

Edward Zorn

From: Edward Zorn
Sent: Tuesday, December 3, 2024 2:59 PM
To: Robert Reffkin; Art Carter
Cc: Brad Serwin; Ashton Alexander; Kathy Mehringer; Jonathan Satz
Subject: RE: Request for CRMLS Action on Clear Cooperation

Mr. Reffkin,

The CRMLS Board of Directors convened on November 25, 2024, to discuss Mandatory Cooperation issues as part of their agenda.

Your e-mail of November 6th, along with correspondence from other brokers and public statements made by other CRMLS brokers on the subject, was provided to the Directors in advance of the meeting. Additionally, your correspondence from November 24th and the full 1000Watt report, which was referenced in that letter, was shared with the Directors prior to the start of our regularly scheduled board meeting.

Kathy Mehringer, the Designated Officer for Compass in the state of California and as a CRMLS Director, attended the November 25th meeting. Mrs. Mehringer was afforded the opportunity to fully participate in the discussion surrounding Mandatory Cooperation.

The Directors, with input from CRMLS executives, engaged in a productive discussion regarding the Mandatory Cooperation issues. We reviewed the history of mandatory submission to the MLS, the challenges that ultimately led to NAR mandating the Clear Cooperation Policy (CCP) and examined its impact. Notably, the CCP has resulted in approximately 750 listings being added into the CRMLS system, making them accessible to buyer's and their chosen agents.

We also discussed the issues and concerns raised not only by Compass, but also other points that have been raised since the original debate and implementation of the CCP. Additionally, we highlighted how the specific CRMLS rule implementing the CCP mitigates any seller choice objections, and emphasized other long-standing options to protect seller privacy, such as the "Internet No" option.

The Board then convened into an Executive Session to address the points made in your letter, potential litigation risks associated with removing the policy, and to receive legal advice surrounding Mandatory Cooperation. Kathy Mehringer, as Compass' Designated Officer, appropriately recused herself from the litigation-focused discussions due to the clear conflict of interest.

After further discussion with Counsel, and consideration of the materials provided to the Board, and the consideration of all comments and discussion from the open session, the CRMLS Board of Directors voted unanimously to deny Compass' requests for CRMLS to:

- 1) Violate the mandatory NAR Clear Cooperation Policy;**
- 2) Establish a new status that intentionally misrepresents and conceals relevant property information from buyers; and**

3) Create a private listing network that would withhold available properties from unrepresented consumers, potentially raising a different set of potential legal issues for CRMLS.

CRMLS rejects Compass' requests on the following grounds:

- 1) **CRMLS is not a listing platform; it is a Broker Cooperative.** As a broker cooperative, CRMLS has the right to develop business practices that support brokers and their clients, including implementing policies, rules, and processes that benefit buyers, buyer agents, sellers, and listing agents.

Unlike a listing platform, which functions solely as an advertising tool for sellers, a broker cooperative needs to provide meaningful services to all of its subscribers, their clients and other stakeholders. While listing platforms are valuable and some of our best customers, they do not establish rules, policies, or systems to facilitate cooperation between agents. Instead, they focus on advertising properties for sale and offer historical information.

CRMLS, as a Broker Cooperative, operates in a much broader and more dynamic space, addressing diverse interests and needs far beyond those of a simple advertising listing platform. Moreover, as a Broker Cooperative, CRMLS needs to establish certain rules that all firms abide by in order for all of the firms to receive the maximum benefit from the services offered by CRMLS and cannot have certain firms free-ride off of the efforts of the other participating firms.

- 2) **Failing to adhere to mandatory NAR policy risks the revocation of the charter for each of the 41 participating Realtor Associations that are the Members of CRMLS, a California Mutual Benefit Corporation.** CRMLS has no shareholders or owners and is governed by our Member Associations.

The desire of a single, market-impacting brokerage firm to withhold exclusive listings from the buying community – using those listings essentially as a billboard to attract buyer traffic and force agents to join that brokerage- fails to justify jeopardizing the existence of these 41 Member Realtor Association charters.

