALTORS® as to whether a Person is a REALTOR®, REALTOR-Associate® Member, or REALTOR® Member Board and has satisfied the conditions for being a "Released Party," and the National Association of REALTORS® shall promptly provide this information.

f. Notwithstanding Paragraphs 18(a)-(e) of this Settlement Agreement, any real estate brokerage with a calendar year 2022 Total Transaction Volume for residential home sales in excess of $2 billion, including all of their respective past, present, and future, direct and indirect, parents subsidiaries, predecessors, successors (all as defined in SEC rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), and all of their franchisees, officers, directors, managing directors, employees, agents, contractors, independent contractors, attorneys, legal or other representatives, accountants, auditors, experts, trustees, trusts, heirs, beneficiaries, estates, executors, administrators, insurers, and assigns, but only if that brokerage (i) has a REALTOR® as a Principal with membership in the National Association of REALTORS® on the date of Class Notice; (ii) has a Principal who was a Participant in any MLS (including a Member Board that operates an unincorporated multiple listing service) at any time during the time period covered by the Settlement Class; (iii) does not assert any claims in the time period specified in Paragraph 59, they may have against the National Association of REALTORS®, any REALTOR® Member Boards, or any REALTOR® MLS based on any or all of the same factual predicates for the claims alleged

in the Actions or the practice changes in this Settlement Agreement; (iv) complies with the practice changes reflected in Paragraphs 58(vi)-(x) of this Settlement Agreement and agrees to provide proof of such compliance if requested by Co-Lead Counsel; and (v) agrees to be bound by the procedure and requirements reflected in Section B of Appendix C, including by making payments pursuant to those Paragraphs.

g. Notwithstanding Paragraph 18(a)-(f) of this Settlement Agreement, HomeServices of America, Inc., BHH Affiliates, LLC, Berkshire Hathaway Energy Company, Long & Foster Companies, Inc., and HSF Affiliates, LLC shall not be a "Released Party," nor shall any such defendant's past, present, and future, direct and indirect, parents (including holding companies), subsidiaries, related entities, associates, predecessors, successors, or affiliates (all as defined in SEC rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), nor any of their respective franchisors, franchisees, officers, directors, managing directors, employees, attorneys, legal or other representatives, accountants, auditors, experts, trustees, trusts, heirs, beneficiaries, estates, executors, administrators, insurers, assigns, or independent contractor real estate agents—but only for the times in which they were franchisors, franchisees, officers, directors, managing directors, employees, attorneys, legal or other representatives, accountants, auditors, experts, trustees, trusts, heirs, beneficiaries, estates, executors, administrators, insurers, assigns, or independent contractor real estate agents of HomeServices of America, Inc., BHH Affiliates, LLC, Berkshire Hathaway Energy Company, Long & Foster Companies, Inc., or HSF Affiliates, LLC or any of their past, present, and future, direct and indirect, parents (including holding companies), subsidiaries, related entities, associates, predecessors, successors, or affiliates (all as defined in SEC rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934).

h. Notwithstanding Paragraphs 18(a)-(f) of this Settlement Agreement, no defendant in the Actions as of the Execution Date—other than the National Association of REALTORS® (which is addressed in Paragraph 18(a) of this Settlement Agreement) and HomeServices of America, Inc., BHH Affiliates, LLC, Berkshire Hathaway Energy Company, Long & Foster Companies, Inc., and HSF Affiliates, LLC (which are addressed in Paragraph 18(g) of this Settlement Agreement)—(i) shall be a "Released Party," (ii) nor shall any such defendant's past, present, and future, direct and indirect, parents (including holding companies), subsidiaries, affiliates, associates (all as defined in SEC rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), predecessors, and successors, (iii) nor any of their respective franchisors, franchisees, officers, directors, managing directors, employees, attorneys, legal or other representatives, accountants, auditors, experts, trustees, trusts, heirs, beneficiaries, estates, executors, administrators, insurers, or assigns—but only for the times in which they were franchisors, franchisees, officers, directors, managing directors, employees, attorneys, legal or other representatives, accountants, auditors, experts, trustees, trusts, heirs, beneficiaries, estates, executors, administrators, insurers, or assigns of such a defendant. Independent contractor real estate agents affiliated with a defendant in the Actions, other than the National Association of REALTORS® or Persons not released under Paragraph 18(g), are covered by Paragraph 18(b) of this Settlement Agreement for the period of such affiliation.

19. "Releasing Parties" means Plaintiffs and any Settlement Class Members (including any of their immediate family members, heirs, representatives, administrators, executors, devisees, legatees, and estates, acting in their capacity as such; and for entities including any of their past, present or future officers, directors, insurers, general or limited partners, divisions, stockholders, agents, attorneys, employees, legal representatives, trustees, parents, associates, affiliates, joint

ventures, subsidiaries, heirs, executors, administrators, predecessors, successors and assigns, acting in their capacity as such solely with respect to the claims based on or derived from claims of the Plaintiffs or Settlement Class Members).

20. "Settlement" means the settlement contemplated by this Settlement Agreement.

21. "Settlement Class" means the class of persons that will be certified by the Court for Settlement purposes only, namely, all persons who sold a home that was listed on a multiple listing service anywhere in the United States where a commission was paid to any brokerage in connection with the sale of the home in the following date ranges:

- Homes listed on Moehrl MLSs: March 6, 2015 to date of Class Notice;
- Homes listed on Burnett MLSs: April 29, 2014
- to date of Class Notice;
- Homes listed on MLS PIN: December 17, 2016 to date of Class Notice;
- Homes in Arkansas, Kentucky, and Missouri, but not on the Moehrl MLSs, the Burnett MLSs, or MLS PIN: October 31, 2018 to date of Class Notice;
- Homes in Alabama, Georgia, Indiana, Maine, Michigan, Minnesota, New Jersey, Pennsylvania, Tennessee, Vermont, Wisconsin, and Wyoming, but not on the Moehrl MLSs, the Burnett MLSs, or MLS PIN: October 31, 2017 to date of Class Notice;
- For all other homes: October 31, 2019 to date of Class Notice.

Plaintiffs and National Association of REALTORS® intend this Settlement Agreement to provide for a nationwide class with a nationwide settlement and release.

22. "Settlement Class Member" means a member of the Settlement Class who does not file a valid request for exclusion from the Settlement Class.

23. "Settling Parties" means Plaintiffs and the National Association of REALTORS®.

24. "Total Monetary Settlement Amount" means $418.00 million. All costs of settlement, including all payments to Settlement Class Members, all attorneys' fees and costs, all service awards to current and former class representatives, and all costs of Class Notice and administration, will be paid out of the Total Monetary Settlement Amount, and the National Association of REALTORS® will pay nothing apart from the Total Monetary Settlement Amount, except as provided in Paragraphs 37 and 40 of this Settlement Agreement.

25. "Total Transaction Volume" means the aggregate dollar value of all residential home sales and purchases of a real estate brokerage, together with the aggregate dollar value of all residential home sales and purchases of that brokerage's direct and indirect parents (including holding companies), subsidiaries, affiliates, associates (all as defined in SEC rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934) and of each's franchisees, in which each such Person represented the buyer, the seller, or both in a real estate brokerage capacity. For any transactions in which a real estate broker represented both the buyer and the seller, that transaction shall be counted twice for purposes of calculating the "Total Transaction Volume." The "Sales Volume" reflected in the T360 Real Estate Almanac shall serve as an irrebuttable presumption of a Person's "Total Transaction Volume."

B. <u>Stipulation to Class Certification</u>

26. The Settling Parties hereby stipulate, for purposes of this Settlement only, that the requirements of Federal Rules of Civil Procedure 23(a), 23(b)(2), and 23(b)(3) are satisfied, and, subject to Court approval, the Settlement Class shall be certified for Settlement purposes as to the National Association of REALTORS®. The Settling Parties stipulate and agree to the conditional certification of the Settlement Class for purposes of this Settlement only. Should, for whatever reason, the Settlement not become Effective, the Settling Parties' stipulation to class certification as part of the Settlement shall become null and void.

27. Neither this Settlement Agreement, nor any statement, transaction, or proceeding in connection with the negotiation, execution, or implementation of this Settlement Agreement should be intended to be, construed as, or deemed to be evidence of an admission or concession by the National Association of REALTORS® that a class should be or should have been certified for any purposes other than settlement, and none of them shall be admissible in evidence for any such purpose in any proceeding.

C. <u>Approval of this Settlement Agreement and Dismissal of the Actions</u>

28. The Settling Parties agree to make reasonable best efforts to effectuate this Settlement Agreement, including, but not limited to, seeking the Court's approval of procedures (including the giving of Class Notice under Federal Rules of Civil Procedure 23(c) and (e)); scheduling a final fairness hearing to obtain final approval of the Settlement and the final dismissal with prejudice of the Actions as to the National Association of REALTORS®; and the National Association of REALTORS®'s cooperation by providing information reflecting its ability to pay limitations. The Settling Parties further agree that Co-Lead Counsel may seek whatever approvals are required by the court in Moehrl related to obtaining approval of and effectuating this Settlement Agreement.

29. Plaintiffs will submit to the Court a motion requesting that the Court preliminarily approve the Settlement. The motion for preliminary approval shall include a proposed form of order preliminarily approving the Settlement and enjoining Releasing Parties from prosecuting any Released Claims in any forum until the Effective Date of this Settlement. At least 48 hours before submission to the Court, the papers in support of the motion for preliminary approval shall be provided by Co-Lead Counsel to counsel for the National Association of REALTORS® for its review. To the extent that the National Association of REALTORS® objects to any aspect of the motion for preliminary approval, it shall communicate such objection to Co-Lead Counsel and the Settling Parties shall meet and confer to resolve any such objection. The Settling Parties shall take

all reasonable actions as may be necessary to obtain preliminary approval of the Settlement. To the extent the Court finds that the Settlement does not meet the standard for preliminary approval, the Settling Parties will negotiate in good faith to modify this Settlement Agreement directly or with the assistance of an agreed mediator and will endeavor to resolve any issues to the satisfaction of the Court.

30. Subject to approval by the Court, the Settling Parties will agree on a method or methods of providing notice of this Settlement to the Settlement Class and for claim administration that meet the requirements of due process and Federal Rule of Civil Procedure 23 ("Class Notice") and are substantially similar to the forms of notice already agreed-to and approved by the Court in the previous settlements with Anywhere, RE/MAX, and Keller Williams. Class members who file a claim to participate in the Anywhere, RE/MAX, or Keller Williams settlements will be deemed to also have made a claim to participate in this Settlement unless they affirmatively state they are excluding themselves from this Settlement Class. The Settling Parties agree to the use of the claims administrator previously selected to administer the Anywhere, RE/MAX, and Keller Williams settlements and approved by the Court. The Settling Parties agree that Class Notice must not be provided earlier than 120 days following the filing of the first motion for preliminary approval of this Settlement Agreement.

31. Within 10 calendar days after the filing of the first motion for preliminary approval of this Settlement Agreement, the claims administrator shall at the National Association of REALTORS®'s expense, to be credited against the Total Monetary Settlement Amount, cause notice of this Settlement Agreement to be served upon appropriate State and Federal officials as provided in the Class Action Fairness Act, 28 U.S.C. § 1715.

32. If the Settlement is preliminarily approved by the Court, Plaintiffs shall timely seek final approval of the Settlement and entry of a final judgment order as to the National Association of REALTORS®:

(a) certifying the Settlement Class under Federal Rule of Civil Procedure 23(b), solely for purposes of this Settlement;

(b) granting final approval of the Settlement as fair, reasonable, and adequate within the meaning of Federal Rule of Civil Procedure 23(e) and directing the consummation of the Settlement according to its terms;

(c) enjoining the National Association of REALTORS® and any opting in REALTOR® MLS, non-REALTOR® MLS, and real estate brokerage in accordance with Paragraph 58 and Paragraph 66 of this Settlement Agreement.

(d) directing that, as to the National Association of REALTORS® only, the Actions be dismissed with prejudice and, except as provided for herein, without costs;

(e) reserving exclusive jurisdiction over the Settlement and this Settlement Agreement, including reserving exclusive jurisdiction over the administration and consummation of this Settlement to the Court; and

(f) determining under Federal Rule of Civil Procedure 54(b) that there is no just reason for delay and directing entry of final judgment as to the National Association of REALTORS®.

33. This Settlement Agreement will become Effective only after the occurrence of all conditions set forth in the definition of the Effective Date.

D. <u>Releases, Discharge, and Covenant Not to Sue</u>

34. Upon the occurrence of the Effective Date, the Releasing Parties expressly and irrevocably waive, and fully, finally, and forever settle, discharge, and release the Released Parties

from, any and all manner of claims, demands, actions, suits, and causes of action, whether individual, class, representative, or otherwise in nature, for damages, restitution, disgorgement, interest, costs, expenses, attorneys' fees, fines, civil or other penalties, or other payment of money, or for injunctive, declaratory, or other equitable relief, whenever incurred, whether directly, indirectly, derivatively, or otherwise, whether known or unknown, suspected or unsuspected, in law or in equity, that any Releasing Party ever had, now has, or hereafter can, shall, or may have and that have accrued as of the date of Class Notice of the Settlement arising from or related to the Released Claims. The Released Claims include but are not limited to the antitrust and consumer protection claims brought in the Actions and similar state and federal statutes. In connection therewith, upon the Effective Date of Settlement, each of the Releasing Parties (a) shall forever be enjoined from prosecuting in any forum any Released Claims against any of the Released Parties that accrued from the beginning of time through the date of Class Notice; and (b) agrees and covenants not to sue any of the Released Parties with respect to any Released Claims. For avoidance of doubt, this release extends to, but only to, the fullest extent permitted by law.

35. The Releasing Parties may hereafter discover facts other than or different from those which they now know or believe to be true with respect to the subject matter of the Released Claims. Nevertheless, the Releasing Parties expressly, fully, finally, and forever settle and release, and, upon the Effective Date, shall be deemed to have, and by operation of the Final Judgment and Order of Dismissal shall have, fully, finally, and forever settled and released, any and all Released Claims, without regard to the subsequent discovery or existence of such other, different, or additional facts, as well as any and all rights and benefits existing under (a) Cal. Civ. Code Section 1542, which provides as follows:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
> THAT THE CREDITOR OR RELEASING PARTY DOES

> NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

or any equivalent, similar or comparable present or future law or principle of law of any jurisdiction, including but not limited to Section 20-7-11 of the South Dakota Codified Laws, which provides that "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR;" or (b) any law or principle of law of any jurisdiction that would limit or restrict the effect or scope of the provisions of the release set forth above, without regard to the subsequent discovery or existence of such other, different, or additional facts. The Releasing Parties acknowledge that the inclusion of unknown claims in the definition of Released Claims was separately bargained for and was a material element of this Settlement Agreement.

36. The Releasing Parties intend by this Settlement Agreement to settle with and release only the Released Parties, and the Settling Parties do not intend this Settlement Agreement, or any part hereof, or any other aspect of the proposed Settlement or release, to release or otherwise affect in any way any claims concerning product liability, breach of warranty, breach of contract or tort of any kind (other than a breach of contract or tort based on any factual predicate in the Actions), a claim arising out of violation of the Uniform Commercial Code, or personal or bodily injury. The release does not extend to any individual claims that a class member may have against his or her own broker or agent based on a breach of contract, breach of fiduciary duty, malpractice, negligence or

other tort claim, other than a claim that a class member paid an excessive commission or home price due to the claims at issue in the Actions.

E. Payment of the Settlement Amount

37. Plaintiffs will open a special interest-bearing settlement escrow account or accounts, established for that purpose as a qualified settlement fund as defined in Section 1.468B-1(a) of the United States Treasury Regulations (the "Escrow Account"). Within 30 days following the filing of the first motion for preliminary approval of this Settlement Agreement, the National Association of REALTORS® will deposit $5 million into the Escrow Account. Within 90 days following final approval of the Settlement by the Court (and notwithstanding the exhaustion of any appellate rights), the National Association of REALTORS® will deposit $197 million into the Escrow Account. No later than one year after the initial $197 million payment, the National Association of REALTORS® will deposit $72 million in principal into the Escrow Account. No later than two years after the initial $197 million payment, the National Association of REALTORS® will deposit another $72 million in principal into the Escrow Account. No later than three years after the initial $197 million payment, the National Association of REALTORS® will deposit into the Escrow Account the remaining principal, along with interest on each of the installment payments, as determined at the federal statutory rate under 28 U.S.C. 1961, into the Escrow Account. All accrued interest shall be for the benefit of the Settlement Class unless the Settlement is not approved, in which case the interest shall be for the benefit of the National Association of REALTORS®.

38. The obligation to make the three installment payments reflected above will be evidenced by a promissory note ("Note") that will be assignable by Plaintiffs, acting on behalf of the Settlement Class, with advance written notice of any assignment provided to the National Association of REALTORS®. The obligation and Note will be enforceable by the Court upon motion by Plaintiffs or Plaintiffs' assignee, and the Court shall retain continuing jurisdiction over the Settling

Parties regarding its enforcement notwithstanding the entry of a final judgment.

