

Short Sale Legal Minefield

Broker-Manager Luncheon

PCAR Event Center
October 13, 2010

Presented by:

John Hughes
Guidant Realty



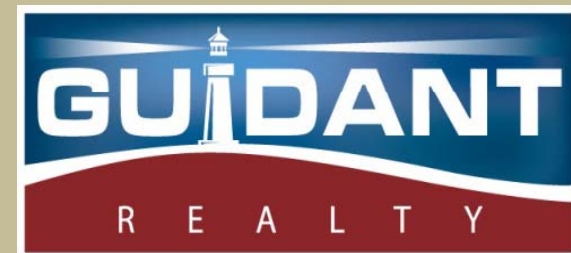
Presentation:

- 🏠 About the Speaker
- 🏠 Market Overview
- 🏠 Applicable Legal Code
- 🏠 The Listing Agreement
- 🏠 The Purchase Contract
- 🏠 Initiating Full Escrow

John Hughes

Broker / Owner

DRE License # 01726716



About John



PRIMARY GOAL: Representing clients best interests at all times with professional habits, value-added tools, and strong contractual expertise

HIGHLIGHTS:

- Director, Placer County Association of Realtors
- Broker, Guidant Realty
- Placer County Leadership Certified
- 2008 & 2009 Masters Club
- Member of Short Sale Masterminds
- Referral Partner for Distressed Market Attorneys
- Largest deal – Bid Mgr on \$3 Billion Svcs. Contract
- Contracts Mgmt – Managed Contracts up to \$460 Million

John Hughes

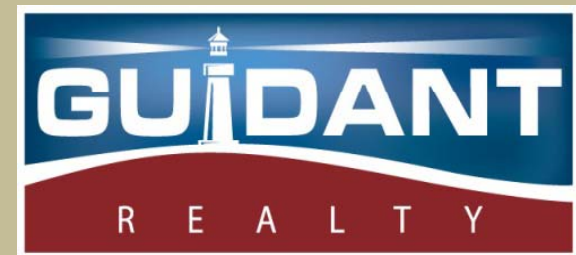
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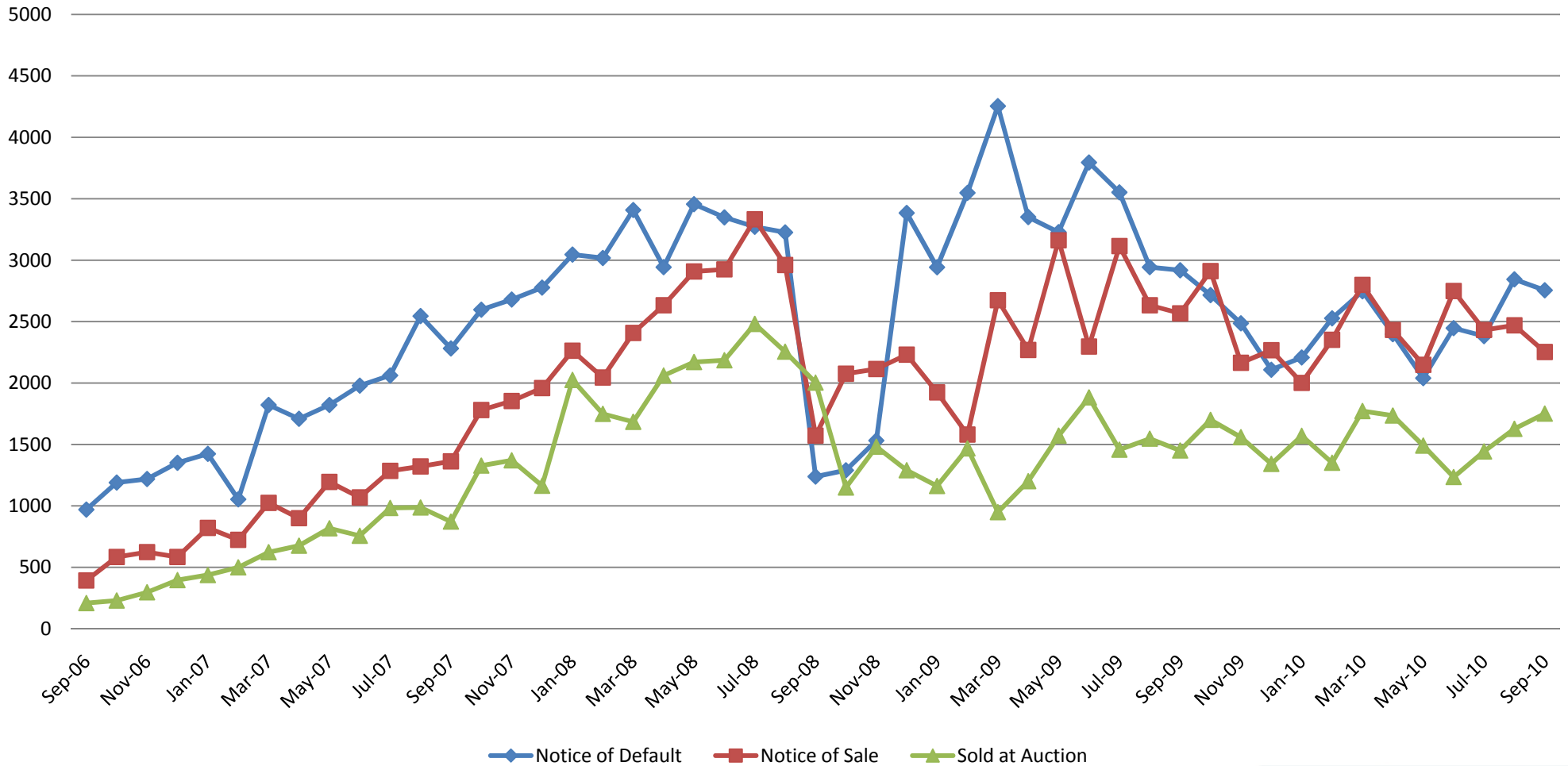
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Market Overview

