

BERENS, KOZUB & KLOBERDANZ, PLC
Attorneys at Law

7047 E. Greenway Parkway, Suite 140 · Scottsdale, Arizona 85254
Telephone (480) 624-2777 · Facsimile (480) 607-2215 · e-mail: wkozub@bkl-az.com

William A. Kozub, Esq.

June 9, 2008

Derek Jarr
Done Deal Solutions, LLC
1 (866) 601-5953

Re: Review of Business Model and Transaction Documents

Dear Derek:

I have reviewed your recent emails concerning the opposition you have been encountering with the structure of your business. It is clear from the emails I have reviewed that your business model, and specifically the use of a trust in the first leg of the real estate transactions, is causing concern to others in the real estate community. It is clear from the comments in the various emails I have reviewed that the criticisms arise from the fact that the use of trusts in real estate transactions over the past few years has often been a red flag of fraudulent behavior. Many of the criticisms also question whether whether you are providing proper disclosure.

Please allow this letter to do the following:

1. Explain to you the type of fraudulent real estate transactions that have been occurring over the past few years, and how trusts were involved in these fraudulent activities. It is my hope that this will allow you to better understand the origin of the opposition to your business model, as well as be able to explain to the sources of this opposition that your business model is different, is premised on full disclosure, and is simply not fraudulent.
2. Provide an analysis of the disclosure duties that exist between the various parties in this transaction. Because you have a complex business model, I anticipate many people will become confused on the issue of when does a duty of disclosure arise, and to whom is the disclosure duty owed.

Addressing this first question, and as explained below in greater detail, your business plan uses a trust that is fully disclosed to the homeowner and the short sale lender. The trust structure is protective of the homeowner until closing and is not used as a vehicle to deprive the homeowner of control of the property until a closing actually occurs. Through the trustee, the homeowner can terminate the transaction at any time prior to the close of escrow. There is simply nothing fraudulent in the use of the trust structure as disclosed in the transaction documents.

Concerning the second issue, while each transaction is different and will give rise to specific needs for disclosure that cannot be anticipated in advance, the transaction documents you are using do provide complete disclosure of the nature of the transaction, the structure of the transaction, and the risks to the homeowner. In addition, the documents make it clear to both the homeowner and the

short sale lender that you are purchasing the property for the express purpose of reselling for a profit.

HISTORICAL PERSPECTIVE

Prior to the current downturn in the real estate market, and most notably during the recent period of large appreciation, the real estate industry was presented with the problem of homeowners who had sizable equity in their homes being victimized by scam artists who engaged in real estate transactions designed to steal homeowner's equity. Over the past few years, successful scam artists stole the equity homeowners had built up in their homes. These predatory transactions often were conducted by individuals who marketed themselves as "foreclosure rescuers". Such individuals often made the marketing pitch that they could "stop foreclosure with just one phone call," or "provide instant debt relief and cash". The practice of engaging in fraudulent real estate practices aimed at acquiring a homeowner's equity became known as "equity skimming."

There were many methods of performing an equity skimming transaction. Regrettably for your business practice, many of these equity skimming transactions involved the use of a trust as a component in the fraudulent transaction. The result of this is that many real estate professionals will immediately become suspicious of any transaction involving a trust. While the use of trust is neither fraudulent or not, it has become "guilty by association."

Some foreclosure rescuers would lend money to homeowners but structure the lending transaction as a sale with a lease-back agreement. Others use a bait-and-switch scheme in which the homeowner facing foreclosure unknowingly signs documents that actually surrender home ownership. Both of these schemes often began with the homeowner transferring their home into a trust and the immediate and simultaneous assignment of the beneficial interest in the trust from the homeowner to an associate of the foreclosure rescuer scam artist. From the moment the trust was created and the beneficial interest in the trust transferred, the homeowner lost control of their home. The homeowner gives ownership to a trust, often bearing the name of the homeowner, and transferring the beneficial interest in the trust. This lack of control would generally prevent the homeowner from seeking any other remedy to their default. (I will address it further below, but keep in mind that your documents allow the seller in your transactions to retain the beneficial interest in the trust until closing, to retain the unilateral right to cancel the transaction at any time until the closing, and/or finally, to remove the home from the trust at any time prior to closing.)

Under this arrangement, the home would usually experience one of two fates. First, the home might not sell and the foreclosure rescue scam artist would not live up to promises made to cure the default. This would lead to the homeowner losing title, and thus losing all other opportunities to resolve their default prior to a foreclosure. Alternatively, the documents might provide for the sale of the property for less than the fair market value, the homeowner receives little or no money from the sale, and the foreclosure rescuers often forge documents to effectuate the transfer of ownership. The homeowner remains in the home as a renter with an option to repurchase it at a later date. The terms of the agreement are so onerous, however, that homeowners often default within a few months and are eventually evicted. The end result is that the homeowner loses both the home and all of its built-up equity.