39. The National Association of REALTORS® represents that, as of the date of the Settlement Agreement, its current obligations with respect to funded debt are not greater than $35 million. The Note will be secured by liens and perfected security interests ("Liens") against the entirety of the assets of the National Association of REALTORS® and its subsidiaries as specified in the Security Agreement ("Obligors"). The Liens securing the Note will be evidenced by a security agreement ("Security Agreement") and any ancillary documentation necessary to perfect the Liens and/or document their priority relative to other security interests held by the Obligors' creditors ("Security Documentation") to be entered into between the Settling Parties. The Liens securing the Note shall be expressly subordinated to security interests granted to the lender ("Truist") under that certain Construction Loan Agreement dated as of September 14, 2018, between the National Association of REALTORS® and Truist (as amended, restated, supplemented, or otherwise modified from time to time, the "Loan Agreement") not more than the amount of the funded debt described above incurred as Obligations (as defined in the Loan Agreement) as of the date of this Settlement Agreement and interest on the principal on the amount of the Obligations as of the date of this Settlement Agreement and any compounding thereof, as consideration for Truist's agreement to waive alleged events of default under the Loan Agreement. The Settling Parties agree to negotiate the Note, Security Agreement, and Security Documentation (including, for the avoidance of doubt, a satisfactory intercreditor and/or subordination agreement between Truist and the Plaintiffs) in good faith during the 90 days following Execution Date. To the extent the Settling Parties are unable to reach agreement on the Note, Security Agreement, or Security Documentation they agree to submit their dispute to Greg Lindstrom or another mediator agreed to by the parties for binding resolution.

F. <u>The Settlement Fund</u>

40. The Total Monetary Settlement Amount, any interest earned thereon, and any payments by Released Parties pursuant to this Settlement Agreement shall be held in the Escrow Account and constitute the "Settlement Fund." The full and complete cost of the Class Notice, claims administration, Settlement Class Members' compensation, current and former class representatives' incentive awards, attorneys' fees and reimbursement of all actual expenses of the Actions, any other litigation costs of Plaintiffs (all as approved by the Court), and all applicable taxes, if any, assessable on the Settlement Fund or any portion thereof, will be paid out of the Settlement Fund. If separate Class Notice occurs with respect to any settlement with a non-REALTOR® MLS or brokerage that opts into the Settlement (including by executing an Appendix C or D), the National Association of REALTORS® agrees to pay the full and complete cost of such Class Notice above and beyond the Total Monetary Settlement Amount, up to $3,000,000.00.

41. The Settling Parties and their counsel will not have any responsibility, financial obligation, or liability for any fees, costs, or expenses related to providing Class Notice to the Settlement Class or administering the settlement except in Paragraphs 40-42 of this Settlement Agreement. Such fees, costs, or expenses shall be paid solely from the Settlement Fund with Court approval. The balance of the Settlement Fund shall be disbursed to Settlement Class Members as provided in a Plan of Allocation (as defined below) approved by the Court. The Settling Parties shall have the right to audit amounts paid from the Settlement Fund.

42. After preliminary approval of the Settlement and approval of a Class Notice plan, Co-Lead Counsel may utilize a portion of the Settlement Fund to provide Class Notice of the Settlement to potential members of the Settlement Class. The National Association of REALTORS® will not object to Plaintiffs' counsel withdrawing from the Settlement Fund, subject to any necessary Court approval, up to $5,000,000.00 to pay the costs for Class Notice. If Plaintiffs settle with one (or more) Non-National Association of REALTORS® Defendants and Class Notice of one or more other

settlements is included in the Class Notice of the National Association of REALTORS® settlement, then the cost of such Class Notice will be apportioned equitably between (or among) the National Association of REALTORS® Settlement Fund and the other settling Defendant(s)' settlement funds. The amount spent or accrued for Class Notice and administration costs is not refundable to the National Association of REALTORS® in the event the Settlement is disapproved, rescinded, or otherwise fails to become Effective.

43. Subject to Co-Lead Counsel's sole discretion as to timing, except that the timing must be consistent with any rules requiring that Settlement Class Members be given the opportunity to review fee applications, Co-Lead Counsel may apply to the Court for a fee award, plus expenses, and costs incurred, and current and former class representative service awards to be paid out of the Settlement Fund. Within 14 business days after any order by the Court awarding attorneys' fees, expenses, or class representative incentive awards or such later date as directed by Co-Lead Counsel, the escrow agent for the Settlement Fund shall pay any approved attorneys' fees, expenses, costs, and class representative service award up to the amount specified in Paragraph 24 of this Settlement Agreement for such fees, expenses, costs, and class representative service award by wire transfer as directed by Co-Lead Counsel in accordance with and attaching the Court's Order, provided that each Co-Lead Counsel receiving payment signs an assurance, in the form attached hereto as Appendix A, attesting that they will repay all awarded amounts if this Settlement Agreement does not become Effective.

44. The Settlement Fund will be invested in United States Government Treasury obligations or United States Treasury money market funds.

45. The National Association of REALTORS® will not have any responsibility, financial obligation, or liability whatsoever with respect to the investment, distribution, use, or administration of the Settlement Fund, including, but not limited to, the costs and expenses of such investment,

distribution, use or administration except as expressly otherwise provided in this Settlement Agreement. The National Association of REALTORS®'s only payment obligation is to pay the Total Monetary Settlement Amount.

46. There will be no reduction of the Total Monetary Settlement Amount based on Opt-Outs. The Settlement will be non-reversionary except as set forth below in Section G of this Settlement Agreement. If the Settlement becomes Effective, no proceeds from the Settlement will revert to the National Association of REALTORS® regardless of the claims that are made.

47. No disbursements shall be made from the Settlement Fund prior to the Effective Date of this Settlement Agreement except as described in Paragraphs 40-42 of this Settlement Agreement.

48. The distribution of the Settlement Fund shall be administered pursuant to a plan of allocation (the "Plan of Allocation") proposed by Co-Lead Counsel in their sole and absolute discretion and subject to the approval of the Court. The National Association of REALTORS® will have no participatory or approval rights with respect to the Plan of Allocation. It is understood and agreed by the Settling Parties that any proposed Plan of Allocation, including, but not limited to, any adjustments to an authorized claimant's claim, is completely independent of and is not a part of this Settlement Agreement and is to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of this Settlement Agreement. The Settlement Class, Plaintiffs, and the National Association of REALTORS® shall be bound by the terms of this Settlement Agreement, irrespective of whether the Court or any other court, including on any appeal, disapproves or modifies the Plan of Allocation, and any modification or rejection of the Plan of Allocation shall not affect the validity or enforceability of this Settlement Agreement or otherwise operate to terminate, modify, or cancel that Agreement.

49. The Releasing Parties will look solely to the Settlement Fund for settlement and satisfaction against the Released Parties of all Released Claims and shall have no other recovery against the National Association of REALTORS® or the Released Parties.

F. <u>Taxes</u>

50. Co-Lead Counsel is solely responsible for filing all informational and other tax returns necessary to report any net taxable income earned by the Settlement Fund and shall file all informational and other tax returns necessary to report any income earned by the Settlement Fund and shall be solely responsible for taking out of the Settlement Fund, as and when legally required, any tax payments, including interest and penalties due on income earned by the Settlement Fund. All taxes (including any interest and penalties) due with respect to the income earned by the Settlement Fund shall be paid from the Settlement Fund. The National Association of REALTORS® has no responsibility to make any filings relating to the Settlement Fund and will have no responsibility to pay tax on any income earned by the Settlement Fund or to pay any taxes on the Settlement Fund unless the Settlement does not become Effective and the Settlement Fund is returned to the National Association of REALTORS®. In the event the Settlement does not become Effective and any funds including interest or other income are returned to the National Association of REALTORS®, the National Association of REALTORS® will be responsible for the payment of all taxes (including any interest or penalties), if any, on said interest or other income. The National Association of REALTORS® makes no representations regarding, and will not be responsible for, the tax consequences of any payments made pursuant to this Settlement Agreement to Co-Lead Counsel or to any Settlement Class Member.

G. <u>Rescission</u>

51. If the Court does not certify the Settlement Class as defined in this Settlement Agreement, or if the Court does not approve this Settlement Agreement in all material respects, or if

such approval is modified in or set aside on appeal in any material respects, or if the Court does not enter final approval, or if any judgment approving this Settlement Agreement is materially modified or set aside on appeal, or if all of the conditions for the Effective Date do not occur, then this Settlement Agreement may be rescinded by the National Association of REALTORS® or by Plaintiffs on behalf of the Settlement Class by written notice to the Court and to counsel for the other Settling Party filed and served within 10 business days of the entry of an order not granting court approval or having the effect of disapproving or materially modifying the terms of this Settlement Agreement. A modification or reversal on appeal of any amount of the Settlement Fund that the Court authorizes to be used to pay Plaintiffs' fees or litigation expenses shall not be deemed a modification of all or a part of the terms of this Settlement Agreement or such final judgment order. The Settling Parties have agreed in the Confidential Supplemental Agreement that, after the deadline for filing timely Opt-Out requests has passed, Plaintiffs will provide to the National Association of REALTORS® a list of exclusion requests. In its sole discretion, the National Association of REALTORS® shall have the right to rescind or terminate this Settlement Agreement if Opt-Out requests for exclusion exceed the threshold specified the Confidential Supplemental Agreement.

52. If the Settlement or Settlement Agreement is rescinded or terminated for any reason, then the balance of the Total Monetary Settlement Amount in the Settlement Fund will be returned to the National Association of REALTORS®. In the event that this Settlement Agreement is rescinded, the funds already expended from the Settlement Fund for the costs of Class Notice and administration will not be returned to the National Association of REALTORS®. Funds to cover Class Notice and administration expenses that have been incurred but not yet paid from the Settlement Fund will also not be returned to the National Association of REALTORS®.

53. If the Settlement or Settlement Agreement is rescinded or terminated for any reason permitted under this Settlement Agreement, then the Settling Parties will be restored to their

respective positions in the Actions as of the Execution Date. Plaintiffs and the National Association of REALTORS® agree that any rulings or judgments that occur in the Actions after Execution Date and before this Settlement Agreement is rescinded will not bind Plaintiffs, the National Association of REALTORS® or any of the Released Parties. Plaintiffs and the National Association of REALTORS® agree to waive any argument of claim or issue preclusion against Plaintiffs or the National Association of REALTORS® arising from such rulings or judgments. In the event of a rescission or termination for any reason permitted under this Agreement, the Actions will proceed as if this Settlement Agreement had never been executed and this Settlement Agreement, and representations made in conjunction with this Settlement Agreement, may not be used in the Actions or otherwise for any purpose. The National Association of REALTORS® and Plaintiffs expressly reserve all rights if this Settlement Agreement does not become Effective or if it is rescinded or terminated as permitted by this Agreement by the National Association of REALTORS® or the Plaintiffs, including the National Association of REALTORS®'s rights to seek review, including appeal, of any judgment entered in Burnett on any available ground.

54. The Settling Parties agree that pending deadlines for motions not yet filed, and all deadlines (whether pending or past) for motions that will be withdrawn pursuant to this Settlement Agreement, shall be tolled for the period from Execution Date, until the date this Settlement Agreement is rescinded, and no Settling Party shall contend that filing or renewal of such motions was rendered untimely by or was waived by the operation of this Settlement Agreement. The Settling Parties further agree that, within five business days of the Execution Date, they will jointly petition the courts overseeing the Actions to request a stay of all pending deadlines as to the National Association of REALTORS® only.

55. The National Association of REALTORS® warrants and represents that it is not "insolvent" within the meaning of applicable bankruptcy laws as of the time this Settlement

Agreement is executed. For the avoidance of doubt, this representation takes no account of the jury verdict rendered in Burnett. In the event of a final order of a court of competent jurisdiction, not subject to any further proceedings, determining the transfer of the Total Monetary Settlement Amount, or any portion thereof, by or on behalf of the National Association of REALTORS® to be a preference, voidable transfer, fraudulent transfer or similar transaction under Title 11 of the United States Code (Bankruptcy) or applicable state law and any portion thereof is required to be refunded and such amount is not promptly deposited in the Escrow Account by or on behalf of the National Association of REALTORS®, then, at the election of Co-Lead Counsel, this Settlement Agreement may be terminated and the releases given and the judgment entered pursuant to the Settlement shall be null and void.

56. The Settling Parties' rights to terminate this Settlement Agreement and withdraw from this Settlement Agreement are a material term of this Settlement Agreement.

57. The National Association of REALTORS® reserves all of its legal rights and defenses with respect to any claims brought by potential Opt-Outs.

H. <u>Practice Changes</u>

58. As soon as practicable, and in no event later than the date of Class Notice (as provided in Paragraph 30 of this Settlement Agreement), the National Association of REALTORS® (defined for purposes of this paragraph to include present and future, direct and indirect subsidiaries, predecessors, and successors) will implement the following practice changes:

i. eliminate and prohibit any requirement by the National Association of REALTORS®, REALTOR® MLSs, or Member Boards that listing brokers or sellers must make offers of compensation to buyer brokers or other buyer representatives (either directly or through buyers), and eliminate and prohibit any requirement that such offers, if made, must be blanket, unconditional, or unilateral;

ii. prohibit REALTOR® MLS Participants, subscribers, other real estate brokers, other real estate agents, and their sellers from (a) making offers of compensation on the MLS to buyer brokers or other buyer representatives (either directly or through buyers) or (b) disclosing on the MLS listing broker compensation or total broker compensation (i.e., the combined compensation to both listing brokers and cooperating brokers);

iii. require REALTOR® MLSs to (a) eliminate all broker compensation fields on the MLS and (b) prohibit the sharing of the offers of compensation to buyer brokers or other buyer representatives described in Paragraphs 58(i) and (ii) of this Settlement Agreement via any other REALTOR® MLS field;

iv. eliminate and prohibit any requirements conditioning participation or membership in a REALTOR® MLS on offering or accepting offers of compensation to buyer brokers or other buyer representatives;

v. agree not to create, facilitate, or support any non-MLS mechanism (including by providing listing information to an internet aggregators' website for such purpose) for listing brokers or sellers to make offers of compensation to buyer brokers or other buyer representatives (either directly or through buyers), however, this provision is not violated by (a) a REALTOR® MLS providing data or data feeds to a REALTOR®, REALTOR® MLS Participant, or third party unless the REALTOR® MLS knows those data or data feeds are being used directly or indirectly to establish or maintain a platform for offers of compensation from multiple brokers (i.e., the REALTOR® MLS cannot intentionally circumvent this requirement); or (b) a REALTOR® or REALTOR® MLS Participant displaying both (1) data or data feeds from a REALTOR® MLS and (2) offers of compensation to buyer brokers or other buyer representatives but only on listings from their own brokerage;

vi. unless inconsistent with state or federal law or regulation before or during the

operation of this Paragraph 58(vi) of this Settlement Agreement, require that all REALTOR® MLS Participants working with a buyer enter into a written agreement before the buyer tours any home with the following:

a. to the extent that such a REALTOR® or Participant will receive compensation from any source, the agreement must specify and conspicuously disclose the amount or rate of compensation it will receive or how this amount will be determined;

b. the amount of compensation reflected must be objectively ascertainable and may not be open-ended (e.g., "buyer broker compensation shall be whatever amount the seller is offering to the buyer"); and

c. such a REALTOR® or Participant may not receive compensation for brokerage services from any source that exceeds the amount or rate agreed to in the agreement with the buyer;

vii. prohibit REALTORS® and REALTOR® MLS Participants from representing to a client or customer that their brokerage services are free or available at no cost to their clients, unless they will receive no financial compensation from any source for those services;

viii. require REALTORS® and REALTOR® MLS Participants acting for sellers to conspicuously disclose to sellers and obtain seller approval for any payment or offer of payment that the listing broker or seller will make to another broker, agent, or other representative (e.g., a real estate attorney) acting for buyers; and such disclosure must be in writing, provided in advance of any payment or agreement to pay to another broker acting for buyers, and specify the amount or rate of any such payment;

ix. require REALTORS® and REALTOR® MLS Participants to disclose to prospective sellers and buyers in conspicuous language that broker commissions are not set

by law and are fully negotiable (a) in their listing agreement if it is not a government-specified form, (b) in their agreement with buyers if it is not a government-specified form, and (c) in pre-closing disclosure documents if there are any and they are not government-specified forms. In the event that the listing agreement, buyer representation agreement, or pre-closing disclosure documents are a government form, then REALTORS® and REALTOR® MLS Participants must include a disclosure with conspicuous language expressly stating that broker commissions are not set by law and are fully negotiable. NAR also shall require that REALTOR® Member Boards and REALTOR® MLSs, to the extent they publish form listing agreements, buyer representation agreements, and pre-closing disclosure documents for use by REALTORS®, Participants, and/or subscribers, must conform those documents to this Paragraph 58(ix).

x. require that REALTORS® and REALTOR® MLS Participants and subscribers must not filter out or restrict MLS listings communicated to their customers or clients based on the existence or level of compensation offered to the buyer broker or other buyer representative assisting the buyer;

xi. rescind or modify any existing rules that are inconsistent with the practice changes reflected in this Settlement Agreement; and

xii. develop educational materials that reflect and are consistent with each provision in these practice changes, and eliminate educational materials, if any, that are contrary to it.

xiii. the practice changes in Paragraph 58 of this Settlement Agreement shall not prevent (a) offers of compensation to buyer brokers or other buyer representatives off of the multiple listing service; or (b) sellers from offering buyer concessions on a REALTOR® MLS (e.g., for buyer closing costs), so long as such concessions are not limited to or

conditioned on the retention of or payment to a cooperating broker, buyer broker, or other buyer representative.

59. The obligations set forth in Paragraph 58 of this Settlement Agreement will terminate 7 years after the Class Notice date. Moreover, if in an action brought against the National Association of REALTORS® by the United States Department of Justice, United States Federal Trade Commission, or any State Attorney General and a final judgment is entered by a court (with all stay rights exhausted) which requires the National Association of REALTORS® to adopt any practice changes that are inconsistent with the practice changes required by this Settlement Agreement, the National Association of REALTORS® may comply with the terms of such judgment, unless the judgment is reversed or vacated, notwithstanding the practice changes specified in this Settlement Agreement. In such circumstance, the National Association of REALTORS® will continue to be obligated to observe the practice changes specified in this Settlement Agreement that are not affected by such judgment.

60. The National Association of REALTORS® acknowledges that the practice changes set forth here are a material component of this Settlement Agreement and agrees to use its best efforts to implement the practice changes specified in Paragraph 58 of this Settlement Agreement.

