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Colorado Residential Contracts ADDENDA PACKAGE Explanation

I. General Comments for All Our Forms

The Colorado Real Estate Commission approved contract forms are sophisticated. However, many of our clients find the need to make repetitive modifications to them. The Real Estate Commission's Rule F-3(a)(1) states: "*If a broker originates or initiates the use of a preprinted or prepared addendum that modifies or adds to the terms of a Commission-approved contract form which does not result from the negotiations of the parties, such addendum must be prepared by: (1) an attorney representing the broker or brokerage firm. . .*" These addenda were prepared for your office and are not to be given to other offices or used in violation of our copyright.

Forms avoid the need to "reinvent the wheel" and eliminate the possibility of multiple variations of solutions to a common problem. When used properly, forms greatly aid brokers and consumers. **Yet, there is a tremendous danger in using forms.** Every real estate transaction is different. Thought must be given to whether all of the provisions of our addenda fit a specific transaction and whether the language within a particular provision is appropriate for the transaction. Every time you use one of our addenda, you and the consumer should review it to verify that it is appropriate and consistent with the consumer's intentions.

One feature of contracts is that they allocate risks between buyers and sellers. In different circumstances, contract provisions will work to the favor of the seller, in other circumstances they will work to the benefit of the buyer. The Real Estate Commission has allocated risk as it has deemed best. Yet we know that sellers and buyers, from time-to-time, wish to alter these risk allocations. Many of our provisions simply give buyers and sellers options to make different risk allocations. We do not hold these provisions out as being necessarily "better" in any objective sense. They simply provide consumers with options and avoid the need for brokers to draft these options spontaneously.

Our addenda and clauses do not purport to include all the provisions which a broker may wish to use to structure a residential real estate transaction. Instead, we have attempted to address the most frequent requests for clauses from most of our clients. Some of our clients have developed addenda addressing their local

concerns. Generally, our clauses do not attempt to address local concerns. Those of you who have repetitive regional concerns may wish to have us add provisions addressing those concerns, or approve your existing language.

The enclosed forms and clauses are designed for residential transactions. While some of the provisions in the enclosed documents may sporadically be useful in commercial transactions, some provisions are not appropriate for commercial transactions. Further, the addenda do not address many of the issues which frequently need to be addressed in commercial transactions. Commercial brokers should contact us to develop their own custom documents.

Our addenda and clauses may only be used with the forms the Real Estate Commission required brokers to use as of July 1, 2009. Any future changes in the Real Estate Commission approved forms or rules, and other changes in the real estate environment, may require a revision of the enclosed forms. You may request additional revisions at any time.

II. Addenda to Contract to Buy and Sell Real Estate (Residential)

A. General Comments

Addendum A includes clauses which most of our clients would like to use in most deals, regardless of whether they are working with buyers or sellers. While paragraphs in Addendum A can be deleted with the stroke of a pen, it is not designed to be an *ala carte* menu of provisions from which brokers pick and reject paragraphs for the contract.

Clients also need a set of clauses which are deal specific, but which are used sufficiently frequently that it is worth developing standard language within the company for these clauses. The enclosed package includes a list of clauses (explained in more detail below) most of which are intended to be added to the buy-sell contract, others of which are intended for the buyer or seller listing agreement.

A variety of the sections create contingencies. These provisions specify that if the contingencies are not satisfied, then the Contract shall terminate. Many of our clients have asked us why the contingencies do not provide that upon termination, the buyer receives a refund of the buyer's earnest money.

The reason our contingencies do not call for the return of the earnest money if the contingency is not satisfied is that § 25 of the Real Estate Commission approved form provides: "*In the event this contract is **terminated**, all payments and things of value received hereunder shall be returned and the parties shall be relieved of all obligations hereunder, **subject to §§ 10.4, 23 and 24.***" [Emphasis added.] None of the contingencies in the Real Estate Commission approved form explicitly state that if the contingency is not satisfied or waived, then the earnest money is returned to the buyer. Instead, the Real Estate Commission approved contingencies specify that if they are not satisfied, the contract shall terminate, relying upon § 25 to call for the return of the earnest money to the buyer.

Referencing the term "termination" in § 25 avoids the need to repeat the following phrase many times throughout the Real Estate Commission approved contract: ". . . all payments and things of value received hereunder shall be returned and the parties shall be relieved of all obligations hereunder, subject to §§ 10.4, 23 and 24." But perhaps more importantly, the system used in the Real Estate Commission approved form (which we have copied) reflects the phenomenon that sellers and buyers disagree from time-to-time about whether the contract is terminated. If there is a squabble about whether the contract is terminated, the broker needs to have

the flexibility to interplead the earnest money (§ 24) and the Real Estate Commission wants the mediation clause (§ 23) to apply. **Even if the contract has been terminated, the buyer may still owe the seller money because of damage caused to the property during the buyer's property inspections (see § 10.4).** For this reason, neither the Real Estate Commission, nor Frascona, Joiner, Goodman and Greenstein, P.C., call for the earnest money to be returned to the buyer after every contingency in the contract.

B. Addendum A. The following is a detailed explanation, paragraph by paragraph, of the Addendum “A”.

1. § 2.1. Buyer. In virtually all transactions, the seller will not be affected by the form of tenancy in which buyer takes title. Many buyers will not have decisively determined how they wish to take title at the time they make an offer. This paragraph allows the buyer to redesignate the form of tenancy in which the buyer will take title. It also provides the default tenancy of "Tenants in Common" and equal ownership if the parties do not specify the type of tenancy in § 2.1 of the contract.

2. § 2.5. Day; Computation of Period of Days, Deadline. Sometimes contract dates or deadlines fall on a Saturday, Sunday, or other legal holiday. Addressing that possibility is especially important because the “MEC” concept included in § 2.4 of the contract allows the parties to create deadlines that are set based upon the mutual execution of the contract. Since neither party knows the date on which the final party will sign the contract, the precise schedule of deadlines based upon MEC cannot be known at the time a broker writes an offer or a counterproposal.

The Real Estate Commission has attempted to address this issue with its § 2.5. However, if the “shall” box in § 2.5 is checked, deadlines intentionally scheduled for non-business days might inadvertently get extended. It is not unusual for a party to intend that a significant deadline in a contract fall on a weekend or legal holiday. For example, a buyer submitting an offer on Thursday might intentionally seek an Acceptance Deadline on Saturday so that if the offer is not accepted, the buyer might look for alternative homes on Sunday. Residential buyers and sellers often prefer to move on weekends.

Our paragraph that replaces § 2.5 provides that, regardless of which box in § 2.5.2 is checked, or if neither box is checked, if a date for payment or performance of the contract – other than a date for the giving of notice – falls on a Saturday, Sunday or legal holiday, then the date or deadline shall be extended to the next business day. Our paragraph does not extend the Acceptance Deadline Date or Acceptance Deadline Time specified in the contract, and, unless the Closing Date is extended because it falls on a Saturday, Sunday or legal holiday, our clause does not affect the Possession Date. In addition, as an ever-increasing number of transactions involve a party or parties who are not located in Colorado, and because of the ever-increasing speed at which transactions occur, the FJGG paragraph makes express what might be implied as part of § 2.5.1 – that all references to time shall be the applicable Colorado time (rather than some other time, such as the time and the locale of one of the principals to the contract).

3. § 3.1. Inclusions. Although the Commission approved form has been revised to include in § 10.8 a disclosure regarding the requirements of the Lofgren and Johnson Families Carbon Monoxide Safety Act, the form does not list carbon monoxide alarms among the Inclusions identified in § 3.1 This paragraph provides that unless they are explicitly excluded by another provision of the contract, or by a subsequent agreement of the parties, any carbon monoxide alarms on the Property on the date of the Contract are part of the Inclusions to be transferred to the Buyer.

4. § 7.2. Copies of Exceptions. This paragraph requires the seller to furnish the buyer with copies of any certificates of occupancy in the seller's possession, on or before the Title Deadline specified in the contract.

5. § 7.4. Common Interest Community Documents. §7.4.4 contains check boxes permitting the parties to chose between the §7.4.4.1 or §7.4.4.2 option. With the §7.4.4.1 option, the Seller “shall cause the CIC Documents to be provided to Buyer” With the §7.4.4.2 option, the Seller authorizes the Association to provide the CIC Documents. There will be situations where the §7.4.4.2 option is selected and the Association will not follow through and provide the documents. This paragraph makes it clear that the choice of the §7.4.4.2 box within §7.4.4 does not relieve the Seller of responsibility of following through and providing the CIC Documents if the owner’s association does not do so.

6. § 10. Property Disclosure and Inspection. This language requires the seller to deliver copies of any property inspection, soil, drainage and similar reports in the seller's possession to the buyer at the same time the seller delivers the Property Disclosure. If the condition of the property or inclusions changes from the date the property went under contract, the seller is obligated to disclose any changes to the buyer as those changes occur.