- 3) **Sellers who choose to hire a real estate agent and market their property without using the MLS are fully permitted to do so under current CRMLS Rules.** Any CRMLS subscriber, including Compass agents, who enter into a non-exclusive listing agreement with such a seller are not subject to the CCP rules mandating submission of the listing to the MLS.

CRMLS Rule 7.9, Mandatory Submission upon Marketing, applies only to properties that are “subject to any exclusive right to sell or seller reserved listing agreement”. During CRMLS webinars held in Spring of 2020 for CCP training and implementation, we consistently addressed hypothetical scenarios, such as extremely-high-value property that might not benefit from broad MLS exposure because only approximately 20 agents had buyers capable of affording such a property. CRMLS specifically instructed agents in these scenarios that they could market such properties publicly and, in any manner desired by the seller and listing agent, including signage on the property, Facebook posts, website marketing, flyers or individual conversations with other brokerage firms that represented the types of buyers that could acquire such a high-priced home by simply using a non-exclusive listing agreement.

Exclusive listing agreements are critical to protecting the interests of listing firms when a property is placed in the multiple listing service and made available for cooperation with competing brokerage firms. These agreements ensure the listing firm will get paid, even if it does not directly bring in the

eventual buyer. This incentive to share the listing broadly by the listing firm directly benefits the seller.

Outside the MLS, where mandatory cooperation does not apply, sellers receive minimal to no benefits from an exclusive listing agreement. In fact, such agreements can be detrimental to the seller, as they give the listing firm complete control over the property's information and access, potentially excluding other brokers who may have qualified buyers. Listing brokerage firms, leveraging their superior knowledge, experience and salesmanship can easily convince sellers to sign an exclusive agreement, guaranteeing the firm's top line commission even if the listing firm refuses to cooperate with other brokers or provides minimal or no service in the event of a sale.

Any competent agent can effectively use the terms of a non-exclusive listing agreement to meet the needs of a seller who prefers not to have their property widely disseminated through the MLS and its corresponding IDX distribution systems. This approach is particularly relevant for high-value properties, where it is common for showings to require signed non-disclosure agreements (NDA) to ensure privacy and facilitate the exchange of proof of funds between buyers and sellers. NDAs can easily include provisions to protect the listing firm's commission rights by preventing a buyer broker from bypassing the listing firm and negotiating directly with the seller.

Additionally, non-exclusive listing agreements can be structured to include two separate and distinct fee components:

1. Buyer Introduction Fee: A fee charged only if the listing firm's efforts resulted in the buyer making an offer on the property. This fee would not apply if the buyer came to the transaction without any involvement from the listing firm.

2. Brokerage Service Fee: A fee for the professional services provided by the listing firm, such as list price recommendations, analyzing offers, negotiating contracts, preparing disclosures and due diligence documents, coordinating property inspections and appraisals, and managing all closing documentation.

By separating the fees into two distinct components, the listing firm ensures they are compensated for the services rendered, regardless of whether they find a buyer. The only risk to the listing firm in using a non-exclusive agreement is forgoing the fee for introducing a buyer if they are not the ones who brought the buyer to the transaction. Every rational, knowledgeable seller that does not want to place their home on the MLS would select this type of a listing arrangement over an exclusive listing agreement given the choice.

A basic understanding of real estate contract law, combined with the ability to address the specific needs of sellers that may not require their property to be listed in the MLS, is fully supported under the existing CRMLS rules, policies, and available technology.

In summary, CRMLS rules already permit any seller to hire any CRMLS agent using a non-exclusive listing agreement and still retain the flexibility to publicly market their property while keeping that property off the MLS.

- 4) **CRMLS will not be a participant in any agreement, plan, or scheme to intentionally misrepresent or withhold critical information about a property's listing history and number of days it has been available for sale,** as Compass has requested. If showings are permitted for a Coming Soon listing, what

would distinguish the Coming Soon status from an Active status? This request appears to misrepresent the actual number of days it took for a listing agent to sell a property.