I. Cooperation

61. The National Association of REALTORS® (defined for purposes of this paragraph to include present and future, direct and indirect subsidiaries, predecessors, and successors) will provide valuable cooperation to Plaintiffs and Settlement Class Member as follows in the Actions, including to the extent that any is consolidated pursuant to *In re Real Estate Commission Antitrust Litigation* (MDL No. 3100):

i. use reasonable efforts to authenticate documents and/or things produced by it in the Actions where the facts indicate that the documents and/or things at issue are authentic, by declarations or affidavits if possible, or at hearings or trial if necessary;

ii. use reasonable efforts to provide the facts necessary to establish, where applicable, that documents and/or things produced by it in the Actions are "business records," a present sense impression, an excited utterance, a recorded recollection, or are otherwise admissible under the Federal Rules of Evidence, by declarations or affidavits if possible, or at hearings or trial if necessary;

iii. make available up to six (6) then-current employees, who are not practicing attorneys, identified by Plaintiffs who will sit for deposition in the Actions and will testify live at trial in any of the Actions if requested by Plaintiffs;

iv. agree that Plaintiffs in the Actions may use any discovery materials provided by the National Association of REALTORS® or its officers or employees in Moehrl or Burnett;

v. agree to produce in any Actions (excepting Moehrl and Burnett) non-privileged documents in its possession, custody, or control from up to eight (8) current or former employees or officers ("Custodians"), that are returned by a reasonable and agreed-upon list of search terms for documents created after January 1, 2022. The National Association of REALTORS® will, within 150 days of the later of (a) the Date of Preliminary Approval or (b) the date by which Plaintiffs identify Custodians and the Settling Parties agree on search terms, whichever is later, produce those documents. If the Parties are unable to reach agreement on a final list of Search Terms after good faith negotiations, they will submit any dispute for mediation by an agreed mediator. For any documents that are withheld on the basis of privilege or as attorney work product, the National Association of REALTORS®

will produce a privilege log according to the requirements of the ESI Order entered in Burnett. Any disputes over privilege or as to attorney work product will be governed by the procedure reflected in the ESI Order entered in Burnett.

vi. submit a withdrawal of expert designations and obtain agreement with any experts retained solely by the National Association of REALTORS® as of February 1, 2024 that they will not testify at trial as a retained expert for any Non-National Association of REALTORS® Defendant in the Actions;

vii. decline to waive any conflict that its counsel may have with respect to representing any non-Released Parties in the Actions;

viii. agree that, if a Non-National Association of REALTORS® Defendant includes a witness on a witness list in the Actions who is then a current officer or employee of the National Association of REALTORS® or its subsidiaries, the National Association of REALTORS® will cooperate in providing access via counsel to that witness prior to trial testimony for up to two (2) hours;

ix. within five business days after the Execution Date, withdraw their existing response before the Judicial Panel on Multidistrict Litigation with respect to *In re Real Estate Commission Antitrust Litigation* (MDL No. 3100);

x. within five business days after the Execution Date, withdraw any pending non-settlement related motions and supporting filings in the Actions filed by the National Association of REALTORS® only, including those concerning summary judgment, the exclusion of experts, and post-trial motions without prejudice to renewal in the event this Settlement or Settlement Agreement is rescinded, and in that event Plaintiffs shall not contend that renewal was rendered untimely by or was waived by the operation of this Settlement Agreement; and

xi. agree not to provide greater assistance in discovery or trial to any defendant or other non-Released Party in the Actions than to the Plaintiffs, unless required by subpoena or other compulsory process.

62. The National Association of REALTORS®'s cooperation obligations, as set forth in Paragraph 61 of this Settlement Agreement, shall not require the production of information, testimony, and/or documents that are protected from disclosure by the attorney-client privilege, work product doctrine, joint defense privilege, or any other applicable privilege or doctrine.

63. The National Association of REALTORS®'s obligation to cooperate will not be affected by the release set forth in this Settlement Agreement or the final judgment orders with respect to the National Association of REALTORS®. Unless this Settlement Agreement is rescinded, disapproved, or otherwise fails to become Effective, the obligation to cooperate as set forth here will continue until the date that final judgment has been entered in all of the Actions and the time for appeal or to seek permission to appeal from the entry of a final judgment has expired or, if appealed, any final judgment has been affirmed in its entirety by the court of last resort to which such appeal has been taken and such affirmance is no longer subject to further appeal or review.

64. The National Association of REALTORS® acknowledges that the cooperation set forth here is a material component of this Settlement Agreement and agrees to use its reasonable best efforts to provide the cooperation specified in Paragraph 61 of this Settlement Agreement.

65. Notwithstanding any of the foregoing, nothing herein shall restrict or impact the ability of the National Association of REALTORS® to defend itself in any way in any litigation aside from the Actions, or government investigations.

J. REALTOR® and Non-REALTOR® MLS Opt-In, Release, and Cooperation

66. In order to be included as a Released Party, each REALTOR® MLS must among other requirements agree to be bound by the practice changes in Paragraph 68 and the cooperation

terms in Paragraph 69, including by executing Appendix B and providing it to the below email address within 60 days of the filing of the first motion for preliminary approval of this Settlement Agreement:

(1) realtorsoptin@jndla.com, (2) realtorsoptin@cohenmilstein.com, and

(3) nargovernance@nar.realtor

67. In order to be included as a Released Party, each non-REALTOR® MLS must among other requirements agree to be bound by the practice changes in Paragraph 68 of this Settlement Agreement, the cooperation terms in Paragraph 69 of this Settlement Agreement, and the payment terms reflected in Appendix D, including by executing Appendix D and providing it to the below email address within 60 days of the filing of the first motion for preliminary approval of this Settlement Agreement:

(1) realtorsoptin@jndla.com, (2) realtorsoptin@cohenmilstein.com, and

(3) nargovernance@nar.realtor

68. As soon as practicable, and in no event later than 150 days after the filing of the first motion for preliminary approval of this Settlement Agreement, each opting-in REALTOR® MLS and non-REALTOR® MLS will implement the following practice changes:

i. eliminate any requirement by the MLS that listing brokers or sellers must make offers of cooperating compensation to brokers or other buyer representatives (either directly or through buyers), and eliminate any requirement that such offers, if made, must be blanket, unconditional, or unilateral;

ii. prohibit MLS Participants, subscribers, other real estate brokers, other real estate agents, and sellers from (a) making offers of compensation on the MLS to cooperating brokers or other buyer representatives (either directly or through buyers); or (b) disclosing on the MLS listing broker compensation or total brokerage compensation (i.e., the combined

compensation to both listing brokers and cooperating brokers);

iii. eliminate all broker compensation fields on the MLS, and prohibit the sharing of offers of compensation to buyer brokers or other buyer representatives described in Paragraphs 68(i) and (ii) of this Settlement Agreement via any other fields on the MLS;

iv. eliminate and prohibit any requirements conditioning participation or membership in an MLS on offering or accepting compensation to buyer brokers or other buyer representatives;

v. agree not to create, facilitate, or support any non-MLS mechanism (including by providing listing information to an internet aggregators' website for such purpose) for listing brokers or sellers to make offers of compensation to buyer brokers or other buyer representatives (either directly or through buyers), however, this provision is not violated by (a) an MLS providing data or data feeds to an MLS Participant, or third party unless the MLS knows those data or data feeds are being used directly or indirectly to establish or maintain a platform for offers of compensation from multiple brokers (i.e., the MLS cannot intentionally circumvent this requirement); or (b) a REALTOR® or MLS Participant displaying both (1) data or data feeds from an MLS and (2) offers of compensation to buyer brokers or other buyer representatives, but only on listings from their own brokerage;

vi. unless inconsistent with state or federal law or regulation before or during the operation of this Paragraph 68(vi) of this Settlement Agreement, require that all MLS Participants working with a buyer enter into a written agreement before the buyer tours any home with the following:

a. to the extent that such an MLS Participant will receive compensation from any source, the agreement must specify and conspicuously disclose the amount or rate of compensation it will receive or how this amount will be determined;

b. the amount of compensation reflected must be objectively ascertainable and may not be open-ended (e.g., "buyer broker compensation shall be whatever amount the seller is offering to the buyer"); and

c. such an MLS Participant may not receive compensation for brokerage services from any source that exceeds the amount or rate agreed to in the agreement with the buyer;

vii. prohibit MLS Participants, subscribers, and other real estate brokers and agents accessing the multiple listing service from representing to a client or customer that their brokerage services are free or available at no cost to their clients, unless they will receive no financial compensation from any source for those services;

viii. require MLS Participants acting for sellers to conspicuously disclose to sellers and obtain seller approval for any payment or offer of payment that the listing broker or seller will make to another broker, agent, or other representative (e.g., a real estate attorney) acting for buyers; and such disclosure must be in writing, provided in advance of any payment or agreement to pay to another broker acting for buyers, and specify the amount or rate of any such payment;

ix. require MLS Participants to disclose to prospective sellers and buyers in conspicuous language that broker commissions are not set by law and are fully negotiable (a) in their listing agreement if it is not a government-specified form, (b) in their agreement with buyers if it is not a government-specified form, and (c) in pre-closing disclosure documents if there are any and they are not government-specified forms. In the event that the listing agreement, buyer representation agreement, or pre-closing disclosure documents are a government form, then MLS Participants must include a disclosure with conspicuous language expressly stating that broker commissions are not set by law and are fully

negotiable.

x. to the extent that the MLS publishes form listing agreements, buyer representation agreements, or pre-closing disclosure documents for use by REALTORS®, participants, and/or subscribers, ensure that those forms include language disclosing to prospective sellers and buyers in conspicuous language that broker commissions are not set by law and are fully negotiable;

xi. require that MLS Participants and subscribers must not filter out or restrict MLS listings communicated to their customers or clients based on the existence or level of compensation offered to the buyer broker or other buyer representative assisting the buyer;

xii. rescind or modify any existing rules that are inconsistent with the practice changes reflected in this Paragraph 68 of this Settlement Agreement; and

xiii. develop or provide from the National Association of REALTORS® educational materials that reflect and are consistent with each provision in these practice changes, and eliminate educational materials, if any, that are contrary to it;

xiv. the practice changes in Paragraph 68 of this Settlement Agreement shall not prevent (a) offers of compensation off of the MLS to buyer brokers or buyer representatives; or (b) sellers from offering buyer concessions on an MLS (e.g., for buyer closing costs), so long as such concessions are not limited to or conditioned on the retention of or payment to a cooperating broker, buyer broker, or other buyer representative.

69. Each opting-in REALTOR® MLS and non-REALTOR® MLS will provide valuable cooperation to Plaintiffs and Settlement Class Member as follows in the Actions, including to the extent that any is consolidated pursuant to In re Real Estate Commission Antitrust Litigation (MDL No. 3100):

i. use reasonable efforts to authenticate documents and/or things produced by it in the Actions where the facts indicate that the documents and/or things at issue are authentic, by declarations or affidavits if possible, or at hearings or trial if necessary;

ii. use reasonable efforts to provide the facts necessary to establish, where applicable, that documents and/or things produced by it in the Actions are "business records," a present sense impression, an excited utterance, a recorded recollection, or are otherwise admissible under the Federal Rules of Evidence, by declarations or affidavits if possible, or at hearings or trial if necessary;

iii. use reasonable efforts at their expense to provide relevant class member and listing data and answer questions about that data to support the provision of Class Notice, administration of any settlements, or the litigation of the Actions;

iv. stipulate that Plaintiffs have the consent to obtain from third parties relevant class member and listing data to support the provision of Class Notice, administration of any settlements, or the litigation of the Actions;

v. agree that Plaintiffs may use in the Actions any discovery materials provided by it or its officers or employees in Moehrl or Burnett;

vi. agree that this Settlement Agreement shall not preclude Plaintiffs from seeking the production of non-privileged documents in its possession, custody, or control;

vii. if a Defendant includes a witness on a witness list in the Actions who is then a current officer or employee of the multiple listing service, the multiple listing service will cooperate in providing access via counsel to that witness prior to trial testimony for up to two (2) hours;

viii. withdraw any existing response before the Judicial Panel on Multidistrict Litigation with respect to *In re Real Estate Commission Antitrust Litigation* (MDL No. 3100);

ix. agree not to provide greater assistance in discovery or trial to any defendant or other non-Released Party in the Actions than to the Plaintiffs unless required by subpoena or other compulsory process.

70. Each opting-in REALTOR® MLS's and non-REALTOR® MLS's cooperation obligations, as set forth in Paragraph 69 of this Settlement Agreement, shall not require the production of information, testimony, and/or documents that are protected from disclosure by the attorney-client privilege, work product doctrine, joint defense privilege, or any other applicable privilege or doctrine.

71. Each opting-in REALTOR® MLS's and non-REALTOR® MLS's obligation to cooperate will not be affected by the release set forth in this Settlement Agreement or the final judgment orders with respect to the National Association of REALTORS® or the opting-in REALTOR® MLS or non-REALTOR® MLS. Unless this Settlement Agreement is rescinded, disapproved, or otherwise fails to become Effective, the obligation to cooperate as set forth here will continue until the date that final judgment has been entered in all of the Actions and the time for appeal or to seek permission to appeal from the entry of a final judgment has expired or, if appealed, any final judgment has been affirmed in its entirety by the court of last resort to which such appeal has been taken and such affirmance is no longer subject to further appeal or review.

K. Miscellaneous

72. This Settlement Agreement and any actions taken to carry out the Settlement are not intended to be, nor may they be deemed or construed to be, an admission or concession of liability, or of the validity of any claim, defense, or point of fact or law on the part of any Settling Party. The National Association of REALTORS® denies the allegations of the complaints in the Actions. Neither this Settlement Agreement, nor the fact of Settlement, nor settlement proceedings, nor the settlement negotiations, nor any related document, shall be used as an admission of any fault or

omission by the National Association of REALTORS®, or be offered in evidence as an admission, concession, presumption, or inference of any wrongdoing by the National Association of REALTORS® in any proceeding.

73. This Settlement Agreement was reached with the assistance of counsel after arm's-length negotiations. The Settling Parties also participated in mediation sessions before a neutral mediator, Greg Lindstrom, of Phillips ADR Enterprises, P.C. and with two other mediators. The Settling Parties reached this Settlement Agreement after considering the risks and costs of litigation. The Settling Parties agree to continue to maintain the confidentiality of all settlement discussions and materials exchanged during the settlement negotiation. The terms of the settlement continue to be subject to mediation privilege and must be kept strictly confidential until 10:00am Eastern Daylight Time on March 15, 2024, except as necessary for the National Association of REALTORS® to inform certain members, REALTOR® Boards, and REALTOR® MLSs or as otherwise agreed in writing by the Co-Lead Counsel and the National Association of REALTORS®.

74. Any disputes relating to this Settlement Agreement will be governed by Missouri law without regard to conflicts of law provisions.

75. This Settlement Agreement does not settle or compromise any claim by Plaintiffs or any other Settlement Class Member against any alleged co-conspirator or other Person or entity other than the Released Parties, including but not limited to the non-National Association of REALTORS® defendants in the Actions. All rights of any Settlement Class Member against any Non-National Association of REALTORS® Defendant or an alleged co-conspirator or other person or entity other than the Released Parties are specifically reserved by Plaintiffs and the other Settlement Class Members.

76. This Settlement Agreement constitutes the entire agreement among Plaintiffs and the National Association of REALTORS® pertaining to the Settlement of the Actions against the

National Association of REALTORS®. This Settlement Agreement may be modified or amended only by a writing executed by Plaintiffs and the National Association of REALTORS®.

77. This Settlement Agreement may be executed in counterparts by Plaintiffs and the National Association of REALTORS®, and a facsimile or pdf signature shall be deemed an original signature for purposes of executing this Settlement Agreement.

78. Neither Plaintiffs nor the National Association of REALTORS® shall be considered the drafter of this Settlement Agreement or any of its provisions for the purpose of any statute, the common law, or rule of interpretation that would or might cause any provision of this Settlement Agreement to be construed against the drafter.

79. The provisions of this Settlement Agreement shall, where possible, be interpreted in a manner to sustain their legality and enforceability.

80. The provisions of this Settlement Agreement governing the opt-in and release of certain MLSs and brokerages (including Appendices B, C, and D) shall be deemed severable, and the invalidity, ineffectiveness, or unenforceability of those provisions shall not affect the validity or enforceability of the other provisions of this Settlement Agreement. The validity, effectiveness, and enforceability of this Settlement Agreement with and as it pertains to the National Association of REALTORS® shall not be affected in any way by the decisions of MLSs or brokerages to accept or decline the opt-in provisions reflected in this Settlement Agreement or of any court with respect to the approval of the opt-in and release provisions of certain MLSs and brokerages (including Appendices B, C, and D).

81. The opt-in and release of REALTOR® MLSs shall be subject to the same separate opt-out, objection, and Class Notice deadlines as this Settlement Agreement with the National Association of REALTORS®. At Plaintiffs' sole option (and in consultation with the opting-in non-REALTOR® MLSs or brokerages), the opt-out, objection, and class notice deadlines for any

Settlements with non-REALTOR® MLSs (as reflected in Appendix D) and brokerages (as reflected in Appendix C) may be subject to different opt-out, objection, and class notice deadlines from this Settlement Agreement with the National Association of REALTORS®.

82. The Court shall retain jurisdiction over the implementation and enforcement of this Settlement Agreement and the Settlement.

83. The terms of this Settlement Agreement are and shall be binding upon and inure to the benefit of, to the fullest extent possible, each of the Releasing Parties and the Released Parties, and upon all other Persons claiming any interest in the subject matter hereto through any of the Settling Parties, Releasing Parties, Released Parties, and any Settlement Class Members.