7. § 10. Property Disclosure and Inspection. The Real Estate Commission’s paragraph limits the buyer’s inspection and termination rights to the “physical condition” of the Property and Inclusions and the other specific matters listed in clauses (1) through (4) in § 10.2 of the contract. Our paragraph expands the inspection and termination rights to anything related to the Property, the Inclusions or the transaction contemplated by the contract. It also lists a variety of other items which serves as a good check list for a buyer. The paragraph does not add a separate contingency for buyer dissatisfaction about wells and septic systems. Buyers have an opportunity to evaluate these features of a property as part of the buyer's § 10 inspection. However, the Additional Provisions section of our system does include a separate well and septic clause requiring the seller to deliver certain reports or tests regarding a well or septic system which a buyer may find desirable.

8. § 17. Possession. It is not unusual for a seller to retain possession of a property for some period of time after closing. Though it is highly undesirable for sellers, from time-to-time buyers take possession of a property before the transaction closes. Either situation creates risk for the buyer and seller. This paragraph advises the parties to obtain insurance and a lease to insure against and allocate such risk.

9. 1031 Exchange. Buyers acquiring property as part of a Section 1031 tax-deferred exchange need to have the ability to assign the buyers' rights under the contract to a qualified intermediary. Yet § 18 of the contract often – depending on which box is checked – prohibits the buyer from assigning the contract without the seller's consent. Buyers acquiring property to complete a Section 1031 exchange have strict time frames in which to do so. Such buyers may not want potential sellers to know of the buyers' need to complete a Section 1031 exchange. This paragraph requires both parties (including the seller) to cooperate with the other party's Section 1031 exchange, so long as cooperation is not to the detriment of the other party. This paragraph should not be deleted.

10. Federal and Colorado Withholding. The Federal Foreign Investment in Real Property Tax Act (FIRPTA) and Colorado's statute calling for withholding on transfers of Colorado real property can require the withholding of a percentage of the sales price or seller's proceeds in non-exempt transactions. This paragraph alerts the buyer and seller to these withholding provisions.

11. § 6.1. Property Approval. § 6.1 was new in the 2008 CREC-approved Contract to Buy and Sell Real Estate. The provision seems to be based on a premise that a seller has some underlying obligation to address or satisfy a lender’s Requirements – a premise not every seller may agree with. Although the provision was revised slightly in the January 2009 version of the CREC-approved form, it still contains some ambiguities and potential problems for the parties. For example, does verbal notice to a seller of the Requirements constitute “receipt of the Requirements” for purposes of this language? What must the “written agreement” contemplated

by clause (1) of the second sentence of §6.1 address or include to eliminate or void the seller's right to terminate? A buyer considering a written waiver of the Requirements under clause (3) of the second sentence of §6.1 should realize the waiver will not satisfy the lender's Requirements, and then consider the position the buyer will be in if such a waiver is given and the loan is not available at closing.

Given the ambiguities and potential problems, it may be best in many transactions to simply delete this § 6.1. This final paragraph of Addendum "A" provides a means of deleting § 6.1. However, **given CREC Rule F-1(c), the broker intending to so delete § 6.1 from the contract is cautioned to do so only when the deletion results from negotiations or instruction(s) of a party to the transaction, and then, in addition to checking the box in this paragraph 11 of Addendum "A," the broker should also strike through § 6.1 in a legible manner that does not obscure the deletion being made.** If using this Addendum "A" and intending to delete § 6.1, the broker should not just strike through the text of § 6.1 and leave the paragraph 11 box unchecked – for that could lead to an ambiguity as to the intent of the parties.

C. Additional Provisions

ADDITIONAL PROVISIONS TO THE CONTRACT TO BUY AND SELL REAL ESTATE

On a case-by-case basis brokers should consider inserting any of the following paragraphs into the Additional Provisions section of the Buy/Sell Contract.

Well Transfers

1. § 3.1.6. Inclusions – Water Rights. The provisions of § 3.1.6 regarding the completion of a Change in Ownership or Registration of Existing Well form, are derived from the requirements of § 38-30-102(3)(b)(I), Colorado Revised Statutes, effective on and after January 1, 2009, when a buyer of residential real estate enters into a transaction that results in the transfer of ownership of the type of well referenced in § 3.1.6.1 of the contract. That statute goes on to provide that where a third party provides the closing service, as a title company usually does in residential real estate transactions, that closing company is required to submit the completed Change in Ownership or Registration of Existing Well form, as applicable, to the Division of Water Resources, and the closing company is not liable for delaying the closing in order to ensure that the required form is completed. Our clause regarding this § 3.1.6.1, then, is intended to avoid the need for any such delay in the closing, by including an authorization for the seller to complete the required form at closing, as the buyer's attorney-in-fact, if the buyer fails or refuses to do so.

Interest on Earnest Money

2. § 4.2. Earnest Money. In large dollar transactions, sometimes it is worthwhile for the earnest money to bear interest for the benefit of the parties. If interest rates increase, there should be more demand for interest on earnest money. Our clause provides for interest on earnest money.

Seller Concession

3. § 4.4. Seller Concession. A buyer and a seller may strike a deal in which the Seller Concession to be given under § 4.4 of the contract is larger than the credit permitted by the buyer's lender. Under the final sentence of that § 4.4, the seller is not required to provide such credit. This clause gives the buyer the option of either reducing the purchase price by the amount of the disallowed credit, or giving up the credit. This clause

also obligates the buyer to allow the seller to verify the lender's treatment of the Seller Concession, directly with the buyer's lender.

Buyer Fault Needed for Loan Liability

4. § 5.2. Loan Conditions. The Real Estate Commission approved contract is not conditional upon buyer getting a loan. Under § 5.2, a buyer must notify the seller to exercise the buyer's right to terminate the contract because of buyer's dissatisfaction with a new loan. If a buyer is silent, the financing contingency is deemed waived. If the loan is not approved, or if it is approved and not funded, and the buyer cannot otherwise come up with the funds to close, the buyer will likely be in default under the contract unless the contract is terminated due to some other contingency, such as the appraisal, title or survey contingency provisions.

Under § 5.2, the burden is on the buyer to determine the reliability of any loan commitment obtained. The following may be a common scenario: (a) buyer obtains a loan commitment; (b) based upon the commitment, the buyer decides to proceed with the contract; and (c) the loan is not funded. If the contract is not terminated pursuant to some other contingency provision and the buyer cannot otherwise come up with the funds to close, the buyer will likely be in default, and such default will exist regardless of whether the failure to fund the loan is the fault of the buyer or someone else.

When a buyer does not provide notice to terminate under §5.2, the buyer is essentially betting that the loan will be approved and funded. If the buyer bets wrong under a liquidated damages contract, then the buyer "only" loses the buyer's earnest money. Under a specific performance contract, the stakes are higher.

The financing contingency avoids arguments about whether the loan was "approved" or not. This CREC provision also avoids arguments about whether the buyer obtained a loan commitment. It also avoids arguments about whether the failure to fund was the fault of the buyer. Depending upon the amount of the earnest money, whether the contract is liquidated damages or specific performance, the hardship to a seller of a buyer breach, and other factors, the buyer may be making a reasonable bet.

However, some buyers will lose bets which they did not realize they had made. Even informed buyers will look to blame their lenders and the brokers who recommended those lenders, and the same brokers will also be accused of not informing buyers of the workings of § 5.2. Brokers working with buyers need to give those buyers an opportunity to make an informed choice about the bet.

This paragraph has the advantage of shifting some of the risk that the loan is not finally approved or funded away from the buyer, back to the seller. It has the disadvantage of raising questions about whether the failure of the loan was due to the fault of the buyer.

Loan Commitment Necessary

5. § 5.2. Loan Conditions. Some buyers will make an informed decision to risk their earnest money even though they do not have a loan commitment. Other buyers will recklessly risk their earnest money without a loan commitment. Still other buyers, unaware of the workings of the financing contingency, will risk their earnest money without even realizing that they have done so. Under the existing § 5.2, the seller is probably stuck with the buyer (and the uncertainty of whether the deal will close) until the closing date. This paragraph provides that the buyer cannot waive the condition of obtaining a loan commitment, and that if the buyer fails to deliver to the seller a copy of a written loan commitment for each new loan, on or before the Loan Conditions Deadline, the contract terminates.

Cap on FHA/VA Repairs

6. § 6.1. Property Approval. An FHA or VA appraiser will sometimes condition the appraisal upon certain repairs being made to the property. This clause allows the parties to identify a cap up to which the seller is obligated to make the repairs required by buyer's lender.

Home Warranty

7. §10. Property Disclosure, Inspection and Insurability; Buyer Disclosure. This paragraph serves to educate buyers and sellers about the existence of pre-owned home warranty programs. It also allows the buyer to shift all or some of the cost of the warranty to the seller, and makes it clear that with this paragraph, the seller does not have the obligation to obtain the warranty; the buyer does.

