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Miami –Dade Seminar
SHORT SALE AND
LOAN MODIFICATION SOLUTIONS
TODAY

What is a Short Sale?

- Borrowing a security from a broker and selling it, with the understanding that it must later be bought back (hopefully at a lower price) and returned to the broker.
- “The sale of a real estate property for a price that is less than the total amount necessary to fully satisfy the actual present encumbrance (mortgage) indebtedness on the real estate property.”

Many Conditions to Short Sales

- There is no such thing as a Seller “being entitled” to a short sale.
- Repayment of deficiency – with terms
- Fixed reduced payment for complete release of mortgage and debt
- No payment complete release of mortgage and debt (forgiveness of debt)

Encumbrances Can Include:

- Mortgages, money judgments, IRS liens and other similar financial obligations that are only partially paid in return for a release of lien upon the real estate.

Lender Participation in the Short Sale Transaction

- A short sale requires not only a buyer and a seller, but ALL of the lien holder(s) accepting the terms of the transaction.
- The approval of the transaction should be a mutual agreement between seller and its lender(s).
- IT IS **NOT** AN AGREEMENT BETWEEN THE **BUYER** AND THE LENDER!

FAR Short Sale Documents

- RPZARETSKY.ACTIVERAIN.COM – My Blogs (Articles on Short Sales and Loan Modifications)
- The Florida Association of Realtors Documents (October 2007 and July 2008) consist of the Short Sale Addenda to the Exclusive Listing Agreement and Contract for Purchase and Sale.

Listing Agreement Short Sale Addendum – 1 (f) right to disclose mortgage information to buyers

1. Seller authorizes Broker and its agent (whether serving as transaction broker or single agent) to: (a) market the Property as a short sale or pre-foreclosure property in the MLS, in accordance with the MLS rules and regulations or other marketing medium; and (b) continue to market the Property for sale according to the MLS rules and regulations until Seller's lender(s) and/or lien holder(s) (collectively the "Lender") approves the short sale; and (c) disclose or provide any requested information or documentation to the Lender for the purpose of obtaining approval from the Lender in connection with the sale of the listed property; and (d) contact the Lender's loss mitigation or similar department to obtain loan and/or lien status, account and payoff -related information; and (e) provide comparables, broker price opinions (information regarding comparable properties, general condition of the community and the condition of the Property in relation to the other properties in the community), MLS and other data documenting the current value of the Property; and (f) provide any and all mortgage and/or other lien account and payoff information to prospective buyers and/or their agent or brokers; and (g) coordinate visual inspection of the Property by authorized representative(s) of the Lender.

Listing Agreement Short Sale Addendum – 5 (b) requirement to pay deficiency

5. Seller acknowledges that: (a) Seller will not receive any net sales proceeds at closing and may be required by the lender to deposit own funds into escrow; and (b) sale of the Property is possible if the Lender agrees to take less than what was owed as a payoff and that the Lender may require the Seller to pay the difference of what was owed as a deficiency judgment; and (c) if Lender refuses to honor the approved discount(s) and closing is not possible, the Property could go to foreclosure; and (d) if the short sale is successful and there is no deficiency judgment, the discount received may become a taxable event to the Seller. Seller may also be taxed on gain in the value of the property from the date of Seller's purchase to the date of the sale. Seller is advised that other options, including but not limited to modification of the existing loan/lien, refinancing, bankruptcy, foreclosure or deed in lieu of foreclosure may be more appropriate than a short sale. Seller is advised to consult with the appropriate legal, tax and financial professionals.

Contract Short Sale Addendum – Lender sets terms for Seller obligation – no negotiation with Lender

1. Approval of the Lender: This Contract is contingent upon: (a) the Seller's lender(s) and/or other lien holder(s) (collectively the "Lender") approval of the purchase price, terms of the Contract and the HUD-1 settlement statement (b) the Lender's agreement to accept a payoff which is less than the balance due on the loan or other indebtedness and (c) the Lender's release and satisfaction of the mortgage(s) and/or other lien(s) upon receipt of discounted payoff. If Seller does not deliver written notice to Buyer that Lender has approved the purchase price and contract terms within _____ days from Effective Date ("Approval Deadline") (45 days if left blank), either party may within five (5) days thereafter cancel the Contract by delivering written notice to the other.

FAR Short Sale Document Practical Problems:

- No option for the seller to negotiate with the lien holders – or to reject a lien holder demand for payment of the loan in full under terms set by the lender.
- Notwithstanding the inability of the seller to perform under the lender demand, the seller is obligated to sell to the buyer and is obligated to pay the Realtor commissions if a qualified buyer is introduced to the seller and the lender(s) approve the contract between the seller and the buyer.

