

262Va184

IN THE
SUPREME COURT OF VIRGINIA



Record No. 001773

ROGER J. McDONALD,

Appellant,

v.

NATIONAL ENTERPRISE, INC.,

Appellee.

APPENDIX

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1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

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5 - - - - - :
6 NATIONAL ENTERPRISES, INC., :

7 Plaintiff, :

8
9 vs. :

FILE NO:

10 : CL-98-1414

11 ROGER J. MCDONALD, :

12 Defendant. :

13 - - - - - :
14
15
16 Complete transcript of the
17 testimony and other incidents of the TRIAL in the
18 above-styled matter, when heard on the 7th day of
19 March, 2000, before the Honorable George F. Tidey,
20 Judge and a jury.

21
22
23 CRANE-SNEAD & ASSOCIATES, INC.
24 4914 Fitzhugh Avenue, Suite 203
25 Richmond, Virginia 23230
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I N D E X

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Timothy Tallarida	6	48	74	80
Voir dire of (Mark Fleckenstein)	90	96	--	--
Mark Fleckenstein	98	108	116	--
Timothy Tallarida	123	125	129	--

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1 (Whereupon, the jury was
2 impaneled and the following proceedings
3 were held in the jury's presence.)

4 THE COURT: First witness.

5 MR. RUSSELL: I will call
6 Mr. Tallarida

7 - - -

8 TIMOTHY TALLARIDA, called on
9 behalf of the plaintiff, having been duly
10 sworn, was examined and testified as
11 follows:

12 - - -

13 DIRECT EXAMINATION

14 BY MR. RUSSELL:

15 Q Tell us your name, please, and if
16 you will spell your last name for the court reporter.

17 A My name is Timothy Tallarida.

18 T-A-L-L-A-R-I-D-A.

19 Q Where do you live, Mr. Tallarida?

20 A I live in San Diego, California.

21 Q How are you employed?

22 A I am employed as a Senior Asset
23 Manager for National Enterprises.

24 Q How long have you worked for
25 National Enterprises?

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1 A Since December 1994.

2 Q If you would tell us, please,
3 what exactly National Enterprises, Inc., is?

4 A National Enterprises has been in
5 the business since 1989, buying subperforming,
6 commercial real estate, secured and unsecured loans.
7 My responsibility is to manage portfolios of loans
8 that we acquire.

9 Q Who do you buy these loans from?

10 A We buy them from the Government.
11 We buy them from banks. We buy them from S&Ls. We
12 buy them from insurance companies. We buy them from
13 private parties.

14 Q Does National Enterprises, Inc.,
15 buy individual mortgages someone has on their house
16 or someone has for a car, those types of loans?

17 A No. We are not in the business
18 of buying consumer loans.

19 Q What types of loans do you buy?

20 A We try to focus on the larger
21 commercial loans, real estate, secured and unsecured.

22 Q You mentioned that National
23 Enterprises buys loans from the Government.

24 A Right.

25

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1 Q On what occasion would National
2 Enterprises buy loans from the Government?

3 A As a result of the recession and
4 changes in tax laws in the late 80s and early 90s,
5 the value of real estate assets declined. As a
6 result of the decline in the value of these real
7 estate properties, borrowers were no longer able to
8 pay on these loans resulting in banks not being able
9 to collect payments that were owed to them. Banks
10 became insolvent as a result of that.

11 MR. BARKER: Your Honor, I am
12 sorry. I don't know how much this Court
13 will allow. I don't think it is directly
14 related to this lawsuit.

15 THE COURT: I will allow it.
16 Overruled.

17 DIRECT EXAMINATION (CONTINUED)

18 BY MR. RUSSELL:

19 Q Go ahead, Mr. Tallarida.

20 A As a result, the Federal
21 Government established something that was known as
22 the Resolution Trust Corporation. The Resolution
23 Trust Corporation had the charter to close
24 institutions and sell assets to generate cash to pay
25 depositors their deposits. Resolution Trust

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1 Corporation established a series of auctions in early
2 1992, by which they sold pools of loans.

3 They sold pools of loans on a
4 secured basis. They sold unsecured loans. They sold
5 regionalized secured loans. They sold regionalized
6 unsecured loans. And they sold them out in a series
7 of auctions to hundreds of buyers like National
8 Enterprises.

9 National Enterprises went to
10 those auctions and we bid. We were the high bidder
11 on pools of loans. We paid millions of dollars to
12 the Federal Government through the RTC. All of that
13 money went directly to --

14 MR. BARKER: Judge, I am sorry.

15 I think this is beyond the --

16 THE COURT: I agree with that.

17 Sustained.

18 MR. BARKER: Thank you.

19 DIRECT EXAMINATION (CONTINUED)

20 BY MR. RUSSELL:

21 Q Have you personally attended any
22 of these auctions on behalf of National Enterprises?

23 A I have never attended the
24 auctions. But I have provided due diligence on most
25 of the auctions.

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1 Q You say due diligence, what do
2 you mean by that?

3 A Due diligence is the process by
4 which you look at loan pools and try to estimate
5 recovery values.

6 Q Does National Enterprises have
7 any standard procedure for conducting due diligence?

8 A We have forms that we need to
9 fill out to organize thoughts. We look at -- These
10 pools sometimes can be so large that you can't look
11 at all of the individual loans. So, you look at the
12 percentage of the outstanding dollar amount that may
13 be owed in an aggregate for that particular pool.
14 You try to look at 75 to 80 percent of the principle
15 balances and draw conclusions as it relates to
16 collectability of that.

17 Q When you say look at the
18 documents, what sort of documents would National
19 Enterprises examine on loans prior to bidding on a
20 pool?

21 A The way the FDIC and the RTC
22 organized these auctions is that they would put you
23 in a large room with large monitors and every
24 document that you --

25

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1 MR. BARKER: Judge, I am sorry.
2 I believe this gentleman just testified he
3 has never been to one. I am going to
4 object.

5 THE COURT: If he is not there, I
6 don't want him to tell me what goes on.

7 MR. RUSSELL: He said he has been
8 to the due diligence part.

9 THE COURT: I am just saying if
10 he is not there, that is all. All he has
11 to do is establish he was there.

12 DIRECT EXAMINATION (CONTINUED)

13 BY MR. RUSSELL:

14 Q Is this something you have
15 personally done?

16 A Yes.

17 Q Go ahead.

18 A I am talking about the due
19 diligence process. In reviewing these assets, all of
20 the assets were put on computer screens. You never
21 held a piece of paper. On a loan by loan basis in
22 particular pools, you looked at a series of documents
23 which may be as long as 4,000 documents deep. You
24 try to draw conclusions. You looked for the security
25 documents. You looked for collateral information.

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1 You looked at solvency issues and draw conclusions
2 based on what the Government downloaded onto the
3 system that was brought up on the computer screen
4 terminal.

5 Q Other than the notes or the
6 document that describes the loan itself, what other
7 sorts of documents would National Enterprises examine
8 in conducting its due diligence?

9 A We would look at all
10 correspondence between the bank and the
11 entrepreneurs. We would look at finance statements.
12 We would look at operate statements and the
13 underlying collateral. We would look at title work
14 information and documents relating to pending
15 litigation, court briefs.

16 Q Are you familiar with a type of
17 document called a guarantee agreement?

18 A Yes, I am.

19 Q What is a guarantee agreement?

20 A A guarantee agreement is an
21 obligation from a third party to guarantee the
22 repayment of a debt of a corporation, partnership or
23 another individual.

24 Q Are guarantee agreements examined
25 at all in the course of NEI doing its due diligence?

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1 A Yes, they are.

2 Q Of what significance would
3 guarantee agreements be to NEI in conducting its due
4 diligence examination?

5 MR. BARKER: Judge, are we
6 talking about this case, because I am going
7 to object?

8 THE COURT: I think he is getting
9 close to this case, Mr. Barker.

10 MR. BARKER: I object to it.

11 A In looking at the guarantee
12 document, you are looking for the name of an
13 individual guarantor, you are looking for limitations
14 that may be written into the guarantee and you are
15 looking for any other variables that may impact the
16 collection or the enforcement of the guarantee.

17 DIRECT EXAMINATION (CONTINUED)

18 BY MR. RUSSELL:

19 Q Now, in 1994, when you came to
20 work for NEI, were you assigned any existing
21 portfolio to manage?

22 A Yes.

23 Q Are you familiar with the loan at
24 issue here from Lafayette Associates to Seasons
25 Mortgage Company?

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1 A In 1994 it wasn't my
2 responsibility. I picked up the responsibility for
3 this asset, I believe, in 1997.

4 Q In the course of picking up
5 responsibility, what was involved in your taking over
6 responsibility for this?

7 A Obviously, in every transaction,
8 we try to settle or negotiate a settlement outside of
9 court --

10 MR. BARKER: Excuse me, Your
11 Honor. I am sorry. Clearly, --

12 THE COURT: Just what are you --

13 MR. RUSSELL: Let me rephrase the
14 question, perhaps.

15 THE COURT: All right.

16 DIRECT EXAMINATION (CONTINUED)

17 BY MR. RUSSELL:

18 Q When you took over the management
19 of this particular loan, what if any records or files
20 did you also take custody of?

21 A I took custody of the entire loan
22 file related to the Lafayette obligation.

23 Q Since you took over
24 responsibility for that, have you remained as
25 custodian of that particular file?

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1 A Yes.

2 Q I would like to show you a
3 document, it is a three page document, and ask you if
4 you can identify what this document is?

5 A This is the bill of sale and
6 assignment of loans. This is a document that we
7 received after an auction. This is a document
8 whereby the Government is assigning, in this case it
9 was the Resolution Trust Corporation, their rights to
10 National Enterprises, the Lafayette loan and the rest
11 of the loans that were included in package number 45.

12 Q Now, the first page, you said is
13 the bill of sale.

14 What is the second page of this
15 document?

16 A The second page, the Exhibit A in
17 this document represents the banks and the savings
18 and loans that were behind the loans that were sold
19 in package number 45.

20 Q Is Seasons Savings Bank part of
21 this package?

22 A Yes, it is.

23 Q What is the third page?
24
25

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1 A The third page is the detail
2 relating to the Lafayette loan that was sold to
3 National Enterprises in December of '92.

4 Q Now, this three page document,
5 did this come from NEI's file that you had custody of
6 from this loan?

7 A Yes.

8 Q Were these records that are kept
9 by National Enterprises in the regular course of its
10 business?

11 A Yes.

12 Q Did National Enterprises receive
13 these in the regular course of its business?

14 A Yes.

15 Q Was this bill of sale --

16 MR. BARKER: Your Honor, I am
17 going to object to those responses on the
18 basis of foundation. This gentleman said
19 he started in 1994 and the face of this
20 document says 1992. There would be no way
21 that he could possibly know that having not
22 started with the company until two years
23 later.

24 THE COURT: All right.

25 Overruled.

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1 DIRECT EXAMINATION (CONTINUED)

2 BY MR. RUSSELL:

3 Q The date on this document,
4 December 15 1992, is that at or about the time of the
5 actual auction?

6 MR. BARKER: Objection,
7 foundation.

8 THE COURT: Only if he knows,
9 Mr. Russell.

10 A Yes.

11 DIRECT EXAMINATION (CONTINUED)

12 BY MR. RUSSELL:

13 Q Do you know when the auction on
14 this particular case took place, on this particular
15 loan?

16 A I don't recall.

17 Q Is this the type of record or
18 type of documents that National Enterprises relies
19 upon in the course of its business?

20 A Yes, it is.

21 Q To what extent does National
22 Enterprises rely on this type of document?

23 A This is the document that
24 evidences National Enterprises' ownership of all of
25 the loans in package 45.

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1 Q Would National Enterprises be
2 able to conduct its business if it couldn't rely on
3 these types of documents?

4 A No, we could not.

5 Q Did Resolution Trust Corporation
6 have a duty to prepare these documents in an accurate
7 fashion?

8 MR. BARKER: I am going to object
9 to that, Your Honor.

10 THE COURT: Sustained.

11 MR. RUSSELL: Your Honor, if he
12 is aware --

13 THE COURT: Sustained.

14 MR. RUSSELL: I would move this
15 as Plaintiff's Exhibit No. 1.

16 MR. BARKER: May I see that
17 document, please?

18 MR. RUSSELL: Sure.

19 MR. BARKER: May I ask counsel a
20 question?

21 THE COURT: Yes.

22 MR. BARKER: I am going to object
23 to this, Your Honor. They don't have the
24 original, allegedly, that RTC made.

25 THE COURT: Overruled.

000018

1 (Whereupon, a bill of sale and
2 assignment of loans was marked as
3 Plaintiff's Exhibit No. 1.)

4 DIRECT EXAMINATION (CONTINUED)

5 BY MR. RUSSELL:

6 Q Now, when you took over the
7 management of this Lafayette Associates loan, did you
8 have occasion to examine the other supporting
9 documents in the loan file?

10 A Yes.

11 MR. BARKER: Your Honor, may I
12 state as to all of these documents that are
13 copies and they are not generated --

14 THE COURT: Wait a minute. If
15 you want to state something, have a seat,
16 make a motion and I will take the jury out
17 so you can make your objection.

18 MR. BARKER: Yes, sir.

19 THE COURT: Have a seat.

20 MR. BARKER: Yes, sir.

21 THE COURT: Ladies and gentlemen,
22 if you will go to your jury room for a
23 moment, please.

24

25

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1 (Whereupon, the jury was excused
2 to the jury room and the following
3 proceedings were held out of the jury's
4 presence.)

5 THE COURT: All right. Put it
6 in.

7 MR. BARKER: Thank you, Your
8 Honor.

9 Judge, as to the bill of sale,
10 assignment of loan, deed of trust note,
11 everything that is generated from third
12 parties, I would like to have a continuing
13 objection if the Court would allow. The
14 continuing objection would be based on the
15 hearsay rule, that it meets none of the
16 shop book exceptions of the hearsay rule as
17 found in the case law, Mika versus
18 Planter's Bank and Trust Company, 241 VA
19 415.

20 Moreover, it is not the best
21 evidence of these documents. And,
22 moreover, there is no foundation for this
23 witness to testify as to the bill of sale,
24 deed of trust or any of these other
25 documents that they intend to introduce

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1 generated by third parties, because they
2 weren't records kept and generated in the
3 regular and ordinary course of NEI's
4 business.

5 There is many ways they could
6 prove it, but this is not the proper way to
7 prove it. So, that objection, as I
8 indicated, is Mika versus Planter's Bank --

9 THE COURT: Yeah, we got that
10 once.

11 MR. BARKER: Yes, sir, 801 --

12 THE COURT: We got it.

13 MR. BARKER: Yes, sir.

14 THE COURT: All right.

15 Bring the jury back.

16 MR. BARKER: If I object to the
17 other documents, Judge, would it be deemed
18 to include all of those grounds that I have
19 explained, if it please the Court?

20 THE COURT: I thought you just
21 put in a continuing objection. How can it
22 be clearer than that?

23 MR. BARKER: Yes, sir. Thank
24 you.

25 **000021**

1 THE COURT: I don't need any
2 thank yous.

3 (Whereupon, the jury was returned
4 to the courtroom and the following
5 proceedings were held in the jury's
6 presence.)

7 DIRECT EXAMINATION (CONTINUED)

8 BY MR. RUSSELL:

9 Q Mr. Tallarida, I ask you to
10 examine the document that you were just handed and
11 ask you if you can identify what that is?

12 A This is the deed of trust note.
13 This is, essentially, the promissory note that is
14 behind this \$425,000 loan.

15 Q Is it a loan for \$425,000?

16 A Yes.

17 Q Who made the loan according to
18 the terms of the note?

19 A The lender was Seasons Mortgage
20 Corporation.

21 Q Who was the money loaned to?

22 A An entity named Lafayette
23 Associates.

24 Q And what is the date on which
25 this happened?

000022

1 A October 3, 1988.

2 Q Is this note the note that you
3 received or NEI received from RTC and was kept by NEI
4 in the regular course of its business?

5 A Yes.

6 Q Is this a note that was relied
7 upon or the type of document that is relied upon by
8 NEI in the conduct of its business?

9 A Yes.

10 MR. RUSSELL: I move that as
11 Plaintiff's Exhibit No. 2.

12 (Whereupon, a deed of trust note
13 was marked for identification as
14 Plaintiff's Exhibit No. 2.)

15 DIRECT EXAMINATION (CONTINUED)

16 BY MR. RUSSELL:

17 Q I ask you if you can identify
18 what this document is?

19 A This document is the deed of
20 trust and security agreement.

21 Q Does it relate to anything in
22 particular?

23 A Yes. This is the security
24 document that perfected Seasons Bank's \$425,000 loan
25 against the mini-storage facility.

000023

1 Q Is this a document that you
2 received from Resolution Trust Corporation as part of
3 the purchase of this loan?

4 A Yes.

5 Q This document has red lines on
6 it. Is that the original document?

7 A Yes.

8 Q Now, there are some stamped
9 numbers at the top that say book and page number. Do
10 you know what those refer to?

11 A Those refer to the recording
12 stamps from the county recorder, whereby this
13 mortgage was recorded in public record.

14 Q Was that recorded here in Henrico
15 County Circuit Court?

16 A Yes.

17 MR. RUSSELL: I move this as
18 Plaintiff's Exhibit No. 3, please.

19 (Whereupon, a deed of trust and
20 security agreement was marked for
21 identification as Plaintiff's Exhibit
22 No. 3.)

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1 DIRECT EXAMINATION (CONTINUED)

2 BY MR. RUSSELL:

3 Q I ask you if you would examine
4 this document, please?

5 A (Witness complies.)

6 Q Can you identify what this is?

7 A This is a guarantee agreement.

8 Q Does it relate to this loan?

9 A Yes, it does. This is a
10 guarantee agreement whereby Mr. Lawrence Phillips and
11 Roger McDonald guaranteed the \$425,000 loan.

12 Q Now, from your examination and
13 your management of this particular loan, do you know
14 what relation Roger McDonald and Lawrence Phillips
15 had to this loan and this transaction?

16 A They were the general partners of
17 Lafayette Associates.

18 Q Is that an original document that
19 you have in your hand?

20 A Yes, sir.

21 Q Does that have the signature of
22 Roger McDonald on it?

23 A Yes, it does.

24 MR. RUSSELL: I would move that
25 as Plaintiff's Exhibit No. 4.

000025

1 (Whereupon, a guarantee agreement
2 was marked for identification as
3 Plaintiff's Exhibit No. 4.)

4 MR. RUSSELL: Your Honor, at this
5 time, I would like to indicate to the jury
6 that the defendant, Roger McDonald, has
7 admitted, under oath, that that is his
8 signature on page 7 of that document.

9 THE COURT: All right.

10 DIRECT EXAMINATION (CONTINUED)

11 BY MR. RUSSELL:

12 Q Now, these three agreements, the
13 note, the deed of trust and the guarantee, all relate
14 to the \$425,000 loan from Seasons Mortgage to
15 Lafayette Associates for the mini-warehouse; is that
16 right?

17 A Yes, sir.

18 Q Are these the types of documents
19 that NEI would examine in the course of conducting a
20 due diligence prior to purchasing loans?

21 A Yes, they would be.

22 Q If you would explain to the jury
23 what this particular guarantee agreement does?

24 MR. BARKER: I am going to object
25 to that, Your Honor.

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1 THE COURT: Well, I will let him
2 do it in general terms. But I don't want
3 any legal terms.

4 MR. RUSSELL: I understand.

5 DIRECT EXAMINATION (CONTINUED)

6 BY MR. RUSSELL:

7 Q From NEI's standpoint, what is
8 the guarantee agreement or what value is the
9 guarantee agreement?

10 MR. BARKER: Judge, I am going to
11 object to that.

12 THE COURT: I will allow it.

13 A The guarantee agreement
14 personally obligates Roger McDonald to the \$425,000
15 obligation.

16 MR. BARKER: Objection, Your
17 Honor. Now, he has testified to an
18 ultimate conclusion.

19 THE COURT: Sustained.

20 DIRECT EXAMINATION (CONTINUED)

21 BY MR. RUSSELL:

22 Q You mentioned earlier that NEI
23 deals with guarantee agreements?

24 A Yes.

25

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1 Q Generally speaking, what value do
2 guarantee agreements serve for NEI?

3 A A guarantee agreement --

4 MR. BARKER: Your Honor, I am
5 sorry. That is not relevant to any issue
6 in this case.

7 THE COURT: I will allow it. It
8 is a suit on the guarantee agreement. I
9 will allow it.

10 A A guarantee agreement provides an
11 additional source of repayment on an obligation.

12 DIRECT EXAMINATION (CONTINUED)

13 BY MR. RUSSELL:

14 Q I ask you if you can examine this
15 document, please?

16 A (Witness complies.)

17 Q Generically, can you identify
18 what type of form this document is?

19 A This is a HUD 1 form.

20 Q What is HUD?

21 A Housing and Urban Development.
22 It is a division of the U.S. Government.

23 Q What is a HUD 1 form?

24

25

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1 A A HUD 1 form is, in my
2 experience, a standard settlement statement, whereby
3 the terms of any transaction, real estate based
4 transaction, is outlined.

5 Q Does this HUD 1 form relate to
6 any particular real estate transaction?

7 A Yes, it does.

8 Q What transaction is that?

9 A The transaction the HUD form
10 outlines is --

11 MR. BARKER: Your Honor, I am
12 sorry. This gentleman is now going to
13 testify to a document that is not signed by
14 my client anywhere and the settlement agent
15 hasn't signed it. It is nothing that came
16 from -- We don't know what the source of it
17 is. He hasn't laid a foundation as to
18 whether they have it in regular and
19 ordinary course of business. I am going
20 to object.

21 THE COURT: Overruled.

22

23

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1 DIRECT EXAMINATION (CONTINUED)

2 BY MR. RUSSELL:

3 Q What does this HUD 1 form relate,
4 to what transaction?

5 A Lafayette Associates' acquisition
6 of the mini-storage facility.

7 Q All right.

8 When did this transaction take
9 place according to the statement?

10 A The settlement date was October
11 3, 1988.

12 Q Is this HUD 1 form a document
13 that NEI received in the regular course of its
14 business?

15 A Yes.

16 Q Did it receive it from the
17 Resolution Trust Corporation when it purchased the
18 loan?

19 MR. BARKER: Objection, Your
20 Honor. He did not work for that company in
21 '92 and he has testified to that. He
22 didn't start until '94.

23 THE COURT: I am going to allow
24 it, Mr. Barker. All right.

25

000030

1 A Yes. This document was in the
2 loan file.

3 DIRECT EXAMINATION (CONTINUED)

4 BY MR. RUSSELL:

5 Q Does it indicate what was done
6 with the \$425,000 from Seasons Mortgage?

7 A It was applied as a credit to the
8 buyer for acquiring the property.

9 Q So, the money was paid from
10 Seasons --

11 THE COURT: Don't testify,
12 please.

13 MR. RUSSELL: We would move this
14 as Plaintiff's Exhibit No. 5, please.

15 (Whereupon, a HUD 1 form was
16 marked for identification as Plaintiff's
17 Exhibit No. 5.)

18 DIRECT EXAMINATION (CONTINUED)

19 BY MR. RUSSELL:

20 Q Now, at the time, from examining
21 the loan file on this particular transaction when you
22 become the asset manager for it, in December '92,
23 when NEI purchased this loan, were you able to
24 determine whether this was a fully performing loan at
25 the time it was purchased? Was it current?

000031

1 A My knowledge of our acquisition
2 of pool 45 is that none of those loans were
3 performing.

4 Q When you say that they weren't
5 performing, what do you mean?

6 A To some degree they were all
7 delinquent.

8 Q All right.

9 At the time of December of '92,
10 when NEI purchased, does NEI's file indicate whether
11 Resolution Trust Corporation had taken any action
12 against the property itself that was the subject of
13 this loan.

14 MR. BARKER: Your Honor, I am
15 sorry. Now, we are going down -- They are
16 summarizing from hearsay documents.

17 THE COURT: I will sustain that
18 objection.

19 DIRECT EXAMINATION (CONTINUED)

20 BY MR. RUSSELL:

21 Q Have you had a chance to examine
22 this?

23 A Yes.

24 Q Do you recognize this document?

25 A Yes, I do.

000032

1 Q What is it?

2 A This is a settlement statement
3 which describes the July '92 sale of the subject
4 collateral by the Resolution Trust Corporation as
5 receivable for Seasons Federal Savings Bank.

6 Q Does it relate to this particular
7 loan?

8 A Yes, it does. It describes the
9 sale of the property for \$275,000, whereby the net
10 cash generated from the sale was \$217,557.14.

11 Q Does it indicate what was done
12 with this \$217,000?

13 A The money was given to the
14 Resolution Trust Corporation --

15 MR. BARKER: Judge, I am going to
16 object to that. There is nothing on that
17 document that says that.

18 THE COURT: Well, I guess the
19 jury can take a look at that and see.

20 MR. RUSSELL: We will move this
21 as Plaintiff's Exhibit No. 6.

22 (Whereupon, a settlement
23 statement was marked for identification as
24 Plaintiff's Exhibit No. 6.)
25

000033

1 DIRECT EXAMINATION (CONTINUED)

2 BY MR. RUSSELL:

3 Q The third page of this document
4 is a copy of a check. Who is the payee on this
5 check?

6 A The payee is Jacobson/CCF
7 Partners as agent for Resolution Trust Corporation.

8 Q Do you know what that means?

9 A That means that Resolution Trust
10 Corporation hired --

11 MR. BARKER: Objection, Your
12 Honor.

13 THE COURT: Sustained.

14 DIRECT EXAMINATION (CONTINUED)

15 BY MR. RUSSELL:

16 Q In the course of your business,
17 are you familiar with how Resolution Trust
18 Corporation manages the loans after it takes over a
19 savings and loan operation?

20 A Yes.

21 Q How does it do that?

22 A Resolution Trust Corporation
23 engaged numerous servicing companies to manage assets
24 for them prior to being sold.

25

000034

1 Q Do you know who the servicing
2 agent used by Resolution Trust Corporation for the
3 Seasons Mortgage loan to Lafayette Associates was?

4 A Yes.

5 Q Who was that?

6 A That would be Jacobson Partners.

7 Q I show you this document and ask
8 you if you can identify what this document is?

9 A This was a document that appears
10 in the loan file. It is a document that describes
11 the sale of the collateral at auction.

12 Q Of this particular --

13 MR. BARKER: Your Honor, I am
14 sorry. This is a piece of paper that is
15 not signed by anybody. It has, definitely,
16 a place for oversight manager, date and all
17 of that. He is going to start testifying
18 on things he knows nothing about. This
19 isn't even signed, in addition to the other
20 objection that I have stated.

21 THE COURT: All right.

22 Overruled.

23

24

25

000035

1 DIRECT EXAMINATION (CONTINUED)

2 BY MR. RUSSELL:

3 Q Was this a document that NEI
4 received from Resolution Trust Corporation as part of
5 its loan package?

6 A Yes.

7 Q What particular transaction does
8 this refer to?

9 A The sale of the collateral
10 involved in the Lafayette Associates loan.

11 Q The same one in the previous
12 exhibit?

13 A Yes.

14 Q Does it indicate an amount of the
15 net proceeds?

16 A Yes, it does.

17 Q Is it this same amount as in
18 Exhibit No. 6?

19 A Yes.

20 MR. RUSSELL: I would move

21 Plaintiff's Exhibit No. 7, please.

22 (Whereupon, a sale of collateral
23 document was marked for identification as
24 Plaintiff's Exhibit No. 7.)

25

000036

1 DIRECT EXAMINATION (CONTINUED)

2 BY MR. RUSSELL:

3 Q Now, when you took over this
4 particular loan, were you able to determine in the --
5 Let me back up. In the course of your business, are
6 you familiar with the term demand letter?

7 A Yes.

8 Q What is a demand letter?

9 A A demand letter is a written
10 request for payment.

11 Q Were you able to determine
12 whether there were any demand letters related to this
13 particular loan in the loan file that were made prior
14 to the foreclosure sale?

15 A Yes.

16 Q I show you this document and ask
17 you if you can identify what this is?

18 A This is a demand letter dated
19 September 11, 1991 from Jacobson/CCF Partners to
20 Roger McDonald demanding payment of the subject loan.

21 Q Was this received by NEI in the
22 regular course of its business?

23 A Yes.

24 Q Was it received from Resolution
25 Trust Corporation in connection with the purchase by

000037

1 NEI of the particular loan in this case?

2 A Yes.

3 MR. RUSSELL: I would move this
4 as Plaintiff's Exhibit No. 8.

5 (Whereupon, a September 11, 1991
6 demand letter was marked for identification
7 as Plaintiff's Exhibit No. 8.)

8 DIRECT EXAMINATION (CONTINUED)

9 BY MR. RUSSELL:

10 Q I show you this document and ask
11 you if you can identify what this is?

12 A This is a subsequent demand
13 letter dated December 17, 1991 to Roger McDonald,
14 Lafayette Associates and Lawrence Phillips, notifying
15 that the loan has been accelerated due to the
16 default.

17 Q What is meant by accelerating a
18 loan?

19 A An acceleration is a process
20 whereby you demand the entire balance, plus accrued
21 interest be paid.

22 Q What is the date of this?

23 A December 17, 1991.

24 Q Was this document in the loan
25 file that NEI had that you had custody of?

000038

1 A Yes.

2 Q Was it kept by NEI in the regular
3 course of its business?

4 A Yes.

5 Q Was it received by NEI from the
6 Resolution Trust Corporation in connection with its
7 purchase of this particular loan?

8 A Yes.

9 MR. RUSSELL: Move as Plaintiff's
10 Exhibit No. 9.

11 (Whereupon, a December 17, 1991
12 demand letter was marked for identification
13 as Plaintiff's Exhibit No. 9.)

14 DIRECT EXAMINATION (CONTINUED)

15 BY MR. RUSSELL:

16 Q Now, since you took over the
17 management of this particular loan, did you have
18 occasion to make any calculation as to the current
19 status of this particular loan?

20 A Yes.

21 Q How did you go about doing that?

22 A I referred to the promissory note
23 and determined the terms at which the loan was to be
24 repaid.

25

000039

1 Q Were you able to determine at
2 what point payments stopped being made on this
3 particular loan?

4 A Yes. There were documents in the
5 file that --

6 MR. BARKER: Your Honor, now we
7 are going beyond documents and summary of
8 some documents that are allegedly in the
9 file. I am going to object.

10 THE COURT: Overruled.

11 A There were documents in the file
12 that reflect at what point the loan was in default.

13 DIRECT EXAMINATION (CONTINUED)

14 BY MR. RUSSELL:

15 Q Let me show you this document and
16 ask if you can identify this?

17 A This is an analysis as to what is
18 currently owing on this transaction as of March 3,
19 2000.

20 Q Who prepared this?

21 A I did.

22 Q In the course of preparing this,
23 what date did you determine was the last current
24 payment date on this particular loan?

25

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1 A The interest paid to date was
2 September 4, 1990.