In addition, agreeing to this request could subject CRMLS to significant liability, as Compass's proposed misrepresentations could harm buyers who might overpay for properties with inaccurately reported Days on Market (DOM). It could also mislead sellers into hiring listing agents who claim to have shorter average marketing times than they actually do.

For example, when a Compass agent conducts a listing presentation and advertises their individual average DOM to potential sellers, are they using DOM data from the MLS? It is reasonable to assume that Compass agents using the Office Exclusive strategy may not accurately calculate DOM from the start of the listing period through to the sale, instead presenting misleading metrics. Given Compass's threats to litigate, these issues could be thoroughly examined in detail, including the accuracy of Compass agents' DOM claims during listing presentations. CRMLS remains committed to transparency and accuracy in the data we provide to ensure fairness and integrity across the market.

- 5) **CRMLS will not support, nor participate in an agreement, plan or scheme to hide available properties that are for sale from potential buyers who choose not to hire a real estate agent,** as Compass has requested. The long-established rules governing the IDX policy were established as part of a settlement agreement reached between NAR and the Department of Justice, which emphasized the importance of ensuring consumers have the same access and knowledge to available property listings as subscribing agents have in the MLS.

Compass' proposal to exclude certain properties from IDX feeds, thereby withholding them from unrepresented buyers, would expose CRMLS to potential litigation from consumer advocacy groups and plaintiffs' attorneys. A buyer who decides not to pay the costs or fees associated with hiring a buyer's agent is entitled to full and fair access to every property available for sale, across the same platforms, and websites that are accessible to represented buyers.

CRMLS recognizes the motivation behind a market-impacting brokerage firm seeking to force buyers to find properties exclusively on that broker's own website. Such a strategy would also benefit the brokerage by pressuring buyer agents from competing firms to leave their current brokerages and join the firm controlling the hidden inventory. However, CRMLS cannot implement rules that favor a particular business model at the expense of others, especially when it causes direct harm to potential buyers, as well as sellers whose properties languish on the market longer than necessary. Adopting such rules could subject CRMLS to potential significant antitrust liability, compromising the principles of fairness and competition that guide our operations.

CRMLS is guided by the principles of fairness, equal access to accurate information, and the spirit of competition between brokerage firms. Moreover, CRMLS is business model agnostic and will not implement rules which favor one business model over others. These guiding ideals ensure that CRMLS implements policies and rules that support fair competition in the provisioning of brokerage services, rather than favoring any specific business model or a market-impacting brokerage firm.

Brokers should compete for clients based on the level of their skill, experience, pricing, services and successful results in the representation of buyers and sellers. Buyers, and their agents, should not be forced to join only the largest brokerage firms simply because those firms withhold available properties

from the general marketplace. Brokerage firms should have confidence in their skills, abilities and service levels without relying on exclusive control of listings to force others to use their services.

Why is Compass afraid to compete in an open marketplace where all consumers, and the brokers they choose to hire, have fair and full access to all properties?

- 6) **CRMLS will not establish a Private Listing Network that is only accessible to CRMLS subscribers**, as Compass has requested. Such a system would clearly disadvantage consumers who choose to not work with a real estate agent, as they would have no access to the listed inventory. The only way for these buyers to view available for sale properties would be to hire a CRMLS subscriber real estate agent. The issue of an MLS making rules that force consumers to use a real estate agent has been extensively litigated, and implementing such a policy could expose CRMLS to significant antitrust liability.
- 7) **Finally, CRMLS will not create rules or eliminate rules which put it at a competitive disadvantage**, as Compass has requested. CRMLS' coverage area includes other MLSs which also include the CCP in their rules and regulations. If CRMLS elects to eliminate this rule, while the other MLSs include it, CRMLS risks severe participant loss to those MLSs which continue to adhere to the CCP. Eliminating CCP risks putting CRMLS at a severe competitive disadvantage and creates risks to the integrity of CRMLS' data. CCP reinforces CRMLS as the "best source of truth for listing data"—something which you tout as important to the vitality of a strong and vibrant MLS.

