



# REPORT ON C.A.R. PROPOSED BUYER REPRESENTATION AGREEMENT

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ON BEHALF OF THE CONSUMER FEDERATION OF AMERICA

# Executive Summary

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Realtor groups across the country are in the process of redrafting their standard forms for real estate contracting in the wake of the National Association of Realtors settlement agreement (“NAR Settlement Agreement” or “NAR Settlement”).<sup>1</sup> The California Association of Realtors (“C.A.R.”), one of the largest trade associations in the United States with more than 180,000 members,<sup>2</sup> has recently released draft forms that are intended to become operative in the summer of 2024. One such form is the Buyer Representation and Broker Compensation Agreement (“Buyer Representation Agreement” or “Agreement”).<sup>3</sup> The Agreement outlines the scope and terms of the broker<sup>4</sup> /buyer representation agreement. The most important provisions of the Agreement concern how much a broker will be paid and by whom.

Part I of this Report analyzes the proposed Buyer Representation Agreement from a consumer protection standpoint—i.e., would a reasonable buyer reading this Agreement be able to understand its terms? It concludes that the answer is no. The Agreement is far too disorganized and complex for the average homebuyer to understand. There are many factors that impact the readability of the Agreement including: cramped text with no white space, inconsistent formatting, extensive cross referencing, grammar and syntax errors, lack of clarity in drafting, complex wording, and general overall clutter.

Part II of this Report looks specifically at the compensation provisions in the Buyer Representation Agreement. It identifies two major problems with the way the compensation provisions are structured. First, the compensation provisions are drafted in a way that disguises the obligation of the buyer to pay his agent. Second, the Agreement contains compensation provisions that telegraph how realtors plan to circumvent the NAR Settlement.

Part III of this Report flags other problematic provisions in the Buyer Representation Agreement that C.A.R. should work to revise and/or reconsider.

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<sup>1</sup> <https://www.realestatecommissionlitigation.com/admin/api/connectedapps.cms.extensions/asset?id=5fa6cf55-60a3-4473-8eb5-85ba512cfbe4&languageId=1033&inline=true>. The author acknowledges that this is a draft form and in a state of flux. Accordingly, section numbers referenced in this Report may not correspond to future drafts of the Agreement.

<sup>2</sup> <https://www.car.org/aboutus/mediacenter/newsreleases/2024-News-Releases/settlementopenletter>.

<sup>3</sup> Available at [https://balboateam.com/wp-content/uploads/2024/05/BRBC\\_6-2024\\_draftv8.1.pdf](https://balboateam.com/wp-content/uploads/2024/05/BRBC_6-2024_draftv8.1.pdf).

<sup>4</sup> Unless otherwise noted, the term broker and agent are used interchangeably.

# Part I: Reader Comprehension

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The proposed Buyer Representation Agreement is virtually unreadable. No layperson will be able to understand and appreciate the terms they are agreeing to. Factors such as odd formatting, an unintuitive numbering and lettering scheme, extensive cross-referencing, text density, and complicated and inconsistent language all detract from the document’s readability.<sup>5</sup> Below are some concrete examples of things that make the Agreement very difficult for an average consumer to understand.

## *Formatting and Cross-Referencing*

The Buyer Representation Agreement is a densely packed, almost 4,000-word contract. Two and a half pages of the document are pure text in what appears to be 10 or 11-point font. There is no white space between provisions. Sections appear to bleed into one another. The numbering and lettering schema is confusing, particularly in the chart on page 1.

There are 39 internal cross-references.<sup>6</sup> There are an additional 6 cross-references in the chart on page 1. And there are 15 cross-references to separate documents and attachments.<sup>7</sup> This amounts to a total of 60 cross-references. No buyer will ever be able to process information presented in this manner.

## *The Summary Chart*

The chart format used on page 1 of the Buyer Representation Agreement is peculiar and deviates from any semblance of a traditional contract. Formatting-wise, it is difficult to figure out what is going on. There are three “grayed out” areas: one for chart headings (underneath Section 2), one for the property to be acquired (Section 2.B.), and one for broker compensation (Section D). It is unclear what principle unites the three grayed out areas. There is also an unintuitive lettering scheme in the chart, which is presumably part of Section 2.<sup>8</sup> These letters are not presented in the same format as the rest of the document (with a period and indented). Seven sections in the chart contain cross-references to other sections of the Agreement.

Leaving aside the format of the chart, the bigger issue is that it is not clear to a buyer what the chart’s relationship is to the rest of the document. Section 2 of the Buyer Representation Agreement provides that the items in this paragraph (i.e., the chart) are

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<sup>5</sup> This is contrary to NAR guidance which provides “Format: Agreements should be organized, written in understandable terms for all parties, and use a clear, readable font size.” <https://www.nar.realtor/the-facts/written-buyer-agreements-101>.

<sup>6</sup> This number was derived by using a search for the word “paragraph.”

<sup>7</sup> This number was derived by using a search for the expression “C.A.R. Form.”

<sup>8</sup> The Buyer Representation Agreement refers to the sections as “paragraphs.” This Report, however, will use the term “Section.”

“contractual terms” of the Agreement.<sup>9</sup> It then states that “[r]eferenced paragraphs provide further information.” This may lead a buyer to believe that only *the chart itself* contains binding “contractual terms” and that the remainder of the document is just “further information.” In fact, Section 2 refers to “this form” being four pages, not “the contract” being four pages.

Overall, the chart is not a useful way to convey information. The lettering and cross-referencing make it difficult to follow. And the chart’s prominence and placement on the first page will likely discourage buyers from reading the entire 4-page document. Buyers will believe that the chart provides them with all the pertinent information and that the rest of the document is “fine print” that they do not need to bother with.<sup>10</sup>

### *Complicated Wording, Unclear Provisions, and Inaccurate Headings*

Certain provisions in the Buyer Representation Agreement are drafted in a way that would require a buyer to consult a lawyer to understand what they mean. For instance, Section 4.F. provides:

ACCOUNTING FOR PAYMENTS TO BROKER IF BROKER ALSO REPRESENTS SELLER: Notwithstanding paragraph 2D(2), if Broker has a listing agreement with the seller of the property to be purchased, no credit toward Buyer’s compensation obligation shall be given for the amount due Broker by seller for the compensation Broker is owed as the seller’s agent. Buyer will pay the amount in paragraph 2D(1), less any amount offered by Broker to buyer’s agents.