3 Q In calculating the balance that
4 was due on this particular loan, how did you
5 determine what interest rate to be charged?

6 A The note provided for an index.
7 That index was a three year T bill with the cost of
8 maturity of one week.

9 Q What is a T bill?

10 A It is a treasury bill. It is an
11 obligation issued by the Federal Government.

12 Q What did the interest rate on the
13 T bill have to do with the interest rate on this
14 particular loan?

15 A The three year T bill was an
16 index. And during the course of the loan,
17 approximately every thirty-six months, the loan
18 interest rate was reset to reflect the current T bill
19 rate plus the margin.

20 Q Now, the second column of this
21 document is labeled Index. What does that refer to?

22 A That refers to the prevailing
23 T bill rate at the time of the change dates as
24 provided for in the note.

25.

000041

1 Q On the second column it is called
2 Margin. What does that refer to?

3 A The margin is the spread between
4 the index rate and the pay rate.

5 Q How is that determined?

6 A By adding the two.

7 Q The margin, who set the margin?

8 A The margin is provided for in the
9 promissory note.

10 Q And you took the five percent
11 from that promissory note?

12 A Yes, I did.

13 Q And the fourth column, which is
14 Effective Rate, what is that number referring to?

15 A The effective rate reflects
16 the -- By adding the index to the margin, you end up
17 with the effective rate. It is the sum of the two
18 ratings, the margin as well as the index.

19 Q Now, going over to the last
20 column, which is Principle Balance, what does that
21 column refer to?

22 A That column refers to the
23 prevailing principle balance at different dates.

24 Q The starting point for you was
25 \$421,324.83; how did you arrive at that figure?

1 A By information that was provided
2 for in the loan file.

3 Q Now, does this document in any
4 way reflect the foreclosure sale that has been
5 testified about?

6 A Yes, it does.

7 Q How does that show up?

8 A It reflects a reduction in July
9 '92 of the net proceeds of \$217,557.14 as a reduction
10 to accrued interest and the principle balance.

11 Q How much of that was applied to
12 the principle balance?

13 A \$106,581.23.

14 Q And the remainder of the \$217,000
15 was applied in what fashion by you?

16 A To accrued interest.

17 Q Did that zero out the accrued
18 interest?

19 A As of the July '92 date, yes, it
20 did.

21 Q Now, since that July '92 date,
22 were you able to determine whether any payments had
23 been made in regard to this loan?

24 A The file contained no records of
25 any payments being made.

000043

1 Q Since December of '92, when NEI
2 took possession of this loan, have any payments been
3 made?

4 A I am not aware of any payments
5 that were made.

6 Q So, the principle balance has
7 remained the same?

8 A Yes, it has.

9 Q Were you able to determine what
10 the current balance on this particular loan is of the
11 principle, plus accrued interest?

12 MR. BARKER: Your Honor, may I
13 say something?

14 THE COURT: Sure.

15 MR. BARKER: Under 8.01-401 on
16 McMunn versus Tatum, I am going to object
17 to this conclusion.

18 THE COURT: All right.
19 Overruled.

20 A Repeat your question, please.

21 THE COURT: What is the amount
22 due?

23

24

25

000044

1 DIRECT EXAMINATION (CONTINUED)

2 BY MR. RUSSELL:

3 Q What is the total amount due,
4 with interest and principle?

5 A \$593,839.60 as of March 7, 2000.

6 MR. RUSSELL: I move this as
7 Plaintiff's Exhibit No. 10.

8 (Whereupon, a current analysis of
9 the transaction was marked for
10 identification as Plaintiff's Exhibit
11 No. 10.)

12 DIRECT EXAMINATION (CONTINUED)

13 BY MR. RUSSELL:

14 Q Now, earlier you testified about
15 two demand letters that were made upon this loan in
16 1991. Since National Enterprises, Inc., has taken
17 over this loan, are you aware of any demands that
18 have been made for the repayment of this loan?

19 A Yes.

20 Q When did that occur?

21 A That occurred in July 1994.

22 Q What form did that take?

23 A It took the form of a complaint
24 for deficiency.

25

000045

1 Q I ask you if you can identify
2 this?

3 A This is the document that
4 reflects National's demand for the payment of the
5 deficiency that was owed on the obligation.

6 Q Is this a lawsuit filed on behalf
7 of National Enterprises, Inc.?

8 A Yes.

9 Q Against whom was it filed?

10 A Lafayette Associates, Roger
11 McDonald and Lawrence Phillips.

12 Q Do you know, as a result of this
13 1996 lawsuit, if judgement was ever obtained against
14 Lawrence Phillips?

15 MR. BARKER: Judge, I am going to
16 object to that.

17 THE COURT: Sustained.

18 MR. RUSSELL: Your Honor, I would
19 agree with you, except that he opened that
20 door in his opening statement. He said
21 that there was --

22 THE COURT: I know and I
23 understand what he said, but that is not
24 evidence.

25

000046

1 DIRECT EXAMINATION (CONTINUED)

2 BY MR. RUSSELL:

3 Q As a result of this demand to
4 Mr. McDonald, Mr. Phillips and Lafayette Associates,
5 has National Enterprises, Inc., received any
6 repayment, in whole or in part, on this particular
7 loan?

8 A No.

9 Q At any time since this demand was
10 made has Lawrence Phillips, Roger McDonald, Lafayette
11 Associates or anyone on behalf of Lafayette
12 Associates informed NEI that any payments have been
13 made?

14 A No.

15 MR. RUSSELL: That is all the
16 questions I have at this time.

17 THE COURT: All right. Let's
18 take a brief recess.

19 MR. RUSSELL: I would move that
20 as Plaintiff's Exhibit No. 11.

21 THE COURT: All right.

22 (Whereupon, a 1996 lawsuit was
23 marked for identification as Plaintiff's
24 Exhibit No. 11.)

25

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1 (Whereupon, a short recess was
2 taken.)

3 THE COURT: Bring the jury in.

4 (Whereupon, the jury is returned
5 to the courtroom and the following
6 proceedings were held in the jury's
7 presence.)

8 THE COURT: All right.

9 Mr. Barker?

10 MR. BARKER: Thank you, Your
11 Honor.

12 CROSS-EXAMINATION

13 BY MR. BARKER:

14 Q Mr. Tallarida, I understood your
15 testimony to be that you didn't work for NEI back in
16 December of 1992 when it supposedly got a bill of
17 sale from the Resolution Trust Corporation; is that
18 correct?

19 A Yes.

20 Q I understood your testimony to be
21 that there was some pools of notes or pools of
22 documents; correct?

23 A Pools over loan.

24 Q And about information that was on
25 a screen?

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1 A Yes.

2 Q Do you remember that testimony?

3 A Yes.

4 Q There was nothing that prevented
5 a buyer from actually inspecting the actual documents
6 or walking away from the sale, was it? In other
7 words, you weren't forced to buy any documents, it
8 was your company's decision to buy notes without
9 looking at the actual original notes; correct?

10 A That is true.

11 Q You have testified about a loan
12 transaction in 1988 dealing with Lafayette
13 Associates; isn't that correct?

14 A Yes.

15 Q You weren't involved in any way
16 with the loan transaction; were you?

17 A No, I wasn't.

18 Q You wouldn't know Roger McDonald
19 if he walked up to you in the hall and said hi would
20 you?

21 A I have never met Mr. McDonald,
22 no.

23 Q You weren't involved in any way
24 with the process of putting together the note or the
25 guarantee, preparing them; were you?

1 A No, I was not.

2 Q If the deputy could hand you
3 Exhibit No. 5, please. That is a HUD statement about
4 what you testified related to an alleged real estate
5 transaction on October 3, 1988.

6 Do you remember testifying about
7 that document, sir?

8 A Yes.

9 Q Could you hold that up and show
10 the jury where Mr. McDonald's signature is?

11 A Mr. McDonald did not sign this
12 document. General partner Lawrence Phillips signed
13 this document.

14 Q Did you see him do it?

15 A No, but his signature is on the
16 document.

17 Q You don't know Mr. Phillips,
18 either; do you?

19 A No, I don't.

20 Q On the second page, do you see a
21 blank for settlement agent on the bottom?

22 A Yes.

23 Q Do you see a signature by the
24 settlement agent indicating that the document
25 actually closed pursuant to what you have submitted

1 as evidence?

2 A The settlement agent space was
3 not signed.

4 Q Not signed. All right.

5 Now, you are aware that there are
6 any number of people that were allegedly involved in
7 this real estate transaction; are you not?

8 A I am aware.

9 Q Right.

10 A lot of those people live right
11 here in Richmond; don't they?

12 A I don't know that.

13 Q Did you look at the sworn answers
14 to interrogatories provided by your company?

15 A I don't recall.

16 Q Let me ask you to look at this
17 and see if it refreshes your recollection, it is
18 entitled sworn answers to interrogatories, November
19 1996.

20 Do you see all that list of names
21 in response to sworn answers your company provided to
22 me about people involved who lived here in Richmond,
23 the list of names?

24 A List of names?

25

000051

1 Q Let me ask you simply to go to
2 the final page of that document. That is a page
3 signed by an employee of your company representing it
4 in this litigation; correct?

5 A Yes, a former employee.

6 Q All right.

7 When he signed that, he was
8 authorized to do that and it was subscribed and sworn
9 to; was it not?

10 A Yes, it was.

11 MR. BARKER: Sheriff, may have I
12 have that document, please.

13 CROSS-EXAMINATION (CONTINUED)

14 BY MR BARKER:

15 Q Now, in regard to these different
16 letters that were sent back and forth between the
17 parties, your company responded by making a list of
18 names. And, then, your company further filed a
19 response in answer to interrogatory No. 2 setting
20 forth the names and addresses of the various people
21 who were, in fact, involved with this transaction;
22 isn't that correct?

23 A And your question again, please?

24

25

000052

1 Q Yes, sir.

2 You see the names of people who
3 live in the Richmond area that your company
4 identified as having been involved in the
5 transaction; do you not?

6 A Yes, I see addresses here.

7 Q And you are unaware that your
8 company had made that response before it was just
9 handed to you today; is that correct?

10 A I don't recall reading this
11 answer to this particular interrogatory, right.

12 Q You don't have any of those names
13 of those people in Richmond who were allegedly
14 involved in that transaction here to testify today as
15 to actually what happened; correct?

16 A That is true.

17 Q To testify whether the HUD 1
18 actually was used or whether the transaction
19 transpired; correct?

20 A True.

21 Q Now, you don't have a cancelled
22 check from Seasons Bank showing that money was
23 transferred as a result of this alleged transaction
24 shown in the unsigned HUD 1; do you?

25

000053

1 A I am not sure what you are
2 referring to.

3 Q Well, I am referring to the HUD
4 1, Exhibit No. 5. This is the one that is not signed
5 by Mr. McDonald and not signed by the settlement
6 agent.

7 My question to you is: You don't
8 have a cancelled check showing that money was
9 transferred by Seasons to anyone on October 3, 1988;
10 do you?

11 A Just so I understand, you are
12 asking me as to whether I saw the cancelled check?

13 THE COURT: No. The question is:
14 Do you have it?

15 A No.

16 CROSS-EXAMINATION (CONTINUED)

17 BY MR. BARKER:

18 Q You had an exhibit that came into
19 evidence, Exhibit No. 11, a lawsuit. Are you
20 familiar with that lawsuit?

21 A Yes.

22 Q It was the last one you testified
23 about?

24 A Yes.

25

000054

1 Q In that lawsuit, your company
2 sued Lafayette Associates to establish that it had to
3 pay the note; didn't it?

4 A Yes.

5 Q And your company didn't win on
6 that suit; did it?

7 MR. RUSSELL: Objection.

8 CROSS-EXAMINATION (CONTINUED)

9 BY MR. BARKER:

10 Q It did not get a judgment against
11 Lafayette Associates on the note; did it?

12 A I don't recall.

13 Q Do you have the original note?

14 A No.

15 Q Now, you had a document and I
16 would like the sheriff to show you a document,
17 Exhibit No. 2, it says deed of trust note.

18 Prior to your testimony today and
19 telling this jury that is the note, have you looked
20 at each and every one of those pages?

21 A Yes.

22 Q And are you telling this jury,
23 under oath, that that is what the note looks like
24 today wherever the original is?

25 A Yes, sir.

000055

1 Q Are you telling this jury --

2 Well, that is fine. I take it at your word that that
3 is your testimony.

4 Are you sure of that?

5 A Yes.

6 Q Is that based on the fact that
7 you have seen the original note recently?

8 A That is the note provided to us
9 by the Resolution Trust Corporation.

10 Q Okay.

11 That is exactly, if you could
12 find the original, what it would look like today; is
13 your testimony?

14 A I am confused. To answer that
15 question, are you asking me I would have to have seen
16 the original note?

17 Q Correct.

18 A I have never seen the original
19 note.

20 Q And you are not saying the
21 original note doesn't say marked paid; are you?

22 A Repeat that?

23 Q You are not telling this jury
24 that the original note does not -- Well, you don't
25 know whether it shows it has been marked paid or not;

000056

1 do you?

2 A I have no reason to believe it
3 would be marked paid.

4 Q You have no reason to believe
5 that there would be any markings on the original
6 note, Exhibit No. 3, as it exist, if you could bring
7 it in here today; correct?

8 A Correct.

9 Q Are you as sure of that testimony
10 as you are the rest of your testimony?

11 THE COURT: What kind of
12 statement is that, Mr. Barker? I don't
13 like that question.

14 MR. BARKER: Pardon?

15 THE COURT: I don't like the
16 question. Next question, please.

17 MR. BARKER: Yes, sir.

18 CROSS-EXAMINATION (CONTINUED)

19 BY MR. BARKER:

20 Q You are aware that partnerships
21 can transfer assets; are you not?

22 A Yes, they can.

23 Q They can transfer liabilities;
24 can't they?

25 A I don't understand.

1 Q Well, didn't your company have
2 transferred to it certain assets and liabilities when
3 it bought notes?

4 A Yes.

5 Q Okay.

6 So, you are aware of the fact
7 that it is not just your company, but partnerships
8 and companies that can transfer assets and
9 liabilities to successors in interest; correct?

10 A No, I don't understand that. I
11 don't see how that could be possible.

12 Q So, you have never heard of a
13 merger, where one company merges or a partnership
14 merges and a successor company takes over the assets
15 and liabilities?

16 A What I don't understand in that
17 analogy is how an obligor on a guarantee can assign
18 that obligation without the beneficiary of that
19 guarantee being involved?

20 Q Well, if I get to that question,
21 I will ask you about that.

22 A Okay.

23 Q The question I am on is: A note
24 that is a liability of the partnership or company can
25 be assigned to the successor partnership or company;

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1 can it not?

2 A My response to that would be the
3 note can be assigned. I don't think the obligation
4 can be assigned.

5 Q Okay.

6 The assignee, the person who gets
7 it and takes over the business, can pay the note off;
8 correct?

9 A Yes.

10 Q Okay.

11 Payment of the note means there
12 is no obligation on the guarantee; doesn't it?

13 A So, I understand your question,
14 you are saying full satisfaction of the note would
15 alleviate the obligation under the guarantee; is that
16 your question?

17 Q That is right.

18 A That would be true.

19 Q If you had the note, that would
20 be evidence that it has never been paid; won't it?

21 A If I had the note that would be
22 evidence that it was not paid?

23 Q If it wasn't marked paid or
24 credits were not marked on it; correct?

25 A That is true.

000059

1 Q You were aware of the fact that
2 notes have been sold, erroneously, twice by the
3 Resolution Trust Corporation and sometimes three
4 times; aren't you?

5 MR. RUSSELL: Objection.

6 THE COURT: Sustained.

7 CROSS-EXAMINATION (CONTINUED)

8 BY MR. BARKER:

9 Q Now, there were certain security
10 documents related to this transaction; is that
11 correct?

12 A Yes.

13 Q Those security documents would be
14 a deed of trust and security agreement; correct?

15 A Yes.

16 Q And it would be a guarantee;
17 correct?

18 A Yes.

19 Q Now, among the records that your
20 company maintained, it identified in the answer to
21 interrogatories a letter of September 18, 1990 in
22 answer to paragraph 4 of the request for production
23 of documents; is that correct?

24

25

000060

1 MR. RUSSELL: Your Honor, he
2 didn't prepare this document. If he wants
3 to put in the answers to interrogatories, I
4 have no objection to him doing that. If he
5 wants to put in --

6 THE COURT: Let's let him take a
7 look at it and see what he does know,
8 Mr. Russell.

9 A Your question, again, please?

10 CROSS-EXAMINATION (CONTINUED)

11 BY MR. BARKER:

12 Q Your company identified a letter
13 of September 18, 1990; correct?

14 A Yes, sir.

15 Q And I am going to ask you to look
16 at a letter of September 18, 1990, which was provided
17 and labeled as September 18, 1990.

18 You are familiar with that
19 letter; are you not?

20 A I would like the opportunity to
21 read it just quickly.

22 Q Sure.

23 A (Witness reads letter.)

24 Q That is the letter in the answer;
25 isn't it?

000061

1 A Yes. It appears to be, yes.

2 MR. BARKER: I move the
3 introduction of both of those exhibits,
4 Your Honor.

5 MR. RUSSELL: No objection.

6 THE COURT: All right.

7 (Whereupon, November 1996 sworn
8 answers to interrogatories were marked for
9 identification as Defendant's Exhibit No.
10 1.)

11 (Whereupon, a September 18, 1990
12 letter was marked for identification as
13 Defendant's Exhibit No. 2.)

14 CROSS-EXAMINATION (CONTINUED)

15 BY MR. BARKER:

16 Q Now, is the guarantee that you
17 testified about -- Have you read the other documents
18 related to the guarantee agreement that were among
19 your file?

20 A I don't understand your question.

21 Q Well, have you read other
22 documents that were among the papers that you had
23 related to the proposed guarantee agreement?

24 A I have read the loan file, if
25 that is your question.

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1 Q If that is your answer, that is
2 fine.

3 You don't know that this
4 guarantee agreement, in fact, was delivered to
5 anybody; do you? You don't know that?

6 A I don't understand your question.

7 Q Well, it is a simple question.

8 In October of 1988, you had no
9 personal knowledge of whether this document was
10 delivered to anybody; isn't that correct?

11 A Delivered in terms of --

12 Q In terms of Mr. McDonald signed
13 it and then rather than intending to consummate the
14 document and sign the HUD 1 delivered it, you don't
15 know yourself; do you?

16 A I am sorry, I am not following
17 your question.

18 THE COURT: Mr. Barker, that is
19 it. He wasn't there in 1988. Why ask a
20 question that answers itself?

21

22

23

24

25

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1 CROSS-EXAMINATION (CONTINUED)

2 BY MR. BARKER:

3 Q Well, you are aware that there
4 are documents in your file that indicate that the
5 security agreement in the form that you have
6 presented it, is not what Seasons Bank wanted; isn't
7 that true?

8 A I don't understand.

9 Q Well, let me ask you to take a
10 look at this piece of paper and maybe it will refresh
11 your recollection?

12 MR. RUSSELL: Your Honor, this is
13 one page of a larger document. I just
14 simply ask that the witness be allowed to
15 examine the entire document before
16 answering.

17 MR. BARKER: Sure.

18 A Your question, again, please?

19 CROSS-EXAMINATION (CONTINUED)

20 BY MR. BARKER:

21 Q What did the loan summary that
22 you produced to me indicate, as highlighted in the
23 center of the page --

24

25

000064

1 MR. RUSSELL: I am going to
2 object to him testifying about the
3 contents. The question was if this
4 refreshed his recollection. If the
5 contents of the document intend to come in,
6 then, I would request that the entire
7 document and not just once excised page --

8 THE COURT: I agree. I think the
9 whole document should come in.

10 CROSS-EXAMINATION (CONTINUED)

11 BY MR. BARKER:

12 Q Let me ask you this question:
13 You are aware that when the loan was proposed, it was
14 proposed that the spouses sign the guarantee, from
15 your own documents; correct?

16 A I don't recall the spouses being
17 an issue in this entity.

18 Q You don't take contest with the
19 fact that that came to me from your file at NEI; do
20 you?

21 A It may have.

22 Q And you don't take contest with
23 the fact that the guarantee agreement has no spousal
24 signatures; do you?

25

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1 A I don't recall spouses signatures
2 being on the guarantee document.

3 Q And it is not unusual that when
4 National Enterprises, Inc., sues on a note it has the
5 spouses' guarantee; isn't that true?

6 A Can you repeat that, please?

7 Q It is not unusual when National
8 Enterprises, Inc., sues on a note that it has a
9 guarantee signed by spouses; isn't that true?

10 A I have seen spouses guarantee
11 obligation. I have seen obligations that have not
12 been guaranteed by spouses.

13 Q Now, have you read the guarantee
14 throughout?

15 A Yes, I have.

16 Q And you are familiar with the
17 irregularities that occur in the guarantee; are you
18 not?

19 A Such as?

20 Q Such as paragraph 10 in, I think,
21 Exhibit No. 4.

22 A Okay. Your question, again?

23

24

25

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1 Q Sir, you are aware that a
2 guarantee in its final form should state the
3 invalidity of any portion of this guarantee agreement
4 or any portion of any agreement or obligation
5 guarantee hereby should not invalidate the remainder
6 of the guarantee agreement? That is the typical
7 form, you are aware of that? The invalidity of the
8 any portion of the guarantee agreement does not
9 invalidate the remainder?

10 A The paragraph 4 that I am reading
11 refers to attorneys fees.

12 Q Paragraph 10, page 5.

13 A I am sorry. I thought you said
14 paragraph 4.

15 Q I notice you grimaced as you read
16 that. The paragraph should say in the its final
17 form, the invalidity, and not the validity; shouldn't
18 it?

19 A It appears to be a typo.

20 Q It appears that you don't know if
21 this was the final document in the pages that were
22 assembled at this time or not; do you?

23 A I --

24 Q Because this is a mistake that
25 should have been corrected; isn't that true?

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1 A It should have been corrected.

2 Q And it appears on the signature
3 page, page 7, that the notary public -- Do you know
4 Nancy Houser?

5 A No, I don't.

6 Q Have you attempted to subpoena
7 her from Sands Anderson to be here and testify today?

8 A Not that I am aware of.

9 Q Okay.

10 Where it says that there is an
11 agreement with a certain date, it is blank; isn't it?

12 A It appears to be blank.

13 Q Yet, the date appears to be
14 filled in on page 1; doesn't it?

15 A Yes, it does.

16 Q Have you ever seen a real estate
17 transaction take place Mr. Tallarida at a lawyer's
18 office? Have you ever seen all of the papers that
19 get put together during the course of a real estate
20 transaction?

21 A I have attended real estate
22 closings, yes.

23 Q You are aware that the statements
24 are read at real estate closings and that the
25 documents need to be amended, too; aren't you?

1 A Yes.

2 Q Did you ever talk to the
3 commissioner of accounts about what credits were due
4 in this case or when?

5 A No.

6 Q Did you know who the commissioner
7 of accounts was at the time that credits were made to
8 the note?

9 A I am not sure what you mean by
10 commissioner of accounts. Perhaps, can you explain
11 that?

12 Q I don't want you to speculate.
13 If you know the term, fine. If you don't, you don't.

14 You don't know what a
15 commissioner of accounts is in Virginia; do you?

16 A No, I don't.

17 Q You don't know what the
18 commissioner of accounts function is; do you?

19 A No, I don't.

20 Q It is your testimony that
21 Mr. McDonald did not make full payment of the note on
22 November 4, 1990 in accordance with the demand that
23 was made of him to do so in the September 18, 1990
24 letter; is that correct?

25 A That is my position.

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1 MR. RUSSELL: Objection. I think
2 the letters are '91.

3 MR. BARKER: No, sir. I was very
4 specific on what I said.

5 Would you like to look at the
6 exhibit for the date? It is there,
7 September 18, 1990.

8 THE COURT: Are you testifying,
9 talking to him ask or asking questions?

10 MR. BARKER: I was responding to
11 Mr. Russell.

12 THE COURT: No, you don't respond
13 to him.

14 MR. BARKER: Yes, sir.

15 CROSS-EXAMINATION (CONTINUED)

16 BY MR. BARKER:

17 Q Now, in calculating the damages,
18 were you aware that this was a mini-warehouse?

19 A Yes.

20 Q You were.

21 Were you aware that there were
22 deposits made by people that rented at the
23 mini-warehouse? You know if you go and rent space at
24 a mini-warehouse, were you aware that security
25 deposits were made for the rental of that space?

1 A I imagine there were security
2 deposits, yes, sir.

3 Q And you understood from reading
4 the deed of trust and security agreement that those
5 security deposits were moneys that would be paid
6 towards any default note; didn't you?

7 A I was not aware of the terms of
8 the sale in how the security deposits were to be
9 handled.

10 Q No. I am sorry.

11 My question was: You were aware
12 that under Plaintiff's Exhibit No. 3, the deed of
13 trust and security agreement, that security deposits
14 that the partnership had for those mini-warehouses
15 would be applied to the note? You were aware of
16 that; weren't you?

17 A As provided for in the documents.

18 Q Yes, sir.

19 And you didn't make any
20 calculation as to what credit should be given as a
21 result of those security deposits; did you?

22 A If that evidence was provided for
23 in the file, I would have made an offset for them.

24 Q Is it your testimony that there
25 was no money in the security accounts or do you know?

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1 A I have no knowledge of that.

2 Q And you are clear that the credit
3 that should be given in this case is \$217,557 as of
4 June 1, 1992; is that correct?

5 A Repeat your question, please?

6 Q You are clear that this exhibit
7 that you prepared, Exhibit No. 10, indicates that a
8 credit should be given towards the note of
9 \$217,557.14 on July 1, 1992; isn't that true?

10 A Yes.

11 Q And that is the only credit that
12 you made; correct?

13 A Yes, sir.

14 Q It is your testimony that you are
15 not aware of any other credits that should be
16 applied; correct?

17 A Subsequent to September 1990?

18 Q September 1990, when that
19 September 18, 1990 demand letter was sent; correct.

20 A True.

21 MR. BARKER: All right.

22 That is all I have of this
23 gentleman, Your Honor.

24 THE COURT: Redirect?

25 MR. RUSSELL: Thank you.

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REDIRECT-EXAMINATION

BY MR. RUSSELL:

Q Now, Mr. Barker asked you a lot of questions about whether you were personally involved in a loan transaction in 1988. As a representative of NEI, are you ever, in the regular course of your business, involved in the actual loan transactions that occur on the loans that you purchase?

A No.

Q Is it possible for NEI to be in business, if you were required to be present at the original loans?

A We could not be in business if that were a requirement.

Q Mr. Barker asked you about whether judgment was obtained in 1996 against Lafayette Associates. Are you aware of whether judgment was obtained against Lawrence Phillips as a result of the 1996 suit?

A Yes.

Q And was it?

A Yes.

Q But no money was actually recovered as a result of that?

1 MR. BARKER: Well, Judge, I think
2 we have a bit of a problem with the nature
3 of the question.

4 THE COURT: I don't have any
5 problem with it. Overruled.

6 MR. BARKER: It is a leading
7 question and I would object to it.

8 THE COURT: Overruled.

9 REDIRECT-EXAMINATION (CONTINUED)

10 BY MR RUSSELL:

11 Q Do you know whether or not any
12 money was recovered from Mr. Phillips as a result of
13 that judgment?

14 A No money was recovered from
15 Mr. Phillips.

16 Q I am going to show you two
17 documents and ask if you can examine those?

18 A (Witness complies.)

19 MR. BARKER: Your Honor, before
20 he testifies in regard to this, I would
21 have some -- I would want the Court to look
22 at it.

23 THE COURT: All right. Ladies
24 and gentlemen of the jury, if you will go
25 to your jury room for a moment, please.

1 (Whereupon, the jury was excused
2 to the jury room and the following
3 proceedings were held out of the jury's
4 presence.)

5 THE COURT: All right.

6 MR. BARKER: Judge, I would
7 assume that Mr. --

8 MR. RUSSELL: There are two
9 separate letters there.

10 MR. BARKER: These are settlement
11 discussions, Judge, and clearly
12 inadmissible. And they were not proved, of
13 course, to this company at all. One was to
14 Crestar Bank, which has no relevancy in
15 this. It does not identify this particular
16 loan at all. And one is to Jacobson/CCF
17 Partners.

18 But in any event they are
19 settlement documents or discussion of
20 settlement documents. And discussion of
21 settlement is not admissible, even if they
22 could get past all to the hearsay hurdles
23 and best evidence and 801.391 statute
24 requirements.
25

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1 THE COURT: Let me hear from you
2 on the December 6, 1990 letter with Crestar
3 Bank?

4 MR. RUSSELL: Yes, sir. Raymond
5 Sanders had move to Crestar Bank, but both
6 of these letters came from the files of
7 NEI. Both of them were part of the loan
8 file received from RTC. Both of them
9 were referred --

10 THE COURT: I specifically asked
11 you to refer to December 6, 1990. Don't
12 give me both.

13 MR. RUSSELL: I am sorry.
14 The December 16 --

15 THE COURT: December 6 --

16 MR. RUSSELL: -- 1991 letter.

17 THE COURT: It is December 6,
18 1990 from Roger McDonald to Raymond
19 Sanders.

20 MR. RUSSELL: That has the loan
21 number on it that refers and corresponds to
22 the loan number in this particular case.
23 It is referenced on several of the exhibits
24 that are already in evidence.
25

1 And it is in direct response to
2 Mr. Barker's question regarding the
3 September 1990 letter and whether
4 Mr. McDonald ever paid any money as a
5 result of that demand letter or whether
6 Lafayette Associates ever paid any money as
7 a result of that demand letter. There was
8 no lawsuit pending, so I don't see how it
9 could be settlement discussions.

10 THE COURT: It is not a
11 settlement discussion, I know that. I can
12 see that. That is not my problem.

13 MR. RUSSELL: It has the apparent
14 signature of his client. It was part of
15 the loan file. It refers, in fact, to the
16 loan number. And Mr. Barker is free to
17 have his client come in and deny that he
18 signed it.

19 THE COURT: That is not the
20 issue.

21 MR. RUSSELL: We are offering it
22 to counter his spectator of repayment or
23 the fact that the loan never even
24 transpired. This is Mr. McDonald's
25 acknowledgment of the fact that the loan

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1 exists and was in unpaid status at that
2 particular time.

3 THE COURT: All right.

4 I will allow the December 3, 1991
5 letter, Daniel Baucomb of Jacobson.

6 MR. BARKER: If the Court would
7 kindly note my exception for the reasons
8 previous stated.

9 THE COURT: Bring the jury back,
10 please.

11 (Whereupon, the jury was returned
12 to the courtroom and the following
13 proceedings were held in the jury's
14 presence.)

15 REDIRECT-EXAMINATION (CONTINUED)

16 BY MR. RUSSELL:

17 Q Mr. Tallarida, having examined
18 that document, can you tell the jury what it is?

19 A This is a letter dated December
20 3, 1991 from Roger McDonald to Daniel Baucomb of
21 Jacobson/CCF Partners.

22 Q Was this correspondence in the
23 loan file maintained by NEI on this particular loan?

24 A Yes.

25

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1 Q Was this correspondence received
2 in the loan package from RTC by NEI?