Foreclosure Leading Indicators

Foreclosure Pipeline



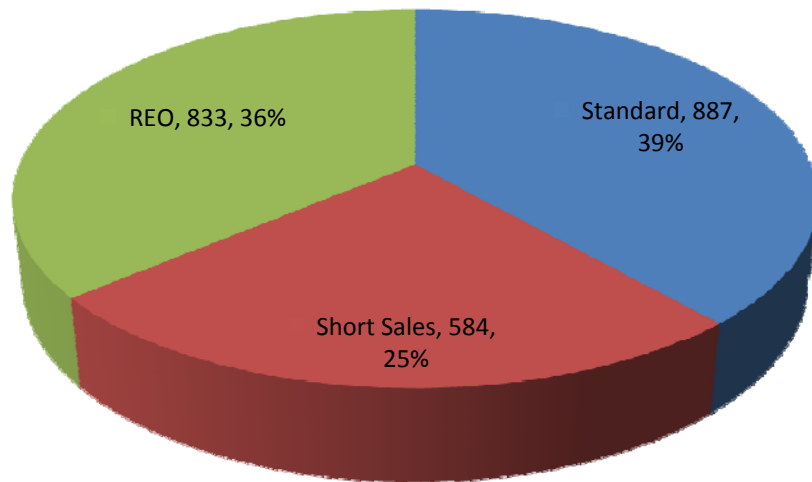
Data: ForeclosureRadar.com



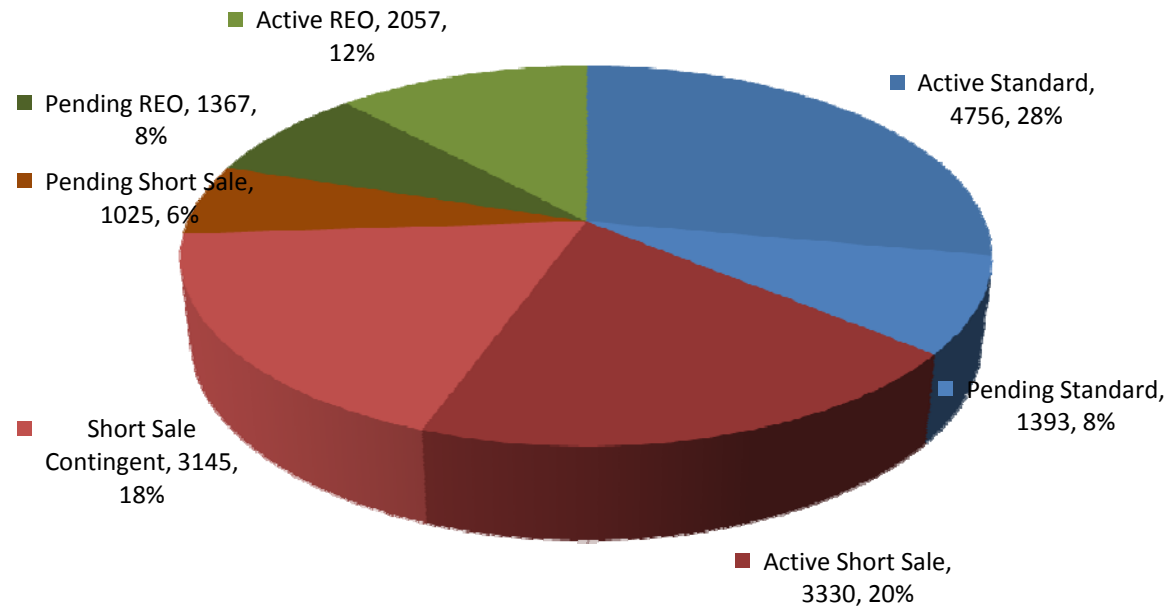
Market Overview

Inventory Split vs. Actual Sales Split

Sales Split, September 2010



Inventory Split, October 2010



Source: Metrolist MLS

Applicable California Legal Code

- 726(a): No pursuit of deficiency on non-Judicial / Statutory foreclosures (regardless of purchase money)
- 580b: Lenders of Purchase Money Loans can not pursue deficiency after a foreclosure (all mortgage lien holders regardless of position)
- 580e: First Lien Holders can not pursue a deficiency after a short sale (purchase or non-purchase money) *effective January 1, 2011*