8. §10. Property Disclosure, Inspection and Insurability; Buyer Disclosure. This alternative home warranty clause allows the Contract to obligate the listing or selling brokerage firm (described in the current CREC Contract to Buy and Sell Real Estate as either the “Brokerage Firm of Broker working with Seller” or the “Brokerage Firm of Broker working with Buyer”) to pay some or all the cost of the home warranty. One disadvantage of using this clause is that it makes the broker a party to the Contract. Among other things, this burdens the broker with the “loser pays attorneys fees” clause in the buy/sell contract.

Well and Septic

9. § 10. Property Disclosure and Inspection. Buyers do not need to add language to the contract to give the buyer the right to inspect the well or septic system which may service the Property, as § 10 of the CREC-approved Contract already gives the Buyer such rights. Selling brokers simply need to make the Inspection Objection Deadline late enough for the buyer to have a realistic opportunity to have the well and septic system inspected. However, in addition to inspection rights, buyers sometimes want, and have the market clout to compel, the seller to do such things as pump the septic tank and test the water's potability. This paragraph requires the seller to do certain things, and provide documentation that those things have been or will be done no later than noon on the third calendar day prior to the Inspection Objection Deadline.

As Is

10. § 10. Property Disclosure and Inspection. In any sale transaction, there is a risk that there are unknown defects with the property. This clause places those risks on the buyer. Note that an inspection under § 10 of the contract is still available to the buyer (unless the parties remove § 10 from the contract) and that this clause doesn't absolve the seller from the seller's duty to disclose material latent defects of which the seller is aware. (If a seller intends to delete the inspection rights of a buyer (something we discourage) the parties should delete applicable portions of § 10 from the contract.)

Source of Water

11. § 10.7. Source of Potable Water (Residential Land and Residential Improvements). Given the statutory requirements regarding disclosure of the source of potable water in residential transactions, listing brokers should make the Source of Water Addendum available on the property for showings, so that buyers can submit such Addendum with offers. In spite of the best efforts of listing brokers to educate selling brokers to submit offers with the Source of Water Addendum attached, many brokers working with buyers will not do so. This clause, then, provides a means for a listing broker to correct that oversight in a counterproposal. (A similar provision for the Lead-Based Paint Disclosure (Sales) form is not included here because, although the same

problem does occasionally arise in that context, §9 of the CREC-approved Contract form contains the buyer's acknowledgment of receipt of the Lead-Based Paint Disclosure (Sales) form, whereas that acknowledgment is not contained in §10.7 regarding the Source of Water Addendum unless the check-box provision is filled out to reflect such receipt. In spite of that §9 language acknowledging receipt of the Lead-Based Paint Disclosure (Sales) form, however, if the listing broker knows that the buyer submitting an offer has not yet received such form, the listing broker should provide the required form and related documents (such as the EPA pamphlet) and then have the parties sign or re-sign as necessary to assure compliance.

Transfer of Warranties

12. § 15. Closing Costs, Documents and Services. Some warranties for inclusions and fixtures in the property may be transferable from a seller to a buyer. Manuals and instruction brochures in the seller's possession can also be very useful to buyers. This paragraph requires the seller to deliver warranties, manuals, and instructional brochures in the seller's possession to the buyer, at closing. Without requiring an additional assignment, this paragraph provides that the bill of sale executed at closing shall be deemed to assign all assignable warranties from the seller to the buyer.

Escrow for Property Condition

13. § 19. Causes of Loss, Insurance; Condition of, Damage to Property and Inclusions and Walk-Through. From time-to-time, sellers will only provide possession of the property after the closing. This clause allows the buyer to request the seller to establish an escrow to secure the seller's obligation to leave the property in the condition required by the contract.

Property Condition

14. § 19. Causes of Loss, Insurance; Condition of, Damage to Property and Inclusions and Walk-Through. This paragraph requires the seller to leave the property in clean condition for the buyer.

15. § 19. Causes of Loss, Insurance; Condition of, Damage to Property and Inclusions and Walk-Through. In addition to the duties of the preceding paragraph, this paragraph obligates the seller to have the Property professionally cleaned.

16. § 19. Causes of Loss, Insurance; Condition of, Damage to Property and Inclusions and Walk-Through. This paragraph is similar to the preceding paragraph, but also obligates the seller to remove all the personal property that is not intended to be transferred to the buyer from the Property at least three calendar days prior to closing.

Extension for Lender Delay (Simple)

17. § 21. Time for Performance. This provision calls for an extension of time for lender delay. We recommend that it be used sparingly and for short periods only. The advantage of including this provision in a contract is that it prevents the seller or the buyer from terminating the transaction because of a delay caused by the buyer's lender. However, such a clause has many disadvantages. Among them are that this clause could work to delay a seller, through no fault of the seller. Though the delay of the buyer's lender may be through no fault of the buyer, it will not be through the fault of the seller either. Many sellers will not want to subject themselves to a risk which is beyond their control. Another disadvantage of such a clause is that it can lead to arguments about whether the delay is caused by the buyer's lender. Yet another disadvantage is that such a

clause may work to make lenders lazier than they otherwise would be if there was a hard loan commitment deadline.

18. § 21. Time for Performance. This clause is identical to the preceding one, but only creates an extension if the delay is “through no fault of the buyer.” It has the same advantages and disadvantages of the preceding paragraph but is somewhat more seller oriented. Again, it has the ambiguity that in some situations reasonable people can disagree about whether the lender delay was without the fault of the buyer. We provide both of these clauses because clients want them, but the law firm discourages their use.

Extension for Lender Delay (Optional Section)

19. § 21. Time for Performance. This paragraph is an alternative to the preceding paragraph and allows the parties to be more specific about which deadlines are extended due to lender delay.

Possession not Affected by Mediation Clause

20. § 23. Mediation. The alternative dispute resolution clause of the Real Estate Commission approved contract requires the mediation of any disputes related to the contract or the property. Parties are only free to litigate after 30 days passes from the first written request for the mediation. When a seller fails to deliver possession on the date specified in the contract, the mediation clause could work a hardship to the buyer and this clause excludes these types of disputes from the delay of mediation.

21. CLUE Report. Properties now have claims histories like borrowers have credit reports. Claims histories are maintained by the Comprehensive Loss Underwriting Exchange property database (CLUE). This clause obligates the seller to provide the buyer with a CLUE report by the Seller’s Property Disclosure Deadline, the date by which the seller must also provide the buyer with a title commitment.

22. Sale of Buyer’s Existing Home. It is common for contracts to contain provisions making the buyer's obligations contingent upon the buyer selling an existing home. This clause provides a home sale contingency. You may require additional language to properly outline the needs and desires of the parties. Use caution when drafting such multiple contract conditions.

Back Up Conditions (select one)

23. Buyer in Back Up Position. This clause provides a back-up contingency for the seller. It contemplates a situation where the seller is already under contract with buyer number one. This clause would be inserted into a contract with buyer number two (perhaps in a counterproposal to an offer from buyer number two) making the seller’s obligation to buyer number two contingent upon buyer number one acknowledging, in writing, the termination of contract number one. It does not give the seller the ability to extend deadlines in contract number one.

24. Buyer in Back Up Position. This clause is identical to the preceding clause but has explicit language allowing the seller to extend any deadlines in the first contract without diminishing the contingency in the second contract.

25. Buyer in Back Up Position. This back-up contingency provides more flexibility for the second buyer. Until the first contract is terminated, the second buyer has the ability to terminate the second contract.

In back-up situations, the second buyer will generally not want to commence his or her evaluation of the property until the first contract is terminated. This desire can be accommodated by identifying dates and deadlines in the second contract which are triggered by the termination of the first contract.

26. Unresolved Issue. It is not unusual for a buyer and seller to desire to form a contract even though there is some significant unresolved issue at the time the contract is formed. For example, the parties may know that the neighbor's garage encroaches onto the subject property. The buyer and seller wish to form a contract and figure out how to deal with the garage encroachment if the contract proceeds. The unresolved issue clause allows the parties to identify some unresolved issue to be addressed later. If the unresolved issue is not addressed later, the contract dies. Using this clause has the disadvantage of creating an out for either the seller, the buyer, or both of them. But § 10 of the Colorado Real Estate Commission approved contract already provides a significant "out" clause for a buyer. Because the "Unresolved Issue" needs to be resolved, or not, by the same date as the Inspection Resolution Deadline, it does not extend the uncertainty for the seller or buyer who still wishes to consummate the transaction.

27. Litigation. It is not unusual for sellers or owners' associations to participate in lawsuits, the results of which can have a significant impact on the value of the Property. This clause requires the seller to make certain representations about seller's awareness (or not) of such suits, and obligates the seller to provide certain information to buyers about such lawsuits if the seller is aware of them.

