

BROKER & MANAGER

QUARTERLY

REFERRAL FEE AGREEMENTS

STAY CONNECTED AND GET PAID:
MY INTRODUCTION TO THE
REFERRAL FEE AGREEMENT

REFERRAL FEE AGREEMENT FAQs
SHOULD I ACCEPT THE REFERRAL?

PLUS+

POCKET LISTINGS, REAL ESTATE
ADVERTISING, FLOOD INSURANCE,
LEVERAGING FACEBOOK
& GOOGLE ALERTS



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LEGAL HOTLINE Q&A



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STAY CONNECTED AND GET PAID

My Introduction To The Referral Fee Agreement

BY PAULA SERVEN, GRI, AAR'S 2015 PRESIDENT-ELECT

Following a request made during a scheduled AAR Risk Management Committee meeting in late 2013, a workgroup was convened to draft a Referral Fee Agreement for use by all Arizona REALTORS®. The workgroup consisted of eight REALTORS® from across the state and five AAR staff members¹. I am proud to have been the chair of the workgroup and I am grateful for the opportunity to serve and collaborate with all of the great workgroup members.

To develop a strong draft of the Agreement, the workgroup met three times prior to July 2014. Thereafter, a draft was circulated to "the loop," which consists of approximately 5,400 AAR members and industry partners. Many of those individuals were kind enough to provide the workgroup with feedback and suggestions, all of which the workgroup took under consideration. Having then finalized the form, it was submitted for approval to the Risk Management Committee and Executive Committee, both of which approved the form for release to all members on October 1, 2014.

Although one would think that drafting a referral agreement would not take too much time, the task proved more challenging than expected. After reviewing various broker forms and referral agreements from other states, along with considering all of the information that needed to go into the form, the workgroup quickly realized that it had a lot of ground to cover.

In contemplating how to best draft the form, I thought back to the number of times I was at a gathering or party and heard that a friend or acquaintance was moving to another state or country. I remember being frustrated at my perceived inability to assist them with such an important event. But the reality is that people are always on the move, and our work is no longer strictly confined to our backyards and local communities. It is global, and with this Referral Fee Agreement, we can better take advantage of our worldwide marketplace.



BROKER & MANAGER

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Keep in mind that just one referral a year can pay your membership dues, increase your profits, and enable you to meet and interact with real estate professionals from other states and countries who serve as great referral partners. Even if your primary job is something other than being a full-time REALTOR®, there is a tremendous amount of money to be made in referrals across Arizona, the United States, and the world. Better yet, we are never too old to learn and become a Certified International Property Specialist (CIPS) and travel the globe. As a professional, you work hard to obtain these opportunities, and you should take advantage of them by helping yourself and others. After all, you never know where the next transaction may take you.

But in order to take advantage of referrals, it is critical that you stay in contact with your friends, family members, former clients, and, perhaps most importantly, your fellow REALTORS®. One way to do this is to increase your participation in local, state, and national associations,

which will help you forge relationships with other real estate professionals in all parts of the world. Perhaps this is a great time to send out a post card to your client base letting them know that you are in the business of helping them with their real estate needs across the globe.

It is my sincere hope that you take advantage of the benefits that come with referrals, and that you incorporate this Referral Fee Agreement into your practice. 🌊

Paula Serven, GRI

1 Members of the workgroup included REALTORS® Gerry Russell, Erin Holman, Sandy Lunsford, Margie Wilson, Andrew Brearley, and Judy Louks. They were assisted by AAR staff members Scott Drucker, Nikki Salgat, Jan Steward, Cynthia Frey and J. Thurston.

Referral Fee Agreement FAQs

BY SCOTT M. DRUCKER, ESQ., AAR'S GENERAL COUNSEL



Q1. Why does the Referral Fee Agreement ask for identification of the Brokerage Firm Code and the Agent Code?

A1. Disclosure of the Brokerage Firm Code and the Agent Code is requested to facilitate payment of the referral fee by identifying the appropriate branch and agent.

Q2. What should an Originating Agent do if they are concerned that the Receiving Agent will circumvent the Referral Fee Agreement by taking the client's information and then refusing to sign the Agreement?

A2. If this is a genuine concern of the Originating Agent, they may want to reconsider the Receiving Agent to whom the referral is being given. With that said, an Originating Agent can request that the Agreement be fully executed before the client's contact information is provided to the Receiving Agent.

Q3. Pursuant to line 24 of the Referral Fee Agreement, the parties can agree that the Receiving Brokerage shall furnish to the Originating Brokerage a copy of the final settlement/closing statement. Can the Receiving Brokerage redact portions of that statement before conveying it to the Originating Brokerage?

A3. Yes. The Originating Brokerage is provided an opportunity to view the final settlement/closing statement in order to confirm that the amount of the referral fee is accurate. However, any confidential or sensitive personal information that appears on the statement can be redacted before it is conveyed to the Originating Brokerage.

Q4. Why does the Referral Fee Agreement leave it to the parties to determine the term of the Agreement?

A4. The workgroup contemplated a default term of six months or one year but ultimately decided to leave it up to the licensees, as they will know best what an appropriate term is for the contemplated transaction. The Agreement does, however, provide that the referral fee will be paid regardless of the closing date as long as the contract or lease is executed during the term.

Q5. Can the Receiving Brokerage withhold payment of the referral fee until such time as the Originating Brokerage has furnished a completed IRS Form W-9 and a copy of the Originating Brokerage's real estate license?

A5. Yes. Payment of the referral fee is subject to the Originating Brokerage's compliance with the terms and conditions set forth in the Referral Fee Agreement. However, if the Receiving Brokerage elects to waive these requirements, it is free to do so.

Q6. Why doesn't the Referral Fee Agreement require disclosure of a taxpayer identification number?

A6. Because the Referral Fee Agreement requires the Originating Brokerage to furnish a completed IRS Form-W-9 to the Receiving Brokerage, there is no need for the disclosure of a taxpayer identification number on the face of the Agreement. Furthermore, not all brokers operate with a taxpayer identification number, meaning that they would be required to disclose their social security number. The workgroup was not in favor of social security numbers appearing on the Referral Fee Agreement.