Yet another form of foreclosure rescue scam was merely profit from the homeowner's financial crisis by charging an up-front fee to negotiate a deal with the lender by submitting a proposal to reduce the arrearage in mortgage payments, but the "negotiations" are so minimal that the homeowner could have easily done the same. These proposals usually raised the homeowner's monthly mortgage payment, yet the foreclosure rescuer often failed to verify whether the homeowner has sufficient income to make the payment. Homeowners who fall victim to this fraud were financially worse off for having paid a worthless fee, and still lose their homes.

While I could explain in greater detail how the various foreclosure rescue scams operate, I do not wish to make this letter a step by step instruction manual for how to commit real estate fraud. I believe it is merely important to note that each of the fraud schemes I have briefly described were often found to utilize a trust in an effort to obtain immediate and total control over the property. However, it is important to note that the use of a trust in a real estate transaction is not, in and of itself, inappropriate. It is merely a vehicle to accomplish a transaction. What is important is how the trust is used and whether the transaction in which it is used complies with the law. Regrettably, you will have to find a way to overcome the bias against trusts that has arisen as a result of the historical fraudulent conduct identified above. In my own experience I find that residential real estate agents are often limited in their comfort zone to the form documents used in their daily practice.

GENERAL DISCLOSURE CONCEPTS

Much of the criticism of your business models includes the allegation there is some type of failure to disclose in your business model. I have not been able to identify such a failure, and find that many of the emails that question your business practice simply do not accurately state the law of disclosure.

Seller's Duty to Disclose. It is true that Seller's of real property have an affirmative duty to disclose material facts to a buyer where:

1. Seller is in possession of material information concerning the transaction or the property being sold;
2. Disclosure is necessary to prevent a previous assertion from being a misrepresentation or from being fraudulent or material;
3. Disclosure would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if nondisclosure amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing;
4. Disclosure would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part;

5. The other person is entitled to know the fact because of a relationship of trust and confidence between them.

Real Estate Broker's Fiduciary Duty to Client. As a general matter, a real estate broker's liability to a buyer or seller is framed by the question, "Does the broker have a fiduciary relationship with the party"? If the broker is acting as the agent for a party, the broker owes that party a fiduciary obligation comprised of the duty of utmost good faith, integrity, honesty and loyalty, as well as the duty of due care and diligence.

More specifically, with some limitation, the law generally provides that a real estate broker must exercise reasonable care and diligence to effect a sale or purchase to the best advantage of the broker's principal. A real estate broker bears a duty to make a full, fair, and timely disclosure to the principal of all facts within the broker's knowledge which may fairly be deemed to be material to the transaction or to affect the principal's rights and interests. A broker is under a duty to disclose to his client information which he possesses pertaining to the transaction in question.

In addition, Restatement (Second) of Agency ' 381, at 182 (1958), provides as follows:

"Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person."

Disclosure Duties Outside a Fiduciary Duty or Contractual Duty. A seller has disclosure duties outside that of the buyer/seller relationship that arise from the following legal theories. In addition, even if a real estate broker has no fiduciary relationship with a particular party, the broker may have a duty of disclosure based upon one or more of the following legal theories and laws. In short, even when a seller or a broker have no special relationship such as a fiduciary relationship with a particular party, the seller or broker's liability arguably may be based upon one or more of the following legal theories and laws.

1. **Intentional misrepresentation.** A seller or broker may be liable to other parties in a transaction for making an intentional misrepresentation. The requirements for an intentional misrepresentation or fraud claim should be the same as the traditional requirements for such claims. Generally, a party must establish that the party's misrepresentation was intentionally made and material, and the party receiving the misrepresentation justifiably relied on the statement, suffering damages proximately caused by such misrepresentation. Generally, a party will also be liable for intentionally failing to disclose a material fact known to the party or for concealing the discovery of such a known fact.

2. **Negligent misrepresentation.** A seller or broker may be held liable for negligent misrepresentation to another for making a material misrepresentation to the other if the

seller or broker knows or reasonably should know that the statement is false, and the other party justifiably relies upon the false statement.

3. Material facts. Generally, the seller or broker is only required to disclose "material" facts to another party. A fact is "material" if it is one to which a reasonable person would attach importance in determining his or her choice of action in the transaction. A misrepresentation is material where it would be likely to affect the conduct of a reasonable man with reference to . . . the transaction in question. Obviously, the broker's duty of disclosure to a non-client must be viewed in light of the broker's fiduciary duty to the broker's client.