84. Any disputes between the National Association of REALTORS® and Co-Lead Counsel concerning this Settlement Agreement shall, if they cannot be resolved by the Settling Parties, be presented first to Gregory Lindstrom or another mediator agreed to by the parties for assistance in mediating a resolution and, if a resolution is not reached, to the Court.

85. Each Settling Party acknowledges that he, she or it has been and is being fully advised by competent legal counsel of such Settling Party's own choice and fully understands the terms and conditions of this Settlement Agreement, and the meaning and import thereof, and that such Settling Party's execution of this Settlement Agreement is with the advice of such Settling Party's counsel and of such Settling Party's own free will. Each Settling Party represents and warrants that it has sufficient information regarding the transaction and the other parties to reach an informed decision and has, independently and without relying upon the other parties, and based on such information as it has deemed appropriate, made its own decision to enter into this Settlement Agreement and was not fraudulently or otherwise wrongfully induced to enter into this Settlement Agreement.

86. The Settling Parties shall have the right to amend this Settlement Agreement, upon mutual written consent, to correct any scrivener's errors in this Settlement Agreement, provided that

such amendment does not materially adversely affect the rights of the Settling Parties.

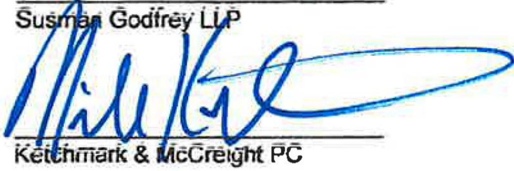
87. Each of the undersigned attorneys represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Settlement Agreement.

LEAD COUNSEL

Hagens Berman Sobol Shapiro LLP

Cohen Milstein Sellers & Toll PLLC

Susman Godfrey LLP



Ketchmark & McCreight PC

Boulware Law LLC

Williams Dirks Dameron LLC

NATIONAL ASSOCIATION OF REALTORS®

By:

Cooley LLP

43

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, HOLLEE ELLIS, FRANCES HARVEY, and JEREMY KEEL, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS®, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and NATIONAL ASSOCIATION OF REALTORS® REALTY, INC., Defendants.	Case No. 19-cv-00332-SRB

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CHRISTOPHER MOEHRL, MICHAEL COLE, STEVE DARNELL, JACK RAMEY, DANIEL UMPA and JANE RUH on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS®, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, THE LONG & FOSTER COMPANIES, INC., RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	Case No. 1:19-cv-01610-ARW

Plaintiffs Rhonda Burnett, Jerod Breit, Jeremy Keel, Hollee Ellis, Frances Harvey, Christopher Moehrl, Michael Cole, Steve Darnell, Jack Ramey, Daniel Umpa, Jane Ruh, Don Gibson, Lauren Criss, and John Meiners (collectively "Plaintiffs") and defendant the National Association of REALTORS® (collectively, "the Parties"), by and through and including their undersigned counsel, stipulate and agree as follows:

WHEREAS, each firm defined in the Settlement Agreement as Co-Lead Counsel desires to give an undertaking (the "Undertaking") for repayment of the award of attorneys' fees, costs, and expenses approved by the Court, and

WHEREAS, the Parties agree that this Undertaking is in the interests of all Parties and in service of judicial economy and efficiency.

NOW, THEREFORE, the undersigned counsel, individually and as agent for his/her law firm, hereby submits both to the jurisdiction of the Court for the purpose of enforcing the provisions of this Undertaking.

Capitalized terms used herein without definition have the meanings given to them in the Settlement Agreement.

By receiving any payments pursuant to the Settlement Agreement, Co-Lead Counsel and their shareholders, members, and/or partners submit to the jurisdiction of the United States District Court for the Western District of Missouri for the enforcement of and any and all disputes relating to or arising out of the reimbursement obligation set forth herein and in the Settlement Agreement.

In the event that the Settlement Agreement does not receive final approval or any part of the final approval is vacated, overturned, reversed, or rendered void as a result of an appeal, or the Settlement Agreement is voided, rescinded, or otherwise terminated for any other reason, Co-Lead Counsel shall, within thirty (30) days repay to the National Association of REALTORS®, based upon written instructions provided by the National Association of REALTORS®, the full amount of

the attorneys' fees and costs paid to Co-Lead Counsel from the Settlement Fund, including any accrued interest.

In the event the Settlement Agreement becomes Effective, but the attorneys' fees, costs, and expenses awarded by the Court or any part of them are vacated, overturned, modified, reversed, or rendered void as a result of an appeal, Co-Lead Counsel shall within thirty (30) days repay to the Settlement Fund, based upon written instructions provided by the settlement administrator, the attorneys' fees and costs paid to Co-Lead Counsel from the Settlement Fund in the amount vacated or modified, including any accrued interest.

This Undertaking and all obligations set forth herein shall expire upon finality of all appeals of the final settlement order and judgment pertaining to attorneys' fees, such that the finality of those fees no longer remains in doubt.

In the event Co-Lead Counsel fails to repay to the National Association of REALTORS® any of attorneys' fees and costs that are owed to it pursuant to this Undertaking, the Court shall, upon application of the National Association of REALTORS®, and notice to Co-Lead Counsel, summarily issue orders, including but not limited to judgments and attachment orders against Co-Lead Counsel.

The undersigned stipulate, warrant, and represent that they have both actual and apparent authority to enter into this stipulation, agreement, and undertaking on behalf of each firm identified as Co-Lead Counsel. This agreement will only be effective upon its execution by each firm identified in the Settlement Agreement as Co-Lead Counsel.

Co-Lead Counsel acknowledge that this Undertaking is a material component of the Settlement Agreement and agree to use its reasonable efforts to timely effect the terms specified in this Undertaking. Each undersigned warrants and represents that it is not "insolvent" within the meaning of applicable bankruptcy laws as of the time this Undertaking is executed.

This Undertaking may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

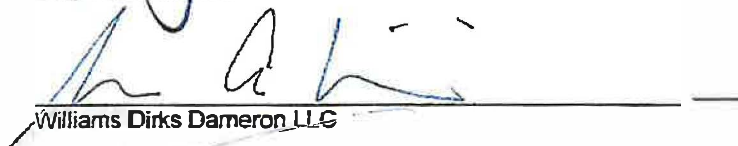
Signatures by facsimile shall be as effective as original signatures.

The undersigned declare under penalty of perjury under the laws of the United States and the State of Missouri that they have read and understand the foregoing and that it is true and correct.

IT IS SO STIPULATED THROUGH COUNSEL OF RECORD:

Ketchmark & McCreight PC

Boulware Law LLC



Williams Dirks Dameron LLC

Hagens Berman Sobol Shapiro LLP

Cohen Milstein Sellers & Toll PLLC

Susman Godfrey LLP

By:

APPENDIX B - REALTOR® MLS "OPT IN" AGREEMENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, HOLLEE ELLIS, FRANCES HARVEY, and JEREMY KEEL, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS®, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and NATIONAL ASSOCIATION OF REALTORS® REALTY, INC., Defendants.	Case No. 19-cv-00332-SRB

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CHRISTOPHER MOEHRL, MICHAEL COLE, STEVE DARNELL, JACK RAMEY, DANIEL UMPA and JANE RUH on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS®, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, THE LONG & FOSTER COMPANIES, INC., RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	Case No. 1:19-cv-01610-ARW

WHEREAS, some plaintiffs have alleged that certain MLSs participated in a conspiracy to raise, fix, maintain, or stabilize real estate commissions in violation of Section 1 of the Sherman Act and corresponding state laws;

WHEREAS, Stipulating MLS is a REALTOR® MLS and denies Plaintiffs' allegations in the Actions;

WHEREAS, Plaintiffs have conducted an extensive investigation into the facts and the law regarding the claims and allegations asserted in the Actions, including more than four years of fact and expert discovery, and have concluded that a settlement according to the terms set forth below is fair, reasonable, and adequate and in the best interest of Plaintiffs and the Settlement Class;

WHEREAS, Stipulating MLS believes that it is not liable for the claims and allegations asserted and has good defenses, but nevertheless has decided to enter into this agreement to avoid further expense, inconvenience, and the distraction of burdensome and protracted litigation, to obtain the nationwide releases, orders, and judgment contemplated by the Settlement Agreement, and to put to rest with finality all claims and allegations that Plaintiffs and Settlement Class Members have or could have asserted against the Stipulating MLS; and

WHEREAS, Stipulating MLS has agreed to cooperate with Plaintiffs and to implement certain practice changes, each as set forth in the Settlement Agreement and Appendix B.

NOW, THEREFORE, in consideration of the agreements and releases set forth in the Settlement Agreement and Appendix B and other good and valuable consideration, and intending to be legally bound, it is agreed by and between ______________________________________ ("Stipulating MLS") and the Plaintiffs that the Actions be settled, compromised, and dismissed with prejudice as to Stipulating MLS only, without costs to Plaintiffs, the Settlement Class or Stipulating MLS except as provided for herein, subject to the approval of the Court, on the following terms and conditions:

1. Stipulating MLS agrees that the terms reflected in this Appendix B shall have the same meaning as those defined in the Settlement Agreement.

2. Stipulating MLS represents that it is a REALTOR® MLS, as that term is defined in the Settlement Agreement. This representation is a material component of Appendix B and Stipulating MLS's inclusion as a Released Party.

3. Stipulating MLS agrees that, to be effective, it must provide an executed version of this Appendix B to the below email address within 60 days of the filing of the first motion for preliminary approval of the Settlement Agreement:

(1) realtorsoptin@jndla.com, (2) realtorsoptin@cohenmilstein.com, and

(3) nargovernance@nar.realtor

4. As a condition for being a Released Party, as that term is defined in the Settlement Agreement, stipulating MLS agrees to be bound by the practice changes in Paragraph 68 and the cooperation terms in Paragraph 69 of the Settlement Agreement.

5. As soon as practicable, and in no event later than 150 days after the filing of the first motion for preliminary approval of the Settlement Agreement, each Stipulating MLS will implement the following practice changes:

i. eliminate any requirement by the MLS that listing brokers or sellers must make offers of compensation to cooperating brokers or other buyer representatives (either directly or through buyers), and eliminate any requirement that such offers, if made, must be blanket, unconditional, or unilateral;

ii. prohibit the MLS participants, subscribers, other real estate brokers, other real estate agents, and sellers from (a) making offers of compensation on the multiple listing service to cooperating brokers or other buyer representatives (either directly or through buyers); or (b) disclosing on the multiple listing service listing broker compensation or total

brokerage compensation (i.e., the combined compensation to both listing brokers and cooperating brokers);

iii. eliminate all broker compensation fields on the MLS, and prohibit the sharing of offers of compensation to buyer brokers or other buyer representatives via any other fields on the MLS;

iv. eliminate and prohibit any requirements conditioning participation or membership in an MLS on offering or accepting compensation to buyer brokers or other buyer representatives;

v. agree not to create, facilitate, or support any non-MLS mechanism (including by providing listing information to an internet aggregators' website for such purpose) for listing brokers or sellers to make offers of compensation to buyer brokers or other buyer representatives (either directly or through buyers), however, this provision is not violated by (a) a REALTOR® MLS providing data or data feeds to a REALTOR®, REALTOR® MLS participant, or third party unless the REALTOR® MLS knows those data or data feeds are being used directly or indirectly to establish or maintain a platform for offers of compensation from multiple brokers (i.e., the REALTOR® MLS cannot intentionally circumvent this requirement); or (b) a REALTOR® or REALTOR® MLS Participant displaying both (1) data or data feeds from an MLS and (2) offers of compensation to buyer brokers or other buyer representatives but only on listings from their own brokerage;

vi. unless inconsistent with state or federal law or regulation before or during the operation of this Paragraph 5(vi) of Appendix B, require that all MLS Participants working with a buyer enter into a written agreement before the buyer tours any home with the following:

a. to the extent that such a Participant will receive compensation from

any source, the agreement must specify and conspicuously disclose the amount or rate of compensation it will receive or how this amount will be determined;

b. the amount of compensation reflected must be objectively ascertainable and may not be open-ended (e.g., "buyer broker compensation shall be whatever amount the seller is offering to the buyer"); and

c. such a Participant may not receive compensation for brokerage services from any source that exceeds the amount or rate agreed to in the agreement with the buyer;

vii. prohibit Participants, subscribers, and other real estate brokers and agents accessing the multiple listing service from representing to a client or customer that their brokerage services are free or available at no cost to their clients, unless they will receive no financial compensation from any source for those services;

viii. require MLS Participants acting for sellers to conspicuously disclose to sellers and obtain seller approval for any payment or offer of payment that the listing broker or seller will make to another broker, agent, or other representative (e.g., a real estate attorney) acting for buyers; and such disclosure must be in writing, provided in advance of any payment or agreement to pay to another broker acting for buyers, and specify the amount or rate of any such payment;

ix. require MLS Participants to disclose to prospective sellers and buyers in conspicuous language that broker commissions are not set by law and are fully negotiable (i) in their listing agreement if it is not a government-specified form, (ii) in their agreement with buyers if it is not a government-specified form, and (iii) in pre-closing disclosure documents if there are any and they are not government-specified forms. In the event that the listing agreement, buyer representation agreement, or pre-closing disclosure documents are a

government form, then MLS participants must include a disclosure with conspicuous language expressly stating that broker commissions are not set by law and are fully negotiable.

x. to the extent that the multiple listing services publishes form listing agreements, buyer representation agreements, or pre-closing disclosure documents for use by REALTORS®, participants, and/or subscribers, ensure that those forms include language disclosing to prospective sellers and buyers in conspicuous language that broker commissions are not set by law and are fully negotiable.

xi. require that MLS Participants and subscribers must not filter out or restrict MLS listings communicated to their customers or clients based on the existence or level of compensation offered to the broker assisting the buyer;

xii. rescind or modify any existing rules that are inconsistent with the practice changes reflected in this Paragraph 5 of Appendix B; and

xiii. develop or provide educational materials developed by the National Association of REALTORS® that reflect and are consistent with each provision in these practice changes, and eliminate educational materials, if any, that are contrary to it.

xiv. the practice changes in Paragraph 5 of Appendix B shall not prevent (a) offers of compensation to buyer brokers or other buyer representatives off of the multiple listing service or (b) sellers from offering buyer concessions on an MLS (e.g., for buyer closing costs), so long as such concessions are not limited to or conditioned on the retention of or payment to a cooperating broker, buyer broker, or other buyer representative.

6. The obligations set forth in Paragraph 5 of this Appendix B will terminate 7 years after the notice date.

7. Stipulating MLS agrees to provide proof of compliance with these practice changes if requested by Co-Lead Counsel.

8. Stipulating MLS will provide valuable cooperation to Plaintiffs and Settlement Class Member as follows in the Actions, including to the extent that any is consolidated pursuant to In re Real Estate Commission Antitrust Litigation (MDL No. 3100):

i. use reasonable efforts to authenticate documents and/or things produced by it in the Actions where the facts indicate that the documents and/or things at issue are authentic, by declarations or affidavits if possible, or at hearings or trial if necessary;

ii. use reasonable efforts to provide the facts necessary to establish, where applicable, that documents and/or things produced by it in the Actions are "business records," a present sense impression, an excited utterance, a recorded recollection, or are otherwise admissible under the Federal Rules of Evidence, by declarations or affidavits if possible, or at hearings or trial if necessary;

iii. use reasonable efforts at their expense to provide relevant class member and listing data and answer questions about that data to support the provision of class notice, administration of any settlements, or the litigation of the Actions;

iv. stipulate that Plaintiffs have the consent to obtain from third parties relevant class member and listing data to support the provision of class notice, administration of any settlements, or the litigation of the Actions;

v. agree that Plaintiffs may use in the remaining Actions any discovery materials provided by it or its officers or employees in Moehrl or Burnett;

vi. agree that the Settlement Agreement and Appendix B shall not preclude Plaintiffs from seeking the production of non-privileged documents in its possession, custody, or control;

vii. if a Defendant includes a witness on a witness list in the Actions who is then a current officer or employee of the multiple listing service, the multiple listing service will cooperate in providing access via counsel to that witness prior to trial testimony for up to two (2) hours;

viii. withdraw any existing response before the Judicial Panel on Multidistrict Litigation with respect to *In re Real Estate Commission Antitrust Litigation* (MDL No. 3100); and

ix. agree not to provide greater assistance in discovery or trial to any defendant or other non-Released Party in the Actions than to the Plaintiffs unless required by subpoena or other compulsory process.

9. Stipulating MLS's cooperation obligations, as set forth in Paragraph 8 of Appendix B, shall not require the production of information, testimony, and/or documents that are protected from disclosure by the attorney-client privilege, work product doctrine, joint defense privilege, or any other applicable privilege or doctrine.

10. Stipulating MLS's obligation to cooperate will not be affected by the release set forth in the Settlement Agreement, Appendix B, or the final judgment orders with respect to National Association of REALTORS®. Unless this Settlement Agreement or Appendix B is rescinded, disapproved, or otherwise fails to become Effective, the obligation to cooperate as set forth here will continue until the date that final judgment has been entered in all of the Actions and the time for appeal or to seek permission to appeal from the entry of a final judgment has expired or, if appealed, any final judgment has been affirmed in its entirety by the court of last resort to which such appeal has been taken and such affirmance is no longer subject to further appeal or review.

11. Stipulating MLS acknowledges that the practice changes and cooperation set forth in Paragraphs 5 and 8 of Appendix B are material components of Appendix B and agrees to use its reasonable best efforts to provide them.

12. Stipulating MLS consents to entry of a final judgment order enjoining Stipulating MLS in accordance with the provisions of Paragraph 68 of the Settlement Agreement.

13. The terms of Appendix B are and shall be binding upon and inure to the benefit of, to the fullest extent possible, each of Plaintiffs and Stipulating MLS, and upon all other Persons claiming any interest in the subject matter hereto through any of the Settling Parties, Releasing Parties, Released Parties, and any Settlement Class Members.