Q7. Why does the Referral Fee Agreement require the Originating Brokerage to furnish to the Receiving Brokerage a copy of the Originating Brokerage's real estate license?

A7. The Receiving Brokerage should confirm that the Originating Brokerage holds a real estate license. Since Originating Brokerages may be licensed in states other than Arizona, having the Originating Brokerage produce a copy of their real estate license will enable the Receiving Brokerage to ensure that payment of the referral fee is legal.

Q8. If the Receiving Brokerage is unable or unwilling to represent the client, can they refer the client to another brokerage or salesperson?

A8. No. The Referral Fee Agreement expressly states that: "In the event Receiving Brokerage is unable or unwilling to service Client, Receiving Brokerage shall immediately notify Originating Brokerage and shall not refer Client to any other brokerage or salesperson."

Q9. Does the execution of a Referral Fee Agreement with an out-of-state broker enable that out-of-state broker to practice real estate in Arizona?

A9. No. Even with a fully executed Referral Fee Agreement, an out-of-state broker cannot sell, lease, rent, exchange or attempt to sell, lease, rent or exchange real property in Arizona.

Q10. Can a licensed broker in Arizona lawfully pay compensation to, and receive compensation from, a broker lawfully operating in another state?

A10. Yes. Payment of this nature is expressly permitted by A.R.S. § 32-2163.

Q11. Is an Arizona real estate licensee permitted to pay a referral fee to a member of the public?

A11. No. A.R.S. § 32-2155(B) prohibits a person, firm or corporation from paying or delivering compensation for licensed activity to anyone who is not licensed at the time the service is rendered. [🔗](#)

ABOUT THE AUTHOR

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Scott M. Drucker, Esq. is General Counsel to the Arizona Association of REALTORS® (AAR). He serves as the primary legal advisor to the Association and oversees AAR's Risk Management Committee, which includes development of standard real estate forms and professional standards administration for twenty of the state's local REALTOR® associations.

This post reflects only the opinion of the author, is not intended to be definitive legal advice and you should not act upon it without seeking independent legal counsel.



2015 AAR Spring Convention *Save the Date!*

Save the date for the 2015 AAR Spring Convention held on **March 24-27, 2015** in the beautiful town of **Prescott Arizona**. Join fellow brokers and agents for 3 days of learning, networking, and fun! 2014 was a record breaking year with over 400 in attendance, 36 break-out sessions, 8 c/e classes, 12 c/e credits and over 40 speakers!

Mark your calendar now to join us in 2015! [🔗](#)

Should I accept the Referral?

BY NIKKI J. SALGAT, ESQ., AAR ASSOCIATE COUNSEL

Referrals are a great way to generate business, forge relationships, and earn extra income. Because of these benefits, real estate agents are generally more than happy to pay a referral fee to another licensee following a successful closing. Unfortunately, problems may arise with the referral if the originating brokerage and receiving brokerage are not on the same page regarding the terms and conditions under which the referral is made. And, in the event the parties do not properly document their agreement or if the receiving brokerage does not thoroughly read the agreement before accepting the referral, the receiving brokerage may be contractually obligated to terms that they did not intend to be bound by.

WHERE ARE REFERRALS COMING FROM?

Nowadays, referrals are not just received from friends and family, current or former clients, or franchise related. With technology at our finger tips, real estate agents receive referrals from completely unknown entities via on-line referral groups, cold calls, and websites that offer services matching consumers with local real estate professionals

PROBLEMS WITH ACCEPTING REFERRALS FROM AN UNKNOWN ENTITY

Problems generally occur when referral fee terms are ambiguous and/or unilaterally imposed. In other words, when the terms of the agreement are not clear or are dictated by one party, disagreements may arise regarding the parties' intentions on details such as who, what, when, where, and how.

Among the issues currently faced by agents across the nation are disputes arising from their acceptance of referrals from unknown entities seeking to impose boilerplate terms and conditions. Without negotiating the conditions upon which a referral fee will be paid, many agents find themselves facing a scenario in which: (1) the referral fee being imposed is for the agent's own former client; (2) the agent is contractually obligated to pay the referral fee when the agent was not involved in the transaction — the referred client was looking for and

utilized another agent in the referred agent's brokerage; (3) the agent agreed to be held personally liable should their broker fail to pay the referral fee; and (4) jurisdiction over any dispute is held by a court located outside of Arizona.

UNDERSTAND YOUR RIGHTS AND OBLIGATIONS

To avoid referral fee disputes, it is imperative that agents thoroughly review the terms and conditions of any referral fee agreement before agreeing to accept the referral. In reviewing the terms and conditions, the agent and broker should ensure that each is willing to agree and abide by the terms. In the event the agent and/or broker do not understand any of the terms, they should seek clarification prior to signing the agreement. Similarly, if there are terms that the agent or broker are not willing to agree to (e.g. consenting to a jurisdiction other than Arizona), they should seek to negotiate those terms.

Finally, agents should never verbally agree to a referral fee. Rather, the agreement should always be documented in writing and closely reviewed prior to execution. Notably, REALTORS® may want to utilize AAR's recently released Referral Fee Agreement form. [🔗](#)

ABOUT THE AUTHOR

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Please note that this post is of a general nature and may not be updated or revised for accuracy as statutes and case law change following the date of first publication. Further, this post reflects only the opinion of the author, is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.

Beware of Pocket Listings

BY NIKKI J. SALGAT, ESQ., AAR ASSOCIATE COUNSEL

A pocket listing is when a property is not advertised on the multiple listing service (MLS). This can occur in a couple of different ways. One way is when the seller signs a listing agreement and either (a) opts out of MLS advertising – this is also commonly referred to as an office exclusive listing or (b) a property is advertised as “coming soon” and the property sells before the property is marketed on the MLS. Another way is when the seller and agent do not have a listing agreement. Instead, the seller and agent have an understanding that the seller will sell the property if the right offer is presented.

Due to the inherent dangers with pocket listings, real estate agents should understand the legal, ethical and industry issues related to pocket listings.

OFFICE EXCLUSIVE LISTINGS ARE PROHIBITED BY MLS UNLESS THE SELLER OPTS OUT

MLS rules usually require agents to file listings on the MLS within two days of receiving a signed agreement. And, in the event the seller opts out of marketing their property on the MLS, the seller is then typically required to provide written authorization confirming the seller's decision to opt out. Significantly, if the seller does not opt out and the listing is not filed on the MLS, the agent is probably in violation of MLS rules and could be subjected to significant penalties and fines.