Including the heading, the word “Broker” is used six times in this provision, the word “seller” is used four times, and the word “Buyer” is used three times (the final time it is used, the word “buyer” is not capitalized). This sentence is virtually unreadable. What the section is attempting to say is that in the case of dual agency, the amount that a buyer owes his<sup>11</sup> broker is separate from what the seller owes that same broker. No buyer will

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<sup>9</sup> It does not make sense to refer to a chart as an item in a paragraph.

<sup>10</sup> This is eminently reasonable consumer behavior. Consumers have a limit for how much information they are able to understand and process. Shmuel I. Becher & Uri Benoliel, *Dark Contracts*, 64 B.C. L. REV. 55, 58 (2023) (“[C]onsumer standard form contracts repeatedly surprise consumers. To begin with, consumers are unaware of the contract’s content. Consumers do not read form contracts, which employ language beyond their literacy levels.” (footnotes omitted)); Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 863, 878 (2010) (“[C]onsumers have become accustomed to not reading contracts due to limited access, time, and ability to negotiate contract terms. Consumers generally assume that they lack power or contracting choices.”); Debra Pogrud Stark & Jessica M. Choplin, *A License To Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U.J.L. & BUS. 617, 655 (2009) (“Although . . . courts generally expect consumers to read and understand the contracts they sign and sometimes penalize the ‘negligent’ person for failing to do so, in reality . . . a large percentage of consumers do not carefully read the contracts they sign.”).

<sup>11</sup> For ease of readability, the term “his” is used instead of his/her/their.

understand this provision's meaning. And, in fact, the heading implies the opposite: that there *will be* "accounting for payments to broker if broker also represents seller."

This heading mismatch appears in other provisions of the Buyer Representation Agreement.

- The "Entire Agreement" clause is an amalgam of three different things: an entire agreement/merger clause, a severability clause, and a clause authorizing the execution of documents in counterparts.
- "Mediation Terms" don't refer to mediation terms, but to issues excluded from mediation.
- "Incorrect, Incomplete or Inaccurate Information" is actually an indemnification clause.
- "Buyer Material Issues" is a misleading heading for a provision that obligates a buyer to submit certain information to a broker in writing.

Certain provisions of the Buyer Representation Agreement are so unclear that a buyer will not understand how they operate. For example, consider the "Exclusive Representation" section in Section 14:

EXCLUSIVE REPRESENTATION: If "Exclusive" is checked in paragraph 2A(2) and initialed by Buyer here:

A. This Agreement shall be exclusive and irrevocable. Broker will devote time and resources to assist Buyer in finding and acquiring the Property in the expectation of being paid for Broker's services. Buyer shall not enter into another representation agreement in conflict with this Agreement.

B. COMPENSATION: Broker is entitled to compensation if Buyer acquires Property during the Representation Period with or without Broker Involvement, even if another broker is also entitled to be paid for representing Buyer.

C. CANCELLATION: 30-days written notice is required before either Buyer or Broker may unilaterally cancel this agreement. If, within 5 days after the effective date of the cancellation, Broker provides Buyer a list of properties for which there was Broker Involvement, Broker may still be entitled to compensation if Buyer purchases one of the properties on the list during the representation period or time specified in paragraph 2D(3).

There appears to be a conflict between section 14.A. which says the agreement is "irrevocable" and 14.C. which provides for "unilateral cancel[l]ation" with 30 days' notice. If an agreement is irrevocable, by definition, it cannot be cancelled. Assuming that the buyer is entitled to cancel and the use of the word "irrevocable" is in error, the commission owed by a buyer upon cancellation is not clear. Say the representation

agreement lasted for 90 days (the maximum). Shortly after entering into the agreement, the buyer cancels, giving 30-days' notice.<sup>12</sup> Is the buyer obligated to pay commission to the broker if he buys a property not shown to him by his realtor one and a half months later? Section 14.B. would seem to suggest yes. Section 14.C., however, may suggest no—i.e., that post-cancellation, the only properties for which a broker may seek commission are those that had broker involvement. In any event, it is not clear to a buyer reading this provision how far their obligation to pay commission extends.<sup>13</sup>

### *Awkwardly Drafted Provisions and Lack of Consistency in Language/Defined Terms/Structure*

Numerous provisions in the Buyer Representation Agreement are awkwardly drafted and contain grammatical and syntax errors. This is unacceptable given that this Agreement is intended to be the operative template for buyers' agreements in the State of California.

Examples of these sorts of provisions include the following:<sup>14</sup>

4.B.1. NON-EXCLUSIVE REPRESENTATION; BROKER INVOLVEMENT: Compensation is payable only if there was Broker Involvement with the Property. "Broker Involvement" means any of the following: . . . (v) the Property was introduced to Buyer by Broker or one for which [sic.] Broker acted on Buyer's behalf.

4.B.(3) BUYER INCLUDES any person or entity, other than Broker, related to Buyer [sic.] or who in any manner acts on Buyer's behalf to acquire Property described in paragraph 2B.

4.C. CONTINUATION OF RIGHT TO COMPENSATION FOR BROKER INVOLVED PROPERTIES: Broker shall be entitled to the compensation provided for in paragraph 2D(1) if, within the time specified in paragraph 2D(3) or if there is a cancellation, within that same amount of time [sic.] after the effective date of the cancellation in paragraph 2E, Buyer enters into an agreement to acquire Property for which there was Broker Involvement provided, prior to expiration of this Agreement or any extension thereof or, if there is a cancellation, within five (5) Days [sic.] after the effective date of the cancellation, Broker delivers Buyer a written

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<sup>12</sup> The legal rights and responsibilities of the parties during this 30-day period are unclear.