28. Legal Review by Buyer. This clause provides an attorney review contingency for the buyer.

29. Legal Review by Each Party. While the Legal Review by Buyer clause only provides an out for the buyer, this second legal review clause provides a legal review contingency which may be taken advantage of by either a seller, a buyer, or both of them.

30. Environmental Matters. Certain environmental laws make a property owner liable for environmental contamination on their property, regardless of whether that owner was the cause of the contamination. This environmental matters clause seeks to elicit disclosure from the seller about environmental problems and also may serve to enhance the likelihood that a buyer of a contaminated property would be considered an "innocent owner" of contaminated property under the environmental laws. Both these things tend to have some risk reduction benefit for buyers.

31. Short Pay Contingency—Single Lender. Our experience is that most lenders will not consider accepting less than the lender is owed in exchange for releasing the lender's lien from the Property (a "short pay off"), without first seeing a contract. The contract needs to contain a contingency which lets the seller off the hook if the seller's lender does not approve the contingency. Our clause provides such a contingency.

32. Short Pay Contingency—Multiple Lenders. We provide this clause for situations in which the seller has more than one deed of trust against the Property.

33. Short Pay Contingency—Buyer Oriented—§ 2.3 Dates & Deadlines All Based On Date Short Pay Agreement Obtained. When attempting to close on a short pay off, the seller and the buyer have a mutual interest in keeping pressure on the seller's lender by identifying a deadline by which the contract terminates unless the short pay off is approved. This clause contains a blank for specifying such a deadline. This clause addresses the phenomenon that buyers typically don't want to start spending money on their due diligence (e.g. appraisal, property inspection) until the buyer has reason to think that the seller's lender will approve the short pay. It does so by specifying a "Trigger Date" (or "TD") that is the date the buyer receives written notice that the seller's lender has approved the short pay. The selling broker completing the offer then specifies the dates

and deadlines in the chart in section 2 based on the Trigger Date. For example, the Inspection and Objection Deadline could be “TD +10.” The Loan Conditions Deadline could be TD +15. WE ARE AWARE THAT IT IS UNUSUAL FOR THE SELLER’S LENDER TO COMMIT IN WRITING TO ACCEPT A SHORT PAY UNTIL SHORTLY BEFORE CLOSING. (Note, however, that at some point, the lender must commit to the short pay amount in writing to the closer.) If a buyer is motivated to buy, the buyer can still proceed even though the contract doesn’t require the buyer to do so. The effect of this clause will be essentially to create a wide open out for buyers in short pay transactions because it is unlikely that sellers’ lenders will issue short pay off approvals sufficiently early, and left open for sufficient amounts of time, to make its precise terms work. Yet short pay sellers, almost by definition, don’t have the resources to enforce the contract against a buyer who doesn’t want to cooperate, and they don’t have the time to bring a specific performance lawsuit against the buyer anyway. Short pay off transactions depend upon the patience and cooperation of the buyer. This clause simply memorializes that concept and may be used to keep pressure on the seller’s lender.

34. Short Pay Contingency–Buyer Oriented—§ 2.3 Dates & Deadlines All Extended By Delay In Obtaining Short Pay Agreement. This clause has all of the same features of the foregoing clause, except that the buyer’s due diligence deadlines are not triggered by the seller’s lender’s notice of approval. With this version of the clause, the selling broker writing the offer inserts specific dates into the chart in section 2. Those dates then get extended based upon the date the buyer’s lender provides notice of approval of the short pay. See the preceding paragraph for a discussion of the inherent flaws with any system that depends upon obtaining written approval from the seller’s lender.

35. Generic Contingency–Option to Terminate. The Real Estate Commission provides parties at least five pre-printed contingencies for things such as loan commitment, title and survey review, appraisal, property condition and insurability. It is not unusual, however, for one or both of the parties to have a need for a deal-specific contingency. For example, the seller may have a need for a contingency that a job transfer is approved. This generic contingency is modeled after the appraisal contingency. If a party benefited by the contingency does not provide notice in writing by the deadline that the contingency has failed, then the contingency is waived and the contract lives.

36. Generic Contingency–Option to Terminate if no Written Resolution. This clause is motivated by the same phenomenon which motivated the preceding contingency. The difference is that a notice from the party benefited by the contingency does not automatically lead to a termination of the contract. Instead, the parties have an opportunity to resolve the issue by the contingency resolution deadline. This paragraph was modeled after the Real Estate Commission’s inspection contingency. It might be used, for example, to allow the contract to be contingent upon the buyer’s satisfaction with the state of a lawsuit brought by the property’s HOA.

ADDITIONAL PROVISIONS TO THE EXCLUSIVE RIGHT-TO-BUY LISTING CONTRACT

37. Purchase of Distressed Property. This clause can be used by the Broker to educate buyers interested in acquiring “distressed” properties about some of the difficulty and complication, and resulting need for patience and legal advice, often associated with such transactions.

38. Homeowner Warranty. This clause can be used by the Broker to educate buyers about the availability of third party home warranty programs. It contains a disclaimer making it clear that the Broker is not liable for the financial integrity of the warranty company, which also serves to educate buyers that a warranty company might be financially infirm.

39. Pitkin County and Aspen Regulations Regarding Carbon Monoxide Detectors. The Colorado statute regarding carbon monoxide alarms, where applicable, requires a seller offering the property for sale to assure that an operational carbon monoxide alarm is installed within fifteen feet of the entrance to each bedroom or in a location as required by the applicable building code. The Pitkin County Code and the Aspen Municipal Code are each examples of an “applicable building code” referenced in the state statute, and those Codes also impose an obligation on the owner – which a buyer will be when it acquires property – relative to the installation and maintenance of carbon monoxide detectors. Our clause serves to educate buyers about these applicable local code requirements. This clause, of course, is specific to Aspen and Pitkin County. Other counties and municipalities may also have codes that should be considered in conjunction with the state law regarding carbon monoxide alarms, and clients assisting buyers with the purchase of properties within other jurisdictions having similar codes may contact us if they would like assistance creating a provision tailored to the specific regulation of another county or municipality.

ADDITIONAL PROVISIONS TO THE EXCLUSIVE RIGHT-TO-SELL LISTING CONTRACT

40. Broker as Buyer. This clause addresses the scenario where the Designated Broker for the seller, or other licensees within the Brokerage Firm, may wish to purchase the listed property.

41. Broker’s Lien. Without an express agreement between a seller and a Brokerage Firm, the Firm has no lien rights against the listed property if the Seller breaches the listing agreement. Among other things, this means that it is slander of title for a broker to record a listing agreement which doesn’t provide for lien rights. This clause provides such an express lien. It would be especially appropriate in situations where a developer expects a broker to front substantial marketing expenses and time before the broker has a realistic opportunity to close on sales.

42. Variable or Reduced Commission if Only One Broker. Occasionally sellers will negotiate a variable listing commission. We discourage brokers from acquiescing to variable listing commissions and encourage brokers to educate their sellers that most multiple listing services require disclosure of a variable commission. Potential showing brokers will know that their buyers are at a competitive disadvantage. A variable listing can actually hurt a seller by discouraging offers. Nevertheless, if a seller wishes to have a variable listing arrangement, our clause provides for one.

43. Reduced Commission for Two Deals. Sometimes a broker will agree to a reduced listing commission if the client agrees to buy a replacement property through broker. These arrangements are problematic unless the replacement transaction closes at the same time, or before, the sale transaction. Our clause helps listing brokers address these issues.

44. Local Transfer Tax. This clause helps disclose to a seller the existence of a local transfer tax which exists for communities such as Aspen, Avon, Breckenridge, Crested Butte, Cripple Creek, Frisco, Gypsum, Minturn, Ophir, Snowmass Village, Telluride, Vail and Winter Park.

45. Authorization. Brokers will occasionally list property held by an entity, rather than individuals. With this clause, the listing broker can have the person with whom they are dealing warrant that he or she has the authority to act on behalf of the entity or trust which owns the property.

46. Jefferson County Regulations Regarding Individual Sewage Disposal Systems. Jefferson County currently places burdens on an owner who is selling a property, which is not connected to a public sewage disposal system, to comply with certain requirements. Generally, a seller needs to have the independent sewage

disposal system (ISDS) permitted. In order to obtain such a permit, the owner must generally first arrange for the pumping of the ISDS. Our clause serves to educate the seller about these needs at the time the listing is taken. Since Jefferson County created its regulations in 2004, Boulder County adopted a regulation addressing this issue, effective September 1, 2008, and other counties may enact, or may already have enacted, similar regulations. Clients listing property in counties with similar regulations may contact us if they would like assistance creating a provision tailored to the specific regulation of another county.