While there are additional reasons to deny Compass's requests, the points summarized above address the primary concerns and explain why CRMLS cannot implement rules that would clearly expose the organization to potential liability and harm both CRMLS subscribers and consumers.

I would also like to briefly address the threats of litigation, particularly the claim that individual CRMLS Directors could be held personally liable for antitrust violations. It is clear that Compass included this threat in an attempt to instill fear in the individual Directors, hoping to sway votes toward protecting personal interests rather than acting in the best interests of CRMLS.

However, Compass's scheme failed. Each Director saw through this attempt, characterizing the threat as "desperate", "a fit-throwing tactic", and "embarrassing for Compass". The Directors viewed Compass' fearmongering as an indication of the obvious weakness in Compass' arguments. CRMLS, along with each individual Director, remains focused on its mission and principles to serve its subscribers and the consumers that they represent, undeterred by such baseless tactics.

Regarding litigation, one of CRMLS's significant concerns is the liability exposure created if CRMLS were to remove the Mandatory Cooperation rules, as suggested by Compass. Permitting properties with exclusive listing agreements to bypass Mandatory Cooperation raises numerous antitrust concerns. In fact, there is a far greater risk of potential liability from buyers bringing claims against CRMLS, Compass, and the other co-conspirators who might be alleged to be involved in such a scheme, as the Compass demanded policies effectively deny buyers the right to choose their own real estate agent.

An exclusive listing agreement grants the listing agent sole: access to the seller, ability to share information about the property, terms of sale, property access, and to present offers.

A buyer who wishes to hire their own representative is denied that opportunity when exclusively listed properties are not subject to Mandatory Cooperation. For instance, if a buyer's agent attempts to contact the listing agent to schedule a showing or submit an offer and the listing agent refuses to cooperate or respond,

the buyer is left with no choice but to approach the exclusive listing agent directly—even if that is not the buyer's preference. This arrangement effectively removes the buyer's ability to select their own agent for representation. Sellers who prefer not to list their property on the MLS still have the option to market their property publicly by using a non-exclusive listing agreement. Such agreements avoid creating the exclusive restrictions and exclusions for the buyer and their agents. If the buyer agent receives no cooperation from the non-exclusive listing agent, then the buyer's agent is free to go directly to the seller with the opportunity presented by the represented buyer. This approach benefits all parties by preserving the buyer's right to representation while accommodating the seller's preferences.

In addition to buyer suits, a viable claim could also be brought by individual agents who choose to work with a brokerage firm that uphold principles of fairness and ensure all buyers have access to all properties. If CRMLS were to agree to the Compass's demands, agents at such firms would be denied the opportunity to represent buyers who might be interested in and capable of purchasing exclusively listed off-MLS properties. By removing access of these properties, buyer agents would be forced to make the business decision to join a firm that engages in these anti-consumer, self-serving practices. Without doing so, they would lack access to sufficient inventory to sustain their buyer representation business. These buyer agents would have strong grounds to pursue legal claims against the brokerage firms conspiring to implement these anti-consumer practices, accusing them of collusion and forming agreements to pressure CRMLS and NAR into removing policies and rules related to Mandatory Cooperation.

Sellers harmed by the off-MLS practices demanded by Compass would also have a strong basis for legal claims. Extensive evidence demonstrates wide exposure through a multiple listing service results in the highest price and quickest sale for sellers. If Mandatory Cooperation is eliminated, self-serving brokerage firms could use exclusive listing agreements to prevent other buyer agents from approaching the seller. This practice effectively turns the property into a marketing tool or "billboard" to attract additional buyers to the firm, rather than getting the property sold.

This issue is not simply about double-ending transactions, as CRMLS data and prior statements – including those made publicly by Compass – make clear. It is about redirecting buyers away from their chosen agents and forcing them to work with the exclusive listing agent, who controls all information and access to the property. Once engaged, the exclusive listing agent often converts these buyers into their own clients, showing them to properties – ironically, properties listing in the MLS that are available for cooperation. The notion that Compass would leverage their market position to divert buyer customers from competing brokerage firms by withholding available properties and then representing those same buyers to purchase MLS-listed properties is both unethical and unacceptable. It is fundamentally unfair for Compass to benefit from MLS cooperation while openly refusing to cooperate themselves.