<sup>13</sup> Another confusing section is 7.A.-C. The section provides that "Buyer shall inform Broker in writing if Buyer has signed a representation agreement, whether exclusive or non-exclusive, with any other Broker for any Property described in paragraph 2B" but then states "Buyer acknowledges that for the Property identified in paragraph 2B, . . . Buyer: (i) has not entered into an exclusive representation agreement with another broker[.]" A buyer is unlikely to understand how it works if he signs multiple non-exclusive representation agreements.

<sup>14</sup> A correction and/or "sic." is included to denote the error.

notice of those properties for which there was Broker Involvement (C.A.R. Form NBIP).

4.H. DISCLOSURE OF ANTICIPATED PAYMENTS TO BROKER BY OTHERS:  
. . . (2) Broker, independently or through escrow, will disclose [to whom?] the final compensation Broker receives from anyone other than Buyer.

7.C. If Property is excluded in paragraph 2B(6), [sic.] Buyer acquires a Property during the time Buyer is obligated to compensate another broker, Broker is neither entitled to compensation under this Agreement, nor obligated to represent Buyer in such transaction . . .

8.B. If the Property contains residential property with one to four dwelling units, Broker will conduct a reasonably competent and diligent, visual inspection of the accessible areas of the one to four Property [sic.] (excluding any common areas) and disclose to Buyer all facts materially affecting the value or desirability of such Property that are revealed by this inspection.

9.A. GOOD FAITH. Buyer agrees: (i) to timely view and consider properties selected by Broker; (ii) [to] [sic.] negotiate in good faith to acquire a property; and (iii) Buyer further agrees [sic.] to act in good faith toward the completion of any contract entered into for a Property.

9.B.(2) This Buyer Representation Agreement is contingent upon either the seller, [sic.] agreeing in an accepted offer or counter offer [sic.] to pay Broker, or seller's broker agreeing in a separate document (C.A.R. Form CBC) to pay Buyer's Broker.

9.B.(1) Within the time specified in paragraph 2F, Buyer shall provide relevant personal and financial information, including, but not limited to, proof of funds needed to buy [Property? sic.] and to pay Broker, and a preapproval/prequalification letter, to Broker to assure [sic.] Buyer's ability to acquire Property.

9.E. BUYER MATERIAL ISSUES: Buyer shall notify or update Broker in writing (C.A.R. Form BIPP) of any material issue to Buyer for any property for which buyer makes an offer, or has already made an offer such as, but not limited to, Buyer requests for information on, or concerns regarding, any particular subject of interest or importance to Buyer. If Buyer does not provide such information for a specific property FOR WHICH [sic.] Buyer makes an offer, . . .

The Buyer Representation Agreement is not internally consistent in its use of defined terms (i.e., terms with a capital letter that are intended to have the same meaning throughout the document). Additionally, certain terms are used as defined terms but are never actually defined. And sometimes a synonym is used even though a defined term exists. For example:

- The expression “third-party” is sometimes hyphenated and sometimes not. “Third-party” or “Third Party” appears to be used interchangeably with the expression “Others,” but it is not clear why. *See, e.g.*, Sections 4.G. and H. (referring to “Third-Party Payments” and “Anticipated Payments . . . by Others”).
- “Broker Involvement” is a defined term, but the Agreement sometimes uses “Broker Involved,” which is not a defined term.
- “Mortgage Loan Broker” is not a defined term, but it is capitalized.
- “Day” is not a defined term, but it is capitalized.
- There are references to “Buyer,” “the Buyer” (*see, e.g.*, Section 9.B.(2)) and “buyer” (*see, e.g.*, Section 9.E.) when they refer to the same thing.
- “Manager” is not a defined term, but it is capitalized.
- “Agreement” (defined term) and “agreement” are used interchangeably.
- “Representation Period” (defined term) and “representation period” are used interchangeably.
- “Property” (defined term) and “property” are used interchangeably. The term is used generically to refer to all properties shown to/viewed by the buyer and the specific property that the buyer wishes to acquire.
- The term “Legally Authorized Signer” is not internally consistent.

There is also a lack of consistency<sup>15</sup> in the use of headings: some subsections have headings, while others do not. There does not seem to be any rhyme or reason to which subsections have headings and which do not. For instance, Section 7 is entitled “Properties Excluded from Representation” and contains subsections A (with subheading), B (without subheading), and C (without subheading).

#### *Clutter: Duplicative Provisions, Advisory Guidance, Permissive Provisions, Non-Contractual Provisions and Buyer-Specific Provisions*

The Buyer Representation Agreement contains a lot of clutter: duplicative provisions, “advisory” guidance to buyers, permissive provisions, provisions that appear not to be contractual in nature, and buyer-specific provisions. For instance:

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<sup>15</sup> The check boxes in various fields are also not consistent. For instance, there is no box for “Single family residential” property in Section 2.B.(1), and no box for the first compensation option in Section 2.D.(2) (even though there is a box for a virtually identical provision in Section 16).



### **Duplicative Provisions**

The Agreement contains three notices about commission being “negotiable” and two statements regarding the amount of compensation for the broker.

### **Advisory Guidance**

The Agreement contains four references to the buyer being “advised” of something.

### **Permissive Provisions**

An example of a permissive provision in the Buyer Representation Agreement is the latter part of Section 15: “This Agreement and any supplement, addendum or modification, including any photocopy, facsimile, or electronic, may be executed in counterparts.” Given that it is permissive (“may”), this section appears superfluous.

### **Non-Contractual Provisions**

An example of a non-contractual provision is Section 4.G. of the Buyer Representation Agreement, which provides:

THIRD-PARTY PAYMENTS LESS THAN BUYER COMPENSATION OBLIGATION: If Buyer owes Broker compensation, after first deducting payments due to Broker from third parties, Broker and Buyer should discuss the potential benefits and detriments of including a term in any offer Buyer makes obligating the seller to pay Broker, directly or through escrow, for any compensation that Buyer owes Broker.