3 A Yes.

4 MR. RUSSELL: I would move this
5 as Plaintiff's Exhibit No. 12.

6 (Whereupon, a December 3, 1991
7 letter was marked for identification as
8 Plaintiff's Exhibit No. 12.)

9 REDIRECT-EXAMINATION (CONTINUED)

10 BY MR. RUSSELL:

11 Q There is a loan number on that or
12 reference in Mr. McDonald's letter to a loan number;
13 are you familiar with that?

14 A Yes.

15 Q I ask you if you would examine
16 Plaintiff's Exhibit Nos. 7 and 8, and tell me if the
17 loan numbers on those two documents are the same as
18 the loan number on Mr. McDonald's letter of December
19 '91?

20 A Yes, all of the numbers are the
21 same.

22 Q Finally, Mr. Tallarida,
23 Mr. Barker asked you a series of questions about
24 spouse guarantees. To your knowledge does
25 Mr. McDonald have a spouse now or did he have one in

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1 1988?

2 A I don't know if he had one in
3 1988.

4 THE COURT: All right.

5 MR. RUSSELL: That is fine.

6 Thank you. No further questions.

7 THE COURT: Mr. Barker?

8 MR. BARKER: Yes, sir.

9 RECROSS-EXAMINATION

10 BY MR. BARKER:

11 Q Mr. Tallarida, you talked about
12 the prior suit that was in evidence, Plaintiff's
13 Exhibit No. 11. I understand your testimony to be
14 that you know there was a judgment against
15 Mr. Phillips and you know there was no judgment
16 against Lafayette Associates on the note; correct?

17 A I expressed I had no knowledge
18 about Lafayette Associates.

19 Q You dropped the lawsuit against
20 Mr. McDonald that you filed in 1996, in October of
21 1988; didn't you?

22 A I don't recall.

23 Q Now, do you know what debtor
24 interrogatories are?

25 A Yes.

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1 Q Did you take debtor
2 interrogatories of Mr. Phillips?

3 MR. RUSSELL: Objection. That
4 goes beyond the scope.

5 THE COURT: Sustained.

6 MR. BARKER: That is all I have
7 of this gentleman, Your Honor.

8 THE COURT: All right. Thank
9 you.

10 Your next witness?

11 MR. RUSSELL: The plaintiff
12 rests, Your Honor.

13 THE COURT: Any evidence for the
14 defendant, Mr. Barker?

15 MR. BARKER: Yes, sir, I have a
16 motion, of course.

17 THE COURT: Okay. You can go to
18 the jury room, please.

19 (Whereupon, the jury was excused
20 to the jury room and the following
21 proceedings were held out of the jury's
22 presence.)

23 THE COURT: All right.

24
25 **000081**

1 MR. BARKER: Judge, I would move
2 to strike the plaintiff's evidence at this
3 stage and I would renew, for the record at
4 least, my objection to the hearsay business
5 records.

6 One additional ground on that,
7 and I think I said it, but if I didn't, one
8 additional ground on that note is that the
9 statute 801.391 indicates that the original
10 should be provided in addition to the facts
11 that none of those documents -- This is all
12 hearsay from third parties many times over.
13 None of these were generated in regular and
14 ordinary course of NEI. And for that
15 reason, the business exception to the shop
16 book rule does not apply. It is hearsay
17 and there is no foundation and it is not
18 the best evidence.

19 In addition, the guarantee case
20 in Candelario was reviewed by the Supreme
21 Court of Virginia. The Bank of Southside
22 Virginia versus Candelario, 238 VA 635,
23 indicates the prove that the bank had in
24 that case, which we submit is the prima
25 facia case that the plaintiff has to prove,

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1 you have to prove the note. And if you
2 read that case along with Lambert versus
3 Barker, 232 VA 21, you have to have the
4 original document. And a person who is
5 alleged to be required to make payment is
6 able to "demand production of the
7 instrument and refuse to pay anyone other
8 than the holder".

9 Now, what has occurred in this
10 case is obvious. The holder of the note
11 and the guarantor are two different people.
12 The note is a collateral undertaking to the
13 obligation on the note. And without the
14 note, they just can't be split and set off.
15 Now, moreover, the law is very clear that
16 the restatement of the law is to guaranteed
17 insurability, that a defense on the bar or
18 to the collection of the note, because you
19 don't hold the note and you can't collect
20 on the note, is barred to the collection on
21 the guarantee.

22 This court has indicated
23 previously, what about a bankruptcy. And
24 in researching that, there is two
25 exceptions under the restatement of the law

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1 related to when a bar against the note
2 maker is not a bar against the guarantor.
3 And those exceptions are the instance where
4 you have a bankruptcy and the maker
5 bankrupted it and when you have capacity, a
6 lack of capacity on behalf of the making.

7 But Section 67 makes it clear
8 that of the restatement of law that if
9 there is a bar -- Along with Section 34 of
10 the restatement of the law and Section 43,
11 if there is a bar to the collection on the
12 note, then there is a bar to the collection
13 of the guarantee. Lambert versus Barker
14 makes it very clear that if you are not the
15 holder of the note, then the maker of the
16 note has every legal right to refuse
17 payment until that note is presented.

18 In this particular case, we also
19 have the statute of limitations issue. It
20 is very clear that the September 18, 1990
21 demand letter was made for full payment.
22 It is very clear that no full payment was
23 made on this note. And it is very clear
24 from the documents that the plaintiff has
25 introduced in this case, CL-96-808, that

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1 the case was not filed until 1996. In
2 fact, it was July of 1996.

3 The Court has previously made a
4 ruling and Mr. Russell has never indicated
5 anything different from your letter in
6 which you said that the five year statute
7 of limitations is applicable if you didn't
8 hear from him otherwise. We went into that
9 whole issue of the statute of limitations
10 and the tolling. If you use the Federal
11 statute of limitations, then you can't use
12 state tolling provisions.

13 Here the demand was 1990. And by
14 their own admission, the first suit was
15 1996, more than five years. We would
16 submit that it is barred by the statute of
17 limitations and it is barred because the
18 note cannot be produced and there is not
19 sufficient evidence to go forward on this
20 trial.

21 THE COURT: Motion to strike is
22 overruled.

23 How many witnesses do you have?

24 MR. BARKER: One.

25

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1 THE COURT: How long will it
2 take?

3 MR. BARKER: About forty-five
4 minutes.

5 THE COURT: All right.

6 MR. RUSSELL: Your Honor, if I
7 could be heard on this witness, assuming it
8 is who he informed me it was, which is some
9 apparent expert, before the jury hears him.
10 I don't believe there is sufficient
11 basis --

12 THE COURT: All right. I will
13 hear you on it before the person comes in.

14 We will be in recess until 1:30.

15 (Whereupon, a lunch recess was
16 taken.)

17 (Whereupon, the following
18 proceedings were held out of the jury's
19 presence.)

20 THE COURT: Who is going to be
21 your next witness, Mr. Barker?

22 MR. BARKER: Mr. Mark
23 Fleckenstein, Your Honor.

24 THE COURT: All right.

25

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1 MR. RUSSELL: Your Honor, as I
2 understand it, Mr. Fleckenstein is supposed
3 to provide some sort of expert testimony.
4 We would object to it on two grounds.
5 First of all, he was never identified in
6 any of the discovery as an possible expert.

7 THE COURT: Did you ask for
8 experts?

9 MR. RUSSELL: In our
10 interrogatories we asked for identification
11 of any witnesses or experts who had
12 knowledge about this case.

13 THE COURT: Okay.

14 MR. RUSSELL: Secondly, I have
15 absolutely no idea what possible relevance
16 an expert could have in this particular
17 case. Unless it is on the calculation or
18 something along those lines. My
19 understanding is that is not his purpose.

20 THE COURT: What are you going to
21 use the expert for?

22 MR. BARKER: Judge the expert
23 will testify in response to what
24 Mr. Tallarida talked about, about customs
25 and practices in the industry, buying notes

000087

1 and foreclosure and credits and all of
2 those sorts of things.

3 Mr. Russell asked this man to go
4 way beyond is this the note, is this the
5 file, is this what he even paid. He talked
6 about pools. He talked about screens. He
7 talked about how they examined things and
8 all of this sort of stuff. He opened the
9 door as widely as he could. The expert is
10 going to testify about foreclosures and
11 credits.

12 I would like him to read this
13 interrogatory question, because he didn't
14 ask it related to Mr. Fleckenstein. I
15 think the record ought to be very clear on
16 that.

17 THE COURT: Well, I just don't
18 understand why an expert is needed in this.
19 I can't figure that out. Why is an expert
20 needed on this transaction?

21 MR. BARKER: He will testify as
22 to the obligations and how they are
23 evidenced. As to the foreclosure, how the
24 foreclosure is conducted and how credits
25 are given after foreclosure. He will

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1 testify about documents that have been put
2 into evidence here.

3 THE COURT: What is he going to
4 say about these documents?

5 MR. BARKER: As to whether they
6 are regular on their face, which is the
7 testimony that this jury should consider.

8 He will testify as to practices
9 of the trustee in regard to undertaking a
10 foreclosure and undertaking credits.
11 Basically, he is going to testify in
12 response to the case of the plaintiffs,
13 which Mr. Tallarida --

14 THE COURT: How does he know
15 anything about this case?

16 MR. BARKER: He knows about the
17 custom and practice in regard to trustees
18 and foreclosure --

19 THE COURT: You put him on and
20 let me hear you ask him some of the
21 questions out of the jury's presence.

22 MR. BARKER: I am going to lead,
23 with the Court's permission.

24 THE COURT: That is fine.

25

000089

VOIR DIRE

DIRECT EXAMINATION

BY MR. BARKER:

Q You are Mark Fleckenstein and you
are an attorney licensed in Richmond, Virginia to
practice law; is that correct?

A That is correct.

Q And you practice in the area of
the foreclosure, credit work and bankruptcy;
correct?

A That is correct.

Q Are you familiar with negotiable
 instruments and practices related to real estate
 transactions is that true?

A Yes.

Q Is it a practice of real estate to have the settlement agent sign the HUD

1 --

A Yes.

Q -- when the transaction is consummated?

A Yes.

Q Will the law firm that handles
ing have evidence of actual transfer payments
ers when the settlement, in fact, occurs?

000090

1 A They should have bookkeeping
2 records showing the transfer of all funds.

3 Q Are you familiar with security
4 documents normally used to accompany a loan for the
5 sale of real property pertaining to an on-going
6 business?

7 A Sale of real property?

8 Q Yes, sir.

9 A Yes.

10 Q Have you seen the deed of trust
11 note in this particular case?

12 A Yes.

13 Q Have you seen the guarantee?

14 A I have.

15 Q Is the guarantee, the deed of
16 trust note and security agreement part of the
17 security documents --

18 A Absolutely.

19 Q -- that would be involved in the
20 transaction?

21 A When you are dealing with an
22 on-going business, you almost always have guarantee
23 agreements as part of the security.

24 Q When you say a guarantee, it was
25 a guarantee of what?

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1 A My recollection is it is a
2 guarantee of payment.

3 Q Explain to jury, if you would, if
4 you have had occasion to foreclose of real property?

5 A I have.

6 Q In foreclosing on real property,
7 do you obtain the actual note?

8 A I won't foreclose until I have
9 the actual note.

10 Q Have you reviewed the facts and
11 the records of the commissioner of accounts in this
12 particular foreclosure?

13 A I have.

14 Q Does that show that the original
15 note was provided to the trustee?

16 A It says that it was.

17 Q Does it show that the trustee, in
18 fact, wrote on the face of the note an indication of
19 credit of payment?

20 A That is what it says.

21 Q Does it show that that would have
22 been \$217,000?

23 A No. It was a bigger number. I
24 can't tell you the exact number. It was about
25 \$66,000 bigger than that.

000092

1 Q Did it occur in January of 1992,
2 the foreclosure sale in which \$283,000 was credited?

3 A I believe that is the date. I
4 would have to look at the record, but I am pretty
5 sure that is the date.

6 Q Exhibit No. 2, the deed of trust
7 note based on the records in the clerk's office and
8 the commission of accounts, does that show that it is
9 in this form or is there anything additional as it
10 exists today?

11 A The accounting that was confirmed
12 by the commissioner --

13 Q Is it in this form or is there
14 something written on it?

15 A There is something written on
16 this. That would be standard practice.

17 Q Have you reviewed this accounting
18 that is certified from the clerk's office?

19 A Yes, I have.

20 Q Would that indicate the fact that
21 on January 9, 1992, \$283,654.55 should have been
22 credited to the note?

23 A That is correct. That would have
24 been the number written at the top of the note.

25

000093

1 Q In reviewing the commissioner of
2 accounts and substitute trustee settlement, as
3 approved, does it indicate that there may or may not
4 be any moneys due as a deficiency?

5 A It does not make any statement
6 concerning deficiency. I think the commission of
7 accounts went out of his way to say he makes no
8 statement.

9 Q No opinion expressed by the
10 undersigned on the amount of alleged deficiency due
11 on the subject note?

12 A That would be normal.
13 Commissioners don't get into that.

14 Q You are familiar with businesses
15 and partnerships?

16 A Yes.

17 Q You are familiar with the
18 practice of businesses and partnerships by which
19 assets and liabilities are sold to successor
20 corporations?

21 A Yes, sir.

22 Q If the original note was
23 presented to the maker of the note, would there be
24 liability on that?

25

000094

1 A If the original note was
2 presented to the makers?

3 Q Correct.

4 A You mean given to the makers? I
5 am not sure I understand.

6 THE COURT: Presented for
7 payment. Would they owe it?

8 A If someone handed me the original
9 note and said --

10 THE COURT: Yes or no?

11 A The answer is yes.

12 VOIR DIRE

13 DIRECT EXAMINATION (CONTINUED)

14 BY MR. BARKER:

15 Q Are you able to determine from
16 the presentation of guarantee whether the note is
17 still in existence or has or has not been paid based
18 upon common practice of --

19 A If all you have is a guarantee,
20 you don't know if the note has been paid. There is
21 nothing inherent in a guarantee that tells you one
22 way or another whether the note has been paid.

23 MR. BARKER: That is the gist of
24 it, Your Honor.

25

000095

1 THE COURT: All right.

2 Do you have any questions,

3 Mr. Russell?

4 MR. RUSSELL: Yes, sir.

5 VOIR DIRE

6 CROSS-EXAMINATION

7 BY MR. RUSSELL:

8 Q As far as the foreclosure sale in
9 this case, you are saying you examined records in the
10 commissioner of accounts office?

11 A No. I examined the document that
12 Mr. Barker gave me, which was purported to be a
13 certified copy of the accounting that should have
14 been filed here at the court. And that accounting
15 was a standard accounting. It had the bid price and
16 it had the subtractions for the cost of the sale and
17 a net figure that would have been applied to the
18 note.

19 Q As far as what is written on the
20 face of the note, you haven't examined whether or not
21 there is anything written on the face of the note?

22 A That is correct.

23 Q So, you have no way of knowing
24 whether the note looks any different than the exhibit
25 that is in evidence?

000096

1 A That is correct. I can only
2 surmise it based on what I have read and standard
3 practice.

4 Q And there is nothing in the
5 commissioner of accounts that indicates whether there
6 is or is not a deficiency?

7 A That is correct.

8 THE COURT: I will allow
9 Mr. Fleckenstein to testify to anything
10 with regard to the foreclosure, but not
11 with regard to the validity of the
12 instruments or any of the other stuff that
13 is not applicable to this particular case.

14 Do you want to note your
15 objections?

16 MR. RUSSELL: That is fine.

17 Again, this document that he is
18 testifying about wasn't furnished as either
19 part of the discovery or as part of the
20 identification of exhibits for trial. So,
21 I don't know what it pretends to be.

22 THE COURT: All right.

23

24

25

000097

1 MR. BARKER: I have to state,
2 Judge, there was no request for this. This
3 was identified timely and Mr. Russell had
4 every opportunity to look at it. Moreover,
5 it is in response to his testimony from
6 Mr. Tallarida.

7 THE COURT: Well, I told you what
8 I was going to let him testify to.

9 Bring the jury back, please.

10 (Whereupon, the jury was returned
11 to the courtroom and the following
12 proceedings were held in the jury's
13 presence.)

14 - - -

15 MARK FLECKENSTEIN, called on
16 behalf of the defendant, having been duly
17 sworn, was examined and testified as
18 follows:

19 - - -

20 DIRECT EXAMINATION

21 BY MR. BARKER:

22 Q Sir, tell the jury your name,
23 please?

24 A My name is Mark Fleckenstein.

25

000098

1 Q What do you do for a living,
2 Mr. Fleckenstein?

3 A I am an attorney.

4 Q In what areas do you practice?

5 A My practice is almost exclusively
6 a combination of real estate practice, residential
7 and commercial; creditors; bankruptcy practice and
8 foreclosure practice.

9 Q How long have you been practicing
10 law?

11 A Twenty years.

12 Q Where is your office located?

13 A In the City of Richmond.

14 Q Now, did you have occasion to
15 review certain documents related to a foreclosure
16 sale that occurred pertaining to a piece of property
17 at 3008 Lafayette Avenue, which is the subject of
18 this lawsuit?

19 A I did.

20 Q Did you have occasion to review
21 the certified copy from the clerk's office pertaining
22 to the accounting that was made by the trustee?

23 A I did.

24 Q First off, let me ask you, have
25 you undertaken foreclosures?

1 A Yes.

2 Q Do you do that in a capacity as a
3 trustee?

4 A Yes.

5 Q As a trustee, what do you obtain
6 in order to do the foreclosure?

7 A The first thing we do is ask for
8 the note.

9 Q When you say the note, do you
10 mean a copy of the note?

11 A No, the original note.

12 Q The original note?

13 A Yes.

14 If we foreclose on behalf of a
15 person that is not the note holder, then we don't
16 pass good title to the property.

17 Q Are you familiar with loan
18 documents in this case that accompany a deed of trust
19 note?

20 A Yes.

21 Q Did that consist of a deed of
22 trust and security agreement and an alleged
23 guarantee?

24 A Yes.

25

000100

1 Q Can you tell from the Plaintiff's
2 Exhibit No. 5, a HUD 1 that is not signed by the
3 settlement agent, whether that transaction occurred?

4 A Well, I don't see anything on the
5 face of the settlement statement that makes it look
6 unusual or odd or out of place. It does have some
7 signatures on it. It does not have the settlement
8 agent's signature on it.

9 Q Does it have Mr. McDonald's name
10 or his signature on it anywhere?

11 A No.

12 Q Is there any indication from the
13 document that he was even a party to this particular
14 alleged transaction?

15 A From this document, no.

16 Q Now, in looking at the account of
17 sale, I am going to ask the sheriff to hand you a
18 three page document certified by Yvonne Smith, the
19 clerk of court.

20 A (Witness examines document.)

21 Q What is that document, sir?

22 A This is a report of the
23 commissioner of accounts, an individual appointed by
24 the court to look over the shoulder of people who do
25 foreclosure work among other things.

000101

1 Q Does that document indicate
2 whether the commissioner of accounts review of what
3 occurred in a foreclosure sale was approved?

4 A Yes. This is Dave Dorset's
5 approval of the transaction.

6 Q Just so it is clear, you have a
7 trustee; is that correct?

8 A Yes.

9 Q And can a person be substituted
10 as the trustee named in the documents?

11 A Yes.

12 Q You have an indication that a
13 trustee held a sale; is that correct?

14 A That is correct.

15 Q When was that sale held as
16 approved by the commission of accounts and filed by
17 the clerk?

18 A The day of sale by the accounting
19 is January 9, 1992.

20 Q On January 9, 1992, do you have
21 an indication of how much money should have been
22 credited to the note?

23 A Yes.

24 Q How much was that?
25

1 A After subtraction of the cost of
2 sale, it indicates \$283,654.55.

3 Q I am going to ask you to look at
4 page 2 of the official accounting approved by the
5 commissioner of accounts. Does that indicate, in
6 paragraph 3, what, if anything, was written on the
7 face of the note, the deed of trust note, or
8 somewhere on the deed of trust note?

9 A It is a statement that the note
10 secured by the deed of trust, it says that the
11 commissioner made a notation of the credit on that
12 document.

13 Q Are you familiar with how that is
14 done as a trustee?

15 A Yes.

16 Q How is that done?

17 A We do it all --

18 Q Excuse me. Let me ask you to
19 take a look at Plaintiff's Exhibit No. 2.

20 A (Witness complies.)

21 Q If you have the original of the
22 deed of trust note, what is done in order to indicate
23 that the sale was occurred and a credit was applied
24 in January of '92 towards the outstanding balance?

25

000103

1 A The common practice is to type it
2 on the face of the note. Credit to the lenders name
3 and put the amount, which is net after all of the
4 cost of the foreclosure sale. So, we type it right
5 on the face of the front page of the document.

6 Q Why do you do that?

7 A So that everybody knows what the
8 credit is. Notes are transferrable, so it is
9 important to have that information on the note.

10 Q When you say transferable, you
11 mean that after the foreclosure it can be sold to a
12 third party?

13 If the third party has it, can
14 they look at the note to determine exactly what
15 credit should have been given as of a certain date?

16 A That would have been the idea
17 behind typing it on the face of the note and that is
18 why the commissioner made that statement.

19 Q Okay.

20 Now, the commissioner of
21 accounts, is that a public official or is that just a
22 trustee? What is that?

23 A They are public officials. They
24 are appointed by the court to handle these
25 accountings and to review them to make sure they are

1 done properly.

2 Q After they do that, do they make
3 any public posting of what they intend to do, so if
4 anybody has any objections, say like the note holder
5 or successor in interest, they can ask to be heard?

6 A Well, these are posted at the
7 courthouse. So, these are actually filed in the
8 record room at the courthouse and it has the
9 recording information on the face of it.

10 Q Now, is there anything unusual
11 about the format of the official, certified document?

12 A No, it looks very normal to me.

13 Q Is the copy of the note that has
14 been introduced as Exhibit No. 2, based on the
15 evidence that you have certified from the clerk's
16 office, how that note exists today?

17 A Well, again, the practice would
18 be to type on the face of it. And the commissioner
19 indicated that there was a notation on the face of it
20 that there was a credit put on the face of it. So, I
21 guess, the answer is, no, this is not the way the
22 note would appear today.

23 Q Would you need to know the credit
24 and any expression of any deficiency, if any, on the
25 face of the note in order to make a determination as

1 to whether anything is left due and owing after the
2 sale?

3 A Absolutely. There would be no
4 other way to do it.

5 MR. BARKER: Okay.

6 That is the evidence I have,
7 Judge, based on your ruling.

8 THE COURT: Cross?

9 MR. RUSSELL: Yes, sir.

10 THE COURT: Are you going to put
11 that in evidence?

12 MR. BARKER: Yes, sir. Your
13 Honor, I would move to introduce that as
14 our Exhibit No. 3. There was a letter
15 September 18, 1990.

16 (Whereupon, a certified report of
17 the commissioner of accounts was marked for
18 identification as Defendant's Exhibit
19 No. 3.)

20 MR. BARKER: There was one other
21 thing I meant to ask of this gentleman.

22 THE COURT: All right.

23 MR. BARKER: Could he be shown
24 Defendant's Exhibit No. 1.

25 THE COURT: All right.

1 DIRECT EXAMINATION (CONTINUED)

2 BY MR. BARKER:

3 Q Now, you have Defendant's Exhibit
4 No. 1 before you that has been introduced; is that
5 correct?

6 A Yes.

7 Q Are you familiar with these types
8 of demand documents?

9 A Yes.

10 Q Does this indicate that failure
11 to make a payment at 401 South Lake Boulevard by
12 October 4, 1990, will be --

13 MR. RUSSELL: I am going to
14 object to him testifying about this
15 particular document, unless he has some
16 basis for doing so.

17 MR. BARKER: It is common
18 practice to make a demand and to clearly
19 note the default.

20 THE COURT: I sustain the
21 objection.

22 Cross?

23 MR. RUSSELL: Yes, sir.

24

25

000107

2 BY MR. RUSSELL:

3 Q Mr. Fleckenstein, the
4 commissioner of accounts report indicates, I believe
5 you said, a foreclosure sale occurred in January of
6 '92?

7 A That is what is typed on the
8 document.

9 Q Anywhere on there does it
10 indicate what the settlement date was?

11 A Well, the normal practice --

12 Q Let me just --

13	A	No.
----	---	-----

14 Q There is no reference to
15 settlement date at all?

16	A	No.
----	---	-----

17 Q Whatever money was due and owing
18 to Resolution Trust Corporation, pursuant to this
19 foreclosure sale, would not actually be paid to
20 Resolution Trust Corporation until that settlement
21 date; is that correct?

22 A Well, when a note holder buys in
23 a note, as they did, they are on the same footing as
24 anybody that goes to a foreclosure sale. When they
25 buy into a note, there is no money that gets paid to

1 them. They are credited with it, because they just
2 brought the property. They have a piece of property
3 now that they didn't used to have and they are the
4 owner of the property. And their bid at the sale,
5 after subtraction of the costs, what is left over is
6 the credit on the note.

7 Q I think you misunderstood my
8 question and maybe I didn't make it clear.

9 Resolution Trust Corporation, as
10 the note holder, not the purchaser of the property,
11 the note holder, Resolution Trust Corporation was the
12 note holder at the time of this foreclosure sale; was
13 it not?

14 A I understand that to be the case,
15 yes.

16 Q As the note holder, Resolution
17 Trust Corporation would have been entitled to receive
18 the net proceeds from the sale of this property;
19 would they not?

20 A The sale.

21 Q The foreclosure sale?

22 A At the foreclosure sale, yes.

23 Q And those funds do not get
24 transferred until settlement; is that correct?

25

1 A No. When you are the note holder
2 at a sale, the transfer is essentially instantaneous.
3 You bided in that day and it is a done deal. You are
4 not getting money from a third party.

5 There is no closing in the sense
6 of a standard real estate closing. We have the note
7 in our possession. If I am the trustee, I would have
8 the note in my possession. I would go back to the
9 office and if the only bidder was the lender, which
10 appears to be the case -- I mean, I don't know, there
11 may have been other people there. They were the high
12 bidder, it was the note holder.

13 So, over the course of the next
14 couple of days, my secretary fills in the information
15 on the note and we get the note holder to sign it.
16 We ask the lender to the person that bided in, which
17 in this case is the lender, to pay the cost. And,
18 then, we submit the accounting to the commissioner of
19 accounts. So, there is no closing in the classic
20 sense when you purchase a home when you sit down
21 across the table from the attorney and have a
22 settlement statement.

23 Q That would be true you said
24 because it is your belief that the purchaser of the
25 property was the note holder itself?

000110

1 A It appears to be that case. It
2 appears to be that Resolution Trust was the holder of
3 the note, because they wouldn't bid on anything else.

4 Q Does the name James H. Pain, Jr.
5 appear anywhere on that?

6 A I don't see it on here.

7 Q Let me ask you if you would
8 examine Plaintiff's Exhibit No. 6.

9 A (Witness complies.)

10 Q You had examined that previously;
11 is that correct?

12 A Yes, I have seen this.

13 Q Although it is not signed by a
14 settlement agent, this does appear to relate to the
15 sale of this same property, but instead of being sold
16 to Resolution Trust Corporation it is sold to a third
17 party, in this case, James H. Pain, Jr.; is that
18 right?

19 A The purchaser listed here is
20 James H. Pain, Jr. and Claire Pain.

21 Q The third page of this document
22 appears to be a check to Resolution Trust
23 Corporation; is that correct?

24 A Yes.

25

000111

1 Q A settlement statement such as
2 this and a corresponding check would be the standard
3 practice to take place at a foreclosure sale where a
4 third party was purchasing the property at question
5 instead of the note holder itself; is that correct?

6 A I would have to answer no and for
7 this reason, all that the trustee wants out of the
8 sale is the net proceeds after giving a credit for
9 the deposit at the sale. Typically, note holders
10 when they bid in don't pay a deposit at the sale
11 because it is their note.

12 If there were a third party
13 purchaser at a foreclosure sale, the only things that
14 would appear on this would be the net proceeds to the
15 seller. In other words, if it were \$100,000 sale and
16 they paid \$5,000 down, there would be no cost shown
17 on this to the trustee, because the trustee has to
18 pay the taxes and the trustee has to pay the
19 guarantors tax, but with a separate check.

20 So, it is not deducted at
21 settlement, like it would normally be in the standard
22 buyer/seller situation. So, this would not be the
23 standard settlement statement you would see on a
24 foreclosure sale to a third party. The sellers side
25 would reflect a \$5,000 credit and the balance of

1 \$95,000 due to the trustee.

2 Q But in a foreclosure sale to a
3 third party, there would be a formal settlement?

4 A There would be on the buyer's
5 side. But all of the seller wants -- This is a buyer
6 and seller document, the standard settlement
7 statement. There is a buyer's side and a seller's
8 side. The seller's side would not have all of these
9 charges.

10 Q I understand that.

11 I am asking you, and listen to my
12 question, if you would: In a foreclosure sale, where
13 the property is being purchased by a third party
14 instead of the note holder, there is formal
15 settlement and an actual transfer of funds; is there
16 not?

17 A That is correct.

18 Q And that typically takes place at
19 some period of time after the sale itself?

20 A Correct.

21 Q And the accounting that you have
22 there on this indicates, I believe, that the net
23 proceeds to Resolution Trust Corporation was \$283,000
24 and some odd change?

25

000113

1 A Yes, to Resolution Trust
2 Corporation as receiver for Security Federal Savings
3 Association, credit on principle interest and cost.

4 Q Is there anything that you have
5 examined anywhere in this transaction that would
6 indicate anything more than \$283,000 should have been
7 credited to Resolution Trust Corporation?

8 MR. BARKER: Objection,
9 foundation, Your Honor.

10 THE COURT: I will allow it.
11 He can answer it, if he knows.

12 A No. I have seen nothing other
13 than this that indicates a credit.

14 CROSS-EXAMINATION (CONTINUED)

15 BY MR. RUSSELL:

16 Q If, in fact, the balance due on
17 this loan was in excess of the \$283,000 proceeds,
18 there would be a deficiency on that loan; would there
19 not?

20 A That is correct.

21 Q And although the exhibit that you
22 were asked to look at which was Plaintiff's Exhibit
23 No. 5, the settlement statement for the original
24 transaction here in 1988 that was not signed, this
25 foreclosure sale could not have taken place had the

1 actual loan not been made and the deed of trust
2 recorded and the transaction actually taking place;
3 could it?

4 A I would assume that is the case.
5 I would not think that Stuart Simon would foreclose
6 if he didn't have proper documentation.

7 Q And the deed of trust note
8 wouldn't be recorded unless the transaction had taken
9 place; would it not?

10 A The deed of trust or the note?

11 Q The deed of trust, itself.

12 A It would be common practice to
13 record a deed of trust in a transaction such as this.

14 Q And the deed of trust that is
15 Exhibit No. 3 here bears the same page number and
16 book number reference as in the accounting that you
17 have?