4. Expressions of value. Generally, absent a special duty imposed by law such as a fiduciary relationship, a misrepresentation must be one of a past or existing fact, rather than a statement of opinion such as value. Mere representations as to value are generally considered expressions of opinion and will not support a claim for fraud. This is significant in the arena of short sale transactions as the actual value of the property is often a matter of guess and estimation. Similarly, vague or indefinite statements are generally not actionable.

DISCLOSURE QUESTIONS ARISING FROM YOUR BUSINESS MODEL

Based upon these general principal so disclosure law, and applying them to the emails I have reviewed criticizing your business model, it appears that the issues of disclosure can be broken into the following questions:

Homeowner's Duties:

1. Duty of Homeowner to Disclose to Homeowner's Short Selling Lender.
2. Duty of Homeowner to Disclose to DDI.
3. Duty of Homeowner to Disclose to End Buyer.
4. Duty of Homeowner to Disclose to End Buyer's Lender.
5. Homeowner's Broker's Duty to Disclose.

DDI's Duties:

6. Duty of DDI to Disclose to the Short Sell Lender.
7. Duty of DDI to Disclose to the Homeowner
8. Duty of DDI to Disclose to End Buyer.
9. Duty of DDI to Disclose to End Buyer.

End Buyer's Duties:

10. End Buyer's Duties to Disclose to End Buyer's Lender.
11. End Buyer's Duties to Disclose to DDI.
12. End Buyer's Duties to Disclose to Homeowner and Homeowner's Short Selling Lender.

Duty of Homeowner to Disclose to Homeowner's Short Selling Lender. A common question in the emails that I have reviewed concerns the disclosures made by the homeowner to the short sale lender concerning the nature of the transaction, and specifically, the fact that you may be

selling the property soon after acquisition at a higher price. The fact that you are buying the property as an investment is expressly and clearly stated in the contract, and the contract is provided to the lender as part of this transaction. The Purchase Contract between the homeowner and you expressly states on the first page of the contract, in bold language, the following:

Seller acknowledges that Buyer is an investor and is purchasing the property with the intent of making a profit on its resale in a subsequent transaction.

In addition, the contract states the following, in bold language, on page 3:

Seller acknowledges that Seller will not pay a fee to Purchaser for the negotiation of a short sale transaction. Purchaser's only profit will come from the subsequent resale of the Property.

I do not know how to put this any more direct than this. The criticisms concerning an alleged lack of disclosure to the lender that you are an investor and will make a profit on the resale of the property are simply unfounded and without any merit. A lender simply cannot approve a short sale transaction without seeing the short sale contract, and the contract is clear on this issue. Significantly, this important disclosure is contained on the first page of the contract and not buried in boiler plate in the back of the document.

It should be noted that you, as the short sale buyer, do not have a duty to disclose any information to the lender as you have no relationship with the lender. However, a similar criticism to the one stated above is found in the emails. This is the assertion that the short selling lender will not go forward with the transaction without knowing what your ultimate transaction sales price, and thus profit, will be. Again, this is a criticism without merit. First, you have no legal duty to make this disclosure. In addition, at the time the short sale contract is submitted by the seller to the lender the ultimate resale price (and thus your profit) is not known by you, and is normally never known by the seller.

I caution you that there are times a duty to disclose to the lender on your part may arise. A seller's lender may condition their approval of a short sale on the disclosure of certain information. As discussed above, under these circumstances, a duty to disclose information to the short sale lender may come into existence. However, I have never seen this occur in a short sale transaction I have worked in and find this more of a theoretical possibility than an expected reality. Put simply, my experience is that lenders are agreeing to short sales based on the numbers in the short sale and the lender's weighing the pros and cons of the proposed transactions versus the cost of carrying the property.

One last point is the existence of the use of the trust in this transaction. These facts are disclosed in detail to the short sale lender. The purchase contract provides in numerous locations that a trust is being used and that the transaction is conditioned on the use of the trust. The contract expressly discloses at paragraph 7(B):

Purchaser and Seller acknowledge that this transaction is contingent upon Seller's creation of a trust naming the Seller as the initial beneficiary and in the form approved by Purchaser prior to the Close of Escrow (as defined below) (the "Seller's Trust"). Purchaser may cancel this Purchase Agreement by written notice to Seller if Purchaser does not, in Purchaser's sole discretion, approve of the form and content of the Seller's Trust.

The contract expressly discloses at paragraph 7(C):

After the formation of the Seller's Trust, and prior to the Close of Escrow, Seller will transfer title of the Property into the Seller's Trust by a General Warranty Deed in the form provided by the title company.

