

To: Brokers

From: Dale J. Galvin
Galvin Realty Law Group
6100-219th SW, Suite 560
Mountlake Terrace, WA. 98043
425-248-2163 (P); 425-248-2168 (F)
Email: DGALVIN@GRLG.NET
Website: WWW.GRLG.NET

Date: November 9, 2010

Re: Checklist for Listing and Selling Agent in Short Sale Transaction

1. LISTING AGENT CHECKLIST

- A. Obtain preliminary title report to determine exact nature and number of liens against property;
- B. Obtain payoffs for all liens. Be aware to include prepayment penalties;
- C. Refer client to attorney, and/or accountant, mortgage professional or HUD certified counselor to assure that a short sale is best decision for client. Client must understand legal, credit and tax ramifications of short sale. (A deed-in-lieu, bankruptcy, modification, or foreclosure may be better for the client).
- D. Who will negotiate the short sale with the lender(s), how will they be paid, and who will pay them? Buyer, Seller or Agent(s)? Will the negotiator be the listing agent or independent short sale negotiator? Is the short sale negotiator licensed to negotiate short sales? Note: DOL has held that short sale negotiators must have a real estate license and work under a managing broker, and an agent who uses an unlicensed negotiator can be charged with aiding or abetting an unlicensed activity and subject to disciplinary action. Since the negotiation of a short sale is the practice of law, an attorney can negotiate short sales as well.
- E. Especially in the case of a second lien where lender is likely to have a large deficiency, is the client willing to execute a note or otherwise acknowledge the deficiency if required by the lender in approving the short sale? If not, should you take the listing?
- F. Once you have decided to take the listing, immediately work with the client to put together the short sale package which will be uploaded to the lender(s). Most lenders have this package available on their website; if not, our office can provide you with a copy of the items in a typical short sale package. Your short sale package should include a property condition report and your Broker's Price Opinion ("BPO").

- G. Advise the Seller that this is a long process, namely, that once an offer is received, it will be uploaded to the lender(s), who may not even receive it into their system for 30 days; explain that the lender(s) will then conduct their own evaluation of the value of the property (eg. a BPO or appraisal), and in approximately 60 days, the negotiator for the lender may be in a position to negotiate the terms of the short sale. The Seller should be advised that 90-150 days to close a short sale is not unreasonable.
- H. Be aware of a pending Trustee's sale. If within 30 days of potential listing, you may want to refuse to take the listing because the lender may refuse to discontinue the trustee's sale. Talk to your negotiator, or if you are the negotiator, contact the trustee and lender as soon as possible to determine if they will extend.
- I. In negotiating form 22-SS, consider the following:
 - a. Paragraph 2, allow at least 90 days for lender's consent, not the current default period of 60 days. Keep in mind, once the period for lender's consent has passed, the deal is DEAD.
 - b. Paragraphs 3 and 4. If Buyer is insisting the Seller may not submit other offers, then Buyer should agree not to withdraw its offer during period of time Seller obtaining lender's consent set forth in paragraph 1.
 - c. Paragraph 5, computation of time. Be aware that none of the time frames commence, except for obtaining lender's consent, as mutual acceptance is delayed until receipt of lender's consent. This is problematic for Seller as once lender's consent is received, if Buyer thereafter seeks a reduction in price associated with an inspection undertaken after lender's consent, this may not be approved by lender, and if approved, may take several weeks for lender's consent. Also, Seller wants to have Buyer be pre-approved on its financing, so that Buyer does not refuse to close after lender's consent has been obtained. Finally, should the Buyer be allowed to wait until lender's consent is received before depositing earnest money?
- J. Following lender's consent, the lender typically requires closing be within 30 days of lender's consent; thus, insert such a provision in the sale agreement.
- K. If the agent is not the negotiator, neither agent nor client should contact the lender directly. This will result in a loss of leverage by the negotiator. Let the negotiator do its job!
- L. Be aware of the rules regarding commission "cram-downs". In a Fannie Mae loan, the commission may not be reduced below 6%; however, many transactions may involve a Fannie Mae loan in first position, but a non-Fannie Mae loan in second position. Will the second position lender attempt to cram down the commission? If a non-Fannie Mae transaction, be aware of NWMLS Rule 101 (g) which states that if seller's creditor requires the total commission or the SOC be reduced, the listing office and selling office commission shall be reduced by an equal amount.