18 A I believe so. I would have to
19 look at it, but I assume it does.

20 Q And that does indicate that the
21 \$425,000 original loan was made?

22 A Yes.

23

24

25

000115

1 Q And if you knew the outstanding
2 balance on the loan before the foreclosure sale, it
3 would be possible to calculate the deficiency based
4 on knowing that original balance and the amount of
5 the credit from the foreclosure sale; would it not?

6 A Yes. That is, in fact, how you
7 do it.

8 MR. RUSSELL: That is all the
9 questions I have.

10 THE COURT: Mr. Barker?

11 MR. BARKER: Yes, sir.

12 REDIRECT-EXAMINATION

13 BY MR. BARKER:

14 Q Mr. Fleckenstein, because there
15 is an unsigned HUD 1 that does not indicate
16 Mr. McDonald was involved in a transaction, that
17 doesn't lead you to believe one way or the other what
18 the final parties and what the final transaction was
19 without seeing the actual signed HUD 1; isn't that
20 true?

21 A Well, if you look at a settlement
22 statement, it indicates who the parties are on the
23 settlement statement. So, looking at just the
24 settlement statement, it just tells you the
25 information that is on there.

1 Q Okay.

2 If it is not signed, you don't
3 know whether that information is reliable or not; do
4 you?

5 A Well, you know, I don't know.
6 The normal practice would be to sign a settlement
7 statement. Anybody who does real estate signs their
8 settlement statement when they do a closing.

9 Q Is there any doubt in your mind
10 that that original note, wherever it is, should have
11 a notation on it in January of 1992 that there is a
12 \$283,000 credit that was given at that time?

13 A There is no doubt in my mind that
14 it should have that.

15 MR. BARKER: That is all I have.

16 THE COURT: Thank you,
17 Mr. Fleckenstein.

18 Your next witness?

19 MR. BARKER: I would like him to
20 remain briefly, Judge.

21 I don't have any other witnesses.
22 I do have documents.

23 MR. RUSSELL: Your Honor, I
24 haven't had a chance to examine these, if I
25 could have just a few minutes.

1 THE COURT: We will take a five
2 minute recess.

3 MR. RUSSELL: Thank you.

4 (Whereupon, a short recess was
5 taken.)

6 THE COURT: All right.

7 MR. RUSSELL: Your Honor on these
8 two documents, they appear to be
9 authenticated, we would object on
10 relevance. I don't know what possible
11 relevance they would have to this
12 proceeding.

13 THE COURT: All right.

14 MR. BARKER: I have four
15 documents. Judge, two of them come from
16 the office of supervision and they are
17 material to the very issue in this case of
18 when does the statute of limitations under
19 Am Jur, which we briefed and argued
20 extensively in May, apply.

21 The statute begins to run whether
22 you use five or the six year statute --
23
24
25

1 THE COURT: Mr. Barker, I have
2 already ruled that is a legal argument. It
3 is not a jury argument. If you want to
4 put it in the record that is fine, but it
5 is not happening.

6 MR. BARKER: I just need --

7 THE COURT: You need to do what?
8 I am trying a jury case right
9 now.

10 MR. BARKER: Yes, sir.

11 THE COURT: And I am going to
12 worry about the jury.

13 This is a legal argument. If you
14 want to argue about that, you will have to
15 argue it some other time.

16 As far as these two documents are
17 concerned, I will allow those in.

18 MR. RUSSELL: Which two are you
19 referring to?

20 THE COURT: The two with the
21 ribbons on it.

22 MR. RUSSELL: For the jury?

23 THE COURT: I am going to allow
24 them in, yes.

25 Any other evidence?

1 MR. BARKER: Judge, the request
2 for admissions that I had indicated I
3 wished to be introduced into evidence.

4 THE COURT: For what purpose?

5 MR. BARKER: Well, I think it
6 becomes an issue for the jury to determine
7 under the law and the facts, is there
8 evidence that these folks were ever the
9 holder.

10 So, these requests for admissions
11 are admissions by them that they were not
12 the holder.

13 THE COURT: I am not going to
14 allow that.

15 MR. BARKER: Then, there was the
16 ruling, Your Honor, they introduced the
17 motion for judgment that was filed in the
18 CL-96 case. So, the final order, I
19 provided a certified copy of.

20 THE COURT: All right. I am not
21 going to allow that either.

22 MR. BARKER: It would be the
23 Court's practice to marked those refused?

24 THE COURT: No. But it is
25 refused in the record.

000120

1 All right.

2 MR. BARKER: Judge, finally, I
3 would ask that the Court admit into
4 evidence the answer to interrogatories of
5 the plaintiff in this case and redacting
6 anything above answer to interrogatories.

7 THE COURT: All right. I am not
8 going to allow that either.

9 MR. BARKER: Well --

10 THE COURT: I will mark these all
11 refused.

12 MR. BARKER: Yes, sir.

13 If it please the Court, I would
14 tender these answers to be marked refused.

15 THE COURT: All right.

16 Any other motions?

17 MR. RUSSELL: Are they resting?

18 MR. BARKER: Yes, sir.

19 MR. RUSSELL: Your Honor, at this
20 point we would make a motion for summary
21 judgment. I would make a motion for
22 partial summary judgment on the issue of
23 liability. There has been no evidence to
24 refute the fact that there is a liability
25 on the deficiency. The only evidence

1 presented contrary to plaintiff's evidence
2 is on the issue of amount.

3 So, we would move for partial
4 summary judgment on the issue of liability
5 for the deficiency. We would request that
6 the only issue for the jury be left with is
7 as to the amount of liability. And we will
8 present some rebuttal evidence on that, on
9 the amount of damages.

10 THE COURT: That motion is
11 overruled at this time.

12 Do you have some other evidence
13 you want to present?

14 MR. RUSSELL: I do.

15 THE COURT: All right.
16 Bring the jury back.

17 MR. BARKER: Judge, I understand
18 that there is some evidence that they were
19 going to try to proffer through
20 Mr. Tallarida in an area he has absolutely
21 no experience and knowledge of.

22 THE COURT: Well, I can't read
23 anybody's mind, Mr. Barker.

24

25

1 MR. BARKER: I understand, Judge.
2 We had Mr. Fleckenstein voir dired
3 beforehand and that is what I would ask to
4 be done.

5 THE COURT: Let see if it is
6 rebuttal or not. It better be.

7 (Whereupon, the jury was returned
8 to the courtroom and the following
9 proceedings were held in the jury's
10 presence.)

11 THE COURT: All right.

12 MR. RUSSELL: We would call
13 Mr. Tallarida.

14 DIRECT EXAMINATION

15 BY MR. RUSSELL:

16 Q Mr. Tallarida, you are still
17 under oath, of course. You heard Mr. Fleckenstein's
18 testimony. Prior to his testifying, had you heard
19 the figure \$283,000 being given as what the proper
20 credit should have been from the foreclosure sale?

21 A No, sir.

22 Q Prior to today, had Mr. McDonald,
23 Mr. Phillips or Lafayette Associates or anybody on
24 their behalf ever approached NEI with a different
25 figure other than the \$217,000?

000123

1 A No.

2 Q Now, if instead of a \$217,000
3 credit in July of '92, which is what your calculation
4 uses -- If instead of that, you had applied the
5 \$283,654.55 that Mr. Fleckenstein testified to and
6 applied it in January of '92 as he testified should
7 have been done, were you able to calculate what
8 difference that would have on your final amount owed?

9 A Yes, I have done what I
10 considered to be an analysis of that just real quick.
11 Based on the average rate of this loan being
12 something less than 12 percent on average, I used a
13 12 percent figure. When you consider the \$66,000 as
14 the principle and accrue 12 percent interest on the
15 difference that we are discussing over a period of
16 almost 3,000 days or almost 9 years, I come up with a
17 principle and interest factor of approximately
18 \$131,000.

19 Q Is that \$131,000 a conservative
20 estimate or a liberal estimate from the standpoint of
21 are you erring on the side of giving more credit or
22 erring on the side of giving less credit for that
23 payment?

24

25

1 A Erring on the side of giving the
2 debtor more credit than he would be owed for that
3 type of principle reduction or that type of payment
4 in January of '92.

5 Q So, it would be no more than
6 \$131,000?

7 A No, it should not be no more than
8 \$131,000.

9 MR. RUSSELL: That is all.

10 THE COURT: All right.

11 Mr. Barker?

12 MR. BARKER: Yes, sir.

13 CROSS-EXAMINATION

14 BY MR. BARKER:

15 Q Mr. Tallarida, your testimony on
16 direct today was that you were certain \$217,000
17 credit should be applied as of July 1992; correct?

18 A Yes, sir.

19 Q And you were unaware that the
20 commissioner puts on the face of the note the amount
21 that has been applied, based on the foreclosure;
22 correct?

23 A I was unaware of that, correct.

24

25

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1 Q In fact, you were completely
2 uneducated in regard to Virginia foreclosure
3 proceedings and credits; correct?

4 A For the most part, yes, I would
5 agree that Virginia foreclosure is something that I
6 don't deal with every day.

7 Q Okay.

8 So, you are making an estimate
9 now based on applicable credits and you don't know
10 exactly how that law works; do you?

11 MR. RUSSELL: Object as to
12 what --

13 THE COURT: Sustained.

14 CROSS-EXAMINATION (CONTINUED)

15 BY MR. BARKER:

16 Q Now, I noticed that you changed
17 in the exhibit where you showed a \$217,000 credit on
18 July 1, '92 being made towards the note that you
19 changed the interest rate at various periods?

20 A Yes, sir.

21 Q And you didn't do that when you
22 made these calculations? You didn't run through the
23 periods and make that calculation; did you?

24 A I gave them the benefit of the
25 highest possible rate for the highest possible credit

1 for the debtor.

2 Q This is the first time in the
3 discovery of this case, in the four years, that you
4 have came up with that figure; is that correct, that
5 you just gave on the witness stand?

6 A I just became aware of a
7 potential additional credit that I wasn't aware of
8 and I responded to it.

9 Q You are not certain that that is
10 accurate either; are you?

11 A What would that be, sir?

12 Q The figure that you now claim is
13 due on this note, the \$131,000?

14 What is it? Give me the exact
15 figure?

16 A I don't have it in front of me,
17 sir.

18 Q Do you have it to the penny or is
19 it ball park or what is it?

20 A It is ball park.

21 Q Best guesstimate; correct?

22 A It is a very conservative
23 estimate to the benefit of your client.

24 Q As you say that, you haven't
25 worked it out month by month, dollar for dollar;

1 correct?

2 A It would work against your client
3 to do it that way.

4 Q No.

5 My question is: You have not
6 worked it out month by month and dollar for dollar;
7 have you?

8 A As I sit here today, no, I have
9 not.

10 Q You whipped it up in the course
11 of about three minutes; didn't you?

12 A It was not a complicated
13 calculation.

14 Q And when you came up with the
15 exhibit showing the amount due earlier that you
16 testified to, you ran that on a computer and used a
17 program to generate that; didn't you?

18 A Yes, sir.

19 Q You didn't have the benefit of
20 that program here; did you?

21 A No, I did not.

22 Q And you didn't have any benefit
23 of any measured time frame in which to come up with a
24 figure, rather than hurriedly do it as rebuttal; did
25 you?

1 A I don't understand that.

2 MR. BARKER: That is fine. I
3 don't have any other questions.

4 THE COURT: Mr. Russell?

5 MR. RUSSELL: One follow-up.

6 REDIRECT-EXAMINATION

7 BY MR. RUSSELL:

8 Q If you use the computer program
9 that you used to come up with Exhibit No. 10 and
10 calculated it based on these new figures you have
11 just been given, would Mr. McDonald be entitled to
12 more credit or less credit?

13 THE COURT: Mr. Russell, he has
14 already answered that question.

15 MR. RUSSELL: Thank you.

16 THE COURT: All right.

17 Ladies and gentlemen, if you will
18 go to your jury room area, we will be with
19 you shortly.

20 (Whereupon, the jury was excused
21 to the jury room and the following
22 proceedings were held out of the jury's
23 presence.)

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1 THE COURT: All right, sir.

2 Mr. Russell?

3 MR. BARKER: Your Honor, may I
4 make a motion to strike that testimony. We
5 have been through discovery and been
6 provided those figures. This case has been
7 going on for four years --

8 THE COURT: Let me ask you
9 something. Did you ever give them that
10 figure? Did you ever give them the
11 \$280,000 figure?

12 MR. BARKER: They gave that to
13 me.

14 THE COURT: Did you give it to
15 them?

16 MR. BARKER: They gave that to
17 me, Your Honor.

18 MR. RUSSELL: No, sir. That is
19 absolutely untrue.

20 THE COURT: I am asking the
21 question, please.

22 Did you give it to them?

23 MR. BARKER: No, sir, they gave
24 it to me.

25

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1 THE COURT: Okay.

2 The answer is no; right?

3 MR. BARKER: Yes.

4 THE COURT: Your motion is
5 overruled.

6 All right, Mr. Russell?

7 MR. RUSSELL: We reassert our
8 motion for directed verdict on the issue of
9 liability. I believe the Court has enough
10 evidence to make a directed verdict on the
11 issue of the amount of the damages. Giving
12 them the benefit of the doubt and
13 stipulating what the deficiency is, there
14 has been no evidence to indicate a contrary
15 beginning balance other than the one that
16 was used.

17 The only issue from all of the
18 evidence is how much credit the defendant
19 was entitled to because of the foreclosure
20 sale. There has been absolutely no
21 evidence to suggest that there is not a
22 deficiency judgment due and owing in this
23 case, only how much it is. Giving all of
24 the benefit of the doubt, that deficiency
25 judgment would still be --

1 THE COURT: \$462,839.60.

2 MR. RUSSELL: And I would submit,
3 Your Honor, that there are no facts from
4 which a jury could conclude otherwise. So,
5 we would move for judgment on that basis.

6 THE COURT: All right.

7 Mr. Barker?

8 MR. BARKER: Your Honor, I would
9 move to strike the evidence of the
10 plaintiff in this case and I will state
11 first off what Mr. Russell has confused is
12 the admission of evidence and the
13 credibility of that evidence to be given by
14 the jury, even if it passes the threshold
15 issue of admissibility which the Court has
16 ruled on.

17 Ultimately, it is for the jury to
18 assess the evidence and the credibility of
19 evidence and to determine if the evidence
20 is believable. There is more than ample
21 room based on the examination of the
22 witnesses and the documents that have been
23 presented to present to the jury whether
24 any of that evidence is credible, that has
25 the plaintiff's jury stickers on it.

1 They have exhibits that they have
2 introduced that are unsigned closing
3 statements. They have exhibits that they
4 have indicated --

5 THE COURT: Are you taking the
6 position that closing didn't happen?

7 MR. BARKER: I am taking the
8 position --

9 THE COURT: Are you taking the
10 position that closing didn't happen; yes,
11 or no?

12 MR. BARKER: I am taking the
13 position they haven't proved that the
14 closing has happened. I am taking the
15 position that they need to have the proof
16 of that. Because under the Candelario
17 decision, which I think both parties are
18 familiar with and come up with jury
19 instructions on, the bank or the lender
20 whoever it is needs to prove that the note
21 was made. They need to prove that the
22 guarantee was made, that the money was
23 transferred, that there was a demand on the
24 note and it was not paid and that there was
25 a demand on the guarantee. And moreover,

1 that they were the holder of the note,
2 under Lambert versus Barker to entitle them
3 to the guarantee. That is their burden of
4 proof.

5 Simply because they come up with
6 some unsigned documents and ask that the
7 Court accept those into evidence does not
8 mean that reasonable minds can't differ on
9 the credibility and the value of that
10 evidence.

11 Now, I think that they have no
12 case. The reason that they have no case,
13 number one, is that they aren't the holder
14 of the note. And they state that they are
15 not the holder of the note. And they have
16 no idea what the note looks like at this
17 present time. The unrefuted evidence is
18 that the note that they present, even the
19 copy of the note that they present, is not
20 anywhere what the note actually looks like,
21 because the commissioner of accounts --
22 Excuse me, the trustee has recorded the
23 credit on that note and expressed what, if
24 any, deficiency is due on that note. Or
25 there is some deficiency that is on that

1 note indicated and the commissioner said he
2 gives no opinion as to the validity of that
3 deficiency that is due.

4 So, we move to strike their
5 evidence, further, because of the statute
6 of limitations. This Court has the
7 unrefuted evidence that the statute began
8 to run and it is a factual matter for the
9 jury if there is any facts in dispute, that
10 under the law the statute begins to run
11 when the --

12 THE COURT: I think you have said
13 this one about four times; haven't you?
14 And I have ruled against you on that and I
15 am going to continue to. But if you want
16 to keep on talking about that is fine. But
17 I do want you to have it in the record.

18 MR. BARKER: That is fine, Judge.
19 If I can proffer. I don't want to irritate
20 the Court.

21 THE COURT: You are not
22 irritating me.

23 I am just telling you, as I said
24 in your opening statement, it is a legal
25 issue, not a jury issue. And it is not

1 going to be a jury issue.

2 MR. BARKER: Here is what my
3 understanding is of the Court's prior
4 ruling based on its letter: That is
5 because a statute of limitations is an
6 affirmative defense, I need to prove facts
7 when it started to run. My facts show from
8 the RTC exhibits that I put into evidence
9 that it starts to run the later of which
10 the note is in default or Seasons goes into
11 conservatorship and receivership.

12 Those documents show that Seasons
13 went into conservatorship and receivership
14 before the September 18, 1990 default
15 letter, because those documents from RTC
16 shows that Seasons went into
17 conservatorship and receivership in 1989.
18 Moreover, the letter that is in evidence is
19 clearly a notice of default on September
20 18, '90 and it demands the entire amount
21 due. The statute began to run at that
22 point, Judge.

1 And the suit that they have
2 introduced into evidence was not filed
3 until 1996. You just can't get there.
4 They can't get there with those documents,
5 there is no dispute on that. So, in
6 addition to the statute of limitation
7 argument, obviously, we would note that the
8 suit on the guarantee is barred because of
9 the nonproduction of the note and they are
10 not the holder of the note.

11 Now, there is a defense that is
12 absolute to the maker of the note,
13 Lafayette Associate, that would defeat
14 their cause of action, which is your
15 dismissal order which was introduced or
16 proffered into evidence. I don't know if
17 you marked it as coming in or not. Which
18 said they could not proceed on the note.
19 And if they can't proceed on the note, if
20 you can't win against the maker of the
21 note, the restatement of law is as clear as
22 possible, you cannot proceed on the
23 guarantee. It is a collateral undertaking.
24
25

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I think in the cases of Candelario and the Horton case, which is a Virginia Supreme Court decision, Union Recovery versus Horton, it was clear that the position of the instruments, the guarantee and the note, are necessary in order to bring the action as the assignee. You can't split those. It is 252 VA 418.

Additionally, the statute of limitations began to run on the guarantee when it began to run on the maker. And Am Jur is very clear on that, Section 116 under the guarantee section, on page 968 in the Virginia law.

Finally, there is no savings provision whatever in this guarantee. Under Joslin, the U.S. District Court case that reviewed this very same issue, Denise Joslin versus Robinson, 977 FSupp 491, a 1997 case. It is an RTC assignment to another entity, which brings suit. It does not have the note. The maker is, therefore, dismissed. It has an original guarantee and the original guarantee needs to have the vital language in it in order

1 to maintain the suit without the note,
2 which is the unenforceability, invalidity
3 or irregularity of any obligation guarantee
4 does not effect, impair or present a
5 defense to performance of the guarantee.

6 In this case, paragraph 10 of
7 their note says the validity, not the
8 invalidity. It has no savings language,
9 which allows them to proceed under
10 guarantee without the note. So, we would
11 submit for those reasons and the reasons
12 previously briefed to the Court, that this
13 action is barred by the statute of
14 limitations and it is barred by the lack of
15 the note and there is complete defense now
16 to the note as the statute of limitations
17 has run on note. They have never filed
18 under it and therefore it presents a bar in
19 addition to the attempt to enforce the
20 guarantee.

21 THE COURT: All right.

22 The defendant's motions to strike
23 are overrule. The plaintiff's motion to
24 strike is granted.

25 Bring the jury back.

1 (Whereupon, the jury was returned
2 to the courtroom and the following
3 proceedings were held in the jury's
4 presence.)

5 THE COURT: Ladies and gentlemen
6 of the jury, after hearing all of the
7 evidence and the motions and reviewing the
8 exhibits and so forth submitted in this
9 case, I have determined that this is a
10 legal matter and not a factual matter. And
11 having made that determination, it is not
12 necessary for you to deliberate on the
13 facts, because you do try the facts and I
14 try the legal issues. Having made that
15 decision, you are excused.

16 I will tell you as I told the
17 other members of the panel, this is the
18 last week of the term. So, you will not be
19 called on for jury service for the next
20 couple of days. So, I want to thank you on
21 behalf of the County of Henrico for your
22 willingness to serve as jurors during the
23 past two months. I know that we went
24 through a storm and a whole lot of other
25 things and I know it wasn't easy for you.

1 You won't be called again for at
2 least two years or maybe three years before
3 you come back up on our list. So, I hope
4 when you are called again in the future you
5 will be willing to serve as jurors.
6 Thank you, very much and have a nice day.

7 THE COURT: I give judgment to
8 the plaintiff in the amount of \$462,839.60.
9 Mr. Russell, if you will do the order,
10 please.

11 MR. RUSSELL: Yes, sir. Your
12 Honor, the terms of the guarantee also
13 provide for costs and attorneys fees.

14 MR. BARKER: There is no evidence
15 on that, Your Honor.

16 THE COURT: All right.

17 If you want to submit something
18 on that, I will look at it. But that is my
19 ruling at the present time.

20 MR. RUSSELL: I will submit
21 something in writing.

22 Thank you, Your Honor.

23 THE COURT: All right.

CERTIFICATE OF COURT REPORTER

I, **ANNETTE L. IMBRIACO**, hereby
certify that I, having been duly sworn, was the Court
Reporter in the Circuit Court of the County of
HENRICO, Virginia on the 7th day of March, 2000, at
the time of the TRIAL herein.

I further certify that the
foregoing transcript is a true and accurate record of
the testimony and other incidents of the TRIAL
herein.

Given under my hand this 15th day
of April, 2000.

A handwritten signature in cursive script, reading "Annette L. Imbriaco", is written over a horizontal line.

ANNETTE L. IMBRIACO

* I was commissioned as Annette L. Evans.

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BILL OF SALE AND ASSIGNMENT OF LOANS

RESOLUTION TRUST CORPORATION, acting (i) in its capacity as either receiver or conservator for each Association, as more particularly set forth on Exhibit A hereto, (ii) on behalf of subsidiaries of such Associations and/or (iii) in its corporate capacity (only for certain of such Associations for which the receivership or conservatorship has been terminated and the assets of which have been transferred to Resolution Trust Corporation in its corporate capacity) ("Assignor") hereby absolutely sells, transfers, assigns, sets-over and conveys to NATIONAL ENTERPRISES INC., a corporation organized under the laws of the State of California, ("Assignee") without recourse and without representations or warranties of any kind or nature:

(a) all of Assignor's right, title and interest in and to each of the loans (the "Loans") identified in the loan schedule ("Loan Schedule") attached as Exhibit B to the Loan Sale Agreement dated as of December 10, 1992 between Assignor and Assignee relating to Loan Package Number 45, together with all promissory notes or other evidence of indebtedness and all judgments relating to the Loans, if any, and together with all instruments and documents securing such Loans and all collateral (whether real or personal property) pledged in connection therewith, if any; and

(b) all principal, interest or other proceeds of any kind with respect to the Loans (including, but not limited to, proceeds derived from the conversion, voluntary or involuntary, of any of the Loans into cash or other liquidated property; including, without limitation, insurance proceeds and condemnation awards), but excluding any payments or other consideration received by or on behalf of Assignor on or before December 10, 1992 with respect to the Loans and applied, regardless of whether timely paid.

DATED: December 15th, 1992

ASSIGNOR:

By: *Dolly R. Gaubach*
Dolly R. Gaubach
Attorney-In-Fact

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NAME OF ASSOCIATION	CAPACITY OF RESOLUTION TRUST CORPORATION
1ST ANNAPOLIS SAVINGS BANK	RECEIVERSHIP
COOPER RIVER	CONSERVATORSHIP
HABERSHAM FEDERAL S&L	RECEIVERSHIP
HOLLYWOOD FEDERAL	CONSERVATORSHIP
INVESTORS SAVINGS BANK	RECEIVERSHIP
JEFFERSON FEDERAL	RECEIVERSHIP
METROPOLITAN FEDERAL NASHVILLE	RECEIVERSHIP
PIONEER SAVINGS BANK, FSB	RECEIVERSHIP
PREFERRED SAVINGS & LOAN	RECEIVERSHIP
SEASONS SAVINGS BANK	RECEIVERSHIP
SECURITY FED SAV & LOAN ASSOC	RECEIVERSHIP
SENTRY FSA NORFOLK, VA	RECEIVERSHIP
UNITED SAVINGS BANK	RECEIVERSHIP

LOAN SCHEDULE

PKG NO	LOAN ID	CROSS REF NUMBER	C/O CODE	COLL TYPE	C/O DATE	NAME	ST	PRINCIPAL BALANCE	ORIGINAL BALANCE
45	671890003		CO	524	920109	LAFAYETTE ASSOCIATES	VA	\$208,403.88	\$425,000.00

Total:

Count:

Total:

Count:

\$9,093,040.22

\$11,006,064.44

18

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DEED OF TRUST NOTE

\$425,000.00

Richmond, Virginia
October 3, 1988

FOR VALUE RECEIVED, the undersigned (the "Borrower") hereby promises to pay without offset to the order of SEASONS MORTGAGE CORPORATION (the "Lender," which shall include any subsequent holder hereof) at its office at 401 Southlake Boulevard, Richmond, Virginia 23236, or at such other place as the Lender may from time to time designate, in lawful money of the United States of America, the just and full principal sum of Four Hundred Twenty-Five Thousand and No/100 Dollars (\$425,000.00), with interest on the unpaid principal balance from the date of this Note until paid at the rate of eleven percent (11%) per annum for the first three years and then as otherwise provided herein. Such interest for the period of time from the date hereof through the last day of the current calendar month shall be payable in full on the date hereof. Thereafter, the principal and interest aforesaid shall be paid by the Borrower in equal monthly installments on the first day of each month (beginning December 1, 1988) for one hundred twenty (120) months as follows:

1. the first thirty-six (36) monthly installments of principal and interest shall be in the amount of Four Thousand Forty-Seven and 37/100 Dollars (\$4,047.37) based on

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the initial interest rate of eleven percent (11%) per annum and a thirty (30) year amortization;

2. the initial interest rate shall be adjusted after the first thirty-six (36) monthly installments hereunder from eleven percent (11%) to an interest rate equal to three percent (3.0%) over the weekly average yield on United States Treasury Three-year Securities (the "Three-year Treasury Index"), as made available by the Federal Reserve Board, adjusted to a constant maturity, rounded up to the nearest one eighth of one percent, such adjustments to be made as of the due date of the thirty-sixth (36th) monthly installment (the "Change Date") and using the Three-year Treasury Index in effect on the date fifteen (15) days before the Change Date. The Lender will then calculate the amount of the monthly payments of principal and interest that will be sufficient to pay the unpaid principal balance owing hereunder as of the Change Date in equal monthly installments of that principal and the interest, adjusted as aforesaid, over a twenty-seven (27) year period, and the result of that calculation will be the amount of the monthly installments to be paid hereunder beginning with the first monthly installment after the Change Date and through the seventy-second (72nd) monthly payment;

3. the interest rate adjusted as aforesaid shall be again adjusted after the seventy-second (72nd) monthly installment to an interest rate equal to three percent

(3.0%) over the Three-year Treasury Index, adjusted to a constant maturity, rounded up to the nearest one eighth of one percent, such adjustments to be made as of the due date of the seventy-second (72nd) monthly installment (the "Second Change Date") using the Three-year Treasury Index in effect on the date fifteen (15) days before the Second Change Date. The Lender will then calculate the amount of the monthly payments of principal and interest that will be sufficient to repay the unpaid principal balance owing as of the Second Change Date in equal monthly installments of that principal and the interest, adjusted as provided for in this paragraph above, over a twenty-four (24) year period, and the result of that calculation will be the amount of the monthly installments hereunder beginning with the first monthly installment after the Second Change Date and through the one hundred eighth (108th) payment;

4. the interest rate adjusted as aforesaid shall be again adjusted after the one hundred eighth (108th) monthly installment to an interest rate equal to three percent (3.0%) over the Three-year Treasury Index, adjusted to a constant maturity, rounded up to the nearest one eighth of one percent, such adjustments to be made as of the date of the one hundred eighth (108th) monthly installment (the "Third Change Date") using the Three-year Treasury Index in effect on the date fifteen (15) days before the Third Change Date. The Lender will then calculate the amount of the

monthly payments of principal and interest that will be sufficient to repay the unpaid principal balance owing as of the Third Change Date in equal monthly installments of that principal and the interest, adjusted as provided for in this paragraph above, over a twenty-one (21) year period, and the result of that calculation will be the amount of the monthly installments hereunder beginning with the first monthly installment after the Third Change Date, except as otherwise herein expressly provided;

5. notwithstanding the formula contained in paragraphs numbered 2, 3 and 4 above, the interest rate shall never be less than five percent (5%) per annum, and shall never be more than seventeen (17%) per annum, except in the event of a default hereunder;

6. notwithstanding anything above to the contrary, if not sooner paid, the principal balance and any interest accrued thereon but as of that time unpaid shall be due and payable on, and in any event no later than, November 1, 1998; and

7. if the Three-year Treasury Index is at any time no longer available, the Lender shall choose a new index satisfactory to it which is based upon comparable information, and that index shall be used instead for the calculations referred to above.

Payments shall be applied first to interest accrued on the unpaid principal balance of the indebtedness evidenced

hereby and the remainder to the reduction of principal. In the event that any payment due hereunder shall not be received by the Lender within fifteen (15) days of the date it is due, a late charge of five percent (5%) of such payment may be charged by the Lender and shall become immediately due and payable. Such late charge shall apply individually to all late payments past due.

In the event that there is a default in any payment when due of any principal and/or interest to be paid hereunder and/or a default under the Deed of Trust referred to below (collectively, a "default"), subject to the provisions hereinafter, the entire principal balance of this Note and all accrued and unpaid interest thereon shall immediately become due and payable at the election of the Lender. Failure to exercise such option shall not constitute a waiver of the right to exercise such option if the Borrower is in default hereunder. The Borrower shall pay all reasonable expenses incurred by the Lender in collecting this Note, including, without limitation, the fees and charges of the Lender's attorneys.

In the event that there is a default in any payment of principal or interest hereunder or a default under the Deed of Trust, the Lender, may increase the interest rate payable hereunder, to the interest rate then in effect plus five percent (5%).