14. Any disputes between Stipulating MLS and Co-Lead Counsel concerning this Appendix B shall, if they cannot be resolved, be presented first to an agreed mediator for assistance in mediating a resolution and, if a resolution is not reached, to the Court.

15. The Court shall retain jurisdiction over the implementation and enforcement of the Settlement Agreement and the Settlement, including Appendix B.

16. Stipulating MLS acknowledges that it has been and is being fully advised by competent legal counsel of Stipulating MLS's own choice and fully understands the terms and conditions of the Settlement Agreement, including Appendix B, and the meaning and import thereof, and that such Stipulating MLS's execution of this Appendix B is with the advice of such Stipulating MLS's counsel and of such Stipulating MLS's own free will. Stipulating MLS submits to the exclusive jurisdiction of the Court for the purposes of interpreting and enforcing the terms of Appendix B, including but not limited to, the practice changes contained therein. Stipulating MLS represents and warrants that it has sufficient information regarding the transaction and the other parties to reach an informed decision and has, independently and without relying upon the other parties, and based on such information as it has deemed appropriate, made its own decision to enter

into the Settlement Agreement, including Appendix B, and was not fraudulently or otherwise wrongfully induced to enter into the Settlement Agreement.

17. Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Appendix B.

Date: ____ day of ________________, 2024

____

On behalf of __________________

APPENDIX C – BROKERAGE "OPT IN" AGREEMENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, HOLLEE ELLIS, FRANCES HARVEY, and JEREMY KEEL, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS®, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and NATIONAL ASSOCIATION OF REALTORS® REALTY, INC., Defendants.	Case No. 19-CV-00332-SRB

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CHRISTOPHER MOEHRL, MICHAEL COLE, STEVE DARNELL, JACK RAMEY, DANIEL UMPA and JANE RUH on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS®, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, THE LONG & FOSTER COMPANIES, INC., RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	Case No. 1:19-cv-01610-ARW

WHEREAS, Plaintiffs allege that the National Association of REALTORS®, its members, and real estate brokers participating in MLSs throughout the United States participated in a conspiracy to raise, fix, maintain, or stabilize real estate commissions in violation of Section 1 of the Sherman Act and corresponding state laws;

WHEREAS, Stipulating Party denies these allegations;

WHEREAS, Plaintiffs have conducted an extensive investigation into the facts and the law regarding the claims and allegations that have been and/or could be asserted against Stipulating Party, including more than four years of fact and expert discovery, and have concluded that a settlement according to the terms set forth below is fair, reasonable, and adequate and in the best interest of Plaintiffs and the Settlement Class;

WHEREAS, Stipulating Party believes that it is not liable for the claims and allegations asserted and has good defenses, but nevertheless has decided to enter into this Appendix C to avoid further expense, inconvenience, and the distraction of burdensome and protracted litigation, to obtain the nationwide releases, orders, and judgment contemplated by this Appendix C, and to put to rest with finality all claims and allegations that Plaintiffs and Settlement Class Members have or could have asserted against the Stipulating Party; and

WHEREAS, Stipulating Party has agreed to cooperate with Plaintiffs and to implement certain practice changes, each as set forth in this Appendix C.

NOW, THEREFORE, in consideration of the agreements and releases set forth in the Settlement Agreement and Appendix C and other good and valuable consideration, and intending to be legally bound, it is agreed by and between ______________________________________ ("Stipulating Party") and the Plaintiffs that certain actual or potential claims be settled, compromised, and dismissed with prejudice as to Stipulating Party, without costs to Plaintiffs, the Settlement Class or Stipulating Party except as provided for herein, subject to the approval of the Court, on the

following terms and conditions:

A. Definitions

Stipulating Party agrees that the terms reflected in this Appendix C shall have the same meaning as those defined in the Settlement Agreement, unless otherwise specified. The following terms, as used in this Appendix C only, have the following meanings:

1. "Burnett" means the case pending in the United States District Court for the Western District of Missouri Case No. 4:19-cv-00332-SRB, which is currently pending.

2. "Burnett MLSs" means the multiple listing services identified as Subject MLSs in Burnett.

3. "Co-Lead Counsel" means the following law firms:

KETCHMARK AND MCCREIGHT P.C.
11161 Overbrook Road, Suite 210
Leawood, KS 66211

BOULWARE LAW LLC
1600 Genessee, Suite 416
Kansas City, MO 64102

WILLIAMS DIRKS DAMERON LLC
1100 Main Street, Suite 2600
Kansas City, MO 64105

HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101

COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW, Fifth Floor
Washington, DC 20005

SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067

4. "Court" means the United States District Court for the Western District of Missouri.

5. “Effective” means that all conditions set forth below in the definition of “Effective Date” have occurred.

6. “Effective Date” means the date when both: (a) the Court has entered a final judgment order approving the Settlement under Rule 23(e) of the Federal Rules of Civil Procedure and a final judgment dismissing the Actions against the National Association of REALTORS® with prejudice has been entered; and (b) the time for appeal or to seek permission to appeal from the Court’s approval of the Settlement and the entry of a final judgment has expired or, if appealed, approval of the Settlement and the final judgment have been affirmed in their entirety by the court of last resort to which such appeal has been taken and such affirmance is no longer subject to further appeal or review; excluding, however, any appeal or other proceedings unrelated to this Settlement initiated by any Non-National Association of REALTORS® Defendant, and any such appeal or other proceedings shall not delay this Settlement from becoming final and shall not apply to this Paragraph; nor shall this Paragraph be construed as an admission that such parties have standing or other rights of objection or appeal with respect to this Settlement. It is agreed that neither the provisions of Federal Rule of Civil Procedure 60 nor the All Writs Act, 28 U.S.C. § 1651, shall be considered in determining the above-stated times.

7. “Moehrl” means the case pending in the Northern District of Illinois Case No. 1:19-cv-01610-ARW, which is currently pending.

8. “Moehrl MLSs” means the multiple listing services named in Moehrl.

9. “MLS PIN” means the multiple listing service at issue in United States District Court for the District of Massachusetts Case No. I :20-cv-12244-PBS, which is currently pending.

10. “Opt-Outs” means members of the Settlement Class who have timely exercised their rights to be excluded from the Settlement Class or have otherwise obtained Court approval to exercise such rights.

11. "Person" means an individual, corporation, partnership, limited partnership, association, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, any business or legal entity, and such individual's or entity's spouse, heirs, predecessors, successors, representatives, affiliates, and assignees.

12. "Released Claims" means any and all manner of claims, regardless of the cause of action, arising from or relating to conduct that was alleged or could have been alleged in the Actions based on any or all of the same factual predicates for the claims alleged in the Actions, including but not limited to commissions negotiated, offered, obtained, rebated, or paid to brokerages in connection with the sale of any residential home.

13. "Released Parties" means Stipulating Party and its past, present, and future, direct and indirect, parents, subsidiaries, predecessors, successors (all as defined in SEC rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), franchisees, officers, directors, managing directors, employees, agents, contractors, independent contractors, attorneys, legal or other representatives, accountants, auditors, experts, trustees, trusts, heirs, beneficiaries, estates, executors, administrators, insurers, and assigns. However, "Released Parties" shall not include any Person who is excluded from being a released party under Paragraphs 18(g) or (h) of the Settlement Agreement.

14. "Releasing Parties" means Plaintiffs and any Settlement Class Members (including any of their immediate family members, heirs, representatives, administrators, executors, devisees, legatees, and estates, acting in their capacity as such; and for entities including any of their past, present or future officers, directors, insurers, general or limited partners, divisions, stockholders, agents, attorneys, employees, legal representatives, trustees, parents, associates, affiliates, joint ventures, subsidiaries, heirs, executors, administrators, predecessors, successors and assigns, acting

in their capacity as such solely with respect to the claims based on or derived from claims of the Plaintiffs or Settlement Class Members).

15. "Settlement" means the settlement of the Actions contemplated by this Appendix C.

16. "Settlement Class" means the class of persons that will be certified by the Court for settlement purposes only, namely, all persons who sold a home that was listed on a multiple listing service anywhere in the United States where a commission was paid to any brokerage in connection with the sale of the home in the following date ranges:

- Homes listed on Moehrl MLSs: March 6, 2015 to date of Class Notice;
- Homes listed on Burnett MLSs: April 29, 2014 to date of Class Notice;
- Homes listed on MLS PIN: December 17, 2016 to date of Class Notice;
- Homes in Arkansas, Kentucky, and Missouri, but not on the Moehrl MLSs, the Burnett MLSs, or MLS PIN: October 31, 2018 to date of Class Notice;
- Homes in Alabama, Georgia, Indiana, Maine, Michigan, Minnesota, New Jersey, Pennsylvania, Tennessee, Vermont, Wisconsin, and Wyoming, but not on the Moehrl MLSs, the Burnett MLSs, or MLS PIN: October 31, 2017 to date of Class Notice;
- For all other homes: October 31, 2019 to date of Class Notice.

For avoidance of doubt, Plaintiffs and Stipulating Party intend this Settlement to provide for a nationwide class with a nationwide settlement and release.

17. "Settlement Class Member" means a member of the Settlement Class who does not file a valid request for exclusion from the Settlement Class.

18. "Settling Parties" means Plaintiffs and Stipulating Party.

B. <u>Operation of the Settlement</u>

19. Stipulating Party represents that neither it nor its past or present, direct or indirect parents (including holding companies), subsidiaries, affiliates (all as defined in SEC rule 12b-2

promulgated pursuant to the Securities Exchange Act of 1934), associates, predecessors, successors, franchisors, or franchisees is a defendant in the Actions, as that term is defined in the Settlement Agreement. This representation is a material component of Appendix C and Stipulating Party's inclusion as a Released Party

20. Settling Parties agree that, as a condition precedent for this Appendix C to become effective, Stipulating Party must deliver to the below email address within 60 days of the filing of the first motion for preliminary approval of the Settlement Agreement each of the following: (i) an executed version of this Appendix C; (ii) a declaration sworn pursuant 28 U.S.C. § 1746 by a competent officer of Stipulating Party accurately attesting to the Stipulating Party's "Total Transaction Volume" for each of the most recent four calendar years; and (iii) an indication of whether Stipulating Party selects either "Option 1" or "Option 2" as defined in this Appendix C:

(1) realtorsoptin@jndla.com (2) realtorsoptin@cohenmilstein.com and

(3) nargovernance@nar.realtor

21. As a condition for being a Released Party, Stipulating Party agrees to be bound by this Appendix C, including the practice changes and cooperation terms reflected in Paragraphs 35-41 of Appendix C.

22. **Option 1**: Plaintiffs will open a special interest-bearing settlement escrow account or accounts, established for that purpose as a qualified settlement fund as defined in Section 1.468B-1(a) of the United States Treasury Regulations (the "Escrow Account"). Within 120 days following preliminary approval of the Settlement Agreement by the Court, Stipulating Party will deposit into the Escrow Account an amount equal to 0.0025 multiplied by its average annual Total Transaction Volume over the most recent four calendar years ("Total Monetary Settlement Amount"). "Total Transaction Volume" is defined as the aggregate value of all residential home sales and purchases in which the Stipulating Entity and its direct and indirect parents (including holding companies),

subsidiaries, affiliates, associates (all as defined in SEC rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), and any of their franchisees represented in a real estate brokerage capacity either the buyer, the seller, or both. For any transactions in which a real estate broker represented both the buyer and the seller, that transaction shall be counted twice for purposes of calculating the "Total Transaction Volume." By way of example, a Stipulating Party with a $2 billion average annual Total Transaction Volume would be required under this agreement to deposit $5 million in the Escrow Account.

23. **Option 2**: Alternatively, to the extent Stipulating Party has a good faith belief that it lacks the ability to pay the amount required under Option 1, Stipulating Party agrees to participate in a non-binding mediation with Co-Lead Counsel to occur within 110 days following preliminary approval of the Settlement Agreement by the Court. That mediation will occur before Greg Lindstrom, of Phillips ADR Enterprises, P.C. or another mediator jointly selected by the parties to Appendix C. The costs of the mediation shall be borne entirely by Stipulating Party. Plaintiffs and Stipulating Party agree to maintain the confidentiality of all settlement discussions and materials exchanged during the settlement negotiation, including the mediation. If, following the non-binding mediation described herein, Stipulating Party and Co-Lead Counsel are unable to reach agreement on a settlement within 130 days following preliminary approval of the Settlement Agreement by the Court, Stipulating Party shall not become a "Released Party" under the Settlement Agreement (including this Appendix C) and any further rights or obligations under the Settlement Agreement (including this Appendix C) of Stipulating Party, Plaintiffs, Co-Lead Counsel, or the Settlement Class to one another shall terminate.

C. Stipulation to Class Certification

24. The Settling Parties hereby stipulate for purposes of this settlement only, that the requirements of Federal Rules of Civil Procedure 23(a), 23(b)(2), and 23(b)(3) are satisfied and,

subject to Court approval, the Settlement Class shall be certified for settlement purposes as to Stipulating Party. The Settling Parties stipulate and agree to the conditional certification of the Settlement Class for purposes of this Settlement only. Should, for whatever reason, the Settlement not become Effective, the Settling Parties' stipulation to class certification as part of the Settlement shall become null and void.

25. Neither the Settlement, Appendix C, or Settlement Agreement, nor any statement, transaction, or proceeding in connection with the negotiation, execution, or implementation of the Settlement, Appendix C, or Settlement Agreement should be intended to be, construed as, or deemed to be evidence of an admission or concession by Stipulating Party that a class should be or should have been certified for any purposes other than settlement, and none of them shall be admissible in evidence for any such purpose in any proceeding.

D. <u>Approval of this Appendix C and Dismissal of the Actions</u>

26. The Settling Parties agree to make reasonable best efforts to effectuate the Settlement Agreement (including Appendix C), including, but not limited to, seeking the Court's approval of procedures (including the giving of class notice under Federal Rules of Civil Procedure 23(c) and (e)); scheduling a final fairness hearing to obtain final approval of the settlement and the final dismissal with prejudice of the Actions as to Stipulating Party; and Stipulating Party's cooperation by providing information reflecting its ability to pay limitations.

27. Plaintiffs will submit to the Court a motion requesting that the Court preliminarily approve the Settlement reflected in Appendix C (the "Motion"). The Motion may be separate from and be filed at a different time than the preliminary approval motion provided in connection with the other class relief afforded in the Settlement Agreement by the National Association of REALTORS®. The Motion shall include a proposed form of order preliminarily approving the Settlement and enjoining Releasing Parties from prosecuting any Released Claims in any forum until

the Effective Date of this Settlement reflected in Appendix C. Stipulating Party shall not have any right or opportunity to review the Motion. The Settling Parties shall take all reasonable actions as may be necessary to obtain preliminary approval of the Settlement reflected in Appendix C. To the extent the Court finds that the Settlement does not meet the standard for preliminary approval, the Settling Parties will negotiate in good faith to modify Appendix C directly or with the assistance of an agreed mediator and will endeavor to resolve any issues to the satisfaction of the Court.

28. Subject to approval by the Court, Plaintiffs will undertake a method of providing notice of this Settlement to the Settlement Class and for claim administration that meets the requirements of due process and Federal Rule of Civil Procedure 23 and is substantially similar to the forms of notice already agreed-to and approved by the Court in the previous settlements with Anywhere, RE/MAX, and Keller Williams. Class members who file a claim under the Anywhere, RE/MAX and Keller Williams settlements will be deemed to also make a claim against this Settlement unless they affirmatively state they are not claiming this Settlement. The Settling Parties agree to the use of the claims administrator previously selected to administer the Anywhere, RE/MAX, and Keller Williams settlements and approved by the Court. The timing of any request to disseminate notice to the Settlement Class will be at the discretion of Co-Lead Counsel and may occur separately from and at a different time than the class notice provided in connection with the class relief afforded in the Settlement Agreement by the National Association of REALTORS®.

29. Within ten (10) calendar days after the filing with the Court of this Appendix C and the accompanying motion papers seeking its preliminary approval, the claims administrator shall at Stipulating Party's expense to be credited against the Total Monetary Settlement Amount cause notice of the Settlement to be served upon appropriate State and Federal officials as provided in the Class Action Fairness Act, 28 U.S.C. § 1715.

30. If the Settlement is preliminarily approved by the Court, Plaintiffs shall timely seek final approval of the Settlement and entry of a final judgment order as to Stipulating Party:

(a) certifying the Settlement Class under Federal Rule of Civil Procedure 23(b), solely for purposes of this Settlement;

(b) granting final approval of the Settlement as fair, reasonable, and adequate within the meaning of Federal Rules of Civil Procedure 23(e) and directing the consummation of the Settlement according to its terms;

(c) enjoining the Stipulating Party in accordance with the provisions of Paragraph 35 of Appendix C.

(d) directing that, as to Stipulating Party only, the Actions be dismissed with prejudice and, except as provided for herein, without costs;

(e) reserving exclusive jurisdiction over the Settlement and this Appendix C, including reserving exclusive jurisdiction over the administration and consummation of this Settlement to the Court; and

(f) determining under Federal Rule of Civil Procedure 54(b) that there is no just reason for delay and directing entry of final judgment as to Stipulating Party.

31. This Appendix C will become Effective only after the occurrence of all conditions set forth above in the definition of the Effective Date.