IS A POCKET LISTING ETHICAL?

Article 1 of the Code of Ethics requires that REALTORS® “protect and promote the interests of their client.” Accordingly, it can be argued that the agent is violating Article 1 if a property is not marketed to a larger audience via the MLS so that the seller can receive more competitive offers. Additionally, the valuation of a property may not be as accurate because the seller does not have the benefit of the use of MLS comparables.

Moreover, Article 3 of the Code of Ethics places a duty to cooperate on REALTORS®. Arguably, if an agent has a pocket listing and does not file the listing on the MLS for broader exposure and allow for cooperative marketing, the agent is not cooperating with other REALTORS®.

IS A POCKET LISTING LEGAL?

Arizona allows pocket listings. However, agents should proceed with caution and consider the related risk management concerns pocket listings pose.

Arizona law provides that “[a] licensee owes a fiduciary duty to the client and shall protect and promote the client's interests.” A.A.C. R4-28-1101(A). Similar to the argument for Article 1, less exposure could limit competitive offers thereby appearing as though the agent did not “protect and promote the client's interests.” With regard to fiduciary duty, the agent must place their client's interests above their own. Because a pocket listing could be perceived to benefit

the agent (dual agency) over the seller, it could be determined that the agent breached their fiduciary duty.

Furthermore, if an agent limits listing exposure to only certain markets, it may have a discriminatory effect even if there was no intent to discriminate. And, if the agent belongs to a “pocket listing club” that sets the minimum commission to participate, it amounts to a price-fixing arrangement and violates federal antitrust regulations.

OTHER ISSUES

Keeping properties from the MLS may skew market value. In other words, because pocket listings are never entered into the MLS database once they are sold, it limits the available information about the market and makes it difficult for other agents, buyers and sellers to determine values of nearby properties. Likewise, an appraiser's appraisal may be compromised with limited information.

If the agent markets a property as “coming soon” via a sign with a “coming soon” rider, the agent must first obtain the seller's written authority. Typically, written authority is issued with an employment agreement which, in turn, may trigger the requirement for the property to be listed in the MLS.

A changing market could cause the seller to not receive the highest and best offer if the property is not marketed on the MLS.

BENEFITS OF MLS

Generally, it is in the seller's best interest to market the property to as large of a forum as possible. MLS provides that kind of exposure. Additionally, marketing via the MLS is not only open to all REALTORS® that participate with that MLS but MLS feeds are usually provided to a larger pool of consumers by way of the internet.

BROKERS SHOULD EDUCATE THEIR AGENTS

Although they are not the same, the terminology for pocket listings and coming soon listings are sometimes used interchangeably. Because using the wrong terminology could convey the wrong information, brokers should educate their agents regarding the differences between the listings.

Additionally, brokers should educate their agents regarding the pros and cons of a pocket listing. An educated agent will be able to provide their seller with the necessary information to make an informed decision.

Finally, brokers may want to consider updating their policies and procedures to address pocket listings. 📄

[For more information on pocket listings online.](http://www.realtor.org/news-releases/2014/06/coming-soon-properties-can-create-consumer-confusion)

<http://www.realtor.org/news-releases/2014/06/coming-soon-properties-can-create-consumer-confusion>

Real Estate Advertising Rules & Guidance

BY COMMISSIONER JUDY LOWE, ARIZONA DEPARTMENT OF REAL ESTATE AND
K. MICHELLE LIND, ESQ., ARIZONA REALTORS® CHIEF EXECUTIVE OFFICER

The Advertising of Real Property is Regulated by Law:
Arizona real estate law defines “advertising” as:

- the attempt by publication, dissemination, exhibition, solicitation or circulation, oral or written, or for broadcast on radio or television
- to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in [real property] including the land sales contract to be used, and
- any photographs, drawings or artist’s presentations of physical conditions or facilities existing or to exist on the property.

Generally, advertising does not include

- (a) press releases or other communications delivered to news media for general information or public relations purposes for no charge; or
- (b) communications to stockholders as specified in the statute. A.R.S. §32-2101(2).

The Arizona Department of Real Estate Commissioner’s Rules, A.A.C. R4-28-502, set forth the rules for real estate advertising. Notably, these rules specify that the use of an electronic medium, such as the Internet or web site technology that targets Arizona residents with the offering of a property interest or real estate brokerage services pertaining to property located in Arizona also constitutes advertising. A.A.C. R4-28-502(L) (See also, A.R.S. §32-2163(D)). Thus, online advertising is subject to the same rules as print advertising.

Consider the following rules and guidelines when advertising real property, either as an entity, an individual or as a member of a real estate team.

Clear and Prominent Identification of the Employing Broker:

A licensee must ensure that all advertising identifies, in a clear and prominent manner, the employing broker’s legal name or the dba name contained on the employing broker’s license certificate. A.A.C. R4-28-502(E). The employing broker is the corporation, limited liability company, partnership or sole proprietorship licensed as the broker. The employing broker

designates a natural person to act as the designated broker. The rule requiring clear and prominent identification of the employing broker ensures that the public is made aware of the person or entity responsible for supervision. Although “clear and prominent” is a somewhat subjective term, it means “readily noticeable,” which may relate to size or position. Consider the following rules and guidelines:

- The employing broker’s name must be included in all advertisements, including classified ads, real estate advertising guides, and other magazine ads.
- In advertising flyers, the employing broker’s name may be located on either the top or the bottom of the flyer however the employing broker’s name must be clearly legible.
- On any other promotional material the employing broker’s name must be on the front page or front of the object.
- The employing broker’s name must be visible on the front page of the website and each subsequent page of the website, without the necessity of scrolling down, regardless of the screen size of the computer.
- When advertising real property on social media, such as Facebook, the name of the employing broker must be stated. When advertising real property in “thumbnails”, text messages, “tweets”, etc., where stating the name of the employing broker firm is not practical, the advertising information being linked to must include the name of the employing broker.
- With team advertising it must be clear that the team is a part of the employing brokerage. For example, placing “The (Team Name) Team” at the top of the page in large letters with a much smaller brokerage symbol somewhere below is not sufficient.
- The employing broker’s name must be spelled out in its entirety. For example, if an employing broker’s legal or dba name on a license includes “Southeast Valley,” that is what must appear in the ad; simply saying “SE” is not sufficient.
- If the brokerage is an office of a franchise, the office must be identified; simply displaying the franchise name alone is not sufficient.