The contract expressly discloses at paragraph 7(D):

Close of Escrow shall occur on Seller(s) assigning Seller's beneficial interest in the Seller's Trust to Purchaser or Purchaser's assignee, and Purchaser's acceptance of same (the "Close of Escrow"). Upon delivery of the assignment of beneficial interest in the Seller's Trust, Seller shall relinquish and waive all right to the Seller's Trust and the trust property as defined in the Trust Agreement.

The contract expressly discloses at paragraph 7(E):

Seller acknowledges that the terms of the Seller's Trust are a material inducement to Purchaser proceeding to Close of Escrow, and that any changes in the form or terms of the Seller's Trust may defeat the Purchaser's purpose in this transaction. Accordingly, Purchaser may cancel this Contract by written notice to Seller if, following Purchaser's approval of the form and content of the Seller's Trust, there are any changes or modifications to the Seller's Trust.

Formally, the contract expressly discloses at paragraph 7(F):

Seller acknowledges that the trustee of the Seller's Trust will communicate directly with Seller's lender(s) and negotiate the short sale transaction. Seller agrees to cooperate with the Trustee of the Seller's Trust in accomplishing these negotiations.

As with the issue of your future profit from the resale of the property, every aspect of the creation, use and mechanic's of the trust structure is disclosed in writing in the purchase contract.

Duty of Homeowner to Disclose to DDI. The homeowner has a duty, as explained in the general disclosure section above, to disclose to you all material facts. There is nothing unique in your transaction with the homeowner that alters the traditional disclosure duties that already exist between the buyer and seller.

Duty of Homeowner to Disclose to End Buyer. The homeowner engaging the short sale transaction has no duty to disclose any information to your ultimate buyer as there is no relationship or legally recognized duty to do so.

Duty of Homeowner to Disclose to End Buyer's Lender. Again, the homeowner engaging in the short sale transaction has no duty to disclose any information to your ultimate buyer's lender as there is no relationship or legally recognized duty to do so.

Homeowner's Broker's Duty to Disclose. As explained above, a broker may have a duty of disclosure based on the specific information they learn. But disclosure concerning your future profit and the existence and use of the trust has already been made.

Duty of DDI to Disclose to the Short Sale Lender. The questions have been raised about your duty to disclose the nature of the transaction to the short sale lender as were raised with the duty of the homeowner. And as explained above in the section entitled "Duty of Homeowner to Disclose to Homeowner's Short Selling Lender", no duty exists by you to make any disclosure. Despite this lack of legal duty, the contract you use fully explains the nature of the transaction, the role the trust plays in the transaction, and the fact that you are buying the property with the intent to resell it for a yet unknown profit.

Duty of DDI to Disclose to the Homeowner. You have a duty to disclose material information to the seller. The most important disclosure is that you are an investor and are seeking to sell the property for a profit in a subsequent transaction. As explained above, this fact is disclosed in clear detail in the purchase contract.

The use of the trust and the manner in which the closing is to occur is also a material item that must be disclosed, and as discussed above, is disclosed in clear detail.

Duty of DDI to Disclose to End Buyer. You will have certain duties of disclosure with respect to the end buyer. While you do not have to disclose the price at which you purchased the property, you will need to make the disclosures that are customary to a residential sales transaction.

End Buyer's Duties to Disclose to End Buyer's Lender. The end buyer will have the normal and customary disclosures required of a borrower to a lender. However, many have asked if the end buyer must disclose the details of your purchase from the homeowner. As the end buyer does not have access to this information, such a disclosure duty does not exist.

End Buyer's Duties to Disclose to DDI. The end buyer generally has a duty to disclose to you any material information that will make the end buyer unable to perform. Your business model is irrelevant to the duties of disclosure owed by an end buyer to you.

End Buyer's Duties to Disclose to Homeowner and Homeowner's Short Selling Lender. The end buyer has no duty to disclose to either the selling homeowner or the selling homeowner's short sale lender.

CONCLUSION

Your business plan uses a trust that is fully disclosed to the homeowner and the short sale lender. The trust structure is protective of the homeowner until closing and is not used as a vehicle to deprive the homeowner of control of the property until a closing actually occurs. Through the trustee, the homeowner can terminate the transaction at any time prior to the close of escrow. There is simply nothing fraudulent in the use of the trust structure as disclosed in the transaction documents.

Finally, while each transaction is different and may give rise to specific needs for disclosure, the transaction documents you are using provide complete disclosure of the nature of the transaction, the structure of the transaction, the risks to the homeowner. In addition, the documents make it clear to both the homeowner and the short sale lender that you are purchasing the property for the express purpose of reselling for a profit.

Very truly yours,

BERENS, KOZUB & KLOBERDANZ, PLC

William A. Kozub, Esq.

WAK/cms
Enclosures