E. <u>Releases, Discharge, and Covenant Not to Sue</u>

32. Upon the occurrence of the Effective Date, the Releasing Parties expressly and irrevocably waive, and fully, finally, and forever settle, discharge, and release the Released Parties from, any and all manner of claims, demands, actions, suits, and causes of action, whether individual, class, representative, or otherwise in nature, for damages, restitution, disgorgement, interest, costs, expenses, attorneys' fees, fines, civil or other penalties, or other payment of money, or for injunctive,

declaratory, or other equitable relief, whenever incurred, whether directly, indirectly, derivatively, or otherwise, whether known or unknown, suspected or unsuspected, in law or in equity, that any Releasing Party ever had, now has, or hereafter can, shall, or may have and that have accrued as of the date of preliminary approval of the Settlement arising from or related to the Released Claims. The Released Claims include but are not limited to the antitrust and consumer protection claims brought in the Actions and similar state and federal statutes. In connection therewith, upon the Effective Date of Settlement, each of the Releasing Parties (i) shall forever be enjoined from prosecuting in any forum any Released Claims against any of the Released Parties that accrued from the beginning of time through the date of preliminary approval of the Settlement; and (ii) agrees and covenants not to sue any of the Released Parties with respect to any Released Claims. For avoidance of doubt, this release extends to, but only to, the fullest extent permitted by law.

33. The Releasing Parties may hereafter discover facts other than or different from those which they now know or believe to be true with respect to the subject matter of the Released Claims. Nevertheless, the Releasing Parties expressly, fully, finally, and forever settle and release, and, upon the Effective Date, shall be deemed to have, and by operation of the Final Judgment and Order of Dismissal shall have, fully, finally, and forever settled and released, any and all Released Claims, without regard to the subsequent discovery or existence of such other, different, or additional facts, as well as any and all rights and benefits existing under (i) Cal. Civ. Code Section 1542, which provides as follows:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD

HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

or any equivalent, similar or comparable present or future law or principle of law of any jurisdiction, including but not limited to Section 20-7-11 of the South Dakota Codified Laws, which provides that "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR;" or (ii) any law or principle of law of any jurisdiction that would limit or restrict the effect or scope of the provisions of the release set forth above, without regard to the subsequent discovery or existence of such other, different, or additional facts. The Releasing Parties acknowledge that the inclusion of unknown claims in the definition of Released Claims was separately bargained for and was a material element of the Settlement Agreement.

34. The Releasing Parties intend by this Appendix C to settle with and release only the Released Parties, and the Settling Parties do not intend this Appendix C, or any part hereof, or any other aspect of the proposed Settlement or release, to release or otherwise affect in any way any claims concerning product liability, breach of warranty, breach of contract or tort of any kind (other than a breach of contract or tort based on any factual predicate in the Actions), a claim arising out of violation of the Uniform Commercial Code, or personal or bodily injury. The release does not extend to any individual claims that a class member may have against his or her own broker or agent based on a breach of contract, breach of fiduciary duty, malpractice, negligence or other tort claim, other than a claim that a class member paid an excessive commission or home price due to the claims at issue in the Actions.

F. <u>Practice Changes</u>

35. Stipulating Party agrees that, as soon as practicable, and in no event later than 150 days after the filing of the first motion for preliminary approval of this Settlement Agreement, Stipulating Party (defined for purposes of this paragraph to include present and future, direct and indirect corporate subsidiaries, related entities and affiliates, predecessors, and successors, but not franchisees) will implement the following practice changes:

i. advise and periodically remind Stipulating Party's company-owned brokerages, franchisees (if any), and their agents that there is no Stipulating Party requirement that they must make offers to or must accept offers of compensation from cooperating brokers or that, if made, such offers must be blanket, unconditional, or unilateral;

ii. require that any Stipulating Party company-owned brokerages and their agents (and recommend and encourage that any franchisees and their agents) disclose to prospective home sellers and buyers and state in conspicuous language that broker commissions are not set by law and are fully negotiable (i) in their listing agreement if it is not a government or MLS-specified form, (ii) in their buyer representation agreement if there is one and it is not a government or MLS-specified form, and (iii) in pre-closing disclosure documents if there are any and they are not government or MLS-specified forms. In the event that the listing agreement, buyer representation agreement, or pre-closing disclosure documents is a government or MLS-specified form, then Stipulating Party will require that any company-owned brokerages and their agents (and recommend and encourage that any Stipulating Party franchisees and their agents) include a disclosure with conspicuous language expressly stating that broker commissions are not set by law and are fully negotiable;

iii. prohibit all Stipulating Party company-owned brokerages and their agents acting as buyer representatives (and recommend and encourage that franchisees and their

agents acting as buyer representatives refrain) from advertising or otherwise representing that their services are free;

iv. require that company owned brokerages and their agents disclose at the earliest moment possible any offer of compensation made in connection with each active listing shared with prospective buyers in any format;

v. prohibit company owned brokerages and their agents (and recommend and encourage that any franchisees and their agents refrain) from utilizing any technology or taking manual actions to filter out or restrict listings that are searchable by and displayed to consumers based on the level of compensation offered to any cooperating broker unless directed to do so by the client (and eliminate any internal systems or technological processes that may currently facilitate such practices);

vi. advise and periodically remind company owned brokerages and their agents of their obligation to (and recommend and encourage that any franchisees and their agents) show properties regardless of the existence or amount of compensation offered to buyer brokers or other buyer representatives provided that each such property meets the buyer's articulated purchasing priorities;

vii. for each of the above points, for company owned brokerages, franchisees, and their agents, develop training materials consistent with the above relief and eliminate any contrary training materials currently used.

36. If not automatically terminated earlier by their own terms, the obligations set forth in the immediately preceding paragraph will sunset 5 years after the Effective Date.

37. Stipulating Party agrees to provide proof of compliance with these practice changes if requested by Co-Lead Counsel.

G. <u>Cooperation</u>

38. Stipulating Party agrees to provide valuable cooperation to Plaintiffs as follows in the Actions, including to the extent that any is consolidated pursuant to In re Real Estate Commission Antitrust Litigation (MDL No. 3100):

i. use reasonable efforts to authenticate documents and/or things produced by it in the Actions where the facts indicate that the documents and/or things at issue are authentic, by declarations or affidavits if possible, or at hearings or trial if necessary;

ii. use reasonable efforts to provide the facts necessary to establish, where applicable, that documents and/or things produced by it in the Actions are "business records," a present sense impression, an excited utterance, a recorded recollection, or are otherwise admissible under the Federal Rules of Evidence, by declarations or affidavits if possible, or at hearings or trial if necessary;

iii. agree that this Settlement Agreement shall not preclude Plaintiffs from seeking the production of non-privileged documents in its possession, custody, or control;

iv. if a defendant includes a witness on a witness list in the Actions who is then a current officer or employee of Stipulating Party, Stipulating Party will cooperate in providing access via counsel to that witness prior to trial testimony for up to two (2) hours;

v. withdraw any existing response before the Judicial Panel on Multidistrict Litigation with respect to *In re Real Estate Commission Antitrust Litigation* (MDL No. 3100); and

vi. agree not to provide greater assistance in discovery or trial to any defendant or other non-Released Party in the Actions than to the Plaintiffs unless required by subpoena or other compulsory process.

39. Stipulating Party's cooperation obligations, as set forth in Paragraph 38 of Appendix C, shall not require the production of information, testimony, and/or documents that are protected

from disclosure by the attorney-client privilege, work product doctrine, joint defense privilege, or any other applicable privilege or doctrine.

40. Stipulating Party's obligation to cooperate will not be affected by the releases set forth in this Settlement Agreement or Appendix C or the final judgment orders with respect to the National Association of REALTORS® or Stipulating Party. Unless this Appendix C is rescinded, disapproved, or otherwise fails to become Effective, the obligation to cooperate as set forth here will continue until the date that final judgment has been entered in all of the Actions and the time for appeal or to seek permission to appeal from the entry of a final judgment has expired or, if appealed, any final judgment has been affirmed in its entirety by the court of last resort to which such appeal has been taken and such affirmance is no longer subject to further appeal or review.

41. Stipulating Party acknowledges that the practice changes and cooperation set forth in this Appendix C are a material component of Appendix C and agrees to use its reasonable best efforts to provide them.

H. The Settlement Fund

42. The Total Monetary Settlement Amount and any interest earned thereon shall be held in the Escrow Account and constitute the "Settlement Fund." The full and complete cost of the settlement notice, claims administration, Settlement Class Members' compensation, current and former class representatives' incentive awards, attorneys' fees and reimbursement of all actual expenses of the Actions, any other litigation costs of Plaintiffs (all as approved by the Court), and all applicable taxes, if any, assessable on the Settlement Fund or any portion thereof, will be paid out of the Settlement Fund. In no event will Stipulating Party's monetary liability with respect to the Settlement exceed the Total Monetary Settlement Amount.

43. The Settling Parties and their counsel will not have any responsibility, financial obligation, or liability for any fees, costs, or expenses related to providing notice to the Settlement

Class or administering the settlement except in Paragraphs 40 and 42 of Appendix C. Such fees, costs, or expenses shall be paid solely from the Settlement Fund with Court approval. The balance of the Settlement Fund shall be disbursed to Settlement Class Members as provided in a Plan of Allocation (as defined below) approved by the Court. The Settling Parties shall have the right to audit amounts paid from the Settlement Fund.

44. Subject to Co-Lead Counsel's sole discretion as to timing, except that the timing must be consistent with rules requiring that Settlement Class Members be given the opportunity to review fee applications, Co-Lead Counsel may apply to the Court for a fee award, plus expenses, and costs incurred, and current and former class representative service awards to be paid out of the Settlement Fund. Within 14 business days after any order by the Court awarding attorneys' fees, expenses, or class representative incentive awards or such later date as directed by Co-Lead Counsel,, the escrow agent for the Settlement Fund shall pay any approved attorneys' fees, expenses, costs, and class representative service award up to the amount specified in Paragraphs 22 or 23 of Appendix C for such fees, expenses, costs, and class representative service award by wire transfer as directed by Co-Lead Counsel in accordance with and attaching the Court's Order, provided that each Co-Lead Counsel receiving payment signs an assurance, in the form attached hereto as Appendix A, attesting that they will repay all awarded amounts if this Settlement Agreement does not become Effective.

45. The Settlement Fund will be invested in United States Government Treasury obligations or United States Treasury money market funds.

46. Stipulating Party will not have any responsibility, financial obligation, or liability whatsoever with respect to the investment, distribution, use, or administration of the Settlement Fund, including, but not limited to, the costs and expenses of such investment, distribution, use or administration except as expressly otherwise provided in this Appendix C.

47. There will be no reduction of the Total Monetary Settlement Amount based on Opt-Out Sellers. The Settlement will be non-reversionary except as set forth below in Paragraphs 33-37 of Appendix C. If the Settlement becomes Effective, no proceeds from the Settlement will revert to Stipulating Party regardless of the claims that are made.

48. No disbursements shall be made from the Settlement Fund prior to the Effective Date of this Settlement Agreement except as described in this Appendix C.

49. The distribution of the Settlement Fund shall be administered pursuant to a plan of allocation (the "Plan of Allocation") proposed by Co-Lead Counsel in their sole and absolute discretion and subject to the approval of the Court. Stipulating Party will have no participatory or approval rights with respect to the Plan of Allocation. It is understood and agreed by the Settling Parties that any proposed Plan of Allocation, including, but not limited to, any adjustments to an authorized claimant's claim, is completely independent of and is not a part of this Settlement Agreement (including Appendix C) and is to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement. The Settlement Class, Plaintiffs, and Stipulating Party shall be bound by the terms of the Settlement Agreement (including Appendix C), irrespective of whether the Court or any other court, including on any appeal, disapproves or modifies the Plan of Allocation, and any modification or rejection of the Plan of Allocation shall not affect the validity or enforceability of this Settlement Agreement or otherwise operate to terminate, modify, or cancel that Agreement.

50. The Releasing Parties will look solely to the Settlement Fund for settlement and satisfaction against the Released Parties of all Released Claims and shall have no other recovery against Stipulating Party or the Released Parties.

I. Taxes

51. Co-Lead Counsel is solely responsible for filing all informational and other tax returns necessary to report any net taxable income earned by the Settlement Fund and shall file all informational and other tax returns necessary to report any income earned by the Settlement Fund and shall be solely responsible for taking out of the Settlement Fund, as and when legally required, any tax payments, including interest and penalties due on income earned by the Settlement Fund. All taxes (including any interest and penalties) due with respect to the income earned by the Settlement Fund shall be paid from the Settlement Fund. Stipulating Party has no responsibility to make any filings relating to the Settlement Fund and will have no responsibility to pay tax on any income earned by the Settlement Fund or to pay any taxes on the Settlement Fund unless the Settlement does not become Effective and the Settlement Fund is returned to Stipulating Party. In the event the Settlement does not become Effective and any funds including interest or other income are returned to Stipulating Party, Stipulating Party will be responsible for the payment of all taxes (including any interest or penalties), if any, on said interest or other income. Stipulating Party makes no representations regarding, and will not be responsible for, the tax consequences of any payments made pursuant to this Settlement to Co-Lead Counsel or to any Settlement Class Member.

J. Rescission

52. If the Court does not certify the Settlement Class as defined in this Appendix C, or if the Court does not approve this Appendix C in all material respects, or if such approval is modified or set aside on appeal, or if the Court does not enter final approval, or if any judgment approving this Appendix C is materially modified or set aside on appeal, or if all of the conditions for the Effective Date do not occur, then this Appendix C may be rescinded by Stipulating Party or by Plaintiffs on behalf of the Settlement Class by written notice to the Court and to counsel for the other Settling Party filed and served within ten (10) business days of the entry of an order not granting court

approval or having the effect of disapproving or materially modifying the terms of the Appendix C. A modification or reversal on appeal of any amount of the Settlement Fund that the Court authorizes to be used to pay Plaintiffs' fees or litigation expenses shall not be deemed a modification of all or a part of the terms of this Settlement or such final judgment order. The decision of certain Settlement Class Members to opt out of the Settlement shall not be a basis for Stipulating Party to rescind or terminate the Appendix C.

53. If Appendix C is rescinded for any reason, then the balance of the Total Monetary Settlement Amount in the Settlement Fund will be returned to Stipulating Party.

54. Stipulating Party warrants and represents that it is not "insolvent" within the meaning of applicable bankruptcy laws as of the time this Appendix C is executed. In the event of a final order of a court of competent jurisdiction, not subject to any further proceedings, determining the transfer of the Total Monetary Settlement Amount, or any portion thereof, by or on behalf of Stipulating Party to be a preference, voidable transfer, fraudulent transfer or similar transaction under Title 11 of the United States Code (Bankruptcy) or applicable state law and any portion thereof is required to be refunded and such amount is not promptly deposited in the Escrow Account by or on behalf of Stipulating Party, then, at the election of Co-Lead Counsel, the Settlement Agreement may be terminated and the releases given and the judgment entered pursuant to the Settlement shall be null and void.

55. The Settling Parties' rights to terminate this Settlement and withdraw from Appendix C are a material term of this Settlement.

56. Stipulating Party reserves all of its legal rights and defenses with respect to any claims brought by potential Opt-Out Sellers.

K. Miscellaneous

57. This Appendix C and any actions taken to carry out the Settlement are not intended

to be, nor may they be deemed or construed to be, an admission or concession of liability, or of the validity of any claim, defense, or point of fact or law on the part of any party. Stipulating Party denies the material allegations of the complaints in the Actions and in the other cases in In re Real Estate Commission Antitrust Litigation (MDL No. 3100). Neither this Appendix C, nor the fact of Settlement, nor settlement proceedings, nor the settlement negotiations, nor any related document, shall be used as an admission of any fault or omission by Stipulating Party, or be offered in evidence as an admission, concession, presumption, or inference of any wrongdoing by Stipulating Party in any proceeding.

58. The terms of Appendix C are and shall be binding upon and inure to the benefit of, to the fullest extent possible, each of Plaintiffs and Stipulating Party, and upon all other Persons claiming any interest in the subject matter hereto through any of the Settling Parties, Releasing Parties, Released Parties, and any Settlement Class Members.

59. Any disputes between Stipulating Party and Co-Lead Counsel concerning this Appendix C shall, if they cannot be resolved, be presented first to an agreed mediator for assistance in mediating a resolution and, if a resolution is not reached, to the Court.

60. The provisions of this Appendix C shall, where possible, be interpreted in a manner to sustain their legality and enforceability.

61. Any disputes relating to this Appendix C will be governed by Missouri law without regard to conflicts of law provisions.

62. The Court shall retain jurisdiction over the implementation and enforcement of this Settlement Agreement and Appendix C.

63. This Settlement Agreement and Appendix C constitute the entire agreement among Plaintiffs and Stipulating Party pertaining to the Settlement of any claims or potential claims against Stipulating Party. This Appendix C may be modified or amended only by a writing executed by

Plaintiffs and Stipulating Party.

64. Stipulating Party acknowledges that it has been and is being fully advised by competent legal counsel of Stipulating Party's own choice and fully understands the terms and conditions of this Settlement Agreement, including Appendix C, and the meaning and import thereof, and that such Stipulating Party's execution of this Appendix C is with the advice of such Stipulating Party's counsel and of such Stipulating Party's own free will. Stipulating Party submits to the exclusive jurisdiction of the Court for the purposes of interpreting and enforcing the terms of Appendix C, including but not limited to, the practice changes contained therein. Stipulating Party represents and warrants that it has sufficient information regarding the transaction and the other parties to reach an informed decision and has, independently and without relying upon the other parties, and based on such information as it has deemed appropriate, made its own decision to enter into this Settlement Agreement, including Appendix C, and was not fraudulently or otherwise wrongfully induced to enter into this Appendix C.