"Blind Ads": A licensee must not advertise property in a manner that implies that no salesperson or broker is taking part in the offer for sale, lease, or exchange. A.A.C. R4-28-502(A). In other words, "blind ads", including advertising a property for sale without the broker and agent's names, in newspapers, on Craigslist, or otherwise is prohibited.

"Owner/Agent": Any licensee advertising their own property for sale, lease, or exchange must disclose the licensee's status as a salesperson or broker and as the property owner by placing the words "owner/agent" in the advertisement. A.A.C. R4-28-502(B). When advertising your own property, include "owner/agent" in all advertising, including any "for sale" sign.

Accurate Claims: A licensee must ensure that all advertising contains accurate claims and representations, and fully states factual material relating to the information advertised. A salesperson or broker must not misrepresent the facts or create misleading impressions. A.A.C. R4-28-502(C).

Advertising another Licensee's Listing: A licensee advertising property that is the subject of another licensee's real estate employment agreement must display the name of the listing broker in a clear and prominent manner. A.A.C. R4-28-502(F).

Permission for "For Sale" Signs: Before placing or erecting a sign giving notice that specific property is being offered for sale, lease, rent, or exchange, a salesperson or broker must secure the written authority of the property owner, and the sign must be promptly removed when authority expires, or upon request of the property owner. ARSS 32-2153(12); A.A.C. R4-28-502(H).

Acre: A licensee must not use the term "acre," either alone or modified, unless referring to an area of land representing 43,560 square feet. A.A.C. R4-28-502(L).

Trade Names: Any broker using a trade name owned by another person on signs displayed at the place of business must place the broker's name, as licensed by the Department on the signs; and the broker must include the following legend, "Each (TRADE NAME or FRANCHISE) office is independently owned and operated," or a similar legend approved by the

Commissioner, in a manner to attract the attention of the public. ARS §32-2126; A.A.C. R4-28-502(K).

Real Estate Schools: A school must include its name, address and telephone number in all advertising of Department-approved courses. The school owner, director, or administrator must supervise all advertising and the school owner must ensure that the school's advertising is accurate. A.A.C. R4-28-502(D).

Broker Supervision: The designated broker must supervise all advertising, for real estate, cemetery, or membership camping brokerage services. A.A.C. R4-28-502(G).

In conclusion, the Department of Real Estate receives numerous advertising complaints each month, primarily from other licensees, and will sanction those licensees in violation of the advertising rules. Therefore, if you have a question about your advertising practices, please contact your broker or the Department at www.azre.gov (message center) for guidance. And, if you notice a possible advertising violation by another licensee, consider contacting the person or the broker about the issue before filing a complaint. 📩

ABOUT THE AUTHORS

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This article is of a general nature and may not be updated or revised for accuracy as statutory or case law changes following the date of first publication. Further, this article reflects only the opinion of the author, is not intended as definitive legal advice and you should not act upon it without seeking independent legal counsel.

LEGAL HOTLINE

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The following is for informational purposes only and is not intended as definitive legal or tax advice. You should not act upon this information without seeking independent legal counsel. If you desire legal, tax or other professional advice, please contact your attorney, tax advisor or other professional consultant.

Q&As are not "black and white," so experienced attorneys and brokers may disagree. Agents are advised to talk to their brokers/managers when they have questions.

Broker's Duty Does Not Include Assisting In A Title Dispute Years After Close Of Escrow.

FACTS:

The brokerage represented the buyer of a property in 1996. As part of that transaction, the buyer obtained title insurance and the title company disclosed to the buyer that there was an easement for access to the property. Recently, however, the buyer was informed that the easement is allegedly invalid. The buyer and a neighboring property owner are litigating the dispute. The buyer has also sent several demand letters to the brokerage, in which the buyer claims that the brokerage has an ongoing obligation to assist her in resolving the dispute and potentially participating in the resolution.


ISSUE:

Does the brokerage owe a duty to the buyer 18 years after the close of escrow to help resolve the dispute?

ANSWER:

No.


DISCUSSION:

Because the transaction closed approximately 18 years ago, no common law or statutory duties are owed by the brokerage to the buyer. It is generally recognized that, absent an agreement to the contrary, the fiduciary duties owed by a brokerage to its client end at the close of escrow. See *Coldwell Banker Commercial Group, Inc. v. Camelback Office Park*, 156 Ariz. 226, 231, 751 P.2d 542, 547 (1988) (recognizing that once an agreement between principal and agent is terminated or completed, "the fiduciary relationship is ended and the broker 'is free to act for himself or the opposing party as long as he does not hinder, delay or interfere' with a transaction which the agreement was intended to bring into being."). Moreover, assisting in or negotiating a legal dispute is beyond the scope of services which a licensee can legally provide. Accordingly, at this point, the brokerage does not owe any ongoing duties to the buyer and the brokerage has no legal duty or obligation to assist the buyer in her current dispute with the neighboring property owner. 

Category: Agency

Broker Manager Quarterly — Fall Issue (Oct./Nov. 2014)



The rCRMS (Certified Risk Management Specialist) program teaches brokers and agents to successfully reduce exposure to risk in real estate transactions. These courses teach you how to recognize the risks, hazards and possible violations up-front and how to avoid them during the real estate transaction. The rCRMS classes are taught by local real estate attorneys who know Arizona law and Arizona practice. If you manage agents, these classes are a MUST ATTEND. 


UPCOMING CLASS:

Mastering the Residential Contract

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The Legal Hotline provides all AAR broker members (designated REALTORS®) free access to a qualified attorney who can provide information on real estate law and related matters.