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This Note may be extended or renewed at any time at the option of the Lender without notice to, or the consent of, the Borrower or of any person who has assumed the obligation hereof and without affecting the liability of the Borrower or of any such person. The Borrower and any guarantor, surety and/or endorser hereof hereby waive presentment, demand, notice of dishonor, protest, the benefit of any homestead or other exemption, and all other demands and notices in connection with the execution, delivery and performance of and under this Note.

This Note shall be governed by, and construed in accordance with, the laws of the Commonwealth of Virginia.

This Note is secured by a Deed of Trust and Security Agreement of even date herewith (the "Deed of Trust") conveying real and/or personal property located in the County of Henrico, Virginia, and reference is made thereto for rights as to acceleration of the indebtedness evidenced by this Note and for provisions as to the release of portions of the real estate described therein from the lien of the Deed of Trust.

WITNESS the following signatures and seals.

LAFAYETTE ASSOCIATES

By: *Lawrence T. Phillips* (SEAL)
Lawrence T. Phillips
General Partner

and


By: *Roger J. McDonald* (SEAL)
Roger J. McDonald
General Partner

PRM4/B

Pay to the order of
RESOLUTION TRUST CORPORATION
without recourse

This 17th day of July 1990

RESOLUTION TRUST CORPORATION
as Conservator of
SEASONS FEDERAL SAVINGS BANK
successor in interest to
Seasons Savings Bank, FSB,
successor to
Lincoln Savings and Loan Association and
Ronzetti Mortgage and Investment Corporation

By: 
Ronald M. Falls, Managing Agent

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DEED OF TRUST AND SECURITY AGREEMENT

A. INTRODUCTION. This Deed of Trust and Security Agreement (this "Deed of Trust") made this 3 day of October, 1988, by and among LAFAYETTE ASSOCIATES, a Virginia general partnership (the "Grantor"), as the first party, and Douglas P. RUCKER, Jr., and Benjamin W. EMERSON (the "Trustees") of Henrico County, Virginia, and Richmond, Virginia, respectively, as trustees and as the second parties, provides as follows.

B. CONSIDERATION AND CONVEYANCE. For and in consideration of the acceptance of the Note hereinafter described and of the making of the loan evidenced thereby and described in the Loan Commitment mentioned below, the Grantor does hereby grant and convey, with General Warranty and English Covenants of title, unto the Trustees that certain real estate (the "Premises") located in the County of Henrico, Virginia, and described in Schedule A attached hereto and by this reference made a part hereof;

TOGETHER with all the easements, rights, privileges, remainders, reversions and appurtenances thereunto belonging or in any way pertaining, and all the estate, right, title, interest, claim or demand whatsoever of the Grantor therein and in the streets and ways adjacent thereto, either in law or in equity, in possession or in expectancy, now or hereafter acquired;

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TOGETHER with all buildings, improvements and all other structures, and all replacements thereof, now or hereafter standing upon the Premises, or any part thereof, including all plant, equipment, apparatus, machinery and fixtures of any and every kind forming any part of such structures, buildings and/or improvements (collectively, the "Improvements");

TOGETHER with any and/or all personal property, fixtures, fittings, appliances, chattels, furniture, furnishings, apparatus, building materials, equipment, machinery and/or articles of personal property, and the replacements thereof, now or at any time hereafter owned by the Grantor and affixed to, attached to, placed upon, or used in any way in connection with, the complete and comfortable use, enjoyment, occupancy and/or operation of the Premises with the Improvements (collectively, the "Equipment");

TOGETHER with all leases of, and contracts relating to, the Premises, the Improvements and/or the Equipment, whether now existing or hereafter entered into, and all rents, income, revenue, issues and profits (the "Rents and Profits") arising from the Premises, the Improvements and/or the Equipment, provided that until the occurrence of an Event of Default (as herein defined) and the failure to cure the same as set forth below and the election of the holder of the Note (as herein defined) to collect the Rents and

Profits after such uncured Event of Default, the Grantor shall have the right to collect and dispose of the Rents and Profits without restriction, and provided further that this assignment shall not impose upon the Trustees or the holder of the Note any of the Grantor's obligations under such leases or contracts except for obligations which arise after the Trustees or the holder of the Note take possession of the Premises;

TOGETHER with any and all tangible or intangible property of the Grantor now or hereafter used in, arising out of, or relating to the construction, ownership or operation of the Premises, the Improvements and/or the Equipment, including, without limitation, documents, instruments, accounts, chattel paper, general intangibles, inventory and proceeds (each of the foregoing as defined in the Uniform Commercial Code of Virginia (the "Code")), architectural and engineering plans and specifications for the Premises, the Improvements and/or the Equipment, or any portion thereof, contract rights, and any funds, letters of credit or other property which are now or hereafter provided by the Grantor to assure the payment of all indebtedness secured by this Deed of Trust and the performance of all obligations of the Grantor to the holder of the Note under the Loan Commitment (as herein defined); and

TOGETHER with all of the Grantor's rights now owned or hereafter acquired to the proceeds from the sale, exchange,

collection or other disposition or conversion, whether voluntary or involuntary, of any of the Property (as herein defined) into cash or other liquidated claims, including, without limitation, all awards, payments and proceeds, included thereon, and the right to receive the same, which may be made as a result of any casualty, any exercise of the right of eminent domain or deed of lieu thereof, the alteration of the grade of any street and any injury to or decrease in the value of the Property (as herein defined), together with reasonable counsel fees, costs and disbursements incurred by the holder of the Note in connection with the collection of such awards, payments and proceeds;

IN TRUST to secure the performance of the covenants herein contained and the payment of that certain Deed of Trust Note of even date herewith (the "Note") executed by the Grantor and payable to the order of SEASONS MORTGAGE CORPORATION (the "Lender"), evidencing a loan in the original principal amount of \$425,000.00 made by the Lender to the Grantor pursuant to that certain eight (8) page typewritten commitment letter dated September 2, 1988, and any addendum thereto, signed by both the Grantor and the Lender (together, the "Loan Commitment"). This Deed of Trust shall also secure the payment of any and all additional indebtedness of the Grantor to the Lender related to the Property whether as future advancements or otherwise,

together with any renewals or extensions of the Note and/or such additional indebtedness. The Note is payable by the Grantor by the payment on the date hereof of interest thereon from the date hereof to the last day of the current calendar month, and thereafter in equal monthly installments on the first day of each month as more fully described in the Note and briefly described as follows.

1. The first thirty-six (36) monthly installments of principal and interest shall be in the amount of Four Thousand Forty-Seven and Thirty-Seven/100 Dollars (\$4,047.37) based on the initial interest rate of eleven percent (11%) per annum and a thirty (30) year amortization; the interest rate is to be adjusted as set forth in the Note.

2. If not sooner paid the principal balance and any interest accrued thereon shall be due and payable on, and in any event no later than, November 1, 1998.

TOGETHER with and in addition to each installment of interest and/or of principal and interest payable under the provisions of the Note, the Grantor shall pay to the Lender an amount of money equal to the pro rata portion of the real estate taxes, assessments and similar charges and casualty, hazard, rent-loss and other insurance premiums next to become due, as estimated by the Lender, which amount of money shall be sufficient to enable the Lender to pay such taxes, assessments, insurance premiums and similar charges

at least thirty (30) days before they are next to become due. Any deficit shall immediately be paid to the Lender by the Grantor. The money so paid to the Lender and held by it shall not bear interest, shall not be trust funds, and, upon default, may be applied by the Lender on account of the indebtedness secured hereby. It shall be the responsibility of the Grantor to furnish to the Lender bills or invoices for all such taxes, assessments, insurance premiums and similar charges in sufficient time to be paid before penalty attaches. The rights and obligations of the Lender hereunder shall apply to, bind, and inure to the benefit of, any holder and/or assignee of the Note. In the event that there is a default in any payment when due of any principal and/or interest to be paid under the Note and/or the occurrence of an Event of Default hereunder, the entire principal balance of the Note and all accrued and unpaid interest thereon shall immediately become due and payable at the election of the Lender. The Borrower shall pay all reasonable expenses incurred by the Lender in collecting the Note, including, without limitation, the reasonable fees and charges of the Lender's attorneys.

C. THE PROPERTY. The Premises, the Improvements, the Equipment, the Rents and Profits, and all other real estate, fixtures, personal property and/or other property referred to above, as well as any interest therein now owned or held

and/or hereafter acquired by the Grantor, are herein collectively referred to as the "Property".

D. NOTEHOLDER AND NOTICE ADDRESSES. The name of the holder of the Note as of the date hereof is Seasons Mortgage Corporation, and its address, to which communications may be mailed or delivered, is 401 Southlake Boulevard, Richmond, Virginia 23236. Any notice or demand required to be sent or delivered to the Grantor shall be in writing and sent or delivered to the Grantor at its address shown on the Loan Commitment, or such other place as the Grantor shall designate in writing to the Lender and the Trustees.

E. SECURITY AGREEMENT. This Deed of Trust, in addition to creating and constituting a lien on real estate, is a security agreement and shall support any financing statement showing the Lender's interest as a secured party with respect to any portion of the Property described in such financing statement, which description is hereby incorporated by reference. The Lender, in addition to, and not in lieu or in limitation of, its rights and remedies provided herein, shall have all of the rights and remedies of a secured party under the Code. The recordation of this Deed of Trust shall also constitute a fixture filing in accordance with the provisions of the Code. The Grantor, at its expense, shall execute, deliver and record, from time to time, such further instruments as may be requested by the

Lender to confirm the lien of, and/or the security interest created by, this Deed of Trust on or in any of the Property.

F. COVENANTS. The Grantor covenants and agrees as follows:

1. The Grantor shall pay the principal of, and interest on, the Note, together with all other sums thereunder, when and as the same shall become due, and the Grantor shall observe and perform all other terms, covenants, warranties, conditions and obligations contained in (a) this Deed of Trust, (b) the Loan Commitment, (c) any other deed of trust, security agreement, assignment of leases and all other agreements which are now, or subsequently may be, executed to secure the obligations of the Grantor to the Lender, and (d) Section 55-59, Code of Virginia, 1950, as amended.

2. The Grantor shall maintain the Property and all other property subject to this Deed of Trust in good condition and repair.

3. The Grantor shall not materially alter or demolish any of the Improvements without the prior written consent of the Lender, which consent shall not be unreasonably withheld, and shall comply with all statutes, ordinances and requirements of any governmental authority relating to the Property, and any part thereof, or the Grantor's operations thereat.

4. The Lender may, at any time, cause an inspection by its representatives to be made of the Property, and such representatives shall be permitted reasonable access to the Property and every part thereof, subject, however, to the rights of the tenants therein. If any such inspection shows the need of restoration, repairs or maintenance and the Lender makes reasonable demand therefor, the Grantor shall proceed within thirty (30) days after such demand has been made to effect such restoration, repairs or maintenance and shall expeditiously complete the same in a good and workmanlike manner to the reasonable satisfaction of the Lender.

5. The Grantor shall keep the Property free from liens which may have priority over the lien of this Deed of Trust, except liens for taxes not yet due, and shall not allow any subordinate mortgage, deed of trust or security interest to encumber the Property without the prior written consent of the Lender which consent shall not be unreasonably withheld.

6. In the event that any proceedings to take the Property or any part thereof by exercise of the power of eminent domain are undertaken or threatened, the Grantor shall give the Lender prompt notice thereof. Any award made to the Grantor shall be paid to the Lender, and the Grantor hereby irrevocably appoints the Lender and its assigns, as may become applicable, as its attorney-in-fact to receive

and give all appropriate discharges for any such award. The power just granted is acknowledged by the Grantor to be coupled with an interest. Any such award shall, at the sole option of the Lender, be applied to the prepayment of the principal of the Note in inverse order of maturity of the installments thereof, and to the payment of accrued interest, if any. Notwithstanding the foregoing, in the event of any partial condemnation of the Property, the proceeds of which are sufficient to restore the Property to a condition in which the Property can be used for its intended purpose, and if the Grantor is not in default hereunder, the Lender shall make such condemnation proceeds available to the Grantor under the same terms and conditions and for the same purposes as insurance proceeds are made available as set forth in paragraph 9 of this Section F of this Deed of Trust.

7. The Grantor shall protect, indemnify and save harmless the Trustees and the Lender from and against all liabilities, obligations, claims, damages, penalties, causes of action, costs and reasonable expenses (including, without limitation, reasonable attorneys' fees and expenses) imposed upon, incurred by and/or asserted against, the Trustees and/or the Lender by reason of (a) any failure on the part of the Grantor to perform or comply with any of the covenants or conditions of this Deed of Trust; (b) the performance of any labor or services and the furnishing of

any materials or other property with respect to the Property or any part thereof; or (c) any accident, injury to or death of persons or loss of or damage to property occurring on or about the Property or any part thereof unless such accident, injury to or death of persons or loss of damage to property is caused by the action or omission of the Trustees or the Lender. Any amounts payable to the Lender under this paragraph which are not paid within ten (10) days after written demand therefor by the Lender shall bear interest at the rate set forth in the Note from the date of such demand. In the event that any action, suit or proceeding is brought against the Trustees and/or the Lender by reason of any such occurrence, the Grantor, upon the Lender's request, shall, at the Grantor's sole expense, resist and defend such action, suit or proceeding or will cause the same to be resisted and defended by counsel designated by the Grantor and approved by the Lender.

8. The Grantor shall keep the Premises and the Property insured with fire and extended coverage insurance for the benefit of the Lender against loss or damage by fire, casualties usually covered by extended coverage, including, without limitation, lightning, tornado and other windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, missile, vehicles, smoke, vandalism and malicious mischief, and (as, when and to the extent insurance against war risks is obtainable from the

United States of America or any agency thereof) against war risks, together with such other hazard coverage as may be reasonably requested by the Lender from time to time, all in amounts approved by the Lender and covering the Premises and the Property for their full replacement costs less any excavation and foundation costs, or the amount of the loan secured by this Deed of Trust, whichever is greater. The Grantor shall provide the Lender with satisfactory evidence of (a) public liability and property damage insurance in amounts sufficient to meet the requirements, if any, of the tenant leases assigned to the Lender as additional security and as approved by the Lender; (b) rent loss insurance, without a coinsurance provision, in an amount equal to the full monthly rentals due on all leases assigned to the Lender as additional security, for at least six (6) months; and (c) flood insurance in an amount and issued by companies or agencies satisfactory to the Lender (or evidence satisfactory to the Lender that the Premises are not located in an area designated by the Secretary of Housing and Urban Development as an area having special flood or mudslide hazards and that flood insurance is not required for the loan evidenced by the Note under the terms of any law, regulation or rule governing the Lender's activities), provided that in the event that the Premises shall at any future date be declared to be in a flood or mudslide hazard area, the requirements of this provision shall be met. When

and to the extent required by the Lender, the Grantor shall keep the Property insured against any other risk regularly insured against by persons operating like properties in the locality of the Premises for the benefit of institutional lenders. All insurance herein provided for shall contain (i) standard New York (or comparable) mortgagee clauses in favor of the Lender as "Seasons Mortgage Corporation, 401 Southlake Boulevard, Richmond, Virginia 23236"; (ii) a full replacement cost or restoration endorsement; (iii) a provision to the effect that the waiver of subrogation rights by the insured does not void the coverage; and (iv) such other special endorsements as may be required by the terms of the leases assigned to the Lender as additional security; and shall be in form and issued by companies approved by the Lender, which companies shall have the highest rating established by Best's Key Rating Guide. Regardless of the types or amounts of insurance required and approved by the Lender, the Grantor shall assign and deliver to the Lender all original policies of insurance which insure against any loss or damage to the Property as collateral and further security for the payment of the indebtedness hereby secured. Not less than fifteen (15) days before the expiration dates of each policy required of the Grantor pursuant to this paragraph, the Grantor shall deliver to the Lender a renewal policy or policies marked "premium paid" or accompanied by other evidence of full

premium payment satisfactory to the Lender; and in the event of a foreclosure hereunder, the purchaser of the Premises shall succeed to all the rights of the Grantor, including any right to unearned premiums, in and to all policies of insurance assigned and delivered to the Lender pursuant to the provisions of this paragraph.

9. In the event of any loss or damage to the Property, or any part thereof, by fire or other casualty, the proceeds payable by reason of the insurance referred to in paragraph 8 above shall be paid to the Lender. The Lender may, at its sole option, (a) apply such proceeds to the outstanding loan balance or (b) allow the proceeds to be disbursed for restoration work in accordance with such procedures as the Lender shall prescribe. Notwithstanding the above, the Lender, if Grantor is not in default under this Deed of Trust or the Note secured hereby, agrees to make the proceeds of such insurance as are received by the Lender available to Grantor to replace, repair and restore such portions of the Improvements that have been damaged or destroyed, provided that Grantor, within ninety (90) days of the occurrence of such damage or destruction: (i) obtains and delivers to the Lender a contract in form acceptable to the Lender with a contractor acceptable to the Lender setting forth a fixed price for the repair or restoration work, which contract shall provide for the repair or replacement of the damage or destruction to a condition

comparable to that as existed immediately prior to such damage or destruction, (ii) delivers to the Lender an amount of money equal to the amount by which the fixed price set forth in such contract exceeds the insurance proceeds; and (iii) otherwise at all times complies with the terms and conditions of the Note and this Deed of Trust. Provided that these conditions are met, such funds shall be held by the Lender and released to Grantor during the repair and replacement period in amount equal to the value or work performed and in place, with all of such remaining funds being disbursed to Grantor upon completion of the repair and restoration work.

10. The Grantor shall furnish to the Lender annually the then current rent roll and the then current operating statements for the Property, both in form satisfactory to the Lender, within ninety (90) days of the end of each of the Grantor's fiscal years.

11. The Lender shall have the right to approve and/or reject any property management firm employed by the Grantor to manage the Premises, the Improvements and/or any portion thereof, as well as the right to require a change in such property management firm if, in the Lender's reasonable opinion, the Premises and the Improvements are not being capably managed or managed so as to effectively maximize the income potential of the Premises and/or the Improvements, and the Grantor shall not employ such a property management

company without first obtaining the Lender's written approval thereof.

12. With respect to the Property, the Grantor shall keep the same in good condition and repair; pay all general and special taxes and assessments and other charges that may be levied or assessed upon or against the same as they become due and payable; furnish to the Lender receipts showing payment of any such taxes and assessments; pay all utility charges, assessments and debts for repair or improvements of whatever nature now existing or hereafter arising that may become liens upon or charges against the Property; comply with, or cause to be complied with, all requirements of any governmental authority relating to the Property; and promptly repair, restore, replace or rebuild any part of the Property which may be damaged or destroyed by any casualty whatsoever or which may be affected by any condemnation proceeding or exercise of eminent domain.

13. Grantor shall not commit, nor suffer to be committed, any waste of the Property; nor initiate, join in or consent to any change in any private restrictive covenant, zoning ordinance, or other public or private restrictions limiting or defining the uses which may be made of the Property, or any part thereof; nor permit any lien or encumbrance, of any kind or character and not consented to by the Lender, to accrue or remain on the Property or any part thereof.

14. The Premises complies with all requirements and conditions set forth in all zoning ordinances, all federal, state and local governmental wetland, coastal waters and environmental protection acts and any other ecological, environmental or use restrictions and all other governmental laws, rules and regulations applicable to or affecting the Premises. The Grantor shall continue to comply with the same now and in the future, and any failure to so comply shall constitute an Event of the Default as hereinafter defined. In furtherance of the foregoing and without limiting any other rights and/or remedies of the Lender, in the event that there shall be filed any lien against the Premises by any entity with respect to any of the matters specified in this paragraph 14, then Grantor agrees to cause such lien to be removed from the Premises or provide a bond satisfactory to the Lender insuring that the Lender shall continue to enjoy first lien status within sixty (60) days from the date that such lien is placed against the Premises or within such shorter period of time as the circumstances shall permit (but in all events at least five (5) days before any sale of the Premises to satisfy such lien) in the event that the holder of such lien takes the steps to cause the Premises to be sold pursuant thereto. Should Grantor cause, suffer or permit any violation of any of the foregoing laws, rules and/or regulations, or fail to remove or provide satisfactory bond

as described herein in the event of the filing of any such lien, then this Deed of Trust, the Note and all other instruments securing the Loan shall at the option of the Lender become immediately due and payable.

15. The Grantor is seized of the Premises in fee simple and has the right to convey the Premises in fee simple. Title to the Premises is marketable and free and clear of all encumbrances with the exception of those contained in Schedule B, Section 2 of the title insurance commitment submitted by the Grantor to the Lender in accordance with the Loan Commitment. The Grantor shall warrant and defend the title to the Premises against the lawful claims of all persons whomsoever.

16. The terms and provisions of the Loan Commitment are, to the extent that the terms thereof are not expressly set forth herein, incorporated herein by reference and made a part hereof, and they shall survive the closing of the loan secured and evidenced by the Note and remain in full force and effect. The terms and provisions of this Deed of Trust and/or the Note shall control over any inconsistencies with the terms and provisions of the Loan Commitment.

17. The Grantor shall maintain the Property at all times so that (a) the Property is free from "hazardous substances" as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.

§§ 9601, et seq., as amended, and the regulations promulgated pursuant thereto, (b) the Property is not subject to federal, state or local regulations or liability because of waste materials and/or debris, "PCB's" or PCB items (as defined in 40 C.F.R. § 761.3), underground storage tanks, "asbestos" (as defined in 40 C.F.R. § 763.63), or the past or present accumulation, spillage or leakage of any substance, and (c) no condition exists which is, or may be, characterized by any federal or local government or agency as an actual or potential threat or danger to the environment. The Grantor shall provide to the Lender, within five (5) days after the Grantor's receipt thereof, copies of all notices from federal or local governments and/or agencies alleging any such threat or danger or alleging violation of any environmental statute, ordinance, regulation and/or rule, or requesting information regarding the Property's compliance with the same. The Grantor shall provide to the Lender copies of all of the Grantor's responses to such notices and/or requests simultaneously with the responses to such government or agency.

G. DEFAULT.

1. There shall be an event of default hereunder ("an Event of Default") upon (1) failure of the Grantor to pay as and when due and payable any installment of principal or interest under the Note or any extension or renewal thereof or any indebtedness secured by this Deed of Trust or

(2) upon failure by the Grantor to duly observe any covenant, representation or agreement included in this Deed of Trust, the Note, the Loan Commitment, or any other document submitted by the Grantor in connection with the indebtedness secured hereby, for a period of fifteen (15) days after written notice from the Lender specifying the nature and extent of such failure.

2. If an Event of Default occurs, the Lender shall have available to it and may exercise any and/or all of the applicable rights and remedies provided for in (1) Titles 8.9 and 55, Code of Virginia, 1950, as amended, (2) the Note, (3) the Deed of Trust, (4) the Loan Commitment, and (5) any other instrument related to the loan referred to in the Loan Commitment, and such rights and remedies shall be cumulative and in addition to (rather than in limitation of) all other rights and remedies available to the Lender, whether legal, equitable or otherwise. This Deed of Trust is given, and shall be construed, to impose and confer upon the Grantor, the Trustees and the Lender all of the duties, rights and obligations set forth in Sections 26-49, 55-59 and 55-59.1, Code of Virginia, 1950, as amended, and further to incorporate herein the following provisions of Section 55-60, Code of Virginia, 1950, as amended, by the short form references that follow:

Exemptions waived.

Renewals, extensions or reinstatement permitted.

Substitution of Trustees permitted.

Any Trustee may act; and

Subject to all upon default.

3. Upon (a) the occurrence of an Event of Default and (b) the request of the Lender, the Trustees shall forthwith declare all debts and obligations secured hereby at once due and payable and may take possession of the Property and sell the same, or any portion thereof, at public foreclosure auction sale in accordance with Title 55, Code of Virginia, 1950, as amended. Before any such sale of the Property, or any portion thereof, at public auction is made, there shall first be advertisement of the time, place and terms of such sale once a week for four successive weeks in some newspaper published or having a general circulation in the county or city which is the site of the Premises. Such advertisement shall set forth a description of that portion of the Property to be sold and shall identify the Property by street address, if any, or if none, shall give the general location of the Property with references to streets, routes or known landmarks. The Trustees shall give written notice of such sale fourteen (14) days prior thereto by personal delivery or by certified or registered mail to the other owner of the Property at its last known address as such owner and address appear in the records of the Lender. The Trustees shall also give written notice of such sale to

the Grantor at its last known address as it appears in the records of the Lender.

4. The Lender may become the purchaser of any portion of the Property so sold, and no purchaser shall be required to see to the proper application of the purchase money. The Lender and the Trustees (with the permission of the Lender) may grant any extension, forbearance or other indulgence, and may release any part of the Property from the lien hereof. In any such foreclosure or upon the enforcement of any other remedy of the Lender hereunder or under the Note, there shall be allowed and included as additional indebtedness, to the extent permitted by law, all reasonable expenditures and expenses which may be paid or incurred by or on behalf of the Lender and/or the Trustees for attorneys' fees and charges, appraisers' fees, publication costs, and costs involved in title insurance and title examination. All reasonable expenditures and expenses of the nature in this paragraph mentioned, and such reasonable expenses and reasonable fees as may be incurred in the protection of the Property and the maintenance of the lien hereof, including the fees of any attorney employed by the Lender and/or the Trustee in any litigation or proceeding affecting the Deed of Trust, the Note or the Premises, including probate and bankruptcy proceedings, or in preparation for the commencement or defense of any proceeding or threatened suit or proceeding, shall be

immediately due and payable by the Grantor, with interest thereon at the lower of the rate of eighteen percent (18%) per annum or the maximum rate permitted by applicable law, and shall be secured hereby. Unless and to the extent, if any, that such is prohibited by law, the proceeds of any such foreclosure sale shall be distributed and applied in the following order or priority: First, on account of all costs and expenses incident to the foreclosure proceedings, including all such items as are mentioned in this paragraph hereof; second, all other items which under the terms hereof constitute secured indebtedness additional to that evidenced by the Note, with interest thereon as herein provided; third, all principal and interest remaining unpaid on the Note; fourth, any remaining amounts due the Lender, its successors or assigns, as their rights may appear; and fifth, to the Grantor.

H. TRUSTEES. The Trustees shall be under no duty to take any action hereunder, except as expressly required, or to perform any act which would involve them in expense or in liability or require them to institute or defend any suit in respect hereof, unless properly indemnified to their satisfaction. All reasonable expenses, charges, counsel fees and other disbursements incurred by the Trustees in and about the administration and execution of the trusts hereby created, and the performance of their duties and powers hereunder, shall be secured by this Deed of Trust prior to

the indebtedness represented by the Note, and shall bear interest at the same rate as the Note.

I. MISCELLANEOUS PROVISIONS.

1. The Lender may at any time, without notice to any person, grant to the Grantor any indulgence, forbearance or any extension of time for the payment of any indebtedness secured hereby or allow any change or substitution of or for any of the Property or any other collateral which may be held by the Lender without in any manner affecting the liability of the Grantor or any endorsers of the indebtedness hereby secured and also without in any manner affecting or impairing the lien of this Deed of Trust.

2. Any failure by the Lender to insist upon strict performance of any of the terms and provisions hereof shall not be deemed to be a waiver of any such terms and provisions, and the Lender, notwithstanding any such failure, shall have the right thereafter to insist upon the strict performance of any and all of the terms and provisions of this Deed of Trust. Neither the Grantor nor any other person now or hereafter obligated for the payment in whole or in part of the sums now or hereafter secured hereby shall be relieved of such obligation by reason of (a) the failure of the Lender to comply with any request of the Grantor, or of any other person so obligated, to take action to foreclose or otherwise enforce any of the provisions hereof or of any obligations secured hereby, (b) the

release, regardless of consideration, of the whole, or any part of, the security held for the indebtedness secured hereby, and/or (c) any agreement or stipulation between any subsequent owner or owners of the Property, or any part thereof, and the Lender to extend, from time to time, the time of payment or to modify the terms of the Note or this Deed of Trust without first having obtained the consent of the Grantor or such other person.

3. Upon the failure of the Grantor to pay any installment due under the Note or other charges above-mentioned as they become due and payable, or to pay any other of the debts or liens above-mentioned at the time above-mentioned, or to insure the Property, or to deliver the policies of insurance as herein agreed, or to perform any of the covenants and agreements herein, the Lender is hereby authorized, at its option, to insure the Property, or any part thereof, and to pay the costs of such insurance, and to pay such taxes, liens, assessments or other charges herein mentioned, or any part thereof, and to remedy the Grantor's failure to perform hereunder and to pay the costs associated therewith. The Grantor shall refund on demand all sums so paid, with interest thereon at the lower of the rate of eighteen percent (18%) per annum or the maximum rate permitted by applicable law. This Deed of Trust shall stand as security for all sums so paid, which shall become a part of the indebtedness hereby secured; provided, however, that

the retention of a lien hereunder for any sums so paid shall not be a waiver of any subrogation or substitution which the Lender might otherwise have had.

4. In the event that (a) the Grantor shall fail to keep the Property insured in the manner and at the times herein provided, (b) any installment of interests or payment of principal is not paid at or within the time required by terms of the Note, (c) the actual demolition or removal of any of the Property is threatened, (d) the Grantor fails to do any of the things herein agreed to be done, or (e) there occurs any breach of any of the terms hereof or of the Note, then, and in any of such events, whether or not the Lender has paid any of the taxes, liens or other charges, or procured the insurance, or remedied the Grantor's failure to perform, all as mentioned above, the Lender shall be entitled to exercise any or all remedies provided for or referred to in this Deed of Trust after the failure of the Grantor to cure the same to the extent, if any, permitted herein.

5. No waiver or modification of this Deed of Trust, or of any covenant, condition or provision herein contained, shall be valid unless in writing and duly executed by both the Grantor and the Lender, and no evidence of any waiver or modification shall be offered or received in evidence in any proceeding, arbitration or litigation arising out of or affecting this Deed of Trust, or any

rights or obligations hereunder, unless such waiver or modification is in writing, duly executed as aforesaid. The provisions of this section may not be waived except as herein set forth.

J. NOTICE: THE DEBT SECURED HEREBY IS SUBJECT TO CALL IN FULL OR THE TERMS THEREOF BEING MODIFIED IN THE EVENT OF SALE OR CONVEYANCE OF THE PROPERTY CONVEYED HEREBY.

1. Upon the voluntary or involuntary sale, lease, exchange, assignment, conveyance, transfer or other disposition (herein collectively called a "Disposition") of all or any portion of the Premises and/or the Improvements (or any interest therein), or all or any part of the beneficial ownership interest in the Grantor, or in the event that the Grantor conveys to any other party a security interest in any of the Property, or voluntarily or involuntarily permits or suffers the Property, or any part thereof, to be further encumbered (herein collectively called an "Encumbrance"), then the Lender may, at its sole option, enforce any and/or all of its rights, remedies and recourses as set forth in this Deed of Trust for an Event of Default; provided, however, that the Lender shall not enforce such rights, remedies and recourses if it consents in writing to the Disposition or Encumbrance in question. In connection with determining whether to grant or withhold such consent, the determination made by the Lender shall be conclusive, and it may require as conditions to its granting

such consent (1) an increase in the rate of interest payable under the Note, (2) payment of the Lender of a transfer fee, (3) payment of the Lender's reasonable attorneys' fees and charges in connection with such Disposition or Encumbrance, and/or (4) the express assumption of the payment of the indebtedness and performance of the obligations of the Grantor by the party to whom such Disposition will be made (with or without the release of Grantor from liability for such indebtedness and obligations).