There is no obligation here on either the part of the buyer or broker; instead, the provision simply states that the parties “should” discuss benefits and detriments in a certain situation. A provision like this is out of place in a contract. If anything, the broker should affirmatively undertake to inform the buyer of his options in the designated scenario.

Another seemingly non-contractual provision is section 6.B., “Possible Dual Agency With Seller.”<sup>16</sup> The section provides that a broker “may” act

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<sup>16</sup> It is strange to see a reference to potential dual agency in a buyer representation agreement. Even the National Association of Realtors recognizes that buyers may be “duped” into dual agency agreement. See <https://www.nar.realtor/magazine/real-estate-news/commentary/dual-agency-doesn-t-benefit-consumers> (“Unfortunately, many buyers and sellers are duped into dual agency transactions, stoked by the fact that, according to a recent survey by the Consumer Federation of America, most consumers are clueless about dual agency. There is a reason why consumers don’t have a clue about dual agency—the agent explaining it often isn’t up to speed on what they can and can’t do either. Putting an agency disclosure form from the local board and asking the client to sign it is not living up to your duties.”). By

as an agent for both a buyer and seller, but this is contingent (presumably) upon the broker “confirming the agency relationship” with both parties. This appears to be a non-binding “agreement to agree,” or even less than that. The provision is unclear on what happens if a buyer does not consent to his agent also representing a seller.

### Buyer-Specific Provisions

There are certain provisions in the Buyer Representation Agreement that will not apply to all buyers signing the Agreement. For example, there is a black box on page 4, Section 14, that will only apply to buyers seeking exclusive representation. Similarly, contractual provisions dealing with “Legally Authorized Signers” and “Entity Buyers” will only apply to a specific sub-set of buyers. Collectively, almost half a page is devoted to these buyer-specific provisions.

To be clear, there is nothing inherently wrong with these sorts of provisions appearing in a contract. But the Buyer Representation Agreement is made more complicated, lengthy, and cluttered by unnecessary provisions. This, in turn, detracts a buyer’s attention from the provisions that matter.

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Overall, the format, length, complexity, and overall unreadability of the Buyer Representation Agreement virtually guarantees that buyers will not understand what they are agreeing to when they sign this Agreement.

## Part II: Compensation Provisions

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The format, positioning, and wording of the Agreement’s compensation provisions specifically make the buyer’s payment obligations very difficult to understand. This is despite the California Association of Realtors’ claim that it “support[s] transparency in how buyer’s agents are compensated.”<sup>17</sup>

The provisions dealing with broker compensation are scattered throughout the Buyer Representation Agreement:

1. Section 2. D., D.(1), D.(2), D.(3)
2. Sections 4., 4.A., 4.B., 4.B.(1), (2), (3), 4.C., 4.D., 4.E., 4.F., 4.G., 4.H.(1), (2), (3)
3. Section 5
4. Section 7

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including a provision about “Possible Dual Agency,” this section primes the pump for the broker to later ask the buyer to sign a dual representation agreement.

<sup>17</sup> [https://www.car.org/aboutus/mediacenter/newsreleases/2024-News-Releases/settlementopen letter](https://www.car.org/aboutus/mediacenter/newsreleases/2024-News-Releases/settlementopen%20letter).

5. Section 9
6. Section 14.A., 14.B., 14.C.
7. Section 16

The amount or percentage of broker compensation appears in Section D.(1). It is listed as a percentage of the acquisition price (along with an optional additional amount), as a flat dollar rate, or pursuant to a separate compensation schedule.

Substantively, there are two main observations concerning the compensation provisions in the Buyer Representation Agreement.<sup>18</sup> First, the Buyer Representation Agreement downplays that it is *the buyer's* obligation to pay his own broker. And second, the compensation provisions telegraph how realtors plan to skirt the provisions of the NAR Settlement.

### *The Buyer Representation Agreement Underplays the Buyer's Obligation to Pay His Broker*

The Buyer Representation Agreement is structured to underplay that it is the buyer's obligation—and the buyer's obligation alone—to pay his broker. This is undoubtedly deliberate. Buyers are generally reluctant to sign agreements that commit them to paying any sum of money on top of what they need to pay to purchase a property.<sup>19</sup> To

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<sup>18</sup> There is an additional, albeit less significant, concern. The NAR Settlement Agreement “require[s] REALTORS® and REALTOR® MLS Participants to disclose to prospective sellers and buyers in conspicuous language that broker commissions are not set by law and *are fully negotiable.*” The Buyer Representation Agreement contains several references to negotiable commissions:

- 2.D. Broker Compensation: NOTICE: The amount or rate of real estate commissions is not fixed by law. They are set by each Broker individually and may be negotiable between Buyer and Broker (real estate commissions include all compensation and fees to Broker). See attached Broker Compensation Advisory (C.A.R. Form BCA).
4. COMPENSATION TO BROKER: Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each Broker individually and may be negotiable between Buyer and Broker (real estate commissions include all compensation and fees to Broker).
- 4.A. ADVISORY: Buyer has been advised that who compensates the Broker in a real estate transaction, and how much, is negotiable.

2.D. and 4. are duplicates of one another. They specify that commissions “may” be negotiable. The Settlement Agreement, on the other hand, requires that the language state that the commissions “are fully negotiable.” While perhaps a semantic difference, the language provides a signaling function for a prospective buyer. The expression “may” be negotiable suggests less willingness to negotiate than “are” fully negotiable.