FAR Short Sale Document Solutions:

- Leave open in any “fix” language the ability for the seller to negotiate the terms of any repayment of all or a portion of the deficiency.
- If the seller and lender cannot come to an agreement – the seller should not be obligated to continue the sale.

Preliminary HUD-1 and Other Submission Documents

- Each lender has its own requirements for analyzing whether to accept a short sale or modification, but general parameters include:

Preliminary HUD-1 and Other Submission Documents

- If it is a sale: Preliminary HUD-1 – although this is “Preliminary” it should NOT be submitted without all known payments, including prorated real estate taxes and assessments, condo or HOA unpaid fees, closing costs and broker commissions, city liens, judgments and junior lienors IN FULL.

Preliminary HUD-1 and Other Submission Documents

- If it is a sale: Fully executed contract including Short Sale Addendum, Exclusive Listing Agreement from the Realtor with Short Sale Addendum, and any addenda, and financial qualification letter or loan commitment for the buyer.

Preliminary HUD-1 and Other Submission Documents – Short Sale or Modification

- Financial Statement for the seller along with last two months' credit card bills, W2's and other regular expenses and bank account statements, and last year's 1040.
- Don't take a position without supporting documentation to back it up!

Preliminary HUD-1 and Other Submission Documents

- Hardship letter from the seller explaining why the sale must occur as a short sale (loss of job and income, health, divorce, death, severely adjusted interest rate, etc).
- Ability to show that the actual income of the borrower is sufficient to service a modified amount of loan, which must be at least 100% of the market value of the home.

SHORT SALE APPROVAL LETTERS

- Lender approval documents usually include some sort of estoppel letter and can include a modification of the existing promissory note, or a new promissory note, or even a consent to judgment
- Whatever the letter is – *insist it be clear*
- Be sure the Seller gets a copy of the lender's letter and signs an acknowledgment they got the letter – AVOID problems at the closing table

Dear [REDACTED]

In response to your request for a sale of the above referenced property, for less than the total payoff of the property, America's Servicing Company hereby agrees to the short sale between [REDACTED], the seller(s), and [REDACTED] the buyer(s), and will release its lien, contingent upon the following terms:

1. With a purchase price of \$200,000.00 in which the required minimum net proceeds for ASC loan number [REDACTED] should be no less than \$162,404.51. The Settlement/Closing is scheduled on or before 12/26/08.
2. Any extension of the closing date requires the written approval of America's Servicing Company.
3. A copy of the HUD-1 Settlement Statement (preliminary) must be faxed to America's Servicing Company. This fax should be sent to 866-231-7960. Or Emailed to ASCClosingMilwaukee@WellsFargo.com. Do not close without an approved HUD from ASC.
4. **IN NO EVENT SHALL THE BORROWER RECEIVE ANY FUNDS FROM THE SALE OF THIS PROPERTY.** Any surplus funds above the agreed upon Short Sale purchase price at the time of closing is the exclusive property of America's Servicing Company and shall be made payable to America's Servicing Company. The mortgagor(s) also waive their rights to any escrowed funds or refunds from prepaid expenses.
5. The Following items are in agreement to be paid at closing:
 - 2nd lien-if applicable to receive \$5,000.00
 - Commission paid to be no more than \$8,000.00
 - Closing costs paid to be \$37,595.49
 - Any outstanding settlement costs to be paid by **SELLER(S), BUYER(S) OR AGENT(S)**

Upon satisfaction of all terms of this approval, the mortgage will be discharged and a release document will be forwarded for recording. If a foreclosure action was commenced against this property, then upon satisfaction of all terms of this approval, the pending foreclosure action will be dismissed and appropriate instruments recorded.

ALL REMITTANCES MUST BE MADE BY CASHIERS CHECK or CERTIFIED FUNDS, PAYABLE TO ASC, and shipped overnight to ASC at address below within 24 hours of closing:

ASC
11200 W. Parkland Avenue
Milwaukee, WI 53224
MAC # X0400-02M
Attn: ASC Liquidations

ASC is required by Fair Debt Collections Practices Act to inform you that if your loan is currently delinquent or in default, as your loan services, we will be attempting to collect a debt and any information obtained will be used for that purpose. However, if you have received a bankruptcy discharge, and the loan was not reaffirmed in the bankruptcy case, ASC will only exercise its right against the property and is not attempting any act to collect the discharged debt from you personally.