K. CONCLUSION. In witness whereof, the Grantor has caused this Deed of Trust and Security Agreement to be executed and sealed by its general partners as of the day, month and year first written above.

LAFAYETTE ASSOCIATES

By: Lawrence T. Phillips (SEAL)
Lawrence T. Phillips
General Partner

and

By: Roger J. McDonald (SEAL)
Roger J. McDonald
General Partner

COMMONWEALTH OF VIRGINIA,
CITY/COUNTY OF Richmond, to-wit;

I, the undersigned, a notary public in and for the jurisdiction aforesaid, do hereby certify that Lawrence T. Phillips, whose name as general partner of Lafayette Associates is signed to the foregoing Deed of Trust and Security Agreement, has acknowledged the same before me in the jurisdiction aforesaid.

000181

Given under my hand this 2nd day of October, 1988.

My commission expires: 12/10/1990.

Dancy J. Heuser
Notary Public



COMMONWEALTH OF VIRGINIA,
CITY/COUNTY OF Richmond, to-wit;

I, the undersigned, a notary public in and for the jurisdiction aforesaid, do hereby certify that Roger J. McDonald, whose name as general partner of Lafayette Associates is signed to the foregoing Deed of Trust and Security Agreement, has acknowledged the same before me in the jurisdiction aforesaid.

Given under my hand this 3rd day of October, 1988.

My commission expires: 12/10/1990.

Dancy J. Heuser
Notary Public



PRM4/A

SCHEDULE A

(Legal Description of the Premises)

PARCEL 1A:

ALL that certain lot, piece or parcel of land, lying and being in Henrico County, Virginia, designated as the Eastern 20 feet of Lot 25, Plan of Putney Place, fronting on Lafayette Avenue, as shown on a plat of Putney Place, dated March 17, 1941, made by William N. Lewis, Certified Surveyor, Richmond, Virginia, recorded in the Clerk's Office of the Circuit Court of Henrico County, Virginia, in Plat Book 18, page 55;

PARCEL 1B:

ALL that certain lot, piece or parcel of land, lying and being in Henrico County, Virginia, designated as the Western 40 feet of Lot 25, Plan of Putney Place, fronting on Lafayette Avenue, as shown on a plat of Putney Place, dated March 17, 1941, made by William M. Lewis, Certified Surveyor, Richmond, Virginia, recorded in the Clerk's Office of the Circuit Court of Henrico County, Virginia, in Plat Book 18, page 55;

PARCEL 2:

ALL that certain lot, piece or parcel of land lying and being in Henrico County, Virginia, designated as Lot 26, Plan of Putney Place, fronting on Lafayette Avenue, as shown on a plat of Putney Place, dated March 17, 1941, made by William M. Lewis, Certified Surveyor, Richmond, Virginia, recorded in the Clerk's Office of the Circuit Court of Henrico County, Virginia, in Plat Book 18, page 55;

PARCEL 3:

ALL that certain lot, piece or parcel of land lying and being in Henrico County, Virginia, designated as Lot 27, Plan of Putney Place, dated March 17, 1941, made by William M. Lewis, Certified Surveyor, Richmond, Virginia, recorded in the Clerk's Office of the Circuit Court of Henrico County, Virginia, in Plat Book 18, page 55;

PARCEL 4:

ALL that certain lot, piece or parcel of land lying and being in Henrico County, Virginia, designated as Lot 28, Plan of Putney Place, fronting on Lafayette Avenue, as shown

on a plat of Putney Place, dated March 17, 1941, made by William M. Lewis, Certified Surveyor, Richmond, Virginia, recorded in the Clerk's Office of the Circuit Court of Henrico County, Virginia, in Plat Book 18, page 55;

The lots described above are more particularly described on that certain plat of survey by Leland F. DySard, Land Surveyor, of George Stephens Associates, dated September 23, 1988, and entitled "Boundary Survey Lots 25, 26, 27, and 28, Putney Place, Brookland District, Henrico Co., Virginia," a copy of which is attached hereto and to which reference is hereby made for a more particular description of such lots, and the conveyance of such lots provided for herein includes all improvements thereon and all appurtenances thereunto belonging;

BEING the same property conveyed to Glenside Associates, a Virginia Limited Partnership, by deed from Lakeside Mini Warehouse Partnership by deed dated April 16, 1986, and recorded May 12, 1986, in the Clerk's Office of the Circuit Court of Henrico County, Virginia, in Deed Book 2003 at Page 420.

PRM3/BB

000184

GUARANTY AGREEMENT

A. INTRODUCTION. This is a guaranty agreement made in Richmond, Virginia, as of the 3 day of October, 1988, by and among ROGER J. MCDONALD and LAWRENCE T. PHILLIPS, as the first parties, the first parties being referred to hereafter in this agreement collectively as the "Guarantors", and SEASONS MORTGAGE CORPORATION (the "Lender"), a Virginia corporation with offices in the metropolitan area of Richmond, Virginia, as the second party. The guaranty of the Guarantors provided for in this agreement shall be for the benefit of the Lender, and this agreement recites and provides as follows.

B. RECITALS.

1. Pursuant to a commitment letter dated September 2, 1988, and containing eight (8) typewritten pages to Lafayette Associates (the "Borrower"), and any addendums thereto (together, the "Loan Commitment"), the Lender has agreed to make a loan of \$425,000.00 (the "Loan").
2. In connection therewith, the Borrower has agreed to execute a Deed of Trust Note of even date herewith payable to the order of the Lender in the principal amount of \$425,000.00 (the "Note").
3. To induce the Lender to make the Loan and in consideration of the Lender's execution of the Loan Commitment and the making of the Loan to the Borrower, the Guarantors have agreed to guarantee payment of the Note and

000185



performance under the Loan Commitment and the Deed of Trust and Security Agreement securing the Note (the "Deed of Trust") all pursuant to this guaranty agreement.

C. AGREEMENT. As a result of the above recitals, which are part of this agreement, to induce the Lender to make the Loan, and for and in consideration of the premises, the consideration recited above, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Guarantors covenant and agree as follows.

1. The Guarantors hereby jointly, severally and unconditionally guarantee to the Lender the full and prompt payment, and not merely collection, of all obligations payable by the Borrower to the Lender pursuant to the Loan Commitment and the Note, including without limitation, any and all principal, interest, charges, expenses, costs and/or other amounts in connection therewith, as well as the performance by the Borrower of its various obligations under the Loan Commitment and the Deed of Trust.

2. The guaranty set forth herein shall be a continuing, absolute and unconditional guaranty and shall remain in full force and effect until all principal, interest and other amounts payable under the Loan Commitment, the Note and the Deed of Trust have been paid in full.

3. This is a guaranty of payment and performance and not merely of collection. The Guarantors expressly waive any right to require that any action be brought against the Borrower or that recourse be had to any collateral for the payment of the Note or for any payment under the Loan Commitment and/or Deed of Trust. If the Borrower defaults in the payment when due of any obligation to the Lender under the Loan Commitment, the Note or the Deed of Trust, the Guarantors, upon demand by the Lender, without notice other than such demand and without the necessity for additional action by the Lender, shall promptly and fully pay such obligation.

4. The Guarantors shall pay all costs and expenses, including the reasonable fees and charges of the Lender's legal counsel, incurred by the Lender in seeking to enforce the obligations of the Borrower under the Loan Commitment, the Note and/or the Deed of Trust and/or the obligations of the Guarantors hereunder.

5. Until such time as all obligations guaranteed hereby have been paid in full and/or fully performed, the Guarantors shall not be subrogated to any right of the Lender against the Borrower or any collateral, and any funds or other property received at any time by the Guarantors from the Borrower shall be held in trust for, and shall be transferred to, the Lender upon demand therefor.

6. Each of the Guarantors hereby waives (a) notice of acceptance of this guaranty; (b) presentment, demand and notice of dishonor; (c) notice of the financial condition of the Borrower; (d) the benefit of any homestead or other exemption; (e) extensions of time for payment of the obligations under the Loan Commitment, Note and/or Deed of Trust, and/or notice of such extensions; (f) notice of any failure of performance, breach and/or violation on the part of the Borrower; (g) indulgences of any and every kind given by the Lender to the Borrower, and (h) notice of every kind, including, but not limited to, notice of (1) any extension of time granted by the Lender to the Borrower for payment of the obligations under the Loan Commitment, the Note and/or the Deed of Trust and/or any other credit extended by the Lender to the Borrower; (3) default by the Borrower in making any payment to the Lender and/or any other extension of credit by the Lender to the Borrower; (4) the grant of any credit or additional credit from the Lender to the Borrower, (5) acceptance by the Lender of this guaranty, and/or (6) acceptance by the Lender of any partial payment of any sum mentioned above, or of any sum due in any arrangement, proceeding, reorganization, bankruptcy, composition or insolvency proceeding, and in the event of such acceptance by the Lender of partial payment, the Guarantors shall remain jointly and severally liable for any unpaid balance.

7. Each of the Guarantors hereby agrees that (a) all obligations guaranteed hereby may be renewed, extended modified or compromised and that any security for such obligations may be released or otherwise dealt with by the Lender without notice to the Guarantors and without thereby releasing them from their obligations under this guaranty agreement, and (b) the Lender may release any of the Guarantors or any other guarantor without notice to any other of the Guarantors.

8. If any amount payable under the Loan Commitment, the Note or the Deed of Trust is paid to the Lender but, because of bankruptcy or similar laws relating to creditors' rights, such amount is repaid to the Borrower or to any trustee or receiver for the Borrower, such amount shall continue to be guaranteed hereby.

9. In the event of any default by the Borrower in its obligations under the Loan Commitment, the Note, and/or the Deed of Trust, the Lender may, in its sole discretion, proceed against the Borrower and/or any of the Guarantors and shall not be deemed to have waived any of its rights against any of them by doing so.

10. The validity of any portion of this guaranty agreement, or any portion of any agreement or obligation guaranteed hereby, shall not invalidate the remainder of the guaranty agreement.

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11. The Guarantors hereby consent to any and all forebearances and extensions of the time for any obligations and/or payments guaranteed hereby, to any and all changes and extensions of the time for any such payments, to any and all changes in the terms, covenants and conditions hereafter made or granted, and to any and all substitutions, exchanges and/or releases of all or any part of the collateral therefor, if any.

12. This guaranty agreement shall be governed by, and construed in accordance with, the laws of the Commonwealth of Virginia.

13. This guaranty agreement shall be jointly and severally binding upon each of the Guarantors and his or her respective heirs, personal representatives, successors and assigns, as may be or become applicable, and shall inure to the benefit of the Lender, its successors and assigns, as may be or become applicable.

14. All notices to, or demands upon, the Guarantors, or any of them, shall be in writing addressed to the Guarantors at the last known address for each Guarantor in the records of the Lender.

WITNESS the following signatures and seals as of the day, month and year first above written.

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 (SEAL)
Roger J. McDonald

 (SEAL)
Lawrence T. Phillips

STATE OF VIRGINIA, at large,
CITY/COUNTY OF Richmond, to-wit:

I, the undersigned, a Notary Public in and for the jurisdiction aforesaid, do hereby certify that Roger J. McDonald and Lawrence T. Phillips, whose names are signed to the foregoing Guaranty Agreement bearing the date of the ___ day of October, 1988, have acknowledged the same before me in my jurisdiction aforesaid.

Given under my hand this 3rd day of October, 1988.

My commission expires 12/10/1990.


Notary Public

PRM4/C

U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT

SETTLEMENT STATEMENT

B. TYPE OF LOAN:		
1. <input type="checkbox"/> FHA	2. <input type="checkbox"/> FmHA	3. <input checked="" type="checkbox"/> CONV. UNINS.
4. <input type="checkbox"/> VA	5. <input type="checkbox"/> CONV. INS.	
6. FILE NUMBER:		7. LOAN NUMBER:
8. MORTGAGE INSURANCE CASE NUMBER:		

C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. NAME OF BORROWER: Lafayette Associates 3008 Lafayette Avenue Richmond, VA 23228	E. NAME OF SELLER: Glenside Associates 10043 Midlothian Turnpike Richmond, VA 23235	F. NAME OF LENDER: Seasons Mortgage Corporation 401 Southlake Blvd. Richmond, VA 23235
G. PROPERTY LOCATION: 3008 Lafayette Avenue Richmond, VA 23228	H. SETTLEMENT AGENT M. Daniel Clark PLACE OF SETTLEMENT 10043 Midlothian Turnpike Richmond, VA 23235	I. SETTLEMENT DATE: October 3, 1988

J. SUMMARY OF BORROWER'S TRANSACTION		K. SUMMARY OF SELLER'S TRANSACTION	
100. GROSS AMOUNT DUE FROM BORROWER:		400. GROSS AMOUNT DUE TO SELLER:	
101. Contract sales price	550,000.00	401. Contract sales price	550,000.00
102. Personal property		402. Personal property	
103. Settlement charges to borrower (line 1400)	17,752.52	403.	
104.		404.	
105.		405.	
Adjustments for items paid by seller in advance		Adjustments for items paid by seller in advance	
106. City/town taxes to		406. City/town taxes to	
107. County taxes to		407. County taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. GROSS AMOUNT DUE FROM BORROWER	567,752.52	420. GROSS AMOUNT DUE TO SELLER	550,000.00
200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER:		500. REDUCTIONS IN AMOUNT DUE TO SELLER:	
201. Deposit or earnest money	5,000.00	501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)	425,000.00	502. Settlement charges to seller (line 1400)	25,063.00
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204. overpayment org fee	500.00	504. Payoff of first mortgage loan	256,639.44
205.		505. Payoff of second mortgage loan	
206.		506.	
207.		507.	
208.		508.	
209. loan by seller	75,000.00	509. loan by seller	75,000.00
Adjustments for items unpaid by seller		Adjustments for items unpaid by seller	
210. City/town taxes to		510. City/town taxes to	
211. County taxes 07-01-88 to 10-04-88	579.85	511. County taxes 07-01-88 to 10-04-88	579.85
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. TOTAL PAID BY/FOR BORROWER	506,079.85	520. TOTAL REDUCTION AMOUNT DUE SELLER	357,282.29
300. CASH AT SETTLEMENT FROM/TO BORROWER		600. CASH AT SETTLEMENT TO/FROM SELLER	
301. Gross amount due from borrower (line 120)	567,752.52	601. Gross amount due to seller (line 420)	550,000.00
302. Less amounts paid by/for borrower (line 220)	506,079.85	602. Less reductions in amount due seller (line 520)	357,282.29
303. CASH (<input type="checkbox"/> FROM) (<input type="checkbox"/> TO) BORROWER	61,672.67	603. CASH (<input type="checkbox"/> TO) (<input type="checkbox"/> FROM) SELLER	192,717.71

The undersigned hereby acknowledge receipt of a completed copy of pages 1 and 2 of this statement and any attachments referred to herein.

Borrower M. Daniel Clark
Lafayette Associates

Seller Glenside Associates

Borrower

Seller SUBJECT TO TRANSMITTAL LETTER 10/5

PLAINTIFF'S
EXHIBIT

5

ALL-STATE INTERNATIONAL

000192

SETTLEMENT STATEMENT			
TYPE OF LOAN	FILE NUMBER	LOAN NUMBER	MORTGAGE INSURANCE CASE NUMBER
	21030254		
C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.d.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.			
D. Name and Address of Borrower		E. Name and Address of Seller	
JAMES H. PAYNE, JR. CLAIRE E. PAYNE 2001 RIO GRANDE ROAD RICHMOND, VIRGINIA 23229		RTC AS RECEIVER FOR SEASONS FEDERAL SAVINGS BANK 100 COLONY SQUARE, SUITE 2100 ATLANTA, GEORGIA 30361	
G. Property Location		H. Settlement Agent	
3008 LAFAYETTE AVENUE COUNTY OF HENRICO, VA RICH-8/25/92-#503 -1164		VANDEVENTER, BLACK, MEREDITH & MARTIN	
		I. Settlement Date	
		07/30/92	
J. Summary of Borrower's Transaction		K. Summary of Seller's Transaction	
100. Gross Amount Due from Borrower		400. Gross Amount Due to Seller	
101. Contract sales price \$275,000.00		401. Contract sales price \$275,000.00	
102. Personal Property		402. Personal Property	
103. Settlement charges to borrower (line 1400) \$0.00		403.	
104.		404.	
105.		405.	
Adjustments for items paid by seller in advance		Adjustments for items paid by seller in advance	
106. City/County taxes to		406. City/County taxes to	
107. County taxes to		407. County taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. Gross Amount Due from Borrower \$275,000.00		420. Gross Amount Due to Seller \$275,000.00	
200. Amounts Paid by or in Behalf of Borrower		500. Reductions in Amount Due to Seller	
201. Deposit or earnest money \$27,500.00		501. Excess Deposit	
202. Principal amount of new loan(s)		502. Settlement Charges to seller (line 1400) \$15,911.77	
203. Existing loan(s) taken subject to		503. Existing Loan(s) taken subject to	
204.		504. Payoff first mortgage loan	
205.		505. Payoff of second mortgage loan	
206.		506.	
207. Cash Credit \$41,250.00		507. Cash Credit \$41,250.00	
208.		508.	
209.		509.	
Adjustments for items unpaid by seller		Adjustments for items unpaid by seller	
210. City/County taxes to		510. City/County taxes to	
211. County Taxes 07/01/92 to 07/30/92 \$281.09		511. County Taxes 07/01/92 to 07/30/92 \$281.09	
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. Total Paid by or for Borrower \$69,031.09		520. Total Reduction Amount due Seller \$57,442.86	
300. Cash at Settlement from/to Borrower		600. Cash At Settlement to/from Seller	
301. Gross amount due from borrower (line 120) \$275,000.00		601. Gross amount due to seller (line 420) \$275,000.00	
302. Less amounts paid by or for borrower (line 200) \$99,031.09		602. Less reductions in amt. due seller (line 520) \$57,442.86	
303. Cash from Borrower \$205,968.91		603. Cash to Seller \$217,557.14	

PLAINTIFF'S
EXHIBIT

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ALL-STATE INTERNATIONAL

07/27/92

10:04 AM

000193

Settlement Charges				PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SETTLER'S FUNDS AT SETTLEMENT
700. Total Sales/Broker's Commission based on	\$275,000.00				
Division of Commission (line 700) as follows:					
701. \$ 5,500.00 to ACCELERATED REAL ESTATE SERVICES					
702. \$ 5,575.00 to J. P. KING AUCTION COMPANY					
703. Commission paid at Settlement					\$12,375.00
704.					
800. Items Payable in Connection With Loan					
801. Loan Origination Fee					
802. Loan Discount					
803. Appraisal Fee \$ to					
804. Credit Report \$ to					
805. Lender's Inspection Fee					
806. Mortgage Insurance Application Fee to					
807. Assumption Fee					
808.					
809.					
810.					
811.					
900. Items Required By Lender to be Paid in Advance					
901. Interest from to					
902. Mortgage Insurance Premium for months to					
903. Hazard Insurance Premium for 1 year to					
904.					
905.					
1000. Reserves Deposited with Lender:					
1001. Hazard Insurance	months @	per month			
1002. Mortgage Insurance	months @	per month			
1003. City Property Taxes	months @	per month			
1004. County Property Taxes	months @	per month			
1005. Annual Assessments	months @	per month			
1006. Flood Insurance	months @	per month			
1007.	months @	per month			
1008.					
1100. Title Charges:					
1101. Settlement or Closing Fee to					
1102. Abstract or Title Search to					
1103. Title Examination to VANDEVENTER, BLACK, MEREDITH & MARTIN					\$200.00
1104. Title Insurance Binder to					
1105. Document Preparation to					
1106. Notary Fees					
1107. Attorney's fees to					
(includes above item numbers:					
1108. Title Insurance LAWYERS TITLE INSURANCE CORPORATION					\$909.00
(includes above item numbers:					
1109. Lender's coverage					
1110. Owner's coverage		\$233,750.00			
1111.					
1112.					
1113.					
1200. Government Recording and Transfer Charges					
1201. Recording fees: Deed: \$18.00 Mortgage: \$18.00					
1202. City/county tax/stamps: Deed: \$180.50 Mortgage: \$180.50					
1203. State tax/stamps: Deed: \$541.50 Mortgage: \$541.50					
1204. Grantor's Tax					
1205. Release fee					
1300. Additional Settlement Charges					
1301. Survey to					
1302. Pest Inspection to					
1303. DELINQUENT REAL ESTATE TAXES DUE 6/5/92					\$1,687.77
1304.					
1305.					
1400. Total Settlement Charges (enter on lines 103, Section J and 802, Section K)			\$0.00		\$15,911.77

I have carefully reviewed the HUD-1 Settlement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

James H. Payne, Jr.
JAMES H. PAYNE, JR.

Claire E. Payne
CLAIRE E. PAYNE

The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement.
VANDEVENTER, BLACK, MEREDITH & MARTIN

ATO AS RECEIVER FOR
SEABOARD FEDERAL SAVINGS BANK

CHARLES P. JOHNSON, ATTORNEY-IN-FACT

BY: _____
Settlement Agent

07/30/92
Date

WARNING: It is a crime to knowingly make false statements on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 US Code Section 1014. For FHA/VA, see Title 18 US Code Section 1001 and Section 1010

000194

VANDEVENTER, BLACK 10-73
MEREDITH & MARTIN
TRUST ACCOUNT
500 WORLD TRADE CENTER
NORFOLK, VA. 23510

15755

JUL 31 1992 19

68-677 1307
510

Pay to the Order of Jacobson/CCF Partners an agent for Resolution Trust Corporation \$ 217,557.14
INSURED BY NO. 65-123 217557 DOLS 14 CTS Dollars

SIGNET BANK
ACH R & T 051006778
Norfolk, VA Virginia

Memo

21030258

⑈00015755⑈ ⑆051006778⑆ 750⑈7360555⑈

000195

RESOLUTION TRUST CORPORATION
SALES TRANSACTION REPORT
FOR EACH REAL ESTATE OWNED ASSET
 MONTH ENDING AUGUST 1992

NOTE: A legible copy of the following must accompany this form:

1. Closing Statement
2. Approved Case

CONTRACTOR NAME: <u>Jacobson/CCF Partners</u>	INSTITUTION NAME: <u>Seasons</u>
CONTRACTOR NO.: <u>719-90-0507</u>	INSTITUTION NO.: <u>7189</u>
	SUBSIDIARY NAME: _____
	(If Applicable)
ASSET NAME: <u>3008 Lafayette Avenue</u>	DATE LISTED WITH _____
ASSET NO.: <u>1009464</u>	BROKER: _____
ASSET TYPE: <u>305</u>	STATUS CODE: <u>Sold</u>
DATE OF TRANSACTION: <u>July 30, 1992</u>	DATE MARKETABLE _____
BOOK VALUE: <u>\$421,690.00</u>	TITLE ACQUIRED: _____
APPRAISED VALUE: <u>\$345,000.00</u>	MARKETING PERIODS (days): <u>Auction</u>
ERV: <u>\$422,000.00</u>	NO. OF BIDS: _____
PARTIAL SALE: _____	
% SOLD: <u>100%</u>	

GROSS SALES PROCEEDS:

Sales Price of REO	<u>\$275,000.00</u>
Sales Price of Personal Property	_____
LESS:	
Commissions	<u>\$12,375.00</u>
Legal Fees	_____
Recording Fees	<u>\$18.00</u>
Taxes & Insurance	<u>\$3,599.86</u>
Other Closing Costs	<u>\$200.00</u>
Earnest Money Deposits	_____
Amounts Financed	_____
Cash Discount (per Auction policy)	<u>\$41,250.00</u>

GROSS PROCEEDS:\$217,557.14**AMOUNTS PAID PARTICIPANTS:**

CASH PROCEEDS COLLECTED:	<u>\$217,557.14</u>	% AV: <u>63.06%</u>	% ERV: <u>51.55%</u>
(Net Proceeds)			

TYPE OF SALE:	<u>Cash</u>
SOURCE OF FINANCING:	<u>Cash</u>
SALE FINANCED AT MARKET RATE:	_____
SOLD-LOW INCOME HOUSING:	<u>No</u>
NAME OF BUYER:	<u>James H. Payne, Jr.</u>
SFH: Income of Household	_____
Number of Children in Household	_____
All Family Members in Household	_____
MFH: ADDRESS OF BUYER	<u>8901 Rio Grande Road</u>
CITY	<u>Richmond</u>
STATE	<u>VA</u>
ZIP CODE	<u>23229</u>
TYPE OF AGENCY:	_____ (N - nonprofit, P - profit, S - state)

"Per Auction case, SMDA disposition fee to be calculated based on ERV"

NOTE: CASES ARE REQUIRED FOR CONSERVATORSHIP ASSETS.
SUBSIDIARY ASSETS REQUIRE WRITTEN BOARD OF DIRECTORS APPROVAL

Noted by: _____	Prepared by: <u>Steven Cohen</u> <i>XC</i>
Oversight Manager (Date) _____	Date Prepared: <u>August 18, 1992</u>
	Phone No.: <u>(301) 577-0005</u>

Z:\LOTUS\LAFAYETT
FORM 3-70 (1/91)

000196

**PLAINTIFF'S
EXHIBIT**
7

ALL-STATE INTERNATIONAL

L. SETTLEMENT CHARGES				PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
COMMISSION based on price / 24,750.00					
Division of Commission (line 700) as follows: Less deposit retained: 5,000.00					
24,750.00 to J. Edward Seay & Assoc. / Less deposit					
to					
703. Commission paid at Settlement					24,750.00
704.					
800. ITEMS PAYABLE IN CONNECTION WITH LOAN.					
801. Loan Origination fee	1.0000 %	Seasons Mortgage Corp	POC	4,250.00	
802. Loan Discount	1.0000 %	Seasons Mortgage Corp		4,250.00	
803. Appraisal Fee	to				
804. Credit Report	to				
805. Lender's Inspection Fee					
806. Mortgage Insurance Application Fee	to				
807. Assumption Fee					
808.					
809.					
810.					
811.					
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE					
901. Interest from	10-03-88 to 11-01-88 @ \$	129.8600 /day	29	3,765.94	
902. Mortgage Insurance Premium for	months to				
903. Hazard Insurance Premium for	1 years to	First VA Property		2,250.00	
904.	years to				
905.					
1000. RESERVES DEPOSITED WITH LENDER					
1001. Hazard Insurance	months @ \$	per month			
1002. Mortgage Insurance	months @ \$	per month			
1003. City Property Taxes	months @ \$	per month			
1004. County Property Taxes	6.0 months @ \$	187.18 per month		1,123.08	
1005. Annual Assessments	months @ \$	per month			
1006.	months @ \$	per month			
1007.	months @ \$	per month			
1008.	months @ \$	per month			
1100. TITLE CHARGES					
1101. Settlement or closing fee	to				
1102. Abst. act or title search	to				
1103. Title examination	to M. Daniel Clark		POC		
1104. Title insurance binder	to				
1105. Document preparation	to Douglas P. Rucker, Jr.			2,139.50	
1106. Notary fees	to				
1107. Attorney's fees	to				
(includes above items numbers:)					
1108. Title insurance	to Guardian Title Services, Inc.			1,100.00	
(includes above items numbers:)					
1109. Lender's coverage	\$	425,000.00			
1110. Owner's coverage	\$	525,000.00			
1111. Release Fee	M. Daniel Clark				50.00
1112. wire transfer fee	M. Daniel Clark				8.00
1113. record 2nd d/t	Clerk, Circuit Court			161.00	
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES					
1201. Recording fees: Deed \$	10.00	Mortgage \$	47.00	Releases \$	20.00
1202. City/county tax/stamps: Deed \$	117.50	Mortgage \$	212.50		330.00
1203. State tax/stamps: Deed \$	352.50	Mortgage \$	637.50		990.00
1204. Grantor's Tax	Henrico Clerk, Circuit Court				235.00
1205. Transfer Fee	Henrico Clerk, Circuit Court			1.00	
1300. ADDITIONAL SETTLEMENT CHARGES					
1301. Survey	to George Stephens Assoc.			1,486.00	
1302. Pest inspection	to				
1303. courier charges	to M. Daniel Clark			50.00	
1304. record fin stmt	to Clerk, Circuit Court			20.00	
1305. record part cer	to Clerk, Circuit Court			10.00	
1400. TOTAL SETTLEMENT CHARGES (enter on lines 103, Section J and 502, Section K)				17,752.52	25,063.00

By signing Page 1 of this statement, the signatories of Page 1 also acknowledge receipt of a completed copy of Page 2 of this two page statement.

1305A assign. leases to Clerk, Circuit Court 19.00

/88551 4/88551
Certified to be a true copy.

Settlement Agent

000197

September 11, 1991

CERTIFIED, RETURN RECEIPT REQUESTED
AND FIRST CLASS REGULAR MAIL

Mr. Roger McDonald
Attorney at Law
4825 Radford Avenue
P.O. Box 6686
Richmond, VA 23230

ATTN: Mr. McDonald

RE: Demand Letter
Loan Number: 1009464
Original Lender: Seasons Savings Bank

Dear Mr. McDonald:

We have previously informed you that Jacobson/CCF Partners has assumed the management responsibilities for the above-referenced loan. Our review of your file indicates that payments under the referenced loan are seriously delinquent.

Our records indicate that you currently owe \$474,729.49 to Seasons Savings Bank. Your loan is delinquent by past due amounts of \$53,404.66. This amount continues to increase with the accrual of interest each day.

Perhaps this delinquency represented by the past due amount is the result of your confusion over the transfer to us of loan servicing, or some other misunderstanding on your part. We would welcome your efforts to voluntarily bring your payments current or to refinance the outstanding debt. I must advise you, however, that we have retained legal counsel. Your failure to act within ten (10) days from the date of this letter will result in immediate legal action to institute foreclosure upon the security property resulting in the imposition of additional sums due under the loan for attorneys' fees and costs. Only your prompt attention to this matter will avoid legal action.

Please feel free to contact me at (301) 306-7608 should you have any questions in this regard.