Initiating The Listing

Use a Short Sale Listing Addendum

- ➊ Other Options May Be More Appropriate
- ➋ Broker Authority to Work with Short Sale Lender
- ➌ No Guarantee of Success
- ➍ Tax & Credit Implications
- ➎ Agent Is Not Qualified to Give Tax & Legal Advice

Initiating The Listing

Properly Reflect Compensation

- Compensation should reflect ALL Fees & Commissions
- RLA states “Broker agrees to exercise reasonable effort and due diligence to achieve the purposes of this Agreement”
- SSL authorizes Broker to receive “any necessary information to negotiate with Lender”
- Negotiation and associated activities may be an implied service covered by the RLA and, by extension, the contracted compensation

Initiating The Listing

Use Appropriate Commission Qualifiers or Rate is Set

- 7.13 – “Must specify...a percentage of the gross selling price...a definite dollar amount...may not contain any provision that varies...based on conditions precedent or subsequent”
- 7.16.2(a) – Compensation offered through the MLS to cooperating brokers on listings which require lender approval (commonly referred to as “short sale” listings) is for the amount published therein unless the listing broker indicates in the confidential agent remarks on MLS the following: (a) the fact that the sale is subject to lender approval, and (b) the amount or method by which any lender reduction in the gross commission shall be apportioned between listing and cooperating brokers.
- 7.16.2(b) – The listing broker shall provide written documentation of any lender required reduction in the gross compensation within three business days of receipt from the lender, but in no case less than one business day in advance of the actual date of the close of escrow...If the listing broker fails to notify...shall be the amount stated in the commission field at the time the offer was submitted.



The Purchase Contract

Contract or No Contract?

- Short Sale Lender approval is a “Seller Contingency” (see SSA par A), they are not a party to the contract
- If multiple offers are signed, “backups” must be used (PAA, par 1) or Seller may be subject to non-delivery damages
- Presenting an unsigned offer to the Short Sale Lender is:
 - Potentially misleading the Lender because the offer expired after 3 days
 - Potentially misleading the Buyer by marketing a home where the intent is to use their offer as a tool rather than contract for a sale – unless the offer period is explicitly extended to cover the anticipated Lender consideration period

The Purchase Contract

Seller Addendums & Cancellation

- ➊ Many Seller addendums for short sales attempt to “lock-in” the Buyer and unconditionally forfeit deposit with early cancellation.
- ➋ An agreement for a "nonrefundable" escrow deposit is invalid and unenforceable, according to the recent California case of *Kuish v. Smith* (2010 WL 373225).
- ➌ To be deemed valid, a liquidated damages clause in a real property purchase contract liquidating damages to a seller should reflect a "reasonable estimate" of the actual loss that the seller would suffer in the event of a buyer's breach.
- ➍ Inspection Rights Still Exist!

The Purchase Contract

Pending vs. Active Short Contingent

- ➊ No longer seeking offers, move to PS and update comments
- ➋ If the offer falls out or you want more offers, move to AS or ASC as appropriate

Per written email from Mike Padjen, MLS

Initiating Full Escrow

The Approval Has 4 Key Elements:

- ➊ Net Price / Distribution of Allowable Costs
- ➋ Close Date
- ➌ Release of Lien
- ➍ Disposition of the Account (i.e. Deficiency)

Your Job:

- ➊ Review and ensure the first 2 may be met
- ➋ Acknowledge the dangers of a deficiency balance and advise the Seller to obtain legal advice – you are not qualified to give legal advice, but your general knowledge should prompt you to review the potential implications

Initiating Full Escrow

Address Seller Election to Proceed:

- ➊ Draft an appropriate Listing addendum addressing:
 - ➋ Acknowledgement of Seller review of approval letter
 - ➌ Acknowledgement of opportunity to have a legal review / not relying on advice of Broker
 - ➍ Election to proceed under the terms of the approval letter

Initiating Full Escrow

Address Critical Factors:

- ➊ Provide a copy of the approval letters to the Buyer's agent (SSA, par A)
- ➋ Draft an appropriate Contract addendum addressing any changed terms
 - ➌ Price
 - ➍ Distribution of costs
 - ➎ Close Date
 - ➏ Address failure to perform (late close, per diem, etc.)

Short Sales are a “Legal Minefield”...

...It only takes one lawsuit to ruin your year and the only real “win” is by not being in one!