For sellers who end up in this exclusive off-MLS strategy, the consequence is often a longer time on market than if their property had just been listed in the MLS from the beginning. CRMLS data indicates that most properties initially kept off the MLS at the insistence of Compass are eventually input into CRMLS in order to secure a sale. The time spent off-MLS is simply used as an advertising tool for the listing firm, exploiting the seller's property as a "billboard" to generate more money for the firm. Sellers who later realize they were misled into a marketing program that prioritized the listing firm's interests over their own, to their disadvantage and financial detriment, are likely to pursue legal action.

Your threats against the Directors of CRMLS—who are exercising sound business judgment in operating CRMLS—by suggesting they could face personal liability, are particularly ironic given the above-described situation. Have your independent contractor agents, who you publicly admit in your stage comments and

correspondence to CRMLS, are pressuring Compass to take these clearly anti-consumer actions, been informed that they may all be named as co-conspirators in the described lawsuits? These demands by Compass agents appear to constitute a concerted action, and Compass may be arguably organizing and consolidating these agreements among horizontal competitors since as independent contractors, these agents compete against one another for clients and commissions. Their participation in such a conspiracy to implement anti-consumer practices to generate additional income could expose them to personal liability as active participants, along with Compass in this scheme to change the rules for their individual benefit.

I hope the tone and tenor of this response clearly conveys CRMLS's unwavering commitment to protecting the rights of individual consumers, including those who choose not to hire a real estate agent, as well as the rights of all CRMLS subscribers to have full and fair access to listing information. Moreover, this letter by no means contains an exhaustive list of the potential legal issues raised by Compass' requests. But, to be perfectly clear, CRMLS will not modify or eliminate the Mandatory Cooperation rules to enable Compass to take advantage of consumers.

CRMLS also aims to resolve this matter quickly, and discreetly, avoiding unnecessary public attention. If Compass voluntarily withdraws its requests to CRMLS in writing, there will be no need for further public discussion or display of the substantial antitrust violations and liabilities Compass' requests create for any MLS or Association that might comply with them.

Sincerely,

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From: Robert Reffkin <robert@compass.com>

Sent: Sunday, November 24, 2024 10:22 PM

To: Art Carter <art@crmls.org>; Edward Zorn <Ed@crmls.org>

Cc: Brad Serwin <brad.serwin@compass.com>; Ashton Alexander <ashton.alexander@compass.com>; Kathy Mehringer <kathy@compass.com>; Jonathan Satz <jonathan.satz@compass.com>

Subject: Re: Request for CRMLS Action on Clear Cooperation

External Sender: Please use caution when opening links or attachments.

Art, Ed,

We are troubled by the lack of communication and collaboration from CRMLS. You are the only MLS that hasn't responded or been willing to have a dialogue about ways to provide sellers more choice to market their homes. Attached is a letter articulating these concerns to the CRMLS Board of Directors. Please share this with your Board.

A recently released [independent study by 1000WATT](#) found that 35% of prospective sellers desire to list their property off-MLS. Additionally, 1000WATT found that 66% of sellers see display of days on market as being bad for sellers and that 48% of sellers do not want price reduction information displayed for their property, which clearly demonstrates homeowners' desire for more choice and autonomy in how and where their home is marketed. Homeowners do not want to be forced to market publicly only through the MLS, and agents have a duty to honor their clients requests, which supersedes MLS rules.

Compass believes CRMLS is forcing every homeowner to market through the MLS to maintain their listing monopoly and to maintain power to force agents to pay dues, because access to the MLS is a practical requirement for agents in your market. An agent can't do their job without access to the MLS.