65. Each of the undersigned attorneys represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Appendix C.

Date: ____ day of ________________, 2024

____

On behalf of ___________________

ON BEHALF OF CO-LEAD COUNSEL

____

Cohen Milstein Sellers & Toll PLLC

APPENDIX D – NON-REALTOR® MLS "OPT IN" AGREEMENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, HOLLEE ELLIS, FRANCES HARVEY, and JEREMY KEEL, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS®, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and NATIONAL ASSOCIATION OF REALTORS® REALTY, INC., Defendants.	Case No. 19-cv-00332-SRB

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CHRISTOPHER MOEHRL, MICHAEL COLE, STEVE DARNELL, JACK RAMEY, DANIEL UMPA and JANE RUH on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS®, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, THE LONG & FOSTER COMPANIES, INC., RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	Case No. 1:19-cv-01610-ARW

WHEREAS, some plaintiffs have alleged that certain MLSs participated in a conspiracy to raise, fix, maintain, or stabilize real estate commissions in violation of Section 1 of the Sherman Act and corresponding state laws;

WHEREAS, Stipulating MLS denies Plaintiffs' allegations in the Actions;

WHEREAS, Plaintiffs have conducted an extensive investigation into the facts and the law regarding the claims and allegations asserted in the Actions, including more than four years of fact and expert discovery, and have concluded that a settlement according to the terms set forth below is fair, reasonable, and adequate and in the best interest of Plaintiffs and the Settlement Class;

WHEREAS, Stipulating MLS believes that it is not liable for the claims and allegations asserted and has good defenses, but nevertheless has decided to enter into this Settlement Agreement to avoid further expense, inconvenience, and the distraction of burdensome and protracted litigation, to obtain the nationwide releases, orders, and judgment contemplated by this Settlement Agreement, and to put to rest with finality all claims and allegations that Plaintiffs and Settlement Class Members have or could have asserted against the Stipulating MLS; and

WHEREAS, Stipulating MLS, has agreed to cooperate with Plaintiffs and to implement certain practice changes, each as set forth in the Settlement Agreement and Appendix D.

NOW, THEREFORE, in consideration of the agreements and releases set forth in the Settlement Agreement and Appendix D and other good and valuable consideration, and intending to be legally bound, it is agreed by and between ____________________________________ ("Stipulating MLS") and the Plaintiffs that the Actions be settled, compromised, and dismissed with prejudice as to Stipulating MLS only, without costs to Plaintiffs, the Settlement Class or Stipulating MLS except as provided for herein, subject to the approval of the Court, on the following terms and conditions:

A. <u>Definitions</u>

Stipulating MLS agrees that the terms reflected in this Appendix D shall have the same meaning as those defined in the Settlement Agreement, unless otherwise specified. The following terms, as used in this Appendix D only, have the following meanings:

1. "Burnett" means the case pending in the United States District Court for the Western District of Missouri Case No. 4:19-cv-00332-SRB, which is currently pending.

2. "Burnett MLSs" means the multiple listing services at issue in Burnett.

3. "Co-Lead Counsel" means the following law firms:

KETCHMARK AND MCCREIGHT P.C.
11161 Overbrook Road, Suite 210
Leawood, KS 66211

BOULWARE LAW LLC
1600 Genessee, Suite 416
Kansas City, MO 64102

WILLIAMS DIRKS DAMERON LLC
1100 Main Street, Suite 2600
Kansas City, MO 64105

HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101

COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW, Fifth Floor
Washington, DC 20005

SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067

4. "Court" means the United States District Court for the Western District of Missouri.

5. "Effective" means that all conditions set forth below in the definition of "Effective Date" have occurred.

6. "Effective Date" means the date when both: (a) the Court has entered a final judgment order approving the Settlement set forth in this Settlement Agreement under Rule 23(e) of the Federal

Rules of Civil Procedure and a final judgment dismissing the Actions against the National Association of REALTORS® with prejudice has been entered; and (b) the time for appeal or to seek permission to appeal from the Court's approval of the Settlement and the entry of a final judgment has expired or, if appealed, approval of the Settlement and the final judgment have been affirmed in their entirety by the court of last resort to which such appeal has been taken and such affirmance is no longer subject to further appeal or review; excluding, however, any appeal or other proceedings unrelated to this Settlement initiated by any Non-National Association of REALTORS® Defendant, and any such appeal or other proceedings shall not delay the Settlement from becoming final and shall not apply to this Paragraph; nor shall this Paragraph be construed as an admission that such parties have standing or other rights of objection or appeal with respect to this Settlement. It is agreed that neither the provisions of Federal Rule of Civil Procedure 60 nor the All Writs Act, 28 U.S.C. § 1651, shall be considered in determining the above-stated times.

7. "Moehrl" means the case pending in the Northern District of Illinois Case No. 1:19-cv-01610-ARW, which is currently pending.

8. "Moehrl MLSs" means the multiple listing services named in Moehrl.

9. "MLS PIN" means the multiple listing service at issue in United States District Court for the District of Massachusetts Case No. I :20-cv-12244-PBS, which is currently pending.

10. "Opt-Outs" means members of the Settlement Class who have timely exercised their rights to be excluded from the Settlement Class or have otherwise obtained Court approval to exercise such rights.

11. "Person" means an individual, corporation, partnership, limited partnership, association, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, any business or legal entity, and such

individual's or entity's spouse, heirs, predecessors, successors, representatives, affiliates, and assignees.

12. "Released Claims" means any and all manner of claims, regardless of the cause of action, arising from or relating to conduct that was alleged or could have been alleged in the Actions based on any or all of the same factual predicates for the claims alleged in the Actions, including but not limited to commissions negotiated, offered, obtained, rebated, or paid to brokerages in connection with the sale of any residential home.

13. "Released Parties" for purposes of this Appendix D means Stipulating MLS and its past and present, direct and indirect, subsidiaries, predecessors, successors (all as defined in SEC rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), officers, directors, managing directors, employees, agents, contractors, independent contractors, attorneys, legal or other representatives, accountants, auditors, experts, trustees, trusts, heirs, beneficiaries, estates, executors, administrators, insurers, and assigns. However, "Released Parties" shall not include any Person who is excluded from being a released party under Paragraphs 18(g) or (h) of the Settlement Agreement.

14. "Releasing Parties" means Plaintiffs and any Settlement Class Members (including any of their immediate family members, heirs, representatives, administrators, executors, devisees, legatees, and estates, acting in their capacity as such; and for entities including any of their past, present or future officers, directors, insurers, general or limited partners, divisions, stockholders, agents, attorneys, employees, legal representatives, trustees, parents, associates, affiliates, joint ventures, subsidiaries, heirs, executors, administrators, predecessors, successors and assigns, acting in their capacity as such solely with respect to the claims based on or derived from claims of the Plaintiffs or Settlement Class Members).

15. "Settlement" means the settlement of the Actions contemplated by this Settlement Agreement.

16. "Settlement Class" means the class of persons that will be certified by the Court for settlement purposes only, namely, all persons who sold a home that was listed on a multiple listing service anywhere in the United States where a commission was paid to any brokerage in connection with the sale of the home in the following date ranges:

- Homes listed on Moehrl MLSs: March 6, 2015 to date of Class Notice;
- Homes listed on Burnett MLSs: April 29, 2014 to date of Class Notice;
- Homes listed on MLS PIN: December 17, 2016 to date of Class Notice;
- Homes in Arkansas, Kentucky, and Missouri, but not on the Moehrl MLSs, the Burnett MLSs, or MLS PIN: October 31, 2018 to date of Class Notice;
- Homes in Alabama, Georgia, Indiana, Maine, Michigan, Minnesota, New Jersey, Pennsylvania, Tennessee, Vermont, Wisconsin, and Wyoming, but not on the Moehrl MLSs, the Burnett MLSs, or MLS PIN: October 31, 2017 to date of Class Notice;
- For all other homes: October 31, 2019 to date of Class Notice.

For avoidance of doubt, Plaintiffs and National Association of REALTORS® intend this Settlement Agreement to provide for a nationwide class with a nationwide settlement and release.

17. "Settlement Class Member" means a member of the Settlement Class who does not file a valid request for exclusion from the Settlement Class.

18. "Settling Parties" means Plaintiffs and Stipulating MLS.

B. <u>Operation of the Settlement</u>

19. Stipulating MLS represents that neither it nor its past or present, direct or indirect parents (including holding companies), subsidiaries, affiliates, associates (all as defined in SEC rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), predecessors, successors, franchisors, or franchisees is a defendant in the Actions, as that term is defined in the Settlement Agreement. This representation is a material component of Appendix D and Stipulating MLS's

inclusion as a Released Party.

20. Settling Parties agree that, as a condition precedent for this Appendix D to become effective, Stipulating MLS must deliver to the below email address within 60 days of the filing of the first motion for preliminary approval of the Settlement Agreement each of the following: (i) an executed version of this Appendix D; and (ii) an indication of whether Stipulating MLS selects either "Option 1" or "Option 2" as defined in this Appendix D:

(1) realtorsoptin@jndla.com, (2) realtorsoptin@cohenmilstein.com, and
(3) nargovernance@nar.realtor

21. As a condition for being a Released Party, Stipulating MLS agrees to be bound by this Appendix D, including the practice changes and cooperation terms reflected in Paragraphs 35-36 of Appendix D.

22. **Option 1**: Plaintiffs will open a special interest-bearing settlement escrow account or accounts, established for that purpose as a qualified settlement fund as defined in Section 1.468B-1(a) of the U.S. Treasury Regulations (the "Escrow Account"). Within 120 days following preliminary approval of the settlement by the Court, Stipulating MLS will deposit into the Escrow Account a dollar amount equal to 100 multiplied by the number of its subscribers in calendar year 2023. The "2023 Subscribers" reflected in the T360 Real Estate Almanac (2023) shall serve as an irrebuttable presumption of that Stipulating MLS's number of subscribers in calendar year 2023.

23. **Option 2**: Alternatively, to the extent Stipulating MLS has a good faith belief that it lacks the ability to pay the amount required under Option 1, Stipulating MLS agrees to participate in a non-binding mediation with Co-Lead Counsel to occur within 110 days following preliminary approval of the Settlement by the Court. That mediation will occur before Greg Lindstrom, of Phillips ADR Enterprises, P.C. or another mediator jointly selected by the parties to Appendix D. The costs of the mediation shall be borne entirely by Stipulating MLS. Plaintiffs and Stipulating

MLS agree to maintain the confidentiality of all settlement discussions and materials exchanged during the settlement negotiation, including the mediation. If, following the non-binding mediation described herein, Stipulating MLS and Co-Lead Counsel are unable to reach agreement on a settlement within 130 days following preliminary approval of the Settlement Agreement by the Court, Stipulating MLS shall not become a "Released Party" under the Settlement Agreement (including this Appendix D) and any further rights or obligations under the Settlement Agreement (including this Appendix D) of Stipulating MLS, Plaintiffs, Co-Lead Counsel, or the Settlement Class to one another shall terminate.

C. <u>Stipulation to Class Certification</u>

24. The Settling Parties hereby stipulate for purposes of this settlement only that the requirements of Federal Rules of Civil Procedure 23(a), 23(b)(2), and 23(b)(3) are satisfied and, subject to Court approval, the Settlement Class shall be certified for settlement purposes as to Stipulating MLS. The Settling Parties stipulate and agree to the conditional certification of the Settlement Class for purposes of this Settlement only. Should, for whatever reason, the Settlement not become Effective, the Settling Parties' stipulation to class certification as part of the Settlement shall become null and void.

25. Neither the Settlement, Appendix D, or Settlement Agreement, nor any statement, transaction, or proceeding in connection with the negotiation, execution, or implementation of this Settlement, Appendix D, or Settlement Agreement should be intended to be, construed as, or deemed to be evidence of an admission or concession by Stipulating MLS that a class should be or should have been certified for any purposes other than settlement, and none of them shall be admissible in evidence for any such purpose in any proceeding.

D. <u>Approval of this Appendix D and Dismissal of the Actions</u>

26. The Settling Parties agree to make reasonable best efforts to effectuate this Settlement Agreement (including Appendix D), including, but not limited to, seeking the Court's approval of procedures (including the giving of class notice under Federal Rules of Civil Procedure 23(c) and (e)); scheduling a final fairness hearing to obtain final approval of the settlement and the final dismissal with prejudice of the Actions as to Stipulating MLS; and Stipulating MLS cooperation by providing information reflecting its ability to pay limitations.

27. Plaintiffs will submit to the Court a motion requesting that the Court preliminarily approve the settlement reflected in Appendix D (the "Motion"). The Motion may be separate from and be filed at a different time than the preliminary approval motion provided in connection with the other class relief afforded in the Settlement Agreement by the National Association of REALTORS®. The Motion shall include a proposed form of order preliminarily approving the settlement and enjoining Releasing Parties from prosecuting any Released Claims in any forum until the Effective Date of this settlement reflected in Appendix D. Stipulating MLS shall not have any right or opportunity to review the Motion. The Settling Parties shall take all reasonable actions as may be necessary to obtain preliminary approval of the settlement reflected in Appendix D. To the extent the Court finds that the settlement does not meet the standard for preliminary approval, the Settling Parties will negotiate in good faith to modify Appendix D directly or with the assistance of an agreed mediator and will endeavor to resolve any issues to the satisfaction of the Court.

28. Subject to approval by the Court, Plaintiffs will undertake a method of providing notice of this settlement to the Settlement Class and for claim administration that meets the requirements of due process and Federal Rule of Civil Procedure 23 and is substantially similar to the forms of notice already agreed-to and approved by the Court in the previous settlements with Anywhere, RE/MAX, and Keller Williams. Class members who file a claim under the Anywhere, RE/MAX and Keller Williams settlements will be deemed to also make a claim against this

Settlement unless they affirmatively state they are not claiming this Settlement. The Settling Parties agree to the use of the claims administrator previously selected to administer the Anywhere, RE/MAX, and Keller Williams settlements and approved by the Court. The timing of any request to disseminate notice to the Settlement Class will be at the discretion of Co-Lead Counsel and may occur separately from and at a different time than the class notice provided in connection with the class relief afforded in the Settlement Agreement by the National Association of REALTORS®.

29. Within ten (10) calendar days after the filing with the Court of this Appendix D and the accompanying motion papers seeking its preliminary approval, the claims administrator shall at Stipulating MLS's expense to be credited against the Total Monetary Settlement Amount cause notice of the Settlement Agreement to be served upon appropriate State and Federal officials as provided in the Class Action Fairness Act, 28 U.S.C. § 1715.

30. If the Settlement is preliminarily approved by the Court, Plaintiffs shall timely seek final approval of the Settlement and entry of a final judgment order as to Stipulating MLS:

(a) certifying the Settlement Class under Federal Rule of Civil Procedure 23(b), solely for purposes of this Settlement;

(b) granting final approval of the Settlement as fair, reasonable, and adequate within the meaning of Federal Rules of Civil Procedure 23(e) and directing the consummation of the Settlement according to its terms;

(c) enjoining the Stipulating MLS in accordance with the provisions of Paragraph 35 of Appendix D.

(d) directing that, as to Stipulating MLS only, the Actions be dismissed with prejudice and, except as provided for herein, without costs;

(e) reserving exclusive jurisdiction over the Settlement and this Appendix D, including reserving exclusive jurisdiction over the administration and consummation of this Settlement to the Court; and

(f) determining under Federal Rule of Civil Procedure 54(b) that there is no just reason for delay and directing entry of final judgment as to Stipulating MLS.

31. This Appendix D will become Effective only after the occurrence of all conditions set forth above in the definition of the Effective Date.

E. <u>Releases, Discharge, and Covenant Not to Sue</u>

32. Upon the occurrence of the Effective Date, the Releasing Parties expressly and irrevocably waive, and fully, finally, and forever settle, discharge, and release the Released Parties from, any and all manner of claims, demands, actions, suits, and causes of action, whether individual, class, representative, or otherwise in nature, for damages, restitution, disgorgement, interest, costs, expenses, attorneys' fees, fines, civil or other penalties, or other payment of money, or for injunctive, declaratory, or other equitable relief, whenever incurred, whether directly, indirectly, derivatively, or otherwise, whether known or unknown, suspected or unsuspected, in law or in equity, that any Releasing Party ever had, now has, or hereafter can, shall, or may have and that have accrued as of the date of preliminary approval of the Settlement arising from or related to the Released Claims. The Released Claims include but are not limited to the antitrust and consumer protection claims brought in the Actions and similar state and federal statutes. In connection therewith, upon the Effective Date of Settlement, each of the Releasing Parties (i) shall forever be enjoined from prosecuting in any forum any Released Claims against any of the Released Parties that accrued from the beginning of time through the date of preliminary approval of the Settlement; and (ii) agrees and covenants not to sue any of the Released Parties with respect to any Released Claims. For avoidance of doubt, this release extends to, but only to, the fullest extent permitted by law.

33. The Releasing Parties may hereafter discover facts other than or different from those which they now know or believe to be true with respect to the subject matter of the Released Claims. Nevertheless, the Releasing Parties expressly, fully, finally, and forever settle and release, and, upon the Effective Date, shall be deemed to have, and by operation of the Final Judgment and Order of Dismissal shall have, fully, finally, and forever settled and released, any and all Released Claims, without regard to the subsequent discovery or existence of such other, different, or additional facts, as well as any and all rights and benefits existing under (i) Cal. Civ. Code Section 1542, which provides as follows:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

or any equivalent, similar or comparable present or future law or principle of law of any jurisdiction, including but not limited to Section 20-7-11 of the South Dakota Codified Laws, which provides that "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR;" or (ii) any law or principle of law of any jurisdiction that would limit or restrict the effect or scope of the provisions of the release set forth above, without regard to the subsequent discovery or existence of such other, different, or additional facts. The

Releasing Parties acknowledge that the inclusion of unknown claims in the definition of Released Claims was separately bargained for and was a material element of the Settlement Agreement.

34. The Releasing Parties intend by this Appendix D to settle with and release only the Released Parties, and the Settling Parties do not intend this Appendix D, or any part hereof, or any other aspect of the proposed settlement or release, to release or otherwise affect in any way any claims concerning product liability, breach of warranty, breach of contract or tort of any kind (other than a breach of contract or tort based on any factual predicate in the Actions), a claim arising out of violation of the Uniform Commercial Code, or personal or bodily injury. The release does not extend to any individual claims that a class member may have against his or her own broker or agent based on a breach of contract, breach of fiduciary duty, malpractice, negligence or other tort claim, other than a claim that a class member paid an excessive commission or home price due to the claims at issue in the Actions.