47. Pitkin County and Aspen Regulations Regarding Carbon Monoxide Detectors. The Colorado statute regarding carbon monoxide alarms, where applicable, requires a seller offering the property for sale to assure that an operational carbon monoxide alarm is installed within fifteen feet of the entrance to each bedroom or in a location as required by the applicable building code. The Pitkin County Code and the Aspen Municipal Code are each examples of an “applicable building code” referenced in the state statute. Our clause serves to educate sellers about these applicable local code requirements. This clause, of course, is specific to Aspen and Pitkin County. Other counties and municipalities may also have codes that should be considered in conjunction with the state law regarding carbon monoxide alarms, and clients listing properties within jurisdictions having similar codes may contact us if they would like assistance creating a provision tailored to the specific regulation of another county or municipality.

III. Addenda to Listing and Exclusive Right-to-Buy Agreements

A. General Comments

Real Estate Commission Rule F-4 states: “*No contract provision, including modifications permitted by Rules F-1 through F-3, shall relieve a broker from compliance with the real estate license law, section 12-61-101, et. seq., or the Rules of the Commission.*”

Some members of the public, and their lawyers, blame brokers for everything which goes wrong in a real estate transaction. Though brokers cannot exculpate themselves from their intentional wrongs, whether a broker is “negligent” in a particular instance can be subject to much debate. Many brokers find the need to clarify their relationships with their buyers and sellers. Our liability reduction addenda attempt to address this need.

Another theme of the Real Estate Commission's Rule F is that it is inappropriate for brokers to use the contract to buy and sell to address issues between the broker and the consumer. Real Estate Commission Rule F-3(c) states: “*A broker who is not a principal party to the contract may not insert personal provisions, personal disclaimers or exculpatory language in favor of the broker in an addendum.*” Our package of forms addresses issues between the buyer and the seller in the contract addenda, while clarifying the issues between the broker and consumers in two other addenda, one for the listing contract, and the other for the right-to-buy agreement.

B. Buyer Addendum to Exclusive Right-to-Buy Contract or Brokerage Disclosure to Buyer/Tenant Form

Sometimes brokers work with buyers under a written agreement, specifying either buyer agency or transaction-brokerage. Other times, the selling licensee has no written agreement with the buyer, and is working with the buyer after having made appropriate disclosures to the buyer under the Commission's Brokerage Disclosure to Buyer/Tenant form. Our Buyer Addendum is designed to work in either of these situations.

1. Buyer Due Diligence. This section attempts to clarify the nature of the broker/buyer relationship. The provision encourages buyers to thoroughly investigate property. It also identifies many (but not all) of the checklist items that the buyer should evaluate before purchasing a home.
2. Use of Professionals. This provision advises buyers to seek the advice of licensed or registered professionals to evaluate and pursue the property, including registered mortgage brokers. Again, this provision helps clarify the nature of the relationship between the buyer and the selling licensee.
3. MLS. The information age and the Internet have greatly expanded the networks through which properties are marketed. This paragraph makes it clear that the broker is only obligated to search for property in multiple listing services in which the brokerage firm is a member.
4. Property Repairs/Improvements. This paragraph educates buyers about how buyers should address property condition issues which arise prior to closing.
5. Homeowner's Warranty. This provision informs buyers of the existence of homeowners warranty programs which can help reduce the risks buyers take when purchasing property.
6. Possession, Lease and Insurance. The risks associated with any real estate transaction are increased when possession date and possession time are other than the closing date. This paragraph advises buyers to monitor their casualty and liability insurance if the possession date and time are other than the closing date, and to address possession issues through a lease.
7. Broker Purchases. It is not unusual for licensees in a company to purchase property available on the market. Arguably, these broker purchases conflict with the interest of buyers who have engaged the entire brokerage as a buyer's agent. This paragraph may help protect brokers and their licensees from such conflicts.
8. Loan Conditions. This provision is a warning to buyers that the financing contingency in the buy/sell contract (§ 5.2) does not make the buyers' obligations under the contract contingent upon the buyers obtaining a loan (see discussion of § 5.2 in this explanation above).
9. Loan Fraud. The slower real estate market is putting more pressure on sellers to participate in "creative" transactions. Also, a flattening or declining market tends to reveal more loan fraud. With increasing frequency, brokers find themselves pressured to participate in transactions which may be misleading to lenders. This paragraph serves as a warning to buyers and explains the consequences if the broker discovers fraud.
10. Seller Concessions. This clause is designed to educate buyers that they may be able to negotiate a seller credit which the buyer's lender treats as a price concession from the seller. This typically does not prevent the buyer from taking the full value of the credit, but some buyers will not be able to take all the credit in cash. Instead, some of the credit may reduce the buyer's loan amount. This clause is designed to create reasonable expectations on the part of a buyer.
11. Property Contaminated with Methamphetamine or Other Contaminants. This clause informs buyers of their statutory right to test a property for meth and the ramifications of positive tests, including the buyer's ability to terminate the contract for meth contamination.
12. Breach or Nonperformance by Buyer-Success Fee Due. Occasionally buyers sneak around their buyer's broker. This clause identifies the amount of the damages for an exclusive broker whose buyer has breached the exclusive brokerage agreement.

13. Increased Success Fee When Dealing With Unlisted Property or Limited Service Listing Broker. As listing brokers experiment with alternative lower service arrangements, selling brokers find themselves doing more work for FSBO, limited service listings, and list only listings. This clause calls for an increase in the fee due to a selling broker who helps a buyer pursue a property which is not listed, or which is listed with a limited services broker. We provide this form not with the expectation that buyers will want to pay the excess. Instead, the selling broker can use this as leverage to have the buyer address the commission issue at the time the buyer makes an offer to the seller.

14. Affiliated Business Arrangements. Some of our clients have affiliated business arrangements with other real estate related companies such as mortgage, title insurance or home warranty companies. If, when placing your request for the addenda, you indicated that you had such an affiliated business arrangement and you wanted to so disclose it on your Buyer and Seller Addenda, then we added such a paragraph in your Buyer Addendum. If you did not request such a clause, then disregard this explanation paragraph.

C. Seller Addendum to Exclusive Right-to-Sell Listing Contract

1. Use of Professionals. This paragraph attempts to clarify the nature of the broker/seller relationship. The clause advises sellers to seek the advice of other professionals.

2. Possession, Lease and Insurance. The risks associated with any real estate transaction are increased when possession date and possession time are other than the closing date. This paragraph advises buyers to monitor their casualty and liability insurance if the possession date and time are other than the closing date, and to address possession issues through a lease.

3. Loan Fraud. The slower real estate market is putting more pressure on buyers to participate in “creative” transactions. Also, a flattening or declining market tends to reveal more loan fraud. With increasing frequency, brokers find themselves pressured to participate in transactions which may be misleading to lenders. This paragraph serves as a warning to sellers and explains the consequences if the broker discovers fraud.

4. Compensation and Arbitration. Brokers sometimes find themselves in procuring cause and other disputes with multiple selling brokers. The selling brokers who are REALTORS® are bound to arbitrate those disputes. Selling brokers who are not REALTORS® need not arbitrate. This exposes the listing broker to inconsistent decisions from the arbitration panel (which hears the REALTOR® to REALTOR® dispute) and the court (which hears the REALTOR® to non-REALTOR® dispute). This provision provides that the listing broker is not required to compensate selling brokers unless the selling broker agrees to REALTOR® arbitration in advance of any contract negotiations or showings.

5. Compensation for Out of Area Co-operating Brokers. This provision allows the listing broker, on a case-by-case basis, to specify a reduced cooperative fee to licensees who are not members of the listing broker’s local board. This provision should not be used as a tool to routinely discourage out-of-area licensees. It is a provision which can only be agreed to by the seller, after the seller provides informed consent. A rationale for using such a provision is that with out-of-area selling brokers, the listing broker must do more work than with in-area licensees. In general, brokers should not discuss the terms of their listings with competing brokers. It is especially important for brokers to not speak to other brokers about how they use this section.

6. Seller Complies with MLS. Sellers benefit from the listing of their property in the MLS, yet MLS rules create some disadvantages for sellers. For example, MLS rules require a listing broker to report when a

property has gone under contract. This tends to discourage back-up offers. With this paragraph, the seller is agreeing to accept the burdens associated with listing a property in the MLS.

7. Additional Documents. Many listings are sold through in-house transactions. In these transactions, the listing company will likely present the buyer with Addendum A. Addendum A has some provisions for the benefit of the buyer. It is useful for the listing broker to disclose to the seller (at the time the listing is taken) that the listing broker will provide a copy of Addendum A to buyers on one licensee transactions.

8. Tax Consequences. Sellers may be able to defer or avoid paying taxes on the sale of property. This clause identifies two key IRS provisions and advises seller to seek tax counsel.

9. Seller to Comply with CIC Obligations. Senate Bill 100, enacted in 2005, and Senate Bill 89, enacted in 2006 require the seller to provide certain governing and financial documents to buyers. This clause educates sellers about these burdens and the need for the seller to begin gathering the necessary documents at the time the listing is taken.

10. Open Houses. Sellers perceive that Open Houses are a useful way of marketing property. Yet Open Houses enhance the risk of theft and other dangers for sellers. This is a clause which a broker can use to inform the seller of the risks associated with Open Houses and to obtain protection from the seller regarding such risks.