Failure to take swift and decisive action to either amend CRMLS rules or pause enforcement of Clear Cooperation before January 1, 2025 will leave us no choice but to pursue legal remedies and remove all Compass employees from positions held with CRMLS. We are prepared to take action not only against CRMLS for its anticompetitive, anticonsumer and damaging behavior, but also against all individual board members who perpetuate these harmful policies, other than our own Kathy Mehringer, who is on record saying she disagrees with these policies but has respected the decision of the majority Board on these matters as per role as a Board Member. Maintaining these policies perpetuates the following harms: (1) restraint of trade and coerced breach of statutory duty, (2) restrictions to pro-competitive innovations, and (3) increased likelihood of additional lawsuits and government investigations.

If CRMLS fails to act, we will also be forced to disclose the attached letter publicly, as our agents have asked us to take a more public stance with CRMLS to protect the interests of their clients.

I support a common sense approach where sellers have a choice of where, when, and how to advertise their home for sale. I welcome a dialogue with you, and your Board, to find solutions that balance the MLS goals of data integrity and cooperation with greater choice for homeowners.

Sincerely,

Robert Reffkin

P.S. Kathy, please ensure this letter is shared with your fellow Board members.

On Wed, Nov 6, 2024 at 11:32 AM Robert Reffkin <robert@compass.com> wrote:

Art,

I look forward to seeing you this Friday.

As you likely know, Compass has serious concerns about how the Clear Cooperation Policy restricts seller choice and is something we're confident brokerage firms will be forced to litigate in the New Year. **In writing this email, we are asking you to consider adopting the same policy as Bright MLS. We believe that all listings should be submitted to the MLS (so that the MLS can be the single source of truth), but that homeowners, with disclosure, should be able to decide how their home is marketed. Bright's interpretation of Clear Cooperation Policy accomplishes both goals.**

This past summer, Bright modified its interpretation of Clear Cooperation. Today, Bright allows 'Office Exclusives' to be publicly marketed, with seller authorization, meaning that the seller (and thereby its agent and their brokerage) have full control over the marketing for the listing, privately or publicly. They have also implemented enhanced disclosures to help ensure sellers are appropriately

informed. We'd ask that CRMLS follow suit in the spirit of homeowner choice and to eliminate future litigation from brokerages that feel obligated to advocate for homeowner choice.

The video [here](#) (1:38 seconds into 2 min video at top of website) and excerpt below detail Bright's clarification and guidance on the rule change.

Bright Statement (excerpt from their interpretation of 'Office Exclusives'):

We are removing perceived limitations to [seller] instructions. [You] still must submit every listing [to Bright], regardless of how you market outside the MLS.... If "Office Exclusive" is selected based on the seller's instruction, then: [1] Bright won't share with subscribers or on the Internet [and] [2] Broker may otherwise market per the seller's instructions, within the brokerage or publicly - must be based on seller's instructions; otherwise must be Active.

Rules Flexibility Added Aug. 14

Limited Marketing/"Office Exclusive"

We are removing perceived limitations to client instruction

- Still must submit every listing, regardless of how you market outside the
- **Bright's listing entry system uniquely enables entry of listings where t**
instructs the broker to restrict marketing only to the broker's network
 - Easy to enter: Select "Office Exclusive" and enter a few fields of basic
 - If "Office Exclusive" is selected *based on the seller's instruction*, then:
 - Bright won't share with subscribers or on the Internet
 - Broker may otherwise market *per the seller's instructions*, within t
 - Switch to Active when your client decides to use the open market

We launched a website on Friday, which outlines our position on the flexibility needed for the homeowner and why - <https://www.compass-homeowners.com/>. We're giving individual homeowners the same playbook and best practices real estate developers and professional home builders have benefited from for years. Their carveout from Clear Cooperation has given them *choice* in how they market hundreds of thousands of homes a year.

We've shared the site with all our agents, and they've shared it with their clients -- the message is resonating with homeowners and they are asking for the marketing flexibility that we're advocating for. It was important to me that I gave you the visibility directly.

I've included Ashton Alexander here, our Head of Strategy, to find a time that could work for you and your team to discuss any next steps.

Robert

Robert Reffkin | Founder & CEO

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