<sup>19</sup> The following post on Reddit encapsulates the feeling that many prospective buyers have about signing a buyer representation agreement. [https://www.reddit.com/r/realtors/comments/1cih3ka/buyers\\_agent\\_commission\\_rules\\_hesitating\\_to\\_sign/](https://www.reddit.com/r/realtors/comments/1cih3ka/buyers_agent_commission_rules_hesitating_to_sign/) (“**Buyers agent commission rules - hesitating to sign a buyers agent agreement.** I am starting the process of buying my first home, I've been pre-approved with a mortgage broker and started talks with a buyers agent. The recent NARS lawsuit has me

get buyers to sign these agreements, the form needs to de-emphasize the fact that the buyer is on the hook for the payment.<sup>20</sup>

Accordingly, the Buyer Representation Agreement is deliberately murky on whose obligation it is to pay the buyer's agent. Nowhere in the agreement does it explicitly say anything like "Buyer agrees to pay x% of the purchase price to Buyer's agent." There is no bolded heading with the language "Buyer's Obligation to Compensate Broker."<sup>21</sup>

Instead, the language is more measured and almost always in the passive voice. For instance:

- 2.D.(2) **Payments from Third Parties** | Shall be credited against Buyer's obligation to pay Broker. . . .
- 4.B. Broker shall be entitled to compensation specified in paragraph 2D(1) from Buyer if during the Representation Period . . .
- 4.B.1. Compensation is payable only if there was Broker Involvement with the Property.
- 4.C. Broker shall be entitled to the compensation provided for in paragraph 2D(1) if, within the time specified in paragraph 2D(3) . . .

This passive voice drafting should be contrasted with other sections of the Buyer Representation Agreement that proactively spell out various buyer obligations:<sup>22</sup>

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a bit concerned with how my buyers agent commission is going to be paid. While I don't fully understand all the changes that will result from this lawsuit, my current understanding is that there is an increased potential that a Seller may choose not to cover the buyers agent commission, requiring me to pay that additional cost to my buyers agent at closing. While I understand the value of a buyers agent, and feel they deserve their compensation for work done - I'm hesitant to sign the buyers agent agreement for concern it could hinder me in buying a specific home where the owner opts not to pay their commission. I'm already trying to buy in a very difficult market, high home costs, high interest rates, lots of competition (despite the later), and if I were to find a home that fit my needs and they decided they didn't want to cover both agents commission it would be another barrier to the purchase. I'm hesitant to sign an agreement that locks me into paying that commission regardless of the agents contributions to a home sale. My agent is very nice, has not bee pressuring me to sign the agreement, and has agreed that this lawsuit causes some added stress - but I don't want to get myself into a tough spot.") (errors in original).

<sup>20</sup> Of course, the reality is that the seller will likely "cover" the commission in some way, shape or form. But the requirement for a buyer's agreement is, in part, to convey to the buyer that his agent is not "free" and to ensure that the buyer potentially has some financial skin in the game.

<sup>21</sup> The headings in the chart on the first page—which is probably the only thing a buyer will read—provide: "Amount of Compensation," "Payment from Third Parties," and "Continued Right to Payment for Broker Involved Properties." The compensation section, Section B, is entitled "Broker Right to Compensation." None of these headings telegraph to a buyer that it is the buyer's obligation to pay his agent.

<sup>22</sup> These are but a few of the provisions that proactively address the Buyer's obligations. For example, there are six references to "Buyer shall," five references to "Buyer agrees," one reference to "Buyer will," four references to "Buyer acknowledges," and two references to "[Buyer] assigns."

- 4.E. PAYMENT THROUGH ESCROW. *Buyer hereby irrevocably assigns to Broker the compensation provided for in this Agreement . . .*
- 9.A. OBLIGATIONS: A. GOOD FAITH: *Buyer agrees: (i) to timely view and consider properties selected by Broker; (ii) negotiate in good faith to acquire a property; and (iii) Buyer further agrees to act in good faith toward the completion of any contract entered into for a Property.*
- 9.C. REASONABLE CARE AND OTHER PROFESSIONAL ASSISTANCE: *Buyer is obligated, and agrees, to read all documents provided to Buyer. Buyer agrees to seek desired assistance from appropriate professionals, . . .*
- 9.D. REPORTS/INVESTIGATIONS: *Buyer agrees to pay for reports, Investigations and meetings arranged by Broker for Buyer.*
- 9.E. BUYER MATERIAL ISSUES: *Buyer shall notify or update Broker in writing (C.A.R. Form BIPP) of any material issue to Buyer for any property for which buyer makes an offer, . . .*

According to Ken Adams' *A Manual of Style for Contract Drafting*, "using the passive voice . . . obscures who the actor is."<sup>23</sup> In contracts, "the stakes are particularly high [and] the consequences of obscuring who the actor is can be drastic."<sup>24</sup> The Buyer Representation Agreement is drafted in such a way to "obscure" who the actor ultimately responsible for paying the agent's commission is.<sup>25</sup> Again, this makes sense if the goal is to get buyers to sign an agreement without fully understanding that they are ultimately undertaking to compensate their realtor.

### *The Buyer Representation Agreement Telegraphs How Brokers Plan to Circumvent the NAR Settlement Agreement*

The Buyer Representation Agreement broadcasts how brokers will attempt to circumvent the NAR Settlement: by entering into modified agreements<sup>26</sup> and by representing buyers "without sufficient funds" to pay a broker.

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<sup>23</sup> <https://www.adamsdrafting.com/the-passive-voice-has-its-uses-2/>.

<sup>24</sup> *Id.*

<sup>25</sup> This is also in contrast to the C.A.R.'s Proposed Residential Listing Agreement which makes it abundantly clear that "*Seller shall pay Broker as follows: . . .*" Section D.