- M. Don't participate in any schemes, such as the double short sale, where a first sale at a low price is followed immediately thereafter by a second sale at a much higher price. Lenders are now disapproving short sales in which there is a contemplated second sale within 90 days. The negotiator in such a transaction, if also the Buyer in the first sale may be a distressed home consultant, and is placing his interests ahead of those of your client. A similar scheme is the option, where the optionee enters into an option with your Seller, but does not exercise the option until he finds a Buyer at a higher price than the option price offered your client.
- N. Who will pay delinquent utility charges and past due HOA dues? (Note: Even if deed of trust was recorded before assessments became delinquent, **HOA still has priority as to** the amount of common area expenses that would have become due (based on budget) during the 6 months preceding foreclosure, except where the HOA forecloses non-judicially) Typically seller's lender will not pay, thus indicate in sale agreement whether Buyer or Seller agrees to pay; if Seller, may need to occur prior to closing and outside of escrow with addenda so indicating.
- O. Is there mortgage insurance? If so:
1. Will the mortgage insurer require the Seller to pay all or a portion of the deficiency?
 2. Is the price agreed to between Buyer and Seller less than the lender would receive if it proceeded to foreclosure and received mortgage insurance? If so, lender may reject short sale and proceed to foreclosure.
- P. In a cash sale have buyer provide proof of funds.
- Q. If you perceive buyer's offer is low, ask buyer's agent to justify with a CMA.
- R. Be there when lender's agent does the inspection for purposes of providing the BPO to lender. Can you provide the agent with information which would be helpful to support the offer your client accepted on the property?
- S. Does your client have a FHA insured mortgage? If so, does he qualify for HUD pre-foreclosure program, which may allow him to avoid foreclosure and any deficiency obligation on the FHA insured mortgage?
- T. If the Buyer intends to finance its loan through FHA, Rural Development (RD) or VA program, can it close that loan within 30 days of the seller obtaining seller's lender consent, a typical requirement of the seller's lender?
- U. Are you dealing with a seller's lender which won't waive a deficiency on the first even though it knows that deficiency will be eliminated in a non-judicial foreclosure (i.e. Credit Unions) ; if so, is your client better off allowing the property to go to foreclosure?
- V. Is this your client's primary residence, with a 1st loan originated prior to 1/01/2009 and current loan balance less than \$729,750? Is the mortgage delinquent (or default is foreseeable), and does the borrower's total monthly mortgage payments (including taxes and insurance) exceed 31%

of the borrower's gross income? If so, does he qualify for the Home Affordable Foreclosure Alternatives Program (HAFA), which may allow him to avoid foreclosure and any deficiency obligation? Does apply to Fannie Mae and Freddie Mac loans.

2. SELLING AGENT CHECKLIST.

- A. Know your Buyer. Is the Buyer prepared to wait up to 120 days to close? If not, a short sale is not for him. Is the Buyer prepared to pay a portion of the short sale negotiator fee, if the negotiator is someone other than the listing agent? Is your Buyer qualified to purchase the property and prepared to do its inspection during the period that Seller is obtaining lender's consent? Explain to the Buyer that his sales costs may be higher in a short sale if he has to pay part of the negotiator's fee or pay you a portion of the commission, but that he is getting the benefit of a much lower price.
- B. Do you have a Buyer Brokerage Agreement with the Buyer, so that if the commission is crammed down, you can be compensated for the difference from the Buyer? (Some Buyer's agents are advising their Buyers not to proceed with a sale because the SOC is being reduced and Buyer's agent believes it can get a higher commission from another purchase. Buyer's agent could have protected itself with a Buyer Brokerage Agreement).
- C. When negotiating 22-SS, if you want your offer to be the only offer to be considered by Seller, consider giving Seller adequate time to get lender's consent, and agree not to withdraw your offer during that time. (See 1 (I) above).
- D. When negotiating an offer, find out from listing agent if the Seller is willing to accept a deficiency, especially if a second. Get a copy of title from listing agent or check with your title co. to see what the liens are. If the Seller refuses to give you a copy of title, insert 22T, title contingency, in your offer, so that you can review the title, and if you see a second, and/or other encumbrances, consider whether you want to continue with the transaction if Seller won't agree to be bound by a deficiency. Keep in mind; some sellers are actually putting a provision in their sales agreements providing that if lender's consent is conditioned upon Seller agreeing to a deficiency, that Seller can opt out.
- E. Make sure your client's financing is in order so that it can close within 30 days of lender consent.
- F. Find out who is going to negotiate the short sale. Is it the listing agent; if not, and a third party, find out exactly what the fee is and who is going to pay it. Many Buyers are blind sided by a last minute request from the short sale negotiator that they pay the negotiator's fee and transactions end up being restructured so that the Buyer (or its agent) pays the fee because the lender won't and the Seller can't. If the negotiator is the listing agent, ask them about their experience in negotiating short sales.

- G. Be suspicious of schemes such as the double short sale and option (See 1 (M) above), as well as a representation by the listing agent that it already has short sale approval, unless a HUD approved pre-foreclosure on FHA insured mortgages or HAFA approved pre-foreclosure on non Fannie Mac and Freddie Mac conventional loans. Some listing agents have submitted dummy short sale offers and preliminary settlement statements to lenders to get lender approval before actually getting a valid offer. Ask the listing agent if it says it has short sale approval, how it got it before your offer was submitted to the lender. There may be cases where a prior legitimate offer was accepted by the lender, and did not close because the Buyer failed to perform, but even in that situation, your offer will have to be submitted to the lender for approval, and considered on its own merits.
- H. Carefully consider whether to make an offer within 30 days of a pending trustee's sale. May be difficult to continue the trustee's sale to get your sale closed.
- I. See paragraph 1 (N) regarding payment past due HOA dues and utility delinquencies.
- J. See paragraph 1 (T) regarding buyer financing via FHA, RD or VA loans.