Sincerely,



Daniel F. Balkam
Asset Manager



000198

STUART A. SIMON, ESQUIRE
STUART A. SIMON & ASSOCIATES
4900 CUTSHAW AVENUE
RICHMOND, VIRGINIA 23230

December 17, 1991

08804.056

CERTIFIED, RETURN RECEIPT REQUESTED
AND FIRST CLASS MAIL

Roger J. McDonald
4825 Radford Avenue
Post Office Box 6686
Richmond, Virginia 23230

Lawrence T. Phillips
8315 Kraft Court
Richmond, Virginia 23228

Lafayette Associates
c/o Roger J. McDonald
4825 Radford Avenue
Post Office Box 6686
Richmond, Virginia 23230

Lafayette Associates
c/o Lawrence T. Phillips
8315 Kraft Court
Richmond, Virginia 23228

Lafayette Associates
3008 Lafayette Avenue
Richmond, Virginia 23228

RE: NOTICE OF ACCELERATION:

Loan to Lafayette Associates, a Virginia general partnership ("Borrower"), in the original amount of \$425,000, evidenced by an Deed of Trust Note dated October 3, 1988 (the "Note") and secured by a Deed of Trust (the "Deed of Trust") dated October 3, 1988, executed by Lawrence T. Phillips, General Partner, and Roger J. McDonald, General Partner, and recorded among the land records of the County of Henrico, Virginia, in Deed Book 2156, at page 1199, encumbering certain real property (the

000199



Roger J. McDonald
Lawrence T. Phillips
Page 2
December 17, 1991

"Property"), more particularly described therein and referred to as the Eastern 20 feet of Lot 25, Western 40 feet of Lot 25, Lot 26, Lot 27, Lot 28, Plan of Putney Place, as shown on a plat of survey entitled "Boundary Survey Lots 25, 26, 27, and 28, Putney Place, Brookland District, Henrico Co., Virginia", recorded with the Deed of Trust among the said land records (the "Loan").

Asset Number: 1009464

Dear Mr. McDonald and Mr. Phillips:

A Notice of Default was hand delivered and/or mailed to you on November 5, 1991, by this firm on behalf of the Resolution Trust Corporation, as receiver for Seasons Federal Savings Bank ("RTC"). You have not cured the default within the thirty (30) day time period required by that Notice of Default and the default continues.

The RTC, by and through its agent, Jacobson/CCF Partners, has directed us to notify you and we hereby notify you that the RTC has on this date accelerated the entire balance of all unpaid sums due under the Loan. On behalf of the RTC, we demand immediate payment in full of \$487,695.64, representing all sums secured by the Deed of Trust due the RTC to date under the terms of the Loan. The total amount due consists of \$421,324.83 principal; \$59,864.10, accrued interest to December 16, 1991; \$3,440.30 late fees; \$3,066.41 unpaid taxes and insurance; and \$3,500.00 attorneys' fees.

Please note that Stuart A. Simon, Attorney at Law ("Substitute Trustee") has been appointed Substitute Trustee pursuant to the Deed of Trust, and recordation of a Deed of Appointment of Substitute Trustee among the land records of the County of Henrico, Virginia. The RTC, by and through its agent, Jacobson/CCF Partners, has delivered written instructions to the Substitute Trustee to institute foreclosure proceedings. We encourage you to cooperate with the Substitute Trustee in connection with the foreclosure to increase the possibility of active bidding on the Property at sale. Please feel free to contact Peter A. Dingman, Esquire, of Mays & Valentine, who is

000200

Roger J. McDonald
Lawrence T. Phillips
Page 3
December 17, 1991

counsel for the RTC at (703) 521-5252, 2300 Ninth Street South,
Arlington, Virginia, 22204, for further information.

Very truly yours,

Stuart A. Simon
Substitute Trustee

cc: Daniel F. Balkam, Asset Manager
Jacobson/CCF Partners

000201

Lafayette Associates

Date	Index	Margin	Effective Rate	Days	Payment	Interest	Accrued Interest	Principal Paid	Principal Balance
9/4/90									
11/1/91	NA	NA	16.00%	423			79,209.07		421,324.83
12/1/91	6.17%	5.00%	11.17%	30		3,921.83	83,130.90		421,324.83
1/1/92	6.17%	5.00%	11.17%	31		4,052.56	87,183.46		421,324.83
2/1/92	6.17%	5.00%	11.17%	31		4,052.56	91,236.02		421,324.83
3/1/92	6.17%	5.00%	11.17%	29		3,791.10	95,027.12		421,324.83
4/1/92	6.17%	5.00%	11.17%	31		4,052.56	99,079.68		421,324.83
5/1/92	6.17%	5.00%	11.17%	30		3,921.83	103,001.52		421,324.83
6/1/92	6.17%	5.00%	11.17%	31		4,052.56	107,054.07		421,324.83
7/1/92	6.17%	5.00%	11.17%	30	217,557.14	3,921.83	0.00	106,581.23	314,743.60
8/1/92	6.17%	5.00%	11.17%	31		3,027.40	3,027.40		314,743.60
9/1/92	6.17%	5.00%	11.17%	31		3,027.40	6,054.79		314,743.60
10/1/92	6.17%	5.00%	11.17%	30		2,929.74	8,984.53		314,743.60
11/1/92	6.17%	5.00%	11.17%	31		3,027.40	12,011.93		314,743.60
12/1/92	6.17%	5.00%	11.17%	30		2,929.74	14,941.67		314,743.60
1/1/93	6.17%	5.00%	11.17%	31		3,027.40	17,969.06		314,743.60
2/1/93	6.17%	5.00%	11.17%	31		3,027.40	20,996.46		314,743.60
3/1/93	6.17%	5.00%	11.17%	28		2,734.42	23,730.88		314,743.60
4/1/93	6.17%	5.00%	11.17%	31		3,027.40	26,758.28		314,743.60
5/1/93	6.17%	5.00%	11.17%	30		2,929.74	29,688.01		314,743.60
6/1/93	6.17%	5.00%	11.17%	31		3,027.40	32,715.41		314,743.60
7/1/93	6.17%	5.00%	11.17%	30		2,929.74	35,645.15		314,743.60
8/1/93	6.17%	5.00%	11.17%	31		3,027.40	38,672.55		314,743.60
9/1/93	6.17%	5.00%	11.17%	31		3,027.40	41,699.94		314,743.60
10/1/93	6.17%	5.00%	11.17%	30		2,929.74	44,629.68		314,743.60
11/1/93	6.17%	5.00%	11.17%	31		3,027.40	47,657.08		314,743.60
12/1/93	6.17%	5.00%	11.17%	30		2,929.74	50,586.81		314,743.60
1/1/94	6.17%	5.00%	11.17%	31		3,027.40	53,614.21		314,743.60
2/1/94	6.17%	5.00%	11.17%	31		3,027.40	56,641.61		314,743.60
3/1/94	6.17%	5.00%	11.17%	28		2,734.42	59,376.03		314,743.60
4/1/94	6.17%	5.00%	11.17%	31		3,027.40	62,403.43		314,743.60
5/1/94	6.17%	5.00%	11.17%	30		2,929.74	65,333.16		314,743.60
6/1/94	6.17%	5.00%	11.17%	31		3,027.40	68,360.56		314,743.60
7/1/94	6.17%	5.00%	11.17%	30		2,929.74	71,290.30		314,743.60
8/1/94	6.17%	5.00%	11.17%	31		3,027.40	74,317.70		314,743.60
9/1/94	6.17%	5.00%	11.17%	31		3,027.40	77,345.09		314,743.60
10/1/94	6.17%	5.00%	11.17%	30		2,929.74	80,274.83		314,743.60
11/1/94	6.17%	5.00%	11.17%	31		3,027.40	83,302.23		314,743.60
12/1/94	6.91%	5.00%	11.91%	30		3,123.83	86,426.06		314,743.60
1/1/95	6.91%	5.00%	11.91%	31		3,227.96	89,654.01		314,743.60
2/1/95	6.91%	5.00%	11.91%	31		3,227.96	92,881.97		314,743.60
3/1/95	6.91%	5.00%	11.91%	28		2,915.57	95,797.55		314,743.60
4/1/95	6.91%	5.00%	11.91%	31		3,227.96	99,025.50		314,743.60
5/1/95	6.91%	5.00%	11.91%	30		3,123.83	102,149.33		314,743.60
6/1/95	6.91%	5.00%	11.91%	31		3,227.96	105,377.29		314,743.60
7/1/95	6.91%	5.00%	11.91%	30		3,123.83	108,501.12		314,743.60
8/1/95	6.91%	5.00%	11.91%	31		3,227.96	111,729.08		314,743.60
9/1/95	6.91%	5.00%	11.91%	31		3,227.96	114,957.04		314,743.60
10/1/95	6.91%	5.00%	11.91%	30		3,123.83	118,080.87		314,743.60
11/1/95	6.91%	5.00%	11.91%	31		3,227.96	121,308.83		314,743.60
12/1/95	6.91%	5.00%	11.91%	30		3,123.83	124,432.66		314,743.60
1/1/96	6.91%	5.00%	11.91%	31		3,227.96	127,660.61		314,743.60
2/1/96	6.91%	5.00%	11.91%	31		3,227.96	130,888.57		314,743.60
3/1/96	6.91%	5.00%	11.91%	29		3,019.70	133,908.28		314,743.60
4/1/96	6.91%	5.00%	11.91%	31		3,227.96	137,136.23		314,743.60
5/1/96	6.91%	5.00%	11.91%	30		3,123.83	140,260.06		314,743.60
6/1/96	6.91%	5.00%	11.91%	31		3,227.96	143,488.02		314,743.60
7/1/96	6.91%	5.00%	11.91%	30		3,123.83	146,611.85		314,743.60
8/1/96	6.91%	5.00%	11.91%	31		3,227.96	149,839.81		314,743.60
9/1/96	6.91%	5.00%	11.91%	31		3,227.96	153,067.77		314,743.60
10/1/96	6.91%	5.00%	11.91%	30		3,123.83	156,191.60		314,743.60
11/1/96	6.91%	5.00%	11.91%	31		3,227.96	159,419.56		314,743.60
12/1/96	6.91%	5.00%	11.91%	30		3,123.83	162,543.39		314,743.60
1/1/97	6.91%	5.00%	11.91%	31		3,227.96	165,771.34		314,743.60
2/1/97	6.91%	5.00%	11.91%	31		3,227.96	168,999.30		314,743.60
3/1/97	6.91%	5.00%	11.91%	28		2,915.57	171,914.88		314,743.60
4/1/97	6.91%	5.00%	11.91%	31		3,227.96	175,142.83		314,743.60

PLAINTIFF'S
EXHIBIT

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ALL-STATE® INTERNATIONAL

000202

5/1/97	6.91%	5.00%	11.91%	30	3,123.83	178,266.66	314,743.60
6/1/97	6.91%	5.00%	11.91%	31	3,227.96	181,494.62	314,743.60
7/1/97	6.91%	5.00%	11.91%	30	3,123.83	184,618.45	314,743.60
8/1/97	6.91%	5.00%	11.91%	31	3,227.96	187,846.41	314,743.60
9/1/97	6.91%	5.00%	11.91%	31	3,227.96	191,074.37	314,743.60
10/1/97	6.91%	5.00%	11.91%	30	3,123.83	194,198.20	314,743.60
11/1/97	6.91%	5.00%	11.91%	31	3,227.96	197,426.16	314,743.60
12/1/97	5.90%	5.00%	10.90%	30	2,858.92	200,285.08	314,743.60
1/1/98	5.90%	5.00%	10.90%	31	2,954.22	203,239.30	314,743.60
2/1/98	5.90%	5.00%	10.90%	31	2,954.22	206,193.51	314,743.60
3/1/98	5.90%	5.00%	10.90%	28	2,668.33	208,861.84	314,743.60
4/1/98	5.90%	5.00%	10.90%	31	2,954.22	211,816.06	314,743.60
5/1/98	5.90%	5.00%	10.90%	30	2,858.92	214,674.98	314,743.60
6/1/98	5.90%	5.00%	10.90%	31	2,954.22	217,629.20	314,743.60
7/1/98	5.90%	5.00%	10.90%	30	2,858.92	220,488.12	314,743.60
8/1/98	5.90%	5.00%	10.90%	31	2,954.22	223,442.34	314,743.60
9/1/98	5.90%	5.00%	10.90%	31	2,954.22	226,396.56	314,743.60
10/1/98	5.90%	5.00%	10.90%	30	2,858.92	229,255.48	314,743.60
11/1/98	5.90%	5.00%	10.90%	31	2,954.22	232,209.69	314,743.60
12/1/98	5.90%	5.00%	10.90%	30	2,858.92	235,068.62	314,743.60
1/1/99	5.90%	5.00%	10.90%	31	2,954.22	238,022.83	314,743.60
2/1/99	5.90%	5.00%	10.90%	31	2,954.22	240,977.05	314,743.60
3/1/99	5.90%	5.00%	10.90%	28	2,668.33	243,645.38	314,743.60
4/1/99	5.90%	5.00%	10.90%	31	2,954.22	246,599.60	314,743.60
5/1/99	5.90%	5.00%	10.90%	30	2,858.92	249,458.52	314,743.60
6/1/99	5.90%	5.00%	10.90%	31	2,954.22	252,412.74	314,743.60
7/1/99	5.90%	5.00%	10.90%	30	2,858.92	255,271.66	314,743.60
8/1/99	5.90%	5.00%	10.90%	31	2,954.22	258,225.88	314,743.60
9/1/99	5.90%	5.00%	10.90%	31	2,954.22	261,180.09	314,743.60
10/1/99	5.90%	5.00%	10.90%	30	2,858.92	264,039.02	314,743.60
11/1/99	5.90%	5.00%	10.90%	31	2,954.22	266,993.23	314,743.60
12/1/99	5.90%	5.00%	10.90%	30	2,858.92	269,852.15	314,743.60
1/1/00	5.90%	5.00%	10.90%	31	2,954.22	272,806.37	314,743.60
2/1/00	5.90%	5.00%	10.90%	31	2,954.22	275,760.59	314,743.60
3/7/00	5.90%	5.00%	10.90%	35	3,335.41	279,096.00	<u>314,743.60</u>
Total Principal & Interest							593,839.60

VIRGINIA: IN THE CIRCUIT COURT OF HENRICO COUNTY
NATIONAL ENTERPRISES, INCORPORATED,

Plaintiff,

v.

AT LAW NO.

CL96-808

LAFAYETTE ASSOCIATES

SERVE: Roger J. McDonald, General Partner
4825 Radford Avenue
Richmond, VA 23230

and

ROGER J. MCDONALD

SERVE: Roger J. McDonald
4825 Radford Avenue
Richmond, VA 23230

and

LAWRENCE T. PHILLIPS

SERVE: Lawrence T. Phillips
1533 Presidential Drive
Richmond, VA 23228

Defendants.

MOTION FOR JUDGMENT

COMES NOW the plaintiff, National Enterprises, Incorporated
and for its Motion for Judgment states as follows:

1. That defendant, Lafayette Associates is a Virginia
General Partnership.

2. That defendants, Roger J. McDonald and Lawrence, T.
Phillips are general partners of Lafayette Associates.

3. That on or about October 3, 1988 the defendants entered
into a Deed of Trust Note with Seasons Mortgage Corporation. A
copy of said Deed of Trust Note is attached hereto and incorporated
herein as "Exhibit A".

000204

PLAINTIFF'S
EXHIBIT

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ALL-STATE® INTERNATIONAL

4. That on or about October 3, 1998 the defendants, Roger J. McDonald and Lawrence T. Phillips, executed a Guaranty Agreement, a copy is attached hereto as Exhibit "B" and incorporated herein by this reference, making them liable for the debts of Lafayette Associates with respect to the Deed of Trust Note.

5. That pursuant to said Deed of Trust Note, Seasons Mortgage Corporation advanced funds to defendant and defendant accepted said funds.

6. That Seasons Mortgage Corporation was placed in receivership and its assets became subject to the control of the Resolution Trust Corporation.

7. That pursuant to a Bill of Sale and Assignment of Loans, attached hereto as Exhibit "C" and incorporated herein by this reference, Resolution Trust Corporation conveyed its full interest in the Note as well as the underlying obligations to the plaintiff.

8. That pursuant to said Deed of Trust Note plaintiff has performed all of its obligations and after proper demand for payment defendants have failed to completely perform.

9. That on or about December 17, 1991 the property secured by the Deed of Trust Note was foreclosed on by Resolution Trust Corporation ("RTC") as receiver for Seasons Savings Bank.

10. That on or about July 30, 1992 the RTC sold the property secured by the Deed of Trust Note to James H. Payne and C.E. Payne for \$275,000.00.

11. That allowing for proper credits there is an outstanding balance due to the plaintiff by the defendants in the amount of \$285,187.47 with accrued interest of \$94,478.41 and accruing daily

at \$.634 per day, taxes and insurance in the amount of \$3,066.41, late fees in the amount of \$3,440.30 for a total of \$389,672.59 as evidenced by the statement of account attached hereto as Exhibit "C" and incorporated herein by this reference and affidavit of Jon D. Fleming, Asset Manager of National Enterprises, Inc. attached hereto as Exhibit "D" and incorporated herein by this reference.

11. Said Agreement allowed for attorneys fees in the event of default.

12. That defendants are in breach of the Agreement.

WHEREFORE, plaintiff prays for judgment against defendants, jointly and individually in the amount of \$389,672.59 plus interest at the rate of 11% from April 30, 1996 until paid in full, attorney's fees and any and all costs deemed fair and just by the court.

NATIONAL ENTERPRISES, INCORPORATED

By: 

Of Counsel

Jon D. Becker, Esquire
DIAMONSTEIN, BECKER & STALEY, P.L.C.
Post Office Box 8915
Virginia Beach, Virginia 23450
(804) 340-7600

THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

000266

ROGER J. McDONALD
ATTORNEY AT LAW
4825 RADFORD AVENUE
P. O. BOX 6686
RICHMOND, VIRGINIA 23230

804-353-8582

December 3, 1991

TELEFAX
804-353-8476

Mr. Daniel F. Balkam
Jacobson/CCF Partners
4451-G Parliament Place
Lanham MD 20706

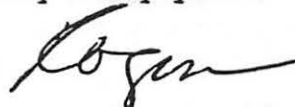
Re: Lafayette Associates Asset No. 1009464

Dear Mr. Balkam:

I wanted to keep you advised of two recent developments regarding the mini warehouse owned by Lafayette Associates. First, we have entered into a Management Agreement with a property management company allowing the property management company to take over the collection and operation of the minis.

Secondly, I have listed the property with that same management company under an arrangement whereby we will attempt to auction the property for sale. This auction process will take between six to eight weeks. I will be meeting with a representative of the auction company as well as the listing agent to discuss possible terms, etc. You may begin to give some thought to what would be an acceptable bid if such an auction were to take place. The second noteholder would also have to be brought into the negotiations. I will keep you advised as things develop.

Very truly yours,



Roger J. McDonald

RJM/mac

000207





September 18, 1990

Certified Mail - Return Receipt Requested

LAFAYETTE ASSOCIATES
A Virginia General Partnership
3008 Lafayette Avenue
Richmond, VA 23228

Re: Lakeside Mini-Storage
Loan #1009464

Gentlemen:

Seasons Mortgage Corporation a wholly owned subsidiary of Seasons Federal Savings Bank (formerly Seasons Savings Bank), is the holder of that certain Deed of Trust Note, dated October 3, 1988, in the original principal amount of \$425,000.00 (the "Note"). The Note is secured by, among other things, Deed of Trust and Security Agreement, dated October 3, 1988 (the "Deed of Trust"), encumbering the referenced property (the "Property").

Seasons' records indicate that you have failed to make certain payments of interest due in accordance with the terms of the Note. In addition, late charges of 5% are due on your various delinquent payments. The following is a breakdown of the past due amounts of the loan as of 9/18/90.

Principal Amount	\$421,690.25
Delinquent Interest	\$ 7,729.32
Late Charges	\$ 607.11
Delinquent Principal	\$ 365.42

The total amount of the loan principal, interest, and late charges now past due equals \$430,392.10.

The failure to make each of the foregoing payments constitutes an Event of Default under the Note and Deed of Trust. As the holder of the Note, Seasons hereby demands full payment of all amounts due, within fifteen (15) days of the date of this letter. Please be advised that unless full payment of all amounts due is received in the offices of Seasons Federal Savings Bank, 401 Southlake Blvd., Richmond,

ACCOUNTING OF SALE UNDER DEED OF TRUST FROM LAFAYETTE ASSOCIATES, A VIRGINIA GENERAL PARTNERSHIP, TO DOUGLAS P. RUCKER, JR. AND BENJAMIN W. EMERSON, TRUSTEES, DATED OCTOBER 3, 1988, AND RECORDED IN DEED BOOK 2156, PAGE 1199, IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF HENRICO COUNTY, VIRGINIA, CONVEYING PORTIONS OF LOT 25, LOT 26, LOT 27, LOT 28, PUTNEY PLACE, HENRICO COUNTY, VIRGINIA

Date of Sale: January 9, 1992 at 11:00 a.m.

By Resolution Trust Corporation,
as Receiver for
Seasons Federal Savings
Bank, high bidder

\$293,250.00

To David C. Dorset, Commissioner
of Accounts for Chesterfield
County, Virginia - Fee for
auditing account of sale and
Clerk's fee for recording same

\$ 350.00

To Richmond Times-Dispatch for
advertising sale

3,106.05

To Stuart A. Simon, Esquire
Substitute Trustee's Fee

250.00

To Clerk, Circuit Court of
Henrico County - Grantor's
Tax

293.50

To Resolution Trust Corporation,
as Receiver for Seasons Federal,
Noteholder, payment of current
1992 real estate taxes paid
through date of sale

95.90

To Mays & Valentine - legal fees
and costs incurred in connection
with collection of amounts due
under the Note and Deed of Trust

5,500.00

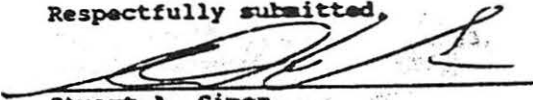
To Resolution Trust Corporation
as Receiver for Security Federal
Savings Association, Credit on
principal, interest and costs
of \$425,000.00

283,654.55

\$293,250.00

\$293,250.00

Respectfully submitted,


Stuart A. Simon
Sole Acting Substitute Trustee

A COPY TESTE:

YVONNE G. SMITH, CLERK


DEPUTY CLERK

000212

**TO THE JUDGES OF THE CIRCUIT COURT OF HENRICO COUNTY,
VIRGINIA:**

There was exhibited to the Commissioner of Accounts by the Fiduciary the following:

1. Notice of sale dated December 17, 1991, to Lafayette Associates, a Virginia general partnership.
2. Copy of subject deed of trust dated October 3, 1988.
3. The executed note secured by the subject deed of trust on which I have made a notation of a credit from the proceeds of this foreclosure sale.
4. Certificate of advertisement by THE RICHMOND TIMES DISPATCH.
5. Proper vouchers substantiating the disbursements set forth in the account of sale.
6. No opinion is expressed by the undersigned on the amount of alleged deficiency due on the subject note as set forth in the account by the Substitute Trustee.

I am satisfied that proper notice of sale was given to the grantors of the deed of trust, advertisement was made in accordance with the deed of trust, and all funds received by the Substitute Trustee are properly accounted for.

I included the Account of Sale in the list of fiduciaries whose accounts were before me for settlement, which list was posted by me on August 3, 1992, at the front door of the courthouse of the Circuit Court of the County of Henrico, Virginia, that being the first Monday in said month, and on the date of this report, more than ten days having elapsed since such posting, I settled and completed the following account. No party appeared to offer any objection thereto.

David C. Dorset
David C. Dorset
Commissioner of Accounts

April 9

1992

A COPY FOLLOWS:
YVONNE E. SMITH, CLERK
Debra H. Embury
DEPUTY CLERK

000211

ACCOUNT OF SALE DATED AUGUST 14, 1992

OF

STUART A. SIMON, SUBSTITUTE TRUSTEE
 UNDER DEED OF TRUST FROM
 LAFAYETTE ASSOCIATES, A VIRGINIA
 GENERAL PARTNERSHIP,
 DATED OCTOBER 3, 1988, AND RECORDED IN THE
 CLERK'S OFFICE, CIRCUIT COURT, COUNTY OF HENRICO,
 VIRGINIA IN DEED BOOK 2156, PAGE 1199

OFFICE OF COMMISSIONER OF ACCOUNTS

CIRCUIT COURT OF HENRICO COUNTY

To the Circuit Court of Henrico County:

The above named fiduciary exhibited before me a statement of all the property which the said fiduciary had received or become chargeable with and has disbursed during the period stated in the caption.

I included the said fiduciary in the list of fiduciaries whose accounts were before me for settlement, which list was posted at the front door of the Courthouse of the Circuit Court of the County of Henrico on August 3, 1992, that being the first Monday in said month, and on the day of this report, more than ten days having elapsed since such posting, I settled and completed the following account, which is sustained by proper vouchers.

Richmond, Virginia

Respectfully,

April 9, 1993

David C. Smith
 Commissioner of Accounts

Filed in the Clerk's Office 4-30, 1993 and fee paid.

Yvonne G. Smith, Clerk

I hereby certify that no exceptions were filed to the foregoing report within the period of fifteen days after the day on which it was filed in the Clerk's Office.

MAY 18 1993

YVONNE G. SMITH, CLERK

Clerk

A COPY TESTE:

YVONNE G. SMITH, CLERK

DEPUTY CLERK

000210

DEFENDANT'S
EXHIBIT

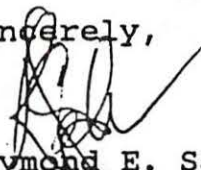
2

ALL-STATE INTERNATIONAL

VA 23236, on or before 5:00 P.M., October 4, 1990, Seasons will proceed to exercise the remedies available to it pursuant to the Deed of Trust and other security documents, and applicable law.

Pursuant to the Note, you are hereby notified that, effective November 1, 1990, the interest rate payable under the Note is increased to 16%.

Sincerely,



Raymond E. Sanders
Senior Vice President

RES/Jmm

cc: William F. Andrews, Managing Agent
Gary E. Blenden, Credit Specialist

000209

Office of Thrift Supervision

Department of the Treasury



I certify that annexed hereto are true copies of documents described below made from records of the Office of Thrift Supervision, Department of the Treasury, successor to the Federal Home Loan Bank Board. Said records are in the official custody of the Dissemination Branch, Records Management and Information Policy Division, and are maintained in its offices at 1700 G Street, Northwest, Washington, District of Columbia.

Copy of the Office of Thrift Supervision Order Number 89-329, executed on October 18, 1989, relating to the Appointment of Conservator for, Seasons Federal Savings Bank, Richmond, Virginia consisting of two (2) pages.

*Signed in Washington, District of Columbia,
and the Seal of the Office of Thrift Supervision
affixed, this 13th day of August, 1998*

Celia Winter

Celia Winter

Manager, Dissemination Branch

Office of Thrift Supervision

I hereby certify that the attached records are true copies of official records, and that Celia Winter, is now, and was at the time of signing, the Manager, Dissemination Branch, (the records custodian,) and that full faith and credit should be given her certificate as such. I further state that I am the person to whom the said custodian reports.

Catherine M. Teti

Catherine M. Teti, Director

Records Management and Information Policy

Office of Thrift Supervision

000213

DEFENDANT'S
EXHIBIT

3

ALL-STATE INTERNATIONAL

OFFICE OF THRIFT SUPERVISION

Appointment of Conservator for
Seasons Federal Savings Bank
Richmond, Virginia

RECITALS

Order Number 89-329
Date: October 18, 1989

A. Seasons Savings Bank, FSB, Richmond, Virginia ("Association"), is a federally-chartered savings association, the accounts of which are insured by the Federal Deposit Insurance Corporation.

B. The Director of the Office of Thrift Supervision ("Director"), by Order No. 89-327, dated October 18, ^A 1989, appointed the Resolution Trust Corporation as Receiver for the Association, and on application of the Resolution Trust Corporation by Order No. 89-328, dated October 2 18, 1989, authorized the incorporation of and the issuance of a federal charter for Seasons Federal Savings Bank, Richmond, Virginia ("New Federal"), a Federal savings association organized to take over the assets and liabilities of the Association.

C. Pursuant to § 5(d)(2)(B)(i) of the Home Owners' Loan Act of 1933, ("HOLA") as amended by § 301 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), the Director may, without any requirement of notice, hearing or other action, appoint a conservator or receiver for a Federal savings association if the association, by resolution of its board of directors or of its members, consents to such appointment.

D. Pursuant to § 5(d)(2)(H) of the HOLA, as amended, the Director, at the Director's discretion, may appoint the Federal Deposit Insurance Corporation or the Resolution Trust Corporation, as appropriate, as conservator for a savings association.

E. The Resolution Trust Corporation, which organized New Federal by application to the Director, pursuant to § 11(d)(2)(F) (i) of the Federal Deposit Insurance Act, as amended by § 212 of FIRREA, exercises the powers of the board of directors of New Federal.

000214

OFFICE OF THRIFT SUPERVISION

Appointment of Conservator for
Seasons Federal Savings Bank
Richmond, Virginia

Order No. 89-329

Page 2

ORDER

1. Effective upon receipt of the consent of New Federal, by resolution of its board of directors or of its members, or by resolution of the Resolution Trust Corporation exercising the powers of a board of directors of New Federal, the Director hereby appoints the Resolution Trust Corporation as conservator for New Federal ("Conservator"), not for the purpose of liquidation, pursuant to subdivisions (B) and (H) of § 5(d)(2) of the HOLA, as amended.

2. The Resolution Trust Corporation as Conservator for New Federal shall have the powers of a conservator for a Federal savings association granted under HOLA, as amended, the Federal Deposit Insurance Act, as amended, and FIRREA.



Director

000215

Office of Thrift Supervision

Department of the Treasury



I certify that annexed hereto are true copies of documents described below made from records of the Office of Thrift Supervision, Department of the Treasury, successor to the Federal Home Loan Bank Board. Said records are in the official custody of the Dissemination Branch, Records Management and Information Policy Division, and are maintained in its offices at 1700 G Street, Northwest, Washington, District of Columbia.

Copy of the Office of Thrift Supervision Order Number 89-327, executed on October 18, 1989, relating to the Appointment of Receiver for, Seasons Savings Bank, FSB, Richmond, Virginia consisting of one (1) page.

*Signed in Washington, District of Columbia,
and the Seal of the Office of Thrift Supervision
affixed, this 13th day of August, 1998*



Celia Winter

Celia Winter

Manager, Dissemination Branch
Office of Thrift Supervision

I hereby certify that the attached records are true copies of official records, and that Celia Winter, is now, and was at the time of signing, the Manager, Dissemination Branch, (the records custodian,) and that full faith and credit should be given her certificate as such. I further state that I am the person to whom the said custodian reports.

Catherine M. Teti

Catherine M. Teti, Director
Records Management and Information Policy
Office of Thrift Supervision

000216

DEFENDANT'S
EXHIBIT

4

ALL-STATE INTERNATIONAL

OFFICE OF THRIFT SUPERVISION

Appointment of Receiver
Seasons Savings Bank, FSB
Richmond, Virginia

RECITALS

Order Number 89-327
October 18, 1989

A. Seasons Savings Bank, FSB, Richmond, Virginia ("Association"), is a federally-chartered savings association, the accounts of which are insured by the Federal Deposit Insurance Corporation ("FDIC").