11. Breach or Nonperformance by Seller - Commission Due. There is much uncertainty in current Colorado law about the amount of compensable damages to which a listing broker is entitled in the event of a breach of the listing agreement by the seller. This clause is an attempt to resolve that ambiguity by providing that a breach of the listing agreement by the seller causes damages to the listing broker in the amount of the commission which would otherwise have been due.

12. Affiliated Business Arrangement. Some of our clients have affiliated business arrangements with other real estate related companies such as mortgage, title insurance or home warranty companies. If, when placing your request for the addenda, you indicated that you had such an affiliated business arrangement and you wanted to so disclose it on your Buyer and Seller Addenda, then we added such a paragraph in your Seller Addendum. If you did not request such a clause, then disregard this explanation paragraph.

D. Supplemental Seller Addendum to Exclusive Right-to-Sell Listing Contract (with respect to a Seller in Financial Distress)

Brokers often list property owned by Sellers in some sort of financial distress. Our Supplemental Seller Addendum provides clauses that may be helpful in three different kinds of such financial distress.

1. Existing Financial Distress – No Authorization to Disclose Seller’s Financial Condition. A broker may be engaged to list a property owned by a seller who has lost a job or had some other situation that results in an inability to pay the mortgage(s). However, in many such situations there is still plenty of equity in the Property with which the seller can, at the closing of a sale, completely pay off the mortgage(s) as well as any other closing costs, and thereby preserve the remaining equity in the property for itself. It can hurt a seller in such a situation to disclose its financial situation. In general, listing brokers cannot disclose the seller’s financial condition or the seller’s motivation to sell a property. However, it is sometimes assumed that brokers can or must disclose whether a seller is in default or in foreclosure. In our opinion, though, neither the Colorado Foreclosure Protection Act nor other currently applicable law obligates a seller in the circumstances contemplated here (with equity in the property more than sufficient to pay at closing all existing liens and any other costs or expenses associated with a sale) to disclose the fact that the seller is in default or in foreclosure.

We believe, for example, that this kind of situation is not an adverse material fact that requires disclosure under the common law applicable to a seller or the statutory disclosure obligations of the listing broker, nor does the Colorado Foreclosure Protection Act expressly obligate a seller to make such a disclosure. If the box for this Section 1 of the Supplemental Seller Addendum is checked, then, the Broker and Brokerage Firm are instructed that they are not authorized to disclose the financial condition of a seller in this situation. In using this Addendum, the broker should not check both Sections 1 and 2, because the underlying assumptions regarding those two sections are inconsistent.

2. Existing Financial Distress – Authorization to Disclose Seller’s Financial Condition and Negotiate Short Sale. As indicated above, listing brokers generally cannot disclose the seller’s financial condition or the seller’s motivation to sell a property. However, when a seller has financial distress, it is sometimes in the seller’s best interest to so inform the market. Among the reasons are that financial distress of a seller might attract buyers. Another reason is that some of these transactions require speed and special buyers. The seller may not want to invest time and other resources with buyers who cannot conform to the seller’s needs. Moreover, at times it may be undeniable that a seller cannot sell the property free of existing liens without the agreement of one or more lenders to accept a short payoff, and we believe that is an adverse material fact which, if known to the listing broker, the listing broker is required to disclose, notwithstanding the general rule about non-disclosure of a seller’s financial condition or motivation. Use of a short sale contingency provision in a Contract to Buy and Sell is also important for a seller in such circumstances, of course, to avoid putting the seller in a default position. This clause in our Supplemental Seller Addendum allows a seller to commit, in writing, to permit the listing broker to disclose the seller’s financial distress to the market, and also authorizes the listing broker to negotiate a short sale. It is designed to save time by avoiding the need for the listing broker to obtain a separate authorization outside of the listing agreement. In using this Addendum, the broker should not check both Sections 1 and 2, because the underlying assumptions regarding those two sections are inconsistent.

3. Existing Financial Distress – Multiple Liens. As the italicized language at the beginning of Section 3 indicates, this section is for situations when there are multiple liens on the property, the amount of which exceeds any net proceeds the seller can be expected to receive from a sale, and when the parties desire to create the possibility of completing a sale by effecting a junior lien redemption from a foreclosure by the first lienor, after one or more intervening junior liens elect not to redeem. The broker’s deed of trust created pursuant to this section would be used to accomplish such a redemption. The seller’s representation in this section that, to the seller’s knowledge, none of the existing liens is presently in foreclosure, is included because the approach contemplated by this section cannot work where a Notice of Election and Demand has already been recorded to begin a foreclosure and such foreclosure proceeds to sale. However, this concept may be available if such a pending foreclosure is withdrawn for some reason – such as when the subject default is cured – and then another foreclosure by the first lienor is subsequently begun by the recording of a new Notice of Election and Demand after the Deed of Trust to the Broker has been created and recorded. That possibility, then, is something the prospective listing broker may want to keep in mind. The broker attempting to implement this section should bear in mind the italicized caution to seek advice from counsel.

IV. Supplement to Short Sale Addendum

The CREC-approved Short Sale Addendum contains much good information about a short sale, but its substantive provisions may not always be the best for the buyer and seller in a particular situation. The broker’s client, whether buyer or seller, is entitled to ask about and/or insist upon the use of different approaches or alternatives for addressing short sales, and the Additional Provisions portion of our system contains clauses that reflect alternative substantive approaches for dealing with short sales. Those clauses are intended for use in lieu of the CREC-approved Short Sale Addendum (although delivery of the CREC form to the Broker’s client,

particularly a seller client, may still be useful as an educational tool). Our Supplement to Short Sale Addendum is another possible means of changing the approach contemplated by the CREC form.

This form has two substantive provisions, with check-boxes, preceded by some instructions on the use of the form. Either or both of the boxes can be checked. Brokers should use Section 1 when the Short Sale Acceptance Deadline is not within three (3) days of the Closing Date specified in the contract, and the buyer wishes to have the right to extend that Short Sale Acceptance Deadline rather than have the contract terminate automatically if notice of Short Sale Acceptance is not received by that Deadline.

Section 8.3 of the CREC form – giving either party the right to terminate if notice of termination is given before Short Sale Acceptance, and expressly giving the seller a right to accept subsequent offers before Short Sale Acceptance – makes this form little more than a non-binding letter of intent. It may be that this § 8.3 reflects what a bank or other lender may want in some or even many situations, but it is not something to which a buyer or seller must always necessarily agree. Box number 2, then, is included for parties who wish to omit that § 8.3 from the Short Sale Addendum. However, as with the deletion of § 6.1 of the Contract to Buy and Sell Real Estate via our Addendum “A,” **given CREC Rule F-1(c), the broker intending to so delete § 8.3 from the Short Sale Addendum is cautioned to do so only when the deletion results from negotiations or instruction(s) of a party to the transaction, and then, in addition to checking box 2 in this Supplement to Short Sale Addendum, the broker should also strike through that § 8.3 in a legible manner that does not obscure the deletion being made.**

To a certain extent, this Supplement exists only as an educational tool. Part of the need or perceived need for the Supplement can be eliminated, without use of the Supplement, by specifying a date for the Short Sale Acceptance Deadline that is very close to the Closing Date specified in the contract; and deletion of § 8.3 of the Short Sale Addendum can be accomplished without this Supplement in the manner contemplated by CREC Rule F-1(c) – by striking through that § 8.3 in a legible manner that does not obscure the deletion being made.

V. 72 Hour Addenda

A. General Comments

Listing brokers sometimes receive otherwise desirable offers on listings from buyers with questionable credit qualifications. The seller is inclined to accept the offer, but wants to preserve the flexibility of replacing the purchaser with another one, if a better offer comes along. Many brokers respond to the first buyer's offer with a counterproposal containing a "right of first refusal."

It is important to understand that these provisions are not "first rights of refusal." A first right of refusal would create in some grantee the ability to meet a bona fide offer on a property. (For example, a homeowners association might hold the first right of refusal to match offers on units within the subdivision.) It would be more accurate to label these clauses "kick out" or "fish or cut bait" clauses. For purposes of these materials, we will refer to such clauses as "kick out" clauses although they have different labels on the forms themselves.

There are certain issues which all good kick out clauses must address. A kick out clause provides that upon the occurrence of some event (seller's acceptance of a new offer, seller's notice to buyer of its intent to accept a new offer . . . etc.) the buyer has a specific period of time to act to avoid contract termination. Any kick out clause must specify what the seller must do to invoke its rights under it. (For example, must seller accept a new offer, must seller simply notify purchaser of seller's intent to accept an offer, must that notice be in

writing, and how much time does the buyer have to perform?) A kick out clause must also address what the purchaser must do to avoid being "kicked out."