PLEASE NOTE: Should you require an extension on the closing, please email your request to ASCClosingMilwaukee@WellsFargo.com

Re: Short Sale Settlement and Agreement on: HELOC
Account No. [REDACTED]
Account Balance: \$ [REDACTED]
Property Address: [REDACTED]

In response to your request, please be advised that Bank of America has agreed to the following short payoff. The Bank of America has agreed to accept the amount of no less than \$3,200.00 from the proceeds of sale, on the subject property.

Upon receipt of the funds the bank will release the lien. The deficiency balance will be reported to the credit bureaus as "Charge Off" collectable balance. Liabilities for the deficiency balance to be determine.

This offer is contingent upon the following conditions being met.

1. That borrower (s) [REDACTED] sells the property
2. With no proceeds going the seller (s) [REDACTED]
3. Borrower(s) is aware that the liability for the deficiency balance is to be determined.
4. This offer is Null and Void after December 15, 2008
5. Lien Release to be prepared by the closing; Attorney, Title or Escrow Company; forwarding the document together with the settlement check to Bank of America, NA for notaring and recording.

Please remit certified funds or Wire to:

Bank of America Wire Instructions
ABA: 026008593 G/LA: 194200-0008880
Attn: Cheryl Orr, RMS Pmt Processing,

Please remit payment to:
Bank of America, NA
Attention: Michael Robles
Mail Code -CA 7 701 03 89
275 S. Valencia Avenue
Brea, CA, 92823

The Bank may be required by law to report this settlement to one or more taxing authorities. The Bank makes no representations about any tax consequences this settlement may have or any requirements, which may be imposed, on the Bank. You should consult independent tax counsel of your own choosing if you desire advice about any tax consequences, which may result from this settlement.

I agree to the terms stated in the above letter agreement.

[REDACTED]

Dear Borrower:

This letter will serve as Countrywide's demand for payment and advises you that Countrywide Home Loans and its Investors and/or Insurers have agreed to accept a short payoff involving the above-referenced property (the Short Sale transaction). This demand should be used by the closing agent as our formal demand statement. No additional statement will be issued. This approval is exclusive to the offer by the buyer referenced in this letter. The conditions of the approval are as follows.

1. Closing must take place no later than **December 24, 2008**, or this approval is **VOID**.
2. The approved buyer(s) is/are [REDACTED] and the sales price for the property is **\$260,000.00**.
3. Another buyer cannot be substituted without Countrywide's prior written approval in connection with this short sale.
4. Proceeds to Countrywide to be no less than **\$230,733.51**.
5. Total closing costs, including realtor's commission, not to exceed **\$29,266.49**. This figure includes **\$1,000.00 for second lien & \$3,000.00 for third lien**.
6. Termite reports and repair not to exceed **\$0.00**.
7. Realtors commission not to exceed **\$13,000.00**.
8. The property is being sold in "AS IS" condition. No repairs will be paid for out of the proceeds, unless specifically stated otherwise.
9. The Seller(s) is [REDACTED] Seller to contribute **\$0.00** to assist in the closing of this transaction. This contribution will be in the form of:

| | | |
|-----------------|----|----------|
| PROMISSORY NOTE | \$ | 0,000.00 |
| CASH | \$ | 0.00 |

If a promissory note is required, it must be signed and returned to Countrywide prior to the close of escrow. It is the responsibility of the closing agent to ensure that the promissory note is signed and returned to Countrywide.

If a promissory note has already been signed and agreed to between the seller, investor and the Mortgage Insurance Company, a signed, certified copy must be provided to Countrywide prior to the close of the short sale transaction. It is the responsibility of the closing agent to ensure that Countrywide receives the copy.

***** Sales proceeds will be returned if the note has not been received. This will result in a delay of the transaction and/or possible cancellation of this short sale transaction. *****