<sup>26</sup> There is already talk of this on internet forums. *See, e.g.,* [https://www.reddit.com/r/realtors/comments/1bt643v/buyer\\_rep\\_agreement/](https://www.reddit.com/r/realtors/comments/1bt643v/buyer_rep_agreement/) ("Or I guess if you have a good relationship with the buyer, you can just call the LA see what, if anything, they sellers are offering and if it's more than what the buyers agreement says, cancel that agreement and write a new one with the higher number. Lol"); ("If seller is offering 3% and your agreement is 2%. I imagine if your offer was accepted you'd create an addendum to change it to 3%."); ("I'm from north carolina and you can update/amend a buyer agreement at any time. I suspect your state will create documents to cover these very scenarios."); ("The settlement makes it quite

## Modified Agreements

The Buyer Representation Agreement provides in Section 2.D.(2)(cross referenced with 4.F.-G.) that “Broker shall not receive any amount in excess of paragraph 2D(1) *unless that amount is modified in a subsequent written agreement* between Broker and Buyer at the time the overage amount is known.” (emphasis added). This is a clear attempt to get around the NAR Settlement provision that provides “a REALTOR® or Participant may not receive compensation for brokerage services from any source that exceeds the amount or rate agreed to in the agreement with the buyer[.]”<sup>27</sup> To allow a modified agreement to “bump up” the rate of compensation would be a breach of the NAR Settlement Agreement.

First, a modified agreement entered *after* an overage amount is known is not “the” agreement referred to in the NAR Settlement. The NAR Settlement Agreement contemplates that the compensation figure may not exceed that which is agreed to in “*the agreement with the buyer.*”<sup>28</sup> This refers to the agreement in Section H.58.(vi). that the realtor has already “enter[ed] into . . . before the buyer tours any home.”<sup>29</sup> By its plain terms, “the agreement” that provides the cap on compensation is the one entered into prior to the buyer touring the home, not a subsequently modified agreement. Indeed, the President of the California Association of Realtors recognized this when she issued a press release stating:

Homebuyers who want to work with an agent will need to sign a written agreement with that agent prior to touring a home. This means *before you start your home search*, you’ll need to discuss and agree with your agent what the agent will do on your behalf, and *you’ll need to decide how much and how to pay that agent.*<sup>30</sup>

The NAR Settlement terms cannot legally be circumvented by creating a separate agreement, after prospective compensation is known, to raise the level of compensation. If a modification (or addendum, supplement, rider or the like) were

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clear that the BBA must offer a set amount; no ranges, bonuses, etc. . . . However, contracts were made to be amended and it doesn’t say anything about that.”); (“So basically you can only get up to what you’ve agreed with your buyer. So if they agreed to 2% but seller is offering 3%... you are capped at the 2%. The extra % may go back to the LA or seller... depends in how their agreement is worded. Now if you’re able to amend the buyers agreement, then maybe you can get the higher amount.”); (“That’s exactly right. Amend or you’ve agreed to 2%.”). Anonymous internet forums such as Reddit may be the best place to find out what agents are doing and plan on doing. It stands to reason that people are more honest when they operate under the cloak of anonymity.

<sup>27</sup> See NAR Settlement Agreement, Section H.58.(vi)(c).

<sup>28</sup> *Id.* (emphasis added).

<sup>29</sup> *Id.*

<sup>30</sup> [https://www.car.org/-/media/CAR/Documents/Your%20CAR/NAR%20Litigation/CAR\\_OpenLetter\\_FINAL](https://www.car.org/-/media/CAR/Documents/Your%20CAR/NAR%20Litigation/CAR_OpenLetter_FINAL).

permitted, the settlement provision providing for a maximum level of compensation would be meaningless.

Second, the “bump up” agreement would run roughshod over the settlement provision that “the amount of compensation reflected must be objectively ascertainable and may not be open-ended (e.g., “buyer broker compensation shall be whatever amount the seller is offering to the buyer”)[.]”<sup>31</sup> What the Buyer Representation Agreement allows—albeit indirectly—is the agent to collect “whatever amount the seller is offering to the buyer.”<sup>32</sup> This can be easily accomplished by specifying a compensation rate of 0% to secure potential buyers who will be reluctant to enter into a buyer agreement that obligates them to pay any commissions.<sup>33</sup> The implicit understanding between the buyer and agent will be that a new agreement will be entered into after the seller’s promised rate of compensation is known. A buyer will be all too happy to sign the modified agreement after a guarantee of payment for the buyer’s agent has been secured.<sup>34</sup>

Leaving aside the NAR Settlement Agreement for the moment, it is unclear if a modified compensation agreement such as the one envisaged by the Buyer Representation Agreement would be legally binding. A modification of a contract at common law requires new consideration to be binding.<sup>35</sup> A unilateral change to the terms of compensation for work already performed and already required to be performed is not supported by adequate consideration.<sup>36</sup> The buyer’s agent has a pre-existing duty to represent the buyer in the transaction. He or she has agreed to do so at a rate of x%. Increasing the compensation of the agent with no corresponding additional consideration offered by the agent falls squarely under the rule that a modification

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<sup>31</sup> See NAR Settlement Agreement, Section H.58.(vi)(b).

<sup>32</sup> *Id.*

<sup>33</sup> [https://www.reddit.com/r/realtors/comments/1cih3ka/buyers\\_agent\\_commission\\_rules\\_hesitating\\_to\\_sign/](https://www.reddit.com/r/realtors/comments/1cih3ka/buyers_agent_commission_rules_hesitating_to_sign/) (“I once had someone do all their research and then sought me out to be their Buyer's Agent. The interview went great right up until we started discussing my fee. At that point they refused to sign anything with compensation in it. I explained that the contract would obligate me to work in their best interests even if it meant helping them buy a property with no Buyer Agent fee and that I needed to protect myself from working for months for free. Their response was, ‘I don't care if you get paid. I just know that I won't sign anything where I would have to pay you.’”).

<sup>34</sup> This will functionally be the same as the status quo in jurisdictions where buyer agreements are not required, and buyers and agents operate informally until a property is secured.

<sup>35</sup> 14A CAL. JUR. 3D CONTRACTS § 278 (“The general rule is that a contract for the modification of an existing written agreement, equally with other contracts, requires a consideration.”).