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Seller Is Entitled To Earnest Money Where Buyer Failed To Timely Provide Unfulfilled Loan Contingency Notice

FACTS:

Pursuant to the AAR Residential Resale Real Estate Purchase Contract (the "Purchase Contract"), the close of escrow date was scheduled for July 18, 2014. On July 21, 2014, the seller issued a Cure Period Notice to the buyer pursuant to Section 7a of the Purchase Contract for the buyer's failure to close escrow and failure to sign loan documents. The cure period expired without the buyer signing loan documents and closing escrow. After the cure period expired, the seller received an Unfulfilled Loan Contingency Notice from the buyer.

ISSUE:

Is the seller entitled to the earnest deposit?

ANSWER:

Yes.

DISCUSSION:

of such notice, the failure to comply shall become a breach of the contract." Here, the buyer failed to close escrow on July 18, 2014, the scheduled closing date as prescribed by Section 1d of the Purchase Contract. As a result, the seller provided a Cure Period Notice allowing the buyer three (3) days to cure as prescribed by Section 7a of the Purchase Contract. The buyer failed to close escrow within the cure period. Instead of closing escrow, the buyer could have alternatively provided an Unfulfilled Loan Contingency Notice pursuant to Section 2c of the Purchase Contract within the three (3) day cure period, provided the reason for failure to close was loan disapproval without Prior to Document ("PTD") conditions. Unfortunately, the buyer failed to either close escrow or send the Unfulfilled Loan Contingency Notice within the three (3) day cure period. As such, the buyer breached and the seller is entitled to the earnest deposit. 📄

Category: Contracts

Broker Manager Quarterly — Fall Issue (Oct./Nov. 2014)

SECOND EDITION NOW AVAILABLE

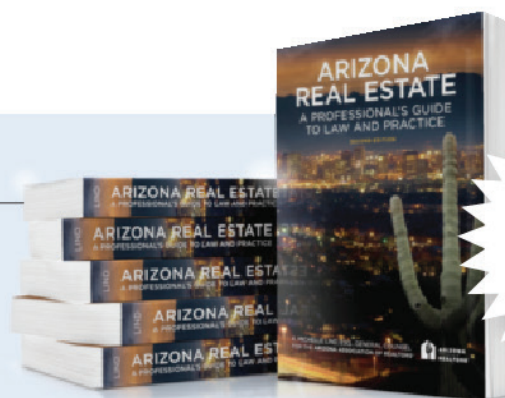
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BY K. MICHELLE LIND, ESQ., AAR CHIEF EXECUTIVE OFFICER

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Spa Heater Is A Warranted Item That Must Be In Working Condition At Close Of Escrow

FACTS:

After the inspection of a property, Buyer submitted a Residential Buyer's Inspection Notice and Seller's Response ("BINSR") that included notice of the non-working warranted items. In that notice, the buyer indicated that the pool heater does not operate and requested that it be repaired/replaced. The heater in question actually serves the spa and it is the spa heater that is not working properly. The seller has refused to repair the heater because the seller does not have a "pool" heater and is relying on the clerical error as a means of avoiding repairing the warranted item.


ISSUE:

Is the seller required to repair the heater?

ANSWER:

Yes.

DISCUSSION:

The spa heater is a warranted item and, pursuant to Section 5a of the Residential Resale Real Estate Purchase Contract, is to be repaired. The seller's reliance on the buyer's clerical error – referring to the heater as a pool heater instead of a spa heater – is insufficient grounds for refusing to make the contractually agreed to repairs of warranted items. 

Category: Contracts-Inspection/Buyer Disapproval

Broker Manager Quarterly – Fall Issue (Oct./Nov. 2014)

Provided The Broker Has No Involvement, It Is Not Required to Maintain A File On An Agent's Personal Home Purchase


ISSUE:

Is the brokerage required to maintain a file for a real estate agent's personal purchase of a residential investment property without any involvement of the brokerage?

ANSWER:

See Discussion.

DISCUSSION:

The brokerage is generally not responsible for an agent who is not acting "for another," *i.e.*, the agent is acting personally either as a buyer or seller, unless the agent expressly or apparently represents to other parties in the transaction that the brokerage firm is involved in the transaction. Apparent authority could include conducting business from the brokerage office, *e.g.*, making telephone calls or meeting prospective buyers in the brokerage office or handing out business cards with the brokerage name or using transactional documents with the brokerage name. Here, as long as the brokerage is not involved in the transaction or identified in the transaction, the brokerage is not required to maintain a file for a transaction involving an agent who is acting in their personal capacity. 

Category: Brokerage

Broker Manager Quarterly – Fall Issue (Oct./Nov. 2014)

Joint Marketing Is Permissible As Long As All Real Estate Service Providers Pay Their Pro-Rata Share

FACTS:

A broker wants to co-sponsor a commercial open house with a title company, lender and mobile home manufacturer. All co-sponsors would jointly advertise for the open house. In addition, the broker would like to send out an email blast advertising the event that would include all of the co-sponsors.

ISSUE:


Is it a Real Estate Settlement Procedures Act ("RESPA") violation for a broker to co-sponsor a commercial open house with a title company, lender and mobile home manufacturer and advertise with the co-sponsors?

ANSWER:

See Discussion.

DISCUSSION:

Nothing in RESPA prevents joint advertising. However, if one party is paying less than a pro-rata share for the advertisement or event, there could be a RESPA violation. For example, if the

broker solicits one or more of the co-sponsors to pay for all or most of the costs associated with the open house and the broker's real estate services are the only services highlighted at the open house and only a small acknowledgement is made for the other co-sponsors of the event, this could be a RESPA violation. However, if the co-sponsors share the expenses evenly and are equally visible in their marketing efforts, there is likely no RESPA violation. 

Category: Advertising

Broker Manager Quarterly – Fall Issue (Oct./Nov. 2014)

A Group Home For Handicapped Persons Is Covered By The Fair Housing Act

FACTS:

The brokerage recently accepted a listing for a property located near a group home for recovering alcoholics and drug addicts. The seller is concerned about potential liability for not disclosing the group home to prospective buyers.


ISSUE:

Can the group home be disclosed to prospective buyers by the seller or listing agent?

ANSWER:

No.