F. <u>Practice Changes</u>

35. Stipulating MLS agrees that, as soon as practicable, and in no event later than 150 days after the filing of the first motion for preliminary approval of the Settlement Agreement, each Stipulating MLS will implement the following practice changes:

i. eliminate any requirement by the MLS that listing brokers or sellers must make offers of compensation to buyer brokers or other buyer representatives (either directly or through buyers), and eliminate any requirement that such offers, if made, must be blanket, unconditional, or unilateral;

ii. prohibit the MLS Participants, subscribers, other real estate brokers, other real estate agents, and sellers from (a) making offers of compensation on the multiple listing service to cooperating brokers or other buyer representatives (either directly or through buyers); or (b) disclosing on the multiple listing service listing broker compensation or total

brokerage compensation (i.e., the combined compensation to both listing brokers and cooperating brokers);

iii. eliminate all broker compensation fields on the MLS, and prohibit the sharing of offers of compensation to buyer brokers or other buyer representatives via any other fields on the MLS;

iv. eliminate and prohibit any requirements conditioning multiple listing service participation or membership in an MLS on offering or accepting compensation to buyer brokers or other buyer representatives;

v. agree not to create, facilitate, or support any non-MLS mechanism (including by providing listing information to an internet aggregators' website for such purpose) for listing brokers or sellers to make offers of compensation to buyer brokers or other buyer representatives (either directly or through buyers), however, this provision is not violated by (a) an MLS providing data or data feeds to a REALTOR®, MLS Participant, or third party unless the MLS knows those data or data feeds are being used directly or indirectly to establish or maintain a platform for offers of compensation from multiple brokers (i.e., the MLS cannot intentionally circumvent this requirement); or (b) a REALTOR® or MLS Participant displaying both (1) data or data feeds from an MLS and (2) offers of compensation to buyer brokers or other buyer representatives but only on listings from their own brokerage;

vi. unless inconsistent with state or federal law or regulation before or during the operation of this Paragraph 35(vi) of Appendix D, require that all MLS Participants working with a buyer enter into a written agreement before the buyer tours any home with the following:

a. to the extent that such a Participant will receive compensation from any source, the agreement must specify and conspicuously disclose the amount or rate

of compensation it will receive or how this amount will be determined;

b. the amount of compensation reflected must be objectively ascertainable and may not be open-ended (e.g., "buyer broker compensation shall be whatever amount the seller is offering to the buyer"); and

c. such a Participant may not receive compensation for brokerage services from any source that exceeds the amount or rate agreed to in the agreement with the buyer;

vii. prohibit Participants, subscribers, and other real estate brokers and agents accessing the multiple listing service from representing to a client or customer that their brokerage services are free or available at no cost to their clients, unless they will receive no financial compensation from any source for those services;

viii. require MLS Participants acting for sellers to conspicuously disclose to sellers and obtain seller approval for any payment or offer of payment that the listing broker or seller will make to another broker, agent, or other representative (e.g., a real estate attorney) acting for buyers; and such disclosure must be in writing, provided in advance of any payment or agreement to pay to another broker acting for buyers, and specify the amount or rate of any such payment;

ix. require MLS Participants to disclose to prospective sellers and buyers in conspicuous language that broker commissions are not set by law and are fully negotiable (i) in their listing agreement if it is not a government-specified form, (ii) in their agreement with buyers if it is not a government-specified form, and (iii) in pre-closing disclosure documents if there are any and they are not government-specified forms. In the event that the listing agreement, buyer representation agreement, or pre-closing disclosure documents are a government form, then MLS participants must include a disclosure with conspicuous

language expressly stating that broker commissions are not set by law and are fully negotiable;

x. to the extent that the multiple listing services publishes form listing agreements, buyer representation agreements, or pre-closing disclosure documents for use by REALTORS®, participants, and/or subscribers, ensure that those forms include language disclosing to prospective sellers and buyers in conspicuous language that broker commissions are not set by law and are fully negotiable;

xi. require that MLS participants and subscribers must not filter out or restrict MLS listings communicated to their customers or clients based on the existence or level of compensation offered to the broker assisting the buyer;

xii. rescind or modify any existing rules that are inconsistent with the practice changes reflected in this Paragraph 35 of Appendix D; and

xiii. develop educational materials that reflect and are consistent with each provision in these practice changes, and eliminate educational materials, if any, that are contrary to it.

xiv. the practice changes in the Paragraph 35 of Appendix D shall not prevent (a) offers of compensation to buyer brokers or other buyer representatives off of the multiple listing service or (b) sellers from offering buyer concessions on an MLS (e.g., for buyer closing costs), so long as such concessions are not limited to or conditioned on the retention of or payment to a cooperating broker, buyer broker, or other buyer representative.

36. Stipulating MLS agrees to provide proof of compliance with these practice changes if requested by Co-Lead Counsel.

G. <u>Cooperation</u>

37. Stipulating MLS will provide valuable cooperation to Plaintiffs and Settlement Class Member as follows in the Actions, including to the extent that any is consolidated pursuant to In re Real Estate Commission Antitrust Litigation (MDL No. 3100):

i. use reasonable efforts to authenticate documents and/or things produced by it in the Actions where the facts indicate that the documents and/or things at issue are authentic, by declarations or affidavits if possible, or at hearings or trial if necessary;

ii. use reasonable efforts to provide the facts necessary to establish, where applicable, that documents and/or things produced by it in the Actions are "business records," a present sense impression, an excited utterance, a recorded recollection, or are otherwise admissible under the Federal Rules of Evidence, by declarations or affidavits if possible, or at hearings or trial if necessary;

iii. use reasonable efforts at their expense to provide relevant class member and listing data and answer questions about that data to support the provision of class notice, administration of any settlements, or the litigation of the Actions;

iv. stipulate that Plaintiffs have the consent to obtain from third parties relevant class member and listing data to support the provision of class notice, administration of any settlements, or the litigation of the Actions;

v. agree that Plaintiffs may use in the remaining Actions any discovery materials provided by it or its officers or employees in Moehrl or Burnett;

vi. agree that this Settlement Agreement shall not preclude Plaintiffs from seeking the production of non-privileged documents in its possession, custody, or control;

vii. if a Defendant includes a witness on a witness list in the Actions who is then a current officer or employee of the multiple listing service, the multiple listing

service will cooperate in providing access via counsel to that witness prior to trial testimony for up to two (2) hours;

viii. withdraw any existing response before the Judicial Panel on Multidistrict Litigation with respect to *In re Real Estate Commission Antitrust Litigation* (MDL No. 3100); and

ix. agree not to provide greater assistance in discovery or trial to any defendant or other non-Released Party in the Actions than to the Plaintiffs unless required by subpoena or other compulsory process.

38. Stipulating MLS's cooperation obligations, as set forth in Paragraph 37 of Appendix D, shall not require the production of information, testimony, and/or documents that are protected from disclosure by the attorney-client privilege, work product doctrine, joint defense privilege, or any other applicable privilege or doctrine.

39. Stipulating MLS's obligation to cooperate will not be affected by the releases set forth in this Settlement Agreement or Appendix D or the final judgment orders with respect to National Association of REALTORS® or Stipulating Party. Unless this Appendix D is rescinded, disapproved, or otherwise fails to become Effective, the obligation to cooperate as set forth here will continue until the date that final judgment has been entered in all of the Actions and the time for appeal or to seek permission to appeal from the entry of a final judgment has expired or, if appealed, any final judgment has been affirmed in its entirety by the court of last resort to which such appeal has been taken and such affirmance is no longer subject to further appeal or review.

40. Stipulating MLS acknowledges that the practice changes and cooperation set forth in this Appendix D are a material component of Appendix D and agrees to use its reasonable best efforts to provide them.

H. <u>The Settlement Fund</u>

41. The Total Monetary Settlement Amount and any interest earned thereon shall be held in the Escrow Account and constitute the "Settlement Fund." The full and complete cost of the settlement notice, claims administration, Settlement Class Members' compensation, current and former class representatives' incentive awards, attorneys' fees and reimbursement of all actual expenses of the Actions, any other litigation costs of Plaintiffs (all as approved by the Court), and all applicable taxes, if any, assessable on the Settlement Fund or any portion thereof, will be paid out of the Settlement Fund. In no event will Stipulating MLS's monetary liability with respect to the Settlement exceed the Total Monetary Settlement Amount.

42. The Settling Parties and their counsel will not have any responsibility, financial obligation, or liability for any fees, costs, or expenses related to providing notice to the Settlement Class or administering the settlement except in this Appendix D. Such fees, costs, or expenses shall be paid solely from the Settlement Fund with Court approval. The balance of the Settlement Fund shall be disbursed to Settlement Class Members as provided in a Plan of Allocation (as defined below) approved by the Court. The Settling Parties shall have the right to audit amounts paid from the Settlement Fund.

43. Subject to Co-Lead Counsel's sole discretion as to timing, except that the timing must be consistent with rules requiring that Settlement Class Members be given the opportunity to review fee applications, Co-Lead Counsel may apply to the Court for a fee award, plus expenses, and costs incurred, and current and former class representative service awards to be paid out of the Settlement Fund. Within 14 business days after any order by the Court awarding attorneys' fees, expenses, or class representative incentive awards or such later date as directed by Co-Lead Counsel, the escrow agent for the Settlement Fund shall pay any approved attorneys' fees, expenses, costs, and class representative service award up to the amount specified in Paragraphs 22 or 23 of Appendix D for such fees, expenses, costs, and class representative service award by wire transfer as directed by Co-

Lead Counsel in accordance with and attaching the Court's Order, provided that each Co-Lead Counsel receiving payment signs an assurance, in the form attached hereto as Appendix A, attesting that they will repay all awarded amounts if this Settlement Agreement does not become Effective.

44. The Settlement Fund will be invested in United States Government Treasury obligations or United States Treasury money market funds.

45. Stipulating MLS will not have any responsibility, financial obligation, or liability whatsoever with respect to the investment, distribution, use, or administration of the Settlement Fund, including, but not limited to, the costs and expenses of such investment, distribution, use or administration except as expressly otherwise provided in this Appendix D.

46. There will be no reduction of the Total Monetary Settlement Amount based on Opt-Out Sellers. The Settlement will be non-reversionary except as set forth below in Paragraphs 51 of Appendix D. If the Settlement becomes Effective, no proceeds from the Settlement will revert to Stipulating MLS regardless of the claims that are made.

47. No disbursements shall be made from the Settlement Fund prior to the Effective Date of this Settlement Agreement except as described in this Appendix D.

48. The distribution of the Settlement Fund shall be administered pursuant to a plan of allocation (the "Plan of Allocation") proposed by Co-Lead Counsel in their sole and absolute discretion and subject to the approval of the Court. Stipulating MLS will have no participatory or approval rights with respect to the Plan of Allocation. It is understood and agreed by the Settling Parties that any proposed Plan of Allocation, including, but not limited to, any adjustments to an authorized claimant's claim, is completely independent of and is not a part of this Settlement Agreement (including Appendix D) and is to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement. The Settlement Class, Plaintiffs, and Stipulating MLS shall be bound by the terms of the Settlement Agreement (including

Appendix D), irrespective of whether the Court or any other court, including on any appeal, disapproves or modifies the Plan of Allocation, and any modification or rejection of the Plan of Allocation shall not affect the validity or enforceability of this Settlement Agreement or otherwise operate to terminate, modify, or cancel that Agreement.

49. The Releasing Parties will look solely to the Settlement Fund for settlement and satisfaction against the Released Parties of all Released Claims and shall have no other recovery against Stipulating MLS or the Released Parties.

I. <u>Taxes</u>

50. Co-Lead Counsel is solely responsible for filing all informational and other tax returns necessary to report any net taxable income earned by the Settlement Fund and shall file all informational and other tax returns necessary to report any income earned by the Settlement Fund and shall be solely responsible for taking out of the Settlement Fund, as and when legally required, any tax payments, including interest and penalties due on income earned by the Settlement Fund. All taxes (including any interest and penalties) due with respect to the income earned by the Settlement Fund shall be paid from the Settlement Fund. Stipulating MLS has no responsibility to make any filings relating to the Settlement Fund and will have no responsibility to pay tax on any income earned by the Settlement Fund or to pay any taxes on the Settlement Fund unless the Settlement does not become Effective and the Settlement Fund is returned to Stipulating MLS. In the event the Settlement does not become Effective and any funds including interest or other income are returned to Stipulating MLS, Stipulating MLS will be responsible for the payment of all taxes (including any interest or penalties), if any, on said interest or other income. Stipulating MLS makes no representations regarding, and will not be responsible for, the tax consequences of any payments made pursuant to this Settlement Agreement to Co-Lead Counsel or to any Settlement Class Member.

J. <u>Rescission</u>

51. If the Court does not certify the Settlement Class as defined in this Appendix D, or if the Court does not approve this Appendix D in all material respects, or if such approval is modified or set aside on appeal, or if the Court does not enter final approval, or if any judgment approving this Appendix D is materially modified or set aside on appeal, or if all of the conditions for the Effective Date do not occur, then this Appendix D may be rescinded by Stipulating MLS or by Plaintiffs on behalf of the Settlement Class by written notice to the Court and to counsel for the other Settling Party filed and served within ten (10) business days of the entry of an order not granting court approval or having the effect of disapproving or materially modifying the terms of the Appendix D. A modification or reversal on appeal of any amount of the Settlement Fund that the Court authorizes to be used to pay Plaintiffs' fees or litigation expenses shall not be deemed a modification of all or a part of the terms of this Settlement or such final judgment order. The decision of certain Settlement Class Members to opt out of the Settlement shall not be a basis for Stipulating MLS to rescind or terminate the Appendix D.

52. If Appendix D is rescinded for any reason, then the balance of the Total Monetary Settlement Amount in the Settlement Fund will be returned to Stipulating MLS.

53. Stipulating MLS warrants and represents that it is not "insolvent" within the meaning of applicable bankruptcy laws as of the time this Appendix D is executed. In the event of a final order of a court of competent jurisdiction, not subject to any further proceedings, determining the transfer of the Total Monetary Settlement Amount, or any portion thereof, by or on behalf of Stipulating MLS to be a preference, voidable transfer, fraudulent transfer or similar transaction under Title 11 of the U.S. Code (Bankruptcy) or applicable state law and any portion thereof is required to be refunded and such amount is not promptly deposited in the Escrow Account by or on behalf of Stipulating MLS, then, at the election of Co-Lead Counsel, the Settlement Agreement may be terminated and the releases given and the judgment entered pursuant to the Settlement shall be null

and void.

54. The Settling Parties' rights to terminate this Settlement and withdraw from Appendix D are a material term of this Settlement.

55. Stipulating MLS reserves all of its legal rights and defenses with respect to any claims brought by potential Opt-Out Sellers.

K. Miscellaneous

56. This Appendix D and any actions taken to carry out the Settlement are not intended to be, nor may they be deemed or construed to be, an admission or concession of liability, or of the validity of any claim, defense, or point of fact or law on the part of any party. Stipulating MLS denies the material allegations of the complaints in the Actions and in the other cases in In re Real Estate Commission Antitrust Litigation (MDL No. 3100). Neither this Appendix D, nor the fact of Settlement, nor settlement proceedings, nor the settlement negotiations, nor any related document, shall be used as an admission of any fault or omission by Stipulating MLS, or be offered in evidence as an admission, concession, presumption, or inference of any wrongdoing by Stipulating MLS in any proceeding.

57. The terms of Appendix D are and shall be binding upon and inure to the benefit of, to the fullest extent possible, each of Plaintiffs and Stipulating MLS, and upon all other Persons claiming any interest in the subject matter hereto through any of the Settling Parties, Releasing Parties, Released Parties, and any Settlement Class Members.

58. Any disputes between Stipulating MLS and Co-Lead Counsel concerning this Appendix D shall, if they cannot be resolved, be presented first to an agreed mediator for assistance in mediating a resolution and, if a resolution is not reached, to the Court.

59. The provisions of this Appendix D shall, where possible, be interpreted in a manner to sustain their legality and enforceability.

60. Any disputes relating to this Appendix D will be governed by Missouri law without regard to conflicts of law provisions.

61. The Court shall retain jurisdiction over the implementation and enforcement of this Settlement Agreement and Appendix D.

62. This Settlement Agreement and Appendix D constitute the entire agreement among Plaintiffs and Stipulating MLS pertaining to the Settlement of any claims or potential claims against Stipulating MLS. This Appendix D may be modified or amended only by a writing executed by Plaintiffs and Stipulating MLS.

63. Stipulating MLS acknowledges that it has been and is being fully advised by competent legal counsel of Stipulating MLS's own choice and fully understands the terms and conditions of this Settlement Agreement, including Appendix D, and the meaning and import thereof, and that such Stipulating MLS's execution of this Appendix D is with the advice of such Stipulating MLS's counsel and of such Stipulating MLS's own free will. Stipulating MLS submits to the exclusive jurisdiction of the Court for the purposes of interpreting and enforcing the terms of Appendix D, including but not limited to, the practice changes contained therein. Stipulating MLS represents and warrants that it has sufficient information regarding the transaction and the other parties to reach an informed decision and has, independently and without relying upon the other parties, and based on such information as it has deemed appropriate, made its own decision to enter into this Settlement Agreement, including Appendix D, and was not fraudulently or otherwise wrongfully induced to enter into this Appendix D.

64. Each of the undersigned attorneys represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Appendix D.

Date: ____ day of ________________, 2024

____

On behalf of ___________________

ON BEHALF OF CO-LEAD COUNSEL

____
Cohen Milstein Sellers & Toll PLLC