<sup>36</sup> RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981) (“Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration[.]”).

unsupported by consideration is not binding.<sup>37</sup> While it may be common practice to agree to such modifications, that does not make the modification legally enforceable.<sup>38</sup>

### **Buyers Without Funds to Compensate Broker**

The Buyer Representation Agreement specifies at Section 9.B.(1) that:

Within the time specified in paragraph 2F, Buyer shall provide relevant personal and financial information, including, but not limited to, proof of funds needed to buy and to pay Broker, and a preapproval/prequalification letter, to Broker to assure Buyer's ability to acquire Property. If Buyer fails to provide such information, or if Buyer does not qualify financially to acquire Property, then Broker may cancel this Agreement in writing.

Notably, if the buyer is not able to pay the agent's commission<sup>39</sup> or does not provide the required financial or personal information, the agent "may" cancel the agreement. This means, of course, that the agent may proceed with the Buyer Representation Agreement notwithstanding the buyer's inability to pay the commission or the buyer's failure to provide the requisite information.<sup>40</sup>

The Buyer Representation Agreement continues at Section 9.B.(2):

If either box is checked in paragraph 2F, for any Property for which Buyer writes an offer to purchase, Buyer authorizes Broker to include a term in Buyer's offer seeking payment from seller of Buyer's compensation obligation to Broker. This Buyer Representation Agreement is contingent upon either the seller, agreeing in an accepted offer or counter offer to pay Broker, or seller's broker agreeing in a separate document (C.A.R. Form CBC) to pay Buyer's Broker. If the purchase agreement does not include a

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<sup>37</sup> § 7:41. Promise to perform or performance of preexisting obligation other than debt as consideration; contractual preexisting duty rule—Promise to perform or performance of preexisting contractual duty as consideration for third party's promise, 3 WILLISTON ON CONTRACTS § 7:41 (4th ed.) ("Analytically, when a party has a contractual duty to perform a specified act, the performance or agreement to perform the act does not constitute a legal detriment, since the actor had a preexisting legal duty to perform the act, and the performance or agreement to perform the act cannot, therefore, constitute consideration for any promise made by a third party. Likewise, if instead of performing, the party previously bound promises to perform what it has already undertaken, its promise does not constitute a detriment.").

<sup>38</sup> Unfortunately, these modifications fly below the radar since the only parties that would have standing to challenge the modification are the parties to the modification itself.

<sup>39</sup> The phrasing here is unusual. The provision permits a broker to terminate the contract if the buyer does not qualify financially to acquire the property—not to permit the broker to terminate if the buyer does not have funds to pay the broker.

<sup>40</sup> In the current draft of the Buyer Representation Agreement, this provision also applies to Veterans Affairs (VA) loans (See Section 2.F.). The VA has recently signaled that it will suspend the ban on buyer agent compensation in VA loans. See <https://www.nar.realtor/magazine/real-estate-news/veterans-affairs-signals-temporary-suspension-of-buyer-agent-payment-ban>. Accordingly, this section will likely disappear from subsequent forms.



term obligating seller to pay Broker, and Broker is unable to reach an agreement with the seller's broker to be paid, Broker is not obligated to represent the Buyer and may terminate any agency relationship related to that purchase.<sup>41</sup>

Thus, in cases where the buyer “does not have sufficient funds to pay Broker,” the buyer automatically authorizes the broker to seek compensation from the seller. It is not clear how this section interfaces with the “Amount of Compensation” designated in D.(1). Section 9.B. refers generically to the “Buyer’s compensation obligation to Broker” but does not specifically reference section D.(1). It is not clear whether D.(1) must be filled out in cases where the broker is proceeding with a buyer referenced in 2.F.

In any event, this section represents another way that agents can violate at least the spirit of the NAR Settlement. Instead of having a buyer commit to paying an agent’s compensation, the agent can sign clients that may “not have sufficient funds” to pay the broker and then proceed under an alternate route: finding a seller who will agree to pay the agent’s compensation. A buyer will be much more comfortable signing an agreement with box checked that he “does not have sufficient funds to pay Broker” than he would be signing an agreement to pay x% to his realtor.

## Part III: Other Problematic Provisions

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The focus on this Report has been on the compensation provisions of the Buyer Representation Agreement—and, in particular, how they may run afoul of the NAR Settlement. This focus should not detract, however, from other problematic terms in the Agreement. These include:

1. **Dispute Resolution (Section 12).** It is unclear why the Representation Agreement mandates mediation as a form of dispute resolution. By definition, mediation is a non-binding form of dispute resolution. If a consumer is obligated to mediate *before* pursuing litigation or arbitration, this simply delays resolution of the dispute and adds to legal fees. Moreover, it is not clear how mediation is supposed to work: How is the mediator chosen? What rules govern mediation? If a buyer does not first attempt to mediate a dispute, the Representation Agreement provides he will be liable for attorneys’ fees in the underlying action if he is the losing party.

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<sup>41</sup> Part of this provision is nonsensical: “This Buyer Representation Agreement is contingent upon either the seller, agreeing in an accepted offer or counter offer to pay Broker, or seller’s broker agreeing in a separate document (C.A.R. Form CBC) to pay Buyer’s Broker.” Presumably, what is meant is that the broker’s obligations to continue performing under the agreement are contingent upon certain conditions, not that the entire contract (which is already being performed) is contingent upon these conditions.