DISCUSSION:

The Fair Housing Act (the "Act") prohibits discrimination against a person with a disability or handicap in connection with the sale or rental of a dwelling. Under the Act, "handicap" is defined as: (1) a mental or physical impairment that substantially limits at least one major life activity; or (2) a record of such impairment; or (3) being regarded as having such an impairment. See 42 U.S.C. § 3602(h). Recovering from alcoholism and drug addiction is considered a handicap. Therefore, the seller and listing agent are prohibited from disclosing the group home in connection with the sale of the property. 

Category: Fair Housing

Broker Manager Quarterly – Fall Issue (Oct./Nov. 2014)

Buyer And Seller May Not Change Commission Terms Without The Broker's Consent

FACTS:

The buyer and seller signed an Addendum to the Purchase Contract that amended the terms of the real estate agents' commissions.


ISSUE:

Can the buyer and seller change the terms of the agents' commission through an Addendum to the Purchase Contract?

ANSWER:

No.

DISCUSSION:

The buyer and seller are not parties to the commission agreement and therefore cannot alter that agreement. Only the seller and the agent can change the terms of the commission agreed to under the Listing Agreement. 

Category: Commission

Broker Manager Quarterly – Fall Issue (Oct./Nov. 2014)

Actual Knowledge Of Criminal Activity In The Neighborhood Must Be Disclosed

FACTS:

The brokerage has taken a listing for a property in Sonoita, Arizona, and there have been recent reports of drug trafficking activities in the area, including the use of "drop" houses. At this point, the brokerage is only aware of rumors to this effect; the brokerage does not have actual knowledge of any drug trafficking-related crimes in the neighborhood or surrounding area.

ISSUE:

Should rumors of criminal activity in the surrounding area be disclosed? Also, if the seller elects not to disclose, is that decision binding on the listing agent, or does the listing agent have his or her own disclosure obligation?

ANSWER:

See Discussion.

DISCUSSION:

Arizona law provides that a seller of real property must disclose all known facts which materially affect the value of the property, and which are not readily observable or known to the buyer. See *Hill v. Jones*, 151 Ariz. 81 (App. 1981). The seller's agent likewise has an obligation to disclose information that would materially affect the consideration to be paid by a buyer, regardless of whether the seller makes such disclosure. See A.A.C. R4-28-1101(B).

Therefore, if either the seller or listing agent has actual knowledge of criminal activity in the surrounding area which would materially affect the consideration to be paid by a reasonable buyer, such information must be disclosed. In this instance, however, neither the seller nor the listing agent has *actual* knowledge of criminal drug trafficking in the surrounding area, and we are aware of no Arizona law that requires the disclosure of rumor or speculation. As such, the rumors probably do not need to be disclosed, but certainly could be in an abundance of caution.

Finally, please note that if criminal activity occurred at the subject property itself, rather than the surrounding area, it would not need to be disclosed. Arizona's stigmatized property statute, A.R.S. § 32-2156, provides that the failure to disclose that a property "is or has been... [t]he site of a natural death, suicide or homicide or any other crime classified as a felony" cannot result in liability. See A.R.S. § 32-2156(A) (1). Accordingly, even if the seller or listing agent had *actual* knowledge that the property itself had been used in furtherance of drug trafficking activities, neither the seller nor the listing agent would be obligated to disclose such information. 📌

Category: Disclosure

Broker Manager Quarterly – Fall Issue (Oct./Nov. 2014)

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Repairs Costing More Than \$1,000 Must Be Done By A Licensed Contractor

FACTS:

The buyer and seller executed an AAR Residential Resale Real Estate Purchase Contract. After the home inspection, the buyer requested that certain roof repairs be made. In the Buyer's Inspection Notice and Seller's Response ("BINSR"), the seller agreed to repair the roof. The bid for the roof repair is \$2,500.

ISSUE:

Must the seller use a licensed contractor for the roof repairs?

ANSWER:

Yes.

DISCUSSION:

In Arizona "it is unlawful for any person" or entity to submit a bid or provide construction services without a contractor license. A.R.S. § 32-1151. There is a commonly cited handyman exemption to this rule which allows an unlicensed handyman to perform work "for which the aggregate contract price ... is less than \$1,000." A.R.S. § 32-1121(A)(14). The statute goes on to say "the work or operations which are exempt under this paragraph shall be of a casual or minor nature." *Id.* Moreover, the handyman exemption does not apply if the work requires a building permit. A.R.S. § 32-1121(A)(14)(a). Accordingly, because the work in this case exceeds \$1,000 and is not casual or minor in nature, a licensed contractor must be utilized. 📌

Category: Contracts-Inspection/Buyer Disapproval

Broker Manager Quarterly – Fall Issue (Oct./Nov. 2014)

ABOUT THE AUTHOR

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Richard V. Mack is a shareholder at [Mack, Watson & Stratman](http://www.mackwatsonstratman.com), which provides the AAR Legal Hotline service. He is a State Bar of Arizona Board Certified Real Estate Specialist and AV rated by Martindale Hubbell. He has also been designated as a Southwest Super Lawyer. Mr. Mack practices commercial litigation with an emphasis on real estate litigation. He is admitted to practice in the state and federal courts of Arizona and before the 9th Circuit Court of Appeals. Mr. Mack graduated Magna Cum Laude from Southwestern College in Winfield, Kansas with a Bachelor of Business Administration, with an emphasis in economics, and received his Juris Doctor from the University of Arizona.

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Can a Lender Require You to Obtain Flood Insurance Above the Amount Required by Federal Law?

BY SCOTT M. DRUCKER, ESQ., AAR'S GENERAL COUNSEL

FAEZ V. WELLS FARGO BANK, N.A., ET AL., 745 F.3D 1098 (11TH CIR. 2014)

According to a recent decision by the United States Court of Appeals for the Eleventh Circuit, lenders can require borrowers with a federally-insured mortgage to obtain flood insurance above and beyond the amount required by the Federal Housing Administration (FHA).

In the case of *Faez v. Wells Fargo Bank, N.A., et al.*, 745 F.3d 1098 (11th Cir. 2014), the borrower, Farie Faez, obtained a \$61,928.00 FHA-insured mortgage. Ms. Faez then secured \$63,000.00 in flood insurance, an amount greater than the loan's principal balance, but less than the home's replacement value. Wells Fargo, after having acquired Ms. Faez's mortgage, demanded that she increase her flood insurance to cover the replacement value of her home. Ms. Faez declined to do so; at which point, Wells Fargo force-placed the increased insurance, passing the premium cost along to Ms. Faez. Thereafter, Ms. Faez filed suit against Wells Fargo claiming that the lender breached the mortgage contract by forcing her to obtain more insurance than federal law requires.