10. The sellers will not receive any proceeds from this short sale transaction. If there are any remaining escrow funds or refunds they will not be returned to the seller, they will be sent to Countrywide to offset the loss.
11. The property must be free and clear of liens and encumbrances other than the first mortgage and CC&Rs.
12. Countrywide does not charge statement, demand, recording and reconveyance fees on short payoff transactions. Do not include them in your settlement statement. Countrywide prepares and records their own reconveyances.
13. Countrywide or its investors will not pursue a deficiency judgment if the shortsale closes on the referenced loan. However, if a new Note is taken out for the remaining balance owed on the loan, we reserve the right to collect on this new Note pursuant to its terms. If the shortsale does not close, then the referenced loan secured by the Note and Security Instrument shall remain in full force and effect and we will pursue all remedies under the Note and Security Instrument.
14. Other: All funds must be wired. Any other form of payment of funds will be returned.
15. Other: Should the closing be delayed, and the Investor/Insurer agree to an extension of the original closing date, the Seller(s) will be responsible for non-refundable per diem through the new date(s) of closing, extension fees and foreclosure sale postponement fees. The Seller(s) will be responsible for any additional costs or fees over the aforementioned approved amounts \$13,000.00 (5.0%).
16. If the property was acquired by any means of fraud, [lender's name] reserves the right to pursue any and all actions available to it to offset its losses. If it is determined that Seller(s) and/or Buyer(s) participated in any way to the fraud, this short sale will be void, and the Note and Security Instrument will remain in full force and effect.
17. If the Seller(s) is entitled to receive any proceeds based on a claim for damage to the subject property under any policy of insurance, including homeowner's, lender-placed, casualty, fire, flood, etc., or if Seller(s) is entitled to receive other miscellaneous proceeds, as that term is defined in the Security Instrument (which could include CDBG grant funds), such proceeds must be disclosed before we will consider the request for short sale. If we receive a check for insurance or miscellaneous proceeds that were not previously disclosed, Countrywide will have the right to keep those proceeds and apply them to Countrywide's loss after the short sale. We similarly will have the right to claim those proceeds to offset our losses if they were not previously disclosed and they were sent directly to the Seller(s).

***** IMPORTANT INSTRUCTIONS *****

The closing agent must fax a copy of the final estimated Settlement Statement prior to Closing along with this signed approval letter. You cannot close without final approval of the closing

LENDER COUNTER-OFFER

- Lenders rarely make price counter-offers.
- Counter-offers are not commitments to approve the short sale under the counter-offer terms. The lender can still say no.



November 14, 2008

Attention: Aurora Levelady

RE: WAMU Loan Number:
PROPERTY ADDRESS:

008394444 (47221007)
[Redacted] Road
West Palm Beach FL 33405

Dear David Marshall ,

Please communicate the following COUNTER OFFER for the above stated property in regards to the closing costs and purchase price:

1) Purchase Price: \$235,000.00

The following contingencies MUST be included in the contract:

- a) "Offer is contingent upon investor and/or Lender's approval of compromise sale agreement."
- b) Property is sold "AS IS."

2) Closing costs which we will consider paying:

- Property Taxes until the closing date
- Owner's Title Policy
- County documentary transfer tax
- Escrow fee
- Drawing Deed
- Commission

Homeowner's Association Dues
Utility Bills
Conveyance fee

4) The following costs which we must have a complete breakdown of in order to review (or explanation of what the cost is):

Buyer's Closing Costs

This letter does not constitute approval or denial of the compromise sale. If these terms are acceptable, please FAX verification. I will also need a new seller's settlement statement /HUD-1 reflecting the changes I have made. The settlement worksheet must be ACCURATE. Please indicate when the closing can take place if we decide to approve the file at the next Management Committee Meeting. If the file is approved, the closing analyst will fax the approval letter to the closing attorney or Title Company within 48 hours. If you have any questions regarding this matter, please contact me at (866) 288-7383 Ext. [Redacted]. Please scan and email the updated sales contract and HUD-1 for review.

Sincerely,

[Redacted Signature]

Homeownership Preservation Team
Loan Workout Specialist
(866) 926- [Redacted] Ext. [Redacted]
[Redacted]@wamu.net

Wasting Time on Short Sales

- It takes an average of 3.8 buyer contracts before a property will actually close – why?
- IS THE OFFER LEGITIMATE? IS THE CONTRACT REAL?
 - Did Buyer make a legitimate deposit?
 - Is the Effective date before or after lender approval?
 - Subject to financing, is buyer really approved?
 - Is Buyer making multiple property offers?
 - Does Buyer know what to expect? Buyer educated on short sale process and time-line?
 - Is there sufficient time for approval by the lender?
 - Deposit at Risk – unilateral pull out by Buyer?

Wasting Time on Short Sales II

- Is your Buyer wanting the Seller to:
 - Use a Trust Agreement?
 - Use a Power of Attorney?
 - Use an Option Contract?
- These are all **RED FLAGS** to an investor buyer
- Is your Buyer intending to use a flipped buyer's funds to close on the property?

1099 and Short Sale Ordinary Income

- Whether or not a *lender* reports forgiven or canceled debt is **NOT** the trigger for the obligation of the taxpayer to include that forgiven debt on his or her income tax return in the year the debt was forgiven.
- Forgiven debt applies to short sales, foreclosure, deed in lieu, and modification!

FIRPTA and the Short Sale

FIRPTA requires that the “buyer” (inclusive) withhold 10% of the “**amount realized**” from property sale.

- “Foreign Seller” - Non-US citizen / non-US income tax resident

FIRPTA and the Short Sale

- Remember, the seller is not the lender - it is the owner of the real estate.

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