We have enclosed two types of kick out clauses. One would require that upon the seller's invocation of his kick out rights, the buyer must perform (i.e., close) within a short period of time (the "72 Hour Accelerated Closing" addendum) to avoid being kicked out of the deal. The second type requires that upon the seller's invocation of the kick out rights, the buyer waive all of its contract contingencies (the "72 Hour Removal of Conditions" addendum).

B. 72 Hour Accelerated Closing Addendum

With this form, the Seller may accelerate the closing with Buyer #1 if the Seller notifies Buyer #1 that the Seller intends to accept an offer from a competing buyer. Upon receiving the notice, Buyer #1 has 72 hours, or some other period of time (the "Decision Period"), to either allow the contract to terminate, or to amend the contract to call for an accelerated closing date – the day after the expiration of the Decision Period.

This form is in two parts. The top half of the form is the agreement which allows the seller to kick out Buyer #1, unless the buyer agrees to an accelerated closing date. The bottom half of the form can then be used as the notice from the Seller to the Buyer #1 informing Buyer #1 that the Seller is invoking the Seller's kick out rights. Buyer #1 must sign the bottom half of the form to reflect the accelerated closing date.

C. 72 Hour Removal of Conditions Addendum

To avoid being kicked out of the transaction under this addendum, Buyer #1 must remove all conditions in the contract for the benefit of the Buyer. This addendum also allows the parties the option to require Buyer #1 to put up additional earnest money to stay in the deal. If the parties do not intend to require additional earnest money from Buyer #1, insert \$0.00 in the blank in the top half of the addendum.

Like the Accelerated Closing Addendum, the Removal of Conditions Addendum is in two parts. The top half is the agreement which allows the Seller, under some circumstances, to kick out Buyer #1, unless the Buyer waives the conditions. The bottom half serves the dual purpose of: (a) providing notice from the Seller to Buyer #1 that the Seller is invoking the Seller's kick out rights; and (b) allowing the Buyer to sign and thereby waive the Buyer contingencies (and increase the Buyer's earnest money if necessary).

When listing brokers use the 72 Hour Removal of Contingencies addendum, they should be careful to avoid creating false expectations in sellers. Buyer #1 may waive all of the contingencies in a contract, but still not have the ability to close. If a buyer has waived the financing contingency, but can't qualify for the loan, it is unlikely that the contract will close. Your seller may be limited to pursuing breach remedies. With an unmodified Real Estate Commission approved form, this should allow the seller to keep Buyer #1's earnest money. As a practical matter, in the type of seller's oriented market which permits kick out clauses, it is unlikely that a seller would want to bring a specific performance lawsuit against the first purchaser. Consequently, with this removal of conditions kick out clause, it is especially important that the amount of earnest money be sufficient to satisfy your seller in the event the first contract doesn't close.

VI. Mold Disclosure

The theme of our mold disclosure addendum is that all properties have mold in them, to some degree or another. This form is not useful to disclose mold which a seller is aware of to a buyer. If the seller is aware of mold, the seller should use the Real Estate Commission approved Seller's Property Disclosure form to disclose

the known mold to buyer, and use our form as it is useful for reducing risk in situations where the mold is worse than the seller was aware of. If the seller is not aware of any mold, our form is a useful risk reduction tool for sellers, listing brokers, and selling brokers.

VII. Notice to Seller

The Real Estate Commission approved contract contains several contingencies that might excuse a buyer from closing on the contract. The Commission approved contract also contains provisions contemplating that a buyer may want to waive certain rights. These contingency and waiver provisions, in turn, drive a variety of situations in which a buyer might need to give notice to a seller. The Real Estate Commission has developed an Inspection Notice form which addresses property condition issues, and it has developed a “Notice to Terminate” form by which the buyer or seller can notify the other party of a termination of the contract pursuant to specified contract provisions. Our Notice to Seller form addresses (in its Section 1) the same buyer to seller termination notices covered by the Commission form, and addresses in the other Sections certain other contingency and waiver provisions in the contract that are not addressed, or not adequately addressed, by any Commission-approved form.

The form has five sections. Brokers should only use that section or sections that are applicable. Brokers should use Section 1 when a buyer wishes to use the Buyer’s right to unilaterally terminate the contract. For example, if the property doesn’t appraise for the purchase price, the buyer would use Section 1 (Notice to Terminate) to terminate the contract. If the seller also signs, then the form makes the Earnest Money Release form obsolete, as Section 1 calls for the return of the Earnest Money to the buyer.

As noted above, the Commission’s “Notice to Terminate” form covers the same sort of unilateral right to terminate provisions as are addressed in Section 1 of our form. We have retained this section of our form, however, because of a problem we believe exists with the Commission form – particularly with respect to the inclusion in the Commission form of § 8.3.2 and § 8.5 in the chart of buyer unilateral termination provisions. The problem is that neither of those two contract provisions gives the buyer any unilateral right to automatically terminate the contract. The termination that occurs pursuant to § 8.5 occurs automatically, **but only if** a previous notice of unsatisfactory condition has been timely given by the buyer under §§ 8.1, 8.2 or 8.3.2, and the condition objected to is not corrected to the buyer’s satisfaction on or before closing – and no Commission-approved form seems to exist for the giving of such a notice of unsatisfactory condition under §§ 8.1, 8.2 or 8.3.2 (or for notifying the seller that the buyer waives its objection to such an unsatisfactory condition, as is contemplated by § 8.5 of the contract). To address any such title, off-record or survey contingency provisions, then, we believe that a Broker should use Sections 2 and 3 of our form, as applicable, rather than the Commission-approved Notice to Terminate form.

As indicated above, Section 2 provides the means for the buyer to exercise one of the title, off-record or survey contingency provisions of §§ 8.1, 8.2 and 8.3.2, but not immediately and unilaterally terminate the contract. For example, the buyer might become aware of some structure on the subject property which encroaches onto a neighboring property. The buyer might still be willing to purchase the property if the seller could obtain an easement from the neighbor permitting the encroachment. Brokers would then use Section 2 (Notice to Correct Unsatisfactory Title Condition) to identify the problem and the buyer’s proposed resolution. Section 2 also calls for a Correction Date so that if the problem is not solved by the Correction Date and if the seller agrees by signing, the contract terminates then rather than waiting until closing to resolve such matter. **A buyer using this Section 2 to provide notice of such a problem, but either wanting to preserve the § 8.5 right to waive objections not corrected to buyer’s satisfaction (and thereby keep the contract intact) or willing to wait until closing to allow time for the seller to resolve the matter or for the parties to negotiate a resolution, may want to consider deleting this last sentence of Section 2.**

Brokers may use Section 3 in one of two situations: (a) where the buyer wants to waive a lender's Requirements and resurrect a contract that otherwise would have been terminated as a result of a seller's notice of termination under § 6.1 of the contract (as contemplated by clause (3) of the second sentence of that § 6.1); or (b) where a § 8 title, off-record or survey objection has been previously given by the buyer, the matter has not been resolved to the buyer's satisfaction, but the buyer wants to exercise its § 8.5 right to waive the objection and keep the contract in effect.

Brokers may use Section 4 of the contract to provide notice to the seller of Requirements that have been imposed by the buyer's lender, as contemplated by § 6.1 of the CREC-approved Contract to Buy and Sell Real Estate.

Brokers would use Section 5 when a buyer identifies a problem which the seller, as a practical matter, can't fix. Brokers would use Section 5 when both parties mutually agree to terminate the contract earlier than the pre-printed contingencies might provide. Section 5 allows the parties, if they so agree, to quickly kill the contract rather than delay an inevitable termination.

VIII. Brokerage Disclosure Regarding New Construction

Contracts for the sale of new construction are generally prepared by the builder's attorney. Unlike the relatively neutral buy/sell contracts prepared by the Colorado Real Estate Commission, most high volume builder contracts are very seller-oriented. This disclosure is designed to educate buyers, and reduce a broker's risk for new construction transactions.

IX. Broker Rebate to Buyer

It is not unusual for buyers to negotiate rebates from their selling brokers. So long as such rebates are disclosed to the buyers' lender and reflected on the HUD-1 settlement statements, such rebates can be legal. This form educates buyers, and serves to memorialize the lender's consent, for these situations.

X. Termination of Marketing Efforts Without Terminating Listing

From time-to-time a seller informs a listing broker that the seller has changed his or her mind and no longer wishes to sell the property. Technically, this is a breach of the listing agreement as it robs the listing broker of an opportunity to earn a commission selling the property. However, most of our clients will acquiesce to the seller's request to cease the marketing of a property, so long as this is not a ruse for the seller to sneak around the listing broker. Our form helps the broker memorialize that the broker is no longer required to market the property, but that the listing agreement remains in effect, so that if the seller closes on a sale during the listing period, the listing broker is still entitled to a commission.