Because the Secretary of HUD requires flood insurance coverage in the lesser of \$250,000.00 or the loan's principal balance, Ms. Faez argued that Wells Fargo could not require her to obtain more flood insurance than her loan's principal balance, which is less than \$250,000.00. Wells Fargo countered by asserting that the regulation sets a floor, rather than a ceiling, on the amount of flood insurance that a borrower must obtain.

After examining the subject regulation and the mortgage contract, the Eleventh Circuit ultimately agreed with Wells Fargo, holding that "the only reasonable interpretation...is that a mortgage lender may require the borrower to have more flood insurance than the HUD-determined minimum." In reaching this conclusion, the Court noted that the mortgage contract between Ms. Faez and Wells Fargo allows the lender to "do and pay whatever is necessary" to "protect the value of the property," which extends to the replacement value of the home. The Court additionally cited FHA's goal of encouraging affordable home ownership and cited concern that a ruling in favor of Ms. Faez could result in lenders declining to offer FHA-insured mortgages in high risk flood areas, or passing the expense of their increased risk of loss along to the borrower. Consequently, it is now clear that lenders can require borrowers with FHA-insured loans to obtain flood insurance in an amount equal to the home's replacement value.

WHY THIS IS IMPORTANT TO YOUR CLIENTS

"Flood Damage" is not covered by your homeowners or business policy and is the leading cause of property loss from natural disasters. In recent years Arizona wildfires have made more Arizona residents vulnerable to flooding.

Important features of the National Flood Insurance Program (NFIP) are:

- Everyone can and should have flood insurance. Even if you do not live in a designated flood zone you can purchase flood insurance if your community participates in the NFIP. Anyone can get flooded. More than 90 percent of all Presidentially declared disasters involve flooding.
- You can insure your home for up to \$250,000. Contents coverage, up to \$100,000 is separate. Renters can insure their belongings, too.
- Flood insurance pays even when no disaster is declared. Statistically, federal disaster declarations are issued in less than 50 percent of flooding incidents. An NFIP policy will pay for flood damage whether or not there is a federal disaster declaration.



ABOUT THE AUTHOR

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Scott M. Drucker, Esq. is General Counsel to the Arizona Association of REALTORS (AAR). He serves as the primary legal advisor to the Association and oversees AAR's Risk Management Committee, which includes development of standard real estate forms and professional standards administration for twenty of the state's local REALTOR® associations.

This post reflects only the opinion of the author, is not intended to be definitive legal advice and you should not act upon it without seeking independent legal counsel.

Source [FEMA](http://www.fema.gov/news-release/2002/07/26/arizona-residents-are-urged-buy-flood-insurance)

<http://www.fema.gov/news-release/2002/07/26/arizona-residents-are-urged-buy-flood-insurance>

Open House Promotion on Facebook

How often has this happened to you? You have a new listing and you need to generate some buzz. Your client wants you to hold an open house. Sounds like a good plan. You set up the open house for the next weekend, Saturday and Sunday. The weekend comes and you set out your open house signs, you let your network of real estate agents know, you even create flyers to hand out, and you have minimal traffic. Why is this? Open houses are a great way to generate buzz and let interested buyers ask questions about the home. So how do you generate buzz and get more potential buyers in the door?

USE FACEBOOK TO HELP PROMOTE YOUR OPEN HOUSE

We have all heard about the power of social media. Everyone has been told the importance of having a Facebook page, so I am going to spare you with these facts and figures. What I want to show you is how to use your Facebook page to promote your open houses effectively. Just keep in mind that advertising regulations can apply to your Facebook page. See [#AskScott, Episode 2](#).

<https://www.youtube.com/watch?v=R-uzGK0gdME&feature=youtu.be>

IMAGES ARE WORTH 1,000 WORDS

Use images to gain interest. 40% of people will respond better to visual information than plain text ([zabisco](#)). Visuals are a very powerful marketing tool. Odds are you already have photos of the home, so use them. Facebook has two options designed to help you use your photos more effectively.

<http://www.webmarketinggroup.co.uk/why-every-seo-strategy-needs-infographics/>

PHOTO ALBUMS

One of the great features of Facebook is the ability to create a photo album. You can create a new photo album for each listing. This would be a great way to organize your listings for your Facebook fans. Let's walk through how to do this.

1. Click Add Photo to upload your open house photos
2. Create a photo album to organize your photos
3. Make sure to add a description to the album
4. Update your status to promote your new album
5. Click Save



COVER PHOTO

Many people (even experienced marketers) fail to use the most valuable real estate on their Facebook page for promotion. The cover photo is the very first thing that visitors see on your Facebook page. Use it to help promote your open house. Here is an example of how the Arizona Association of REALTORS® is using the cover photo to promote the [REALTOR® Caucus on September 12](#).

<https://www.eventbrite.com/e/realtor-caucus-2014-tickets-12213935209>

Beyond just placing a cover photo promoting your open house, you can add a link to add additional information about the house. This is a perfect opportunity to showcase the home on your website (I admit this is a little more technical, but can really payoff). Let's take a look at how this is done.

1. Click to change the cover photo
2. Click upload photo or choose from photos
3. Click anywhere on your new cover photo
4. Add a description with a link

Facebook has evolved from the posting pictures of cute cats to a platform that you can use to promote and grow your business. Odds are as a real estate agent, you are already using Facebook to promote your listings. I hope that these tips help promote your open houses and generate more buzz.

I would love to hear other creative ideas you have used in the past to promote your open houses. Please comment below to join in the conversation.