2. **Dual Agency (Section 6.B.):** This section states that a broker “may” act as an agent for both a buyer and a seller. It is not clear what this means. Is the buyer pre-authorizing a dual agency situation? The section then states that the broker will, in writing, “confirm” the agency relationship. Again, the section is opaque. Does the buyer need to agree—at this point in time—to dual agency status? Or is the buyer *already agreeing*, in the Representation Agreement, to dual agency? All this information in the Agreement about dual agency status may serve to normalize dual agency in the mind of the buyer (provided, of course, he reads and understand the provision).
3. **Commission Owed in the Absence of a Sale (Section 4.B.):** An additional area of concern is the provision that commission is due even when an actual purchase is not consummated. A buyer who breaches a contract will likely forfeit their earnest money deposit.<sup>42</sup> A buyer would not contemplate that, on top of forfeiting his deposit, he would also owe his broker a commission for a property that he did not purchase. Moreover, this provision would mean that a broker could collect two different commissions from the buyer: one for the failed transaction and one for a subsequent successful transaction.
4. **Commission Owed from Damages Award (Section 4.B.):** In a related vein, if a buyer sues a seller for breach of contract and recovers damages, he will owe his broker the full commission on the failed transaction—up to half of the net recovery. For instance, say a buyer recovers \$100,000 in damages from the seller. Assume further that the buyer owes \$30,000 in legal fees and expenses. This nets the buyer \$70,000. Up to half of that will now go to the broker (\$35,000) (assuming the commission on the original failed transaction was \$35,000 or higher). This means that a buyer who successfully litigated a claim for breach of contract and won \$100,000 would only take home \$35,000. This is a clear disincentive to a buyer pursuing a breach of contract action against a seller.

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<sup>42</sup> See generally Tanya J. Monestier, *Fixer Upper: Buyer Deposits in Residential Real Estate Transactions*, 80 OHIO ST. L. J. 1149 (2019).

5. **Broker Abandoning Buyer Mid-Transaction (Section 9.B.(2)):** There is the very real possibility that brokers will represent buyers who do “not have sufficient funds to pay Broker” and then bail on them mid-offer if the broker cannot “reach an agreement with the seller’s broker to be paid.” Logistically, the section is nebulous on the actual mechanics of the request for compensation. Will a buyer’s broker be able to write an offer that is contingent upon the seller paying the buyer’s broker?<sup>43</sup> How does a buyer broker navigate their fiduciary obligation in this respect? If a seller agrees to accept the buyer’s offer (minus the compensation to the broker), where does this leave the buyer? A prospective buyer will not contemplate that his agent would or could abandon him mid-offer or mid-purchase agreement.
6. **30 Days’ Notice to Cancel Exclusive Agreement:** It is likely that a number of buyers will sign an “Exclusive Representation Agreement” whereby they deal solely with one agent. With an exclusive agreement, the buyer is obligated to give 30-days’ written notice to terminate the relationship. It is not clear why such a lengthy amount of notice is required. Given that the entire relationship can only last 3 months, a 30-day notice period is unduly lengthy. It forces a buyer to work with an agent he doesn’t want to work with and to compensate him for any transactions entered into during this 30-day period (even if the property was not “Broker Involved”). This just seems like a way to extend the representation agreement against the wishes of the buyer.
7. **Management Approval (Section 11):** Where an agent signs the contract on behalf of the broker, the brokerage has five days to cancel the agreement.

## Conclusion

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Much confusion abounds over the NAR settlement and the future of real estate contracting in the United States. The proposed Buyer Representation Agreement does little to dispel the confusion. Most homebuyers reading this agreement will not fully appreciate what they are signing and will not understand that they have agreed to pay their agent’s commission. The soft language in the Agreement concerning the broker’s “right to compensation,” coupled with multiple references to “third-parties” or “others” paying the commission, will communicate to buyers that they are not ultimately responsible for paying their broker’s commission.

On an equally concerning note, the Buyer Representation Agreement plainly broadcasts how realtors are going to create a “work around” so that the compensation amount agreed to in the Buyer Compensation Agreement does not actually serve as a cap on

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<sup>43</sup> The section states that “Buyer authorizes Broker to include a term in Buyer’s offer seeking payment from seller of Buyer’s compensation obligation to Broker.”

compensation: by modifying their representation agreements after they know how much a seller is offering in compensation. It will not be difficult to secure a buyer's signature on a modified agreement after an overage amount is known. At this point, the buyer does not view it as "their" money; what do they care if their agent gets more money from the seller? A more subtle way that realtors may flout the NAR Settlement Agreement is by checking the box that the buyer "does not have sufficient funds to pay broker" and then proceeding under a separate path that leads to compensation provisions buried in Section 9.

It is recommended that the Agreement be jettisoned in its entirety and that the California Association of Realtors truly pursue a buyer-friendly agreement that enables everyday people to understand their rights and obligations. Additionally, the purported workarounds of the NAR Settlement should be scrutinized more carefully; as they stand, they will most certainly invite additional litigation.

# About the Author

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Tanya Monestier joined the University at Buffalo Faculty of Law in July 2022 as a Professor of Law. She teaches Contracts, Sales, and Conflict of Laws. Monestier's work has been published in leading academic journals including *Wisconsin Law Review*, *Cornell Law Review*, *Boston University Law Review*, *Cardozo Law Review*, *American University Law Review*, *Hastings Law Journal*, *UC Davis Law Review*, and the *Ohio State Law Journal*. Monestier's academic work has been cited by numerous trial and appellate courts, including by the Supreme Court of Canada, the Second Circuit Court of Appeals, the Ninth Circuit Court of Appeals, and dozens of federal and state courts. Her amicus brief was recently quoted by the United States Supreme Court in *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2054 (2023) (Justice Alito, concurring). She is a Staff Editor for the *American Business Law Journal*.

Monestier has written articles in the areas of real estate and consumer protection. Her article, *Fixer Upper: Buyer Deposits in Residential Real Estate Transactions*, 80 OHIO ST. L. J. 1149 (2019) argues that buyer deposits often operate as unlawful penalties. The article is cited in a leading Property Law case book. Monestier's follow-up article, *Cake-and-Eat-It-Too* clauses was recently published in the *Wisconsin Law Review* (*Cake-And-Eat-It-Too Clauses*, 2024 WISC. L. R. 87 (2024)).

Monestier graduated first in her class from Osgoode Hall Law School in Toronto, Canada. She clerked for the Honorable Justice Frank Iacobucci at the Supreme Court of Canada. Monestier then earned an LL.M. from Cambridge University, graduating with first class honors and receiving a specialty designation in Commercial Law. Prior to entering academia, she practiced in-house at a pharmaceutical company, specializing in class action litigation.

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