XI. Notice to Parties Regarding Earnest Money

If there is a dispute about the earnest money, one of the options that § 24 of the Contract to Buy and Sell gives to the Earnest Money Holder – provided the Earnest Money Holder is one of the Brokerage Firms identified in § 34 or § 35 of the contract – is to initiate a “put up or shut up” process to resolve the issue. Essentially, the Earnest Money Holder can send out a notice giving the Seller a 120 period to file a law suit claiming the earnest money, and if the Seller does not do so, the Earnest Money Holder will turn the earnest money over to the buyer. More precisely, § 24(3) allows the Earnest Money Holder to notify the buyer and

seller that unless the Earnest Money Holder receives a copy of the Summons and Complaint, with a court case number, for a suit between them within 120 calendar days of the date of the notice, the Earnest Money Holder shall be authorized to return the Earnest Money to the buyer. The top half of our form is the notice and the bottom part of the form contains tracking information to aid the Earnest Money Holder through the process. This form is to be used only by a Brokerage Firm acting as the Earnest Money Holder, since the last sentence of § 24 specifically states that its provisions apply only if the Earnest Money Holder is one of the Brokerage Firms identified in § 34 or § 35 of the contract (and this form references that § 24). If, however, the Earnest Money is held by a title company and the title company and the parties have signed the CREC-approved Closing Instructions (which includes a provision virtually identical to § 24 of the Contract to Buy and Sell), then a similar notice could be given by the title company, although the references to the contract would have to be changed appropriately in such a notice.

XII. Buyer Notice That Property Has Been Contaminated With Methamphetamine

If a buyer's test results indicate that the property has been contaminated with methamphetamine or other contaminants for which standards have been established pursuant to § 25-18.5-102, C.R.S., and has not been remediated to meet state standards established by the State Board of Health, Colorado law obligates the buyer to promptly give written notice to the seller of such test results. This document provides the broker with a form for the buyer to give such notice to a seller.

XIII. Seller Authorization

The Real Estate Commission's form Seller Authorization (SA20-5-09) is a good idea, and is increasingly necessary with the financial difficulties regularly encountered in a down market. In practice, however, lenders frequently want to see the Seller's social security number or EIN. Our form adds that information to the Commission form.

XIV. Commission Split Settlement Agreement

Disputes about entitlement to a commission sometimes occur among brokers. Our form is an example of a document brokers might use to evidence their settlement or resolution of such a dispute. No form like this can fit every possible fact situation, however, and even in situations for which the form seems appropriate, some risk or potential difficulty may still exist. For example, the form does not address how the settling parties' rights or obligations would be affected if, after entering into such an agreement, another broker – not a party to the agreement – successfully asserted a claim to a commission. As a result, we encourage brokers to seek advice from legal counsel before using this form in any particular situation, and, in any event, before using this form a broker must evaluate whether the applicable facts can be adequately addressed by the form.

XV. Foreclosure Protection Act-Compliant Form of Contract to Buy and Sell Real Estate

In 2006, the Colorado legislature created the Foreclosure Protection Act (the "FPA"), which was designed to protect homeowners who were in foreclosure. Among other things, the FPA regulated the terms of contracts when an "Equity Purchaser" bought a "residence in foreclosure." Two of the many requirements for contracts governed by the FPA were that they needed to provide the seller with a rescission period, and they must be written in the language principally spoken by the seller. If a contract does not comply with the FPA, the Equity Purchaser faces potential criminal prosecution.

An Equity Purchaser is defined in the FPA to be "a person who, in the course of the person's business, vocation, or occupation, acquires title to a residence in foreclosure [subject to certain logical exceptions, such as

a lender who takes title to a property through a deed-in-lieu of foreclosing on the property].” For all practical purposes, any non-owner occupant buyer who writes offers for residences in foreclosure, regardless of the number of properties the investor owns or is looking to purchase, could be considered an Equity Purchaser and therefore subject to the FPA.

Under the 2006 version of the FPA, a property was not considered a “residence in foreclosure” until a notice of election and demand starting the foreclosure had been recorded in the clerk and recorder’s office for the county in which the property was located. This definition allowed real estate brokers representing investors to obtain an ownership and encumbrance report on the property to determine whether a notice of election and demand had been recorded. If no notice of election and demand appeared in the public record, then the broker writing the offer did not need to comply with the equity purchaser portion of the FPA.

As amended in 2009, the **new FPA applies if a homeowner’s principal place of residence is encumbered by a residential mortgage loan that is at least thirty days delinquent or in default.** There are at least two significant ramifications of this change. One is that it greatly expands the number of investors who might be included in the definition of an Equity Purchaser. In an economy where approximately thirty percent of U.S. homeowners owe more on their mortgage debt than their home is worth, many investors are looking to buy property from financially distressed sellers. Perhaps more importantly, the new definition of a “residence in foreclosure” no longer allows a broker to determine whether or not the FPA applies merely by obtaining an O&E report. Typically, when an investor makes an offer on residential property, the investor doesn’t know if the home is the seller’s principal residence or whether the loan is in default.

Compliance with the FPA was already tricky before the 2009 amendments. While the Colorado Real Estate Commission had created forms to help brokers comply with the FPA, the terms of the forms specified a very narrow range of transactions in which the forms could be used. (For more on this topic, please see articles entitled “Goldilocks and the Foreclosure Protection Act, Part I and Part II at http://www.frascona.com/resource/jag_daf907foreclosureact.htm.) The 2009 amendments to the FPA have made compliance even more complicated. Perhaps because of this new complexity, and perhaps for other reasons, the CREC repealed its two forms designed to comply with the FPA (the Contract to Buy and Sell Real Estate (Foreclosure), form CBSF1-11-08, and the Foreclosure Property Addendum, form FPAF33-9-08).

One option for coping with the repeal of the CREC forms is for brokers to refer all investor buyers of residential property to attorneys to write the offer. But our addenda package provides our broker clients with an alternative. Our form CBS1 – CFPA1-07-09 (“FPA Contract”), based on the new Commission approved Contract to Buy and Sell Real Estate (CBS1-5-09), provides brokers a tool to assist their investor clients in complying with the FPA when writing an offer. Because of the broad new definition of a “residence in foreclosure,” and the uncertainty in determining whether a residential mortgage loan is “at least thirty days delinquent or in default,” **this contract is designed to be used whenever an investor writes an offer on a residential property** (provided the “standard” terms of § 30.2 apply).

The FPA Contract makes special note of those items required by the FPA. For instance, in order for the offer to comply with the FPA, the contract must include items such as a full legal description of the Property (§ 2.2), cancellation language (lines 735-747), Buyer’s Business Address (line 749), and the Non-Assumption of Obligations (page 20) and Notice of Cancellation (page 21) attachments. Brokers should particularly familiarize themselves with § 30 of the FPA Contract, paying special attention to the timing and Seller copy requirements related to the Notice of Cancellation.

As mentioned above, this FPA Contract may be used to write offers whenever the “standard” terms of § 30.2 apply. If any of the “special” situations apply, the FPA Contract may not be used, and an attorney must prepare the contract. Do not use the FPA Contract if any of the following “special” situations apply:

- A rental agreement or lease for the Property exists between Buyer and Seller;
- Seller has an option or right to repurchase the Property;
- Seller’s principally spoken language is not English; or
- Seller is receiving consideration other than the Purchase Price.

Since the FPA requires every contract involving an Equity Purchaser Buyer to be “written in at least twelve-point bold-faced type,” our addenda package also includes a Counterproposal; an Amend/Extend and a Short Sale Addendum in the specified font to comply with the statute. Brokers are advised to have Sellers who wish to counter an offer made on the FPA Contract do so on the included Counterproposal form. Likewise, a mutually executed FPA Contract should be amended and/or extended on the included Amend/Extend form, and a Property requiring a short sale should use the included Short Sale Addendum.

The revised FPA statute has created uncertainty for brokers and their investor clients as to whether an offer needs to be written on a contract that complies with the FPA. As a risk reduction tool for brokers and their clients, **the FPA Contract should be used any time a non-owner occupant investor Buyer contracts to purchase a residential property.**

XVI. Forms to Address Carbon Monoxide Alarm Requirements Relative to Pre-7/1/09 Listing Contracts

The Real Estate Commission, as required by the Lofgren and Johnson Families Carbon Monoxide Safety Act, has adopted new listing contract forms for use by brokers on and after July 1, 2009, which, among other things, disclose to sellers certain requirements of that Act. In our opinion, that Act does not obligate any seller under a still-effective listing contract that was entered into prior to July 1, 2009, to sign a new listing contract on the revised Commission form. However, it is recommended that sellers in such situations be informed of these requirements of this Act. Our last two forms address that: a form Addendum to Exclusive Right-to-Sell Listing Contract containing the carbon monoxide disclosure provision from the new Commission form listing contracts; and a sample transmittal letter that the listing broker might use to send to, and seek the signature of, such sellers on this Addendum.

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We strive to meet your requests and still keep the forms short. This is a complex business. Thank you for requesting our forms. We appreciate your business.