To learn more about using Facebook and other social media tools, consider taking a [Marketing Reboot class](#) offered by AAR or your local association. [🔗](#)

<http://www.aaronline.com/calendar/view-event/?id=381>

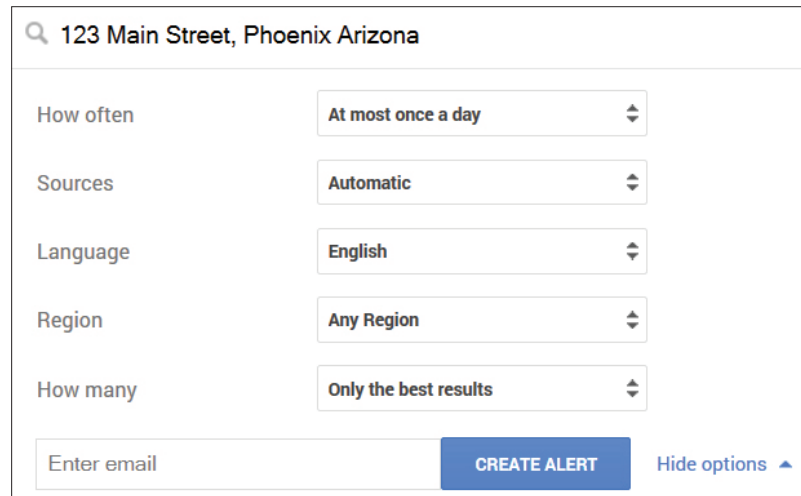
Using Google Alerts To Stop Rental Scams

Despite repeated warnings from authorities and increased media coverage about rental scams and the scraping of on-line real estate listings, many consumers continue to fall victim. Because it's free, Craigslist is perhaps the most common on-line platform used to perpetrate these scams. However, there are easy to implement techniques Arizona REALTORS® can use to protect themselves and their listings. This article will examine one of those techniques – the use of Google alerts.

While rental scams come in many forms, the most common version involves a scenario in which the perpetrator takes legitimate listing information and posts it on websites such as Craigslist. The listing information, including photos and a property description, is used by the pretend owner to list the property for rent. Rather than identify the phone number of the listing agent, the scam artist lists their own phone number and instructs prospective tenants to contact them directly. Ultimately, the perpetrator of the scam collects a deposit from unsuspecting would-be tenants who learn too late that their money has been taken by someone with no connection to the property. In some extreme cases, the individual pretending to be the owner breaks into an abandoned home, sometimes even changing the locks, and proceeds to show the home to interested tenants.

An effective tool to stop your listings from becoming the subject of a rental scam is to set up a Google alert for every property you have listed for sale. By way of this alert, you can be quickly notified if your listing has been added to a website without your permission. It's also a good way to know where your listings are legitimately appearing on the internet.

To utilize Google alert, the first step is to log onto www.google.com/alerts. Once on the webpage, you simply type into the search box the address of the property you want to monitor. Next, click on the “show options” tab and the following dropdown box will appear:


A screenshot of the Google Alerts options dropdown menu. At the top, the search query "123 Main Street, Phoenix Arizona" is displayed. Below this, there are five dropdown menus: "How often" set to "At most once a day", "Sources" set to "Automatic", "Language" set to "English", "Region" set to "Any Region", and "How many" set to "Only the best results". At the bottom, there is a text input field labeled "Enter email", a blue button labeled "CREATE ALERT", and a link labeled "Hide options" with an upward-pointing triangle icon.

Use this box to first choose how often you wish to receive search results regarding the property you identified: (1) as it happens; (2) at most once a day; or (3) at most once a week. After selecting your preferred language and identifying your region as the United States, it is best to identify that you wish to receive “all results,” as opposed to “only the best results.”

Finally, you may want to ensure that Google alerts focus on a specific website, such as Craigslist. To do this, you will need to add your desired search directive immediately following the property address, separated by a colon punctuation mark. For example, if the property is located in Phoenix, following the address, you will type in “phoenix.craigslist.org.” Your search box will therefore look as follows:

A screenshot of the Google Alerts search box. It shows the search query "123 Main Street:phoenix.craigslist.org". The colon punctuation mark is used to separate the property address from the specific website.

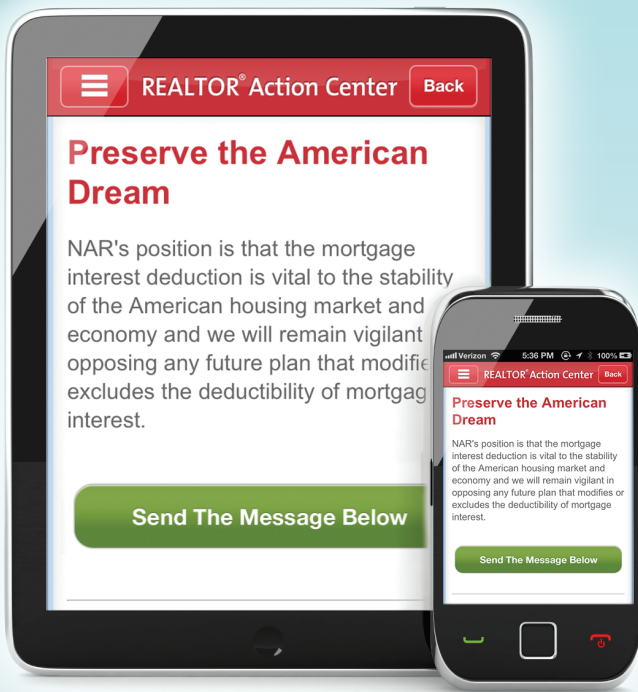
Note that there are no spaces in the search directive following the property address. Finally, you will receive an email from Google asking you to confirm or cancel your request. Once you confirm the request, you will begin receiving your alerts.

There are many legitimate rental ads on Craigslist and the company does its best to warn people about rental scams. Nonetheless, prospective tenants continue to fall prey. It is for this reason that REALTORS® should exercise diligence in monitoring where and why their listings appear on the internet. 



LEARN MORE ONLINE

www.realtoractioncenter.com/realtor-party/get-involved/mobile-app-1.html



WHERE WILL YOU BE WHEN YOU GET THE CALL FOR ACTION?

As a busy professional on the go your lifeline to clients and your office is your phone. Fewer and fewer of us are tied to a traditional desktop or laptop anymore to complete the functions of our work. Smartphones and tablets are how we increasingly manage our information and daily tasks.

THE REALTOR® ACTION CENTER MOBILE APP – DON'T JUST GET IT – USE IT!
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