B. Pursuant to § 5(d)(2)(H)(ii) of the Home Owners' Loan Act of 1933 ("HOLA"), as amended by § 301 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, the Director of the Office of Thrift Supervision ("Director") shall appoint only the Federal Deposit Insurance Corporation or the Resolution Trust Corporation, as appropriate, as receiver for a savings association for the purpose of liquidation or winding up the affairs of such savings association.

ORDER

1. The Director, upon consideration of the administrative record, hereby finds and determines that the Association is insolvent in that its assets are less than its obligations to its creditors and others, including its members; and that a ground for the appointment of a receiver for the Association therefore exists under § 5(d)(2)(A) of HOLA, as amended.

2. The Director hereby appoints the Resolution Trust Corporation as receiver for the Association for the purpose of liquidation, pursuant to subdivisions (A), (E), and (H)(ii) of § 5(d)(2) of HOLA, as amended.



Director

000217

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO
NATIONAL ENTERPRISES, INCORPORATED

Plaintiff,

vs.

AT LAW NO.: CL96-808

LAFAYETTE ASSOCIATES, et al.,

Defendants.

PLAINTIFF'S ANSWERS TO DEFENDANTS' FIRST
DISCOVERY TO PLAINTIFF OF OCTOBER 30, 1996

Comes now your defendants, Lafayette Associates, by Roger J. McDonald, General Partner, and Roger J. McDonald, individually, by counsel, and propounds the following discovery requests to the plaintiff pursuant to Part IV of the Rules of the Supreme Court of Virginia to be answered within twenty-one (21) days from the date of service.

DEFINITIONS AND INSTRUCTIONS

1. The term "document" shall mean and include whether stored in electronic form and capable of reproduction or in tangible form any and all statements, notations, contracts, agreements, letters, reports, books, ledgers, drawings, sketches, photographs, telegrams, sound recordings, book of account, catalogs, checks, check stubs, and written statements of witnesses or other persons having knowledge of the pertinent facts, whether or not such documents are claimed to be privileged against discovery on any grounds.

2. Whenever an Interrogatories, Request for Admission, or Request for Production of Document asks for the description or identification of a document, such identification or description shall include, but not be limited to, the nature and contents

Refused Exhibit 1

000218

3/17/00
Refused
GFB

identification of the author or signer, and sufficient information to enable a party to identify it for purposes of a Request for Production of Documents or a Subpoena Duces Tecum.

3. Whenever an Interrogatory, Request for Admission, or Request for Production of Document asks for the description or identification of a document, a copy of such document may be attached to the answer to the Interrogatory, Request for Admission, or Request for production of Document rather than describing it in accordance with the foregoing definition.

4. The term "person" shall include individual persons, firms, associations, partnerships or corporations. Whenever a request is made for the name or identity of such a person, the answer shall state in addition to the full name of such person, his or its social security number, present home and business addresses, and if that be not know, the answer shall further state his or its last known address and the last known date he or it resided or was located at those addresses.

5. "You" or "your" is defined to include the plaintiff, its agents, representatives, attorneys, experts, investors, insurers, assignees, or anyone acting on behalf of the foregoing.

6. "Identify" or "identification" when used in reference to an individual means to state his full name and his present home and business addresses, and his present business and home telephone numbers. "Identify" or "identification" when used in reference to a document means to state the type of document, e.g., letter, memoranda, telegram, chart, etc., and some means of identifying it, its present location and custodian. If any such document was but

is not longer in your possession or subject to your control, state what disposition was made of it.

7. The Discovery Request shall be deemed continuing so as to require supplemental answers if you or your attorney obtain further information between the time answers are served and the time of trial.

8. A request for the identification of any fact shall be deemed to include a request for the identification of:

a. all person with knowledge of such fact and the date they became aware of such fact; and

b. All documents relating to such fact.

9. If the plaintiff considers any document called for in these Discovery Requests to be privileged from production, then the plaintiff should include in the answers to these Discovery Requests a list of documents, withheld from production, identifying each document by date, addressee(s), author, title and subject matter. In addition, the plaintiff should identify those person who have seen the document or who were sent copies. Finally, the plaintiff should state the ground(s) upon which each such document is considered privileged.

10. The documents requested are to be produced on 11/23/96 at 10:00 a.m. for a period of 24 hours for photocopying and inspection at the law offices of S. Keith Barker, P.C., Suite 228, 1500 Forest Avenue, P.O. Box K-150, Richmond, Virginia 23288-0150.

11. "Predecessor(s)" means any business form, whether or not incorporated, which had all or some of its assets purchased by you or came to be acquired by you whether by merger, consolidation, or

otherwise. Note that the term "predecessor(s)" includes, but is not limited to, the Resolution Trust Corporation, Seasons Savings Bank, Seasons Mortgage Corporation, and Seasons Federal Savings the alleged note on which you have brought this suit. The term "Seasons" refers to Seasons Mortgage Corporation, and/or Seasons Federal Savings Bank, and/or Seasons Savings bank.

12. The term "note" means the alleged note on which plaintiff has brought suit which is entitled "Deed of Trust Note" and labeled Exhibit A to your motion for judgment.

RESPONSES TO REQUEST FOR PRODUCTION OF DOCUMENTS

1. Produce each and every letter or document allegedly sent by the plaintiff, or plaintiff's predecessors in interest to the note, which was sent to Roger J. McDonald or Lafayette Associates or Lawrence T. Phillips, or any lawyer or person on their behalf from October 30, 1988 until present.

RESPONSE: Letter dated April 30, 1991, to Larry T. Phillips from Danny Balkam.

Letter dated April 30, 1991 to Roger J. McDonald from Danny Balkam.

Letter date April 30, 1991 to Edward H. Bryant, Jr. from Danny Balkam.

Letter dated September 11, 1991 to Roger McDonald from Daniel F. Balkam.

Letter dated October 28, 1991 to Lafayette Associates of Virginia from Seasons Mortgage Corporation.

Letter dated September 18, 1990 to Lafayette Associates from Raymond E. Sanders.

Letter dated October 1, 1992 to S. Keith Barker, Esquire from Raymond E. Sanders.

Letter dated August 23, 1989 to Roger J. McDonald, Lafayette Associates, from Eric C. Carter.

Letter dated November 28, 1989 to Roger J. McDonald, Lafayette Associates, from Eric C. Carter.

Letter dated April 9, 1990 to Lafayette Associates, from Victoria D. Barnes.

Letter dated June 4, 1990 to Lafayette Associates, from Victoria D. Barnes.

Letter dated June 26, 1990 to Lafayette Associates, from Victoria D. Barnes.

Letter dated July 11, 1990 to Lafayette Associates, from Victoria D. Barnes.

Letter dated September 5, 1990 to Lafayette Associates, from Victoria D. Barnes.

Letter dated January 19, 1989 to Lafayette Association of Virginia from Diane M. Bryant.

Letter dated November 8, 1988 to Roger J. McDonald from Amy Jo McVeigh.

Letter dated August 23, 1989 to Roger J. McDonald from Eric C. Cater.

Letter dated February 12, 1990 to Lafayette Associates from Raymond E. Sanders.

Letter dated June 21, 1990 to Lafayette Associates, c/o Roger J. McDonald from Raymond E. Sanders.

Letter dated June 21, 1990 to Lafayette Associates, c/o Lawrence T. Phillips from Raymond E. Sanders.

Letter dated September 6, 1990 to Roger J. McDonald from Raymond E. Sanders.

Letter dated July 27, 1989 to Lafayette Associates from Amy Jo McVeigh.

Letter dated October 25, 1989 to Lafayette Associates from Amy Jo McVeigh.

Letter dated July 27, 1989 to Lafayette Associates from Amy Jo McVeigh.

Letter dated September 11, 1991 to Lafayette Associates from Daniel F. Balkam.

Letter dated December 11, 1991 to all defendants from Stuart A. Simon.

000222

2. Produce for photocopying and inspection each and every letter or document which Lafayette Associates, Roger J. McDonald or Lawrence T. Phillips allegedly sent to National Enterprises, Inc., or any predecessor in interest to the note from October 30, 1988 until present.

RESPONSE: Letter dated June 17, 1991 to Danny Balkam from Roger J. McDonald.

Letter dated December 3, 1991 to Daniel F. Balkam from Roger J. McDonald.

Letter dated November 15, 1988 to Amy Jo McVeigh from Roger J. McDonald.

Letter dated September 27, 1988 to Seasons Mortgage Corporation from Roger J. McDonald.

Letter dated January 17, 1990 to Raymond E. Sanders from Larry Phillips.

Letter dated December 6, 1990 to Raymond E. Sanders from Roger J. McDonald.

3. Produce each and every document related in any way to the facts or circumstances surrounding the alleged loss, destruction or unavailability of the note.

RESPONSE: See attached Lost/Destroyed Not/Agreement with regard to the Deed of Trust Note and Guaranty. Also see attached Affidavit, dated May 10, 1996, with attached Bill of Sale and Assignment of Loans and Receipt of Proceeds.

4. Produce each and every letter mailed by Raymond E. Sanders or Victoria D. Barnes of Season Federal Savings Bank to Roger J. McDonald or Lafayette Associates from May 1990 through November 1, 1990.

RESPONSE: Letter dated September 18, 1990 to Lafayette Associates from Raymond E. Sanders.

Letter dated June 4, 1990 to Lafayette

Associates, from Victoria D. Barnes.

Letter dated June 26, 1990 to Lafayette Associates, from Victoria D. Barnes.

Letter dated July 11, 1990 to Lafayette Associates, from Victoria D. Barnes.

Letter dated September 5, 1990 to Lafayette Associates, from Victoria D. Barnes.

Letter dated June 21, 1990 to Lafayette Associates, c/o Roger J. McDonald from Raymond E. Sanders.

Letter dated June 21, 1990 to Lafayette Associates, c/o Lawrence T. Phillips from Raymond E. Sanders.

Letter dated September 6, 1990 to Roger J. McDonald from Raymond E. Sanders.

5. Produce each and every document related in any way to the date and amount of each payment received by plaintiff or its predecessors in interest to the note.

RESPONSE: See Resolution Trust Corporation Sales Transaction Report dated August 18, 1992. See attached Statement of Account and copies of checks dated November 15, 1990 in the amount of \$3,200.00, November 15, 1990 in the amount of \$847.37 and December 6, 1990 in the amount of \$4,047.37.

6. Produce each and every document related in any way to the loss of the original note.

RESPONSE: See response to Request for Production number 3.

7. As to the requests for admissions below, if you deny any such request, produce each and every document which provides a factual basis for your denial of the request.

RESPONSE: Letter dated December 17, 1991 to Roger J. McDonald, Lawrence T. Phillips, Lafayette Associates, c/o Roger J. McDonald, Lafayette Associates c/o Lawrence T. Phillips and Lafayette Associates from Stuart A. Simon.

RESPONSES TO REQUESTS FOR ADMISSIONS

1. Admit that the suit filed by the plaintiff is the only suit that has ever been brought against defendants McDonald and Lafayette Associates to recover any payment due on this note.

ANSWER: Admitted.

2. Admit that you did not file the suit captioned above until greater than 5 years after the noteholder, Seasons declared that defendant Lafayette Associates was in default.

ANSWER: Denied.

3. Admit that you did not file the suit captioned above until greater than 5 years after the noteholder, Seasons declared that defendant Roger J. McDonald was in default.

ANSWER: Denied.

4. Admit that the plaintiff is not now in possession of the original note.

ANSWER: Admitted.

5. Admit that the plaintiff has never been in possession of the original note.

ANSWER: Plaintiff, National Enterprises, Incorporated, does not have possession of the original Note; however, the assignor did have possession of the original Note.

ANSWERS TO INTERROGATORIES

1. Identify each and every person who is in possession of documents, which are requested in the Requests for Production of Documents above, but of which you do not have the originals or

copies.

ANSWER: Jon D. Fleming, Senior Asset Manager, National Enterprises, Incorporated, 5440 Morehouse Drive, Suite 4000, San Diego, California 92121, 619-623-9000.

2. If any of the requests for admissions are denied state separately as to each such request and denial, (a) the reason and all purported facts which support your denial; (b) identify each witness who has knowledge of the reason for denial; (c) and identify each document which provides support for your denial of each such request, if you cannot produce it.

ANSWER:

(a) Notice was given to defendant on November 5, 1991 with a demand letter to defendant on December 17, 1991 and suit was filed on July 8, 1996 which is within the five (5) year period.

(b) Jon D. Fleming, Senior Asset Manager, National Enterprises, Incorporated, 5440 Morehouse Drive, Suite 4000, San Diego, California 92121, 619-623-9000.

Raymond E. Sanders, Resolution Trust Corporation - MACO, 100 colony Square, Suite 1200, Box 68, Atlanta, Georgia 30361.

Phyllis F. Winters, Resolution Trust Corporation - MACO, 100 colony Square, Suite 1200, Box 68, Atlanta, Georgia 30361.

Edward H. Bryant, Jr., Real Estate Resources, Inc., 7204 Glen Forest Drive, Suite 110, Richmond, Virginia 23226 or 1108 East Main Street, Suite 900, Richmond, Virginia 23219, 804-344-5355.

Danny Balkam, Jacobson/CCF Partners, 4451-G Parliament Place, Lanham, Maryland 20706.

Sandy Waters, Jacobson/CCF Partners, 4451-G Parliament Place, Lanham, Maryland 20706.

Eric A. Carter, Manager, Single Family Construction, Seasons Mortgage Corporation, 401 Southlake Boulevard, Richmond, Virginia 23236, 804-794-1600.

Diane M. Bryant, Assistant Manager, Mortgage

Servicing Department, Seasons Mortgage Corporation, 401 Southlake Boulevard, Richmond, Virginia 23236, 804-794-1600.

Amy Jo McVeigh, Commercial & Construction Lending Assistant, Seasons Mortgage Corporation, 11655 Midlothian Turnpike, P.O. Box 35043, Richmond, Virginia 23235-0043, 804-379-1740.

Stuart A. Simon, Esquire, Stuart A. Simon & Associates, 4900 Cutshaw Avenue, Richmond, Virginia 23230.

Raymond E. Sanders, Senior Vice President, Seasons Federal Savings Bank, P.O. Box C32020, Richmond, Virginia 23261-2020, 804-794-1600 or 1-800-333-4454.

Victoria D. Barnes, Commercial/Construction Loan Assistant, Seasons Federal Savings Bank, P.O. Box C32020, Richmond, Virginia 23261-2020, 804-794-1600 or 1-800-333-4454.

Douglas Rucker, Esquire, Sands, Anderson, Marks & Miller, 801 E. Main Street, Suite 1400, Richmond, Virginia 23219.

Alisa Billington, Seasons Mortgage Corporation, 10320 Little Patuxent Parkway, Suite 1208, Columbia, Maryland 21044.

Michelle Jacobson, Jacobson Associates/CCF Joint Venture, 4451 G Parliament Place, Lanham, Maryland 20706.

Edward G. Knight, Knight, Dorin & Rountrey, 2720 Enterprise Parkway, Suite 114, Richmond, Virginia 23294, 804-273-1818.

Steven C. Cohen, Senior Asset Manager, Jacobson/CCF Partners, 4451-H parliament Place, Lanham, Maryland 20706.

Karl B. Wagner, Jr., CCIM, President, Wagner & Associates, Inc., 1911 Huguenot Road, Suite 200, Richmond, Virginia 23235, 804-379-7200.

J. Edward Seay, J. Edward Seay Associates, 3006, Lincoln Avenue, Richmond, Virginia, 23228, 804-264-6311.

Larry Phillips, Larry Phillips Real Estate, 3008 Lafayette Avenue, Richmond, Virginia 23228, 804-266-0000 (office) and 804-262-3333 (home).

(c) Letter dated December 17, 1991 to Roger J. McDonald, Lawrence T. Phillips, Lafayette Associates c/o Roger J. McDonald, Lafayette Associates c/o Lawrence T. Phillips, and Lafayette Associates from Stuart A. Simon. Also see all documents attached hereto to the Request for Production of Documents.

000227

I hereby affirm that the foregoing Answers to Defendants Interrogatories and Request for Production and Request for Admissions are true and correct to the best of my knowledge, information and belief.



Jon D. Fleming
Name Jon D. Fleming

Title Senior Asset Manager

STATE OF California
COUNTY OF San Diego, to wit:
~~CITY~~ OF San Diego

Subscribed and sworn to before me this 7th day of November, 1996, by Jon D. Fleming.

Harriett Papayouanou
Notary Public

My Commission Expires: 1-29-99

NATIONAL ENTERPRISES, INCORPORATED

By [Signature]
Of Counsel

Jon D. Becker, Esquire
DIAMONSTEIN, BECKER & STALEY, P.L.C.
P.O. Box 8915
Virginia Beach, VA 23450
(757) 340-7600

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the forgoing pleading was mailed, via first class mail, postage prepaid, to S. Keith Barker, Esquire, P.O. Box K150, Richmond, Virginia 23288-0150 on the 20th day of NOVEMBER, 1996.

Jon D. Becker

000228

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO
NATIONAL ENTERPRISES, INCORPORATED,
Plaintiff,

v. Case Number: CL96-808

LAFAYETTE ASSOCIATES, et al.,
Defendants.

NONSUIT ORDER

Upon motion of the plaintiff, and without the consent of the defendant, it is hereby ORDERED that this action is nonsuited pursuant to Code §8.01-380;

In the event of any refileing after this involuntary nonsuit the parties hereto agree that either party may use the discovery questions and responses in this action in any subsequent suit between them. In the event of any refileing the parties hereto agree that the plaintiff and defendant may ask the trial court to apply the law of the case doctrine and the plaintiff shall be allowed to proceed on the guarantee, but not on the note, and either party may ask the court to enter summary judgment in his/its favor based on the discovery from this case, and any discovery conducted in the new action;


The Clerk of this Court is directed to send a certified copy of this order to all counsel of record.

ENTER: 8/25/98

JUDGE 

I ASK FOR THIS:

p.q.

A COPY TESTE:
YVONNE G. SMITH, CLERK
DEPUTY CLERK 

Refused Exhibit 2

000229

SEEN & as to the taking of a nonsuit
only, not agreed:

for Smith Barla 8-17-95 p.d.
LAFAYETTE ASSOCIATES

for Smith Barla 8-17-95 p.d.
Roger J. McDonald

000230

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO
NATIONAL ENTERPRISES, INCORPORATED

Plaintiff,

vs.

AT LAW NO.: CL96-808

LAFAYETTE ASSOCIATES, et al.,

Defendants.

PLAINTIFF'S ANSWERS TO DEFENDANTS' FIRST
DISCOVERY TO PLAINTIFF OF OCTOBER 30, 1996

Comes now your defendants, Lafayette Associates, by Roger J. McDonald, General Partner, and Roger J. McDonald, individually, by counsel, and propounds the following discovery requests to the plaintiff pursuant to Part IV of the Rules of the Supreme Court of Virginia to be answered within twenty-one (21) days from the date of service.

RESPONSES TO REQUESTS FOR ADMISSIONS

1. Admit that the suit filed by the plaintiff is the only suit that has ever been brought against defendants McDonald and Lafayette Associates to recover any payment due on this note.

ANSWER: Admitted.

4. Admit that the plaintiff is not now in possession of

000231

Refused Exhibit 3

the original note.

ANSWER: Admitted.

000232

RECEIPT OF PROCEEDS

Date: June 29, 1992

Received Two Hundred Eighty-Three Thousand Six Hundred Fifty-Four and 55/100 (\$283,654.55) Dollars of proceeds from the amount paid by the high bidder at the foreclosure sale held on January 9, 1992, under the Deed of Trust securing a \$425,000.00 Deed of Trust Note made by Lafayette Associates, dated October 8, 1988, payable to the order of Seasons Mortgage Corporation, now held by Resolution Trust Corporation, as Receiver for Seasons Federal Savings Bank, which amount was credited to the outstanding balance of such \$425,000.00 Deed of Trust Note.

RESOLUTION TRUST CORPORATION, as
Receiver for Seasons Federal Savings
Bank

By:


Steve Cohen, Asset Manager

000233

000113

COMMONWEALTH OF VIRGINIA
FOURTEENTH JUDICIAL CIRCUIT

BUFORD M. PARSONS, JR.
JUDGE

JAMES E. KULP
JUDGE

GEORGE F. TIDEY
JUDGE

L.A. HARRIS, JR.
JUDGE



LOCATION:
PARHAM AND
HUNGARY SPRING ROADS

MAILING ADDRESS:
P. O. BOX 27032
RICHMOND, VA 23273

CIRCUIT COURT OF THE COUNTY OF HENRICO
February 14, 1997

Jon D. Becker, Esquire
Diamonstein, Becker & Staley, P.L.C.
Post Office Box 8915
Virginia Beach, Virginia 23450

S. Keith Barker, P.C., Esquire
Post Office Box K150
Richmond, Virginia 23228-0150

Re: National Enterprises, Incorporated v. Lafayette Associates and Roger J. McDonald.
Case No. CL96-808

Dear Mr. Becker and Mr. Barker:


I have reviewed the memorandums filed by each of you.

I feel that the plaintiff can proceed on the Guarantee instrument. The Motion to Dismiss is denied.

I do not fee that it is necessary for a bond to be posted at this time.

I ask Mr. Becker to prepare the order.

Very truly yours,


George F. Tidey
Judge

GFT/sm

000234

ACCOUNTING OF SALE UNDER DEED OF TRUST FROM LAFAYETTE ASSOCIATES,
A VIRGINIA GENERAL PARTNERSHIP, TO DOUGLAS P. RUCKER, JR. AND
BENJAMIN W. EMERSON, TRUSTEES, DATED OCTOBER 3, 1988, AND RECORDED
IN DEED BOOK 2156, PAGE 1199, IN THE CLERK'S OFFICE OF THE CIRCUIT
COURT OF HENRICO COUNTY, VIRGINIA, CONVEYING PORTIONS OF LOT 25,
LOT 26, LOT 27, LOT 28, PUTNEY PLACE, HENRICO COUNTY, VIRGINIA

Date of Sale: January 9, 1992 at 11:00 a.m.

By Resolution Trust Corporation,
as Receiver for
Seasons Federal Savings
Bank, high bidder \$293,250.00

To David C. Dorset, Commissioner
of Accounts for Chesterfield
County, Virginia - Fee for
auditing account of sale and
Clerk's fee for recording same \$ 350.00

To Richmond Times-Dispatch for
advertising sale 3,106.05

To Stuart A. Simon, Esquire
Substitute Trustee's Fee 250.00

To Clerk, Circuit Court of
Henrico County - Grantor's
Tax 293.50

To Resolution Trust Corporation,
as Receiver for Seasons Federal,
Noteholder, payment of current
1992 real estate taxes paid
through date of sale 95.93

To Mays & Valentine - legal fees
and costs incurred in connection
with collection of amounts due
under the Note and Deed of Trust 5,500.00

To Resolution Trust Corporation
as Receiver for Security Federal
Savings Association, Credit on
principal, interest and costs
of \$425,000.00 283,654.55

\$293,250.00 \$293,250.00

Respectfully submitted,

Stuart A. Simon
Sole Acting Substitute Trustee

000235

~~000057~~

ACCOUNTING OF SALE UNDER DEED OF TRUST FROM LAFAYETTE ASSOCIATES,
A VIRGINIA GENERAL PARTNERSHIP, TO DOUGLAS P. RUCKER, JR. AND
BENJAMIN W. EMERSON, TRUSTEES, DATED OCTOBER 3, 1988, AND RECORDED
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Clerk's fee for recording same

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To Richmond Times-Dispatch for
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3,106.05

To Stuart A. Simon, Esquire
Substitute Trustee's Fee

250.00

To Clerk, Circuit Court of
Henrico County - Grantor's
Tax

293.50

To Resolution Trust Corporation,
as Receiver for Seasons Federal,
Noteholder, payment of current
1992 real estate taxes paid
through date of sale

95.93

To Mays & Valentine - legal fees
and costs incurred in connection
with collection of amounts due
under the Note and Deed of Trust

5,500.00

To Resolution Trust Corporation
as Receiver for Security Federal
Savings Association, Credit on
principal, interest and costs
of \$425,000.00

283,654.55

\$293,250.00

\$293,250.00

Respectfully submitted,

Stuart A. Simon
Sole Acting Substitute Trustee

000236

000098

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO
NATIONAL ENTERPRISES, INCORPORATED,

Plaintiff,

v.

Case Number: CL96-808

LAFAYETTE ASSOCIATES, et al.,

Defendants.

NONSUIT ORDER

Upon motion of the plaintiff, and without the consent of the defendant, it is hereby ORDERED that this action is nonsuited pursuant to Code §8.01-380;

In the event of any refiling after this involuntary nonsuit the parties hereto agree that either party may use the discovery questions and responses in this action in any subsequent suit between them. In the event of any refiling the parties hereto agree that the plaintiff and defendant may ask the trial court to apply the law of the case doctrine and the plaintiff shall be allowed to proceed on the guarantee, but not on the note, and either party may ask the court to enter summary judgment in his/its favor based on the discovery from this case, and any discovery conducted in the new action;


The Clerk of this Court is directed to send a certified copy of this order to all counsel of record.

ENTER: 8125198

JUDGE 

I ASK FOR THIS: 

p.q.

A COPY TESTE:
YVONNE G. SMITH, CLERK
DEPUTY CLERK 



000237

SEEN & as to the taking of a nonsuit
only, not agreed:

Sheets Baul 8-17-95 p.d.
for LAFAYETTE ASSOCIATES

Sheets Baul 8-17-95 p.d.
for Roger J. McDonald

VIRGINIA: IN THE CIRCUIT COURT OF HENRICO COUNTY
NATIONAL ENTERPRISES, INCORPORATED,

Plaintiff,

v.

AT LAW NO. CL 98-644

ROGER J. MCDONALD

SERVE: Roger J. McDonald
4825 Radford Avenue
Richmond, VA 23230

Defendant.

MOTION FOR JUDGMENT

COMES NOW the plaintiff, National Enterprises, Incorporated
and for its Motion for Judgment states as follows:

1. That on or about October 3, 1998 the defendant, Roger J. McDonald, executed a Guaranty Agreement, a copy is attached hereto as Exhibit "A" and incorporated herein by this reference, making him liable for the debts of Lafayette Associates with respect to the Deed of Trust Note dated October 3, 1998, a copy is attached hereto as Exhibit "B" and incorporated herein by this reference.

2. That pursuant to said Deed of Trust Note, Seasons Mortgage Corporation advanced funds to defendant and defendant accepted said funds.

3. That Seasons Mortgage Corporation was placed in receivership and its assets became subject to the control of the Resolution Trust Corporation.

4. That pursuant to a Bill of Sale and Assignment of Loans, attached hereto as Exhibit "C" and incorporated herein by this reference, Resolution Trust Corporation conveyed its full interest in the Note as well as the underlying obligations to the plaintiff.

5. That pursuant to said Deed of Trust Note plaintiff has performed all of its obligations and after proper demand for payment defendants have failed to completely perform.

6. That on or about December 17, 1991 the property secured by the Deed of Trust Note was foreclosed on by Resolution Trust Corporation ("RTC") as receiver for Seasons Savings Bank.

7. That on or about July 30, 1992 the RTC sold the property secured by the Deed of Trust Note to James H. Payne and C.E. Payne for \$275,000.00.

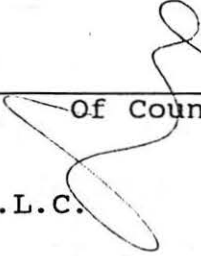
8. That allowing for proper credits there is an outstanding balance due to the plaintiff by the defendants in the amount of \$285,187.47 with accrued interest of \$94,478.41 and accruing daily at \$.634 per day, attorney's fees in the amount of \$3,500.00, taxes and insurance in the amount of \$3,066.41, and late fees in the amount of \$3,440.30 for a total of \$389,672.59 through May 1, 1996 as evidenced by the statement of account attached hereto as Exhibit "D" and incorporated herein by this reference and affidavit of Jon D. Fleming, Asset Manager of National Enterprises, Inc. attached hereto as Exhibit "E" and incorporated herein by this reference.

11. Said Agreement allowed for attorneys fees in the event of default.

12. That defendants are in breach of the Agreement.

WHEREFORE, plaintiff prays for judgment against defendant, in the amount of \$389,672.59 plus interest at the rate of 11% from April 30, 1996 until paid in full, attorney's fees and any and all costs deemed fair and just by the court.

NATIONAL ENTERPRISES, INCORPORATED

By:  _____
Of Counsel

Jon D. Becker, Esquire
DIAMONSTEIN, BECKER & STALEY, P.L.C.
Post Office Box 8915
Virginia Beach, Virginia 23450
(757) 340-7600

THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION
OBTAINED WILL BE USED FOR THAT PURPOSE.

000241

GUARANTY AGREEMENT

A. INTRODUCTION. This is a guaranty agreement made in Richmond, Virginia, as of the 3 day of October, 1988, by and among ROGER J. MCDONALD and LAWRENCE T. PHILLIPS, as the first parties, the first parties being referred to hereafter in this agreement collectively as the "Guarantors", and SEASONS MORTGAGE CORPORATION (the "Lender"), a Virginia corporation with offices in the metropolitan area of Richmond, Virginia, as the second party. The guaranty of the Guarantors provided for in this agreement shall be for the benefit of the Lender, and this agreement recites and provides as follows.

B. RECITALS.

1. Pursuant to a commitment letter dated September 2, 1988, and containing eight (8) typewritten pages to Lafayette Associates (the "Borrower"), and any addendums thereto (together, the "Loan Commitment"), the Lender has agreed to make a loan of \$425,000.00 (the "Loan").

2. In connection therewith, the Borrower has agreed to execute a Deed of Trust Note of even date herewith payable to the order of the Lender in the principal amount of \$425,000.00 (the "Note").

3. To induce the Lender to make the Loan and in consideration of the Lender's execution of the Loan Commitment and the making of the Loan to the Borrower, the Guarantors have agreed to guarantee payment of the Note and

performance under the Loan Commitment and the Deed of Trust and Security Agreement securing the Note (the "Deed of Trust") all pursuant to this guaranty agreement.

C. AGREEMENT. As a result of the above recitals, which are part of this agreement, to induce the Lender to make the Loan, and for and in consideration of the premises, the consideration recited above, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Guarantors covenant and agree as follows.

1. The Guarantors hereby jointly, severally and unconditionally guarantee to the Lender the full and prompt payment, and not merely collection, of all obligations payable by the Borrower to the Lender pursuant to the Loan Commitment and the Note, including without limitation, any and all principal, interest, charges, expenses, costs and/or other amounts in connection therewith, as well as the performance by the Borrower of its various obligations under the Loan Commitment and the Deed of Trust.

2. The guaranty set forth herein shall be a continuing, absolute and unconditional guaranty and shall remain in full force and effect until all principal, interest and other amounts payable under the Loan Commitment, the Note and the Deed of Trust have been paid in full.

3. This is a guaranty of payment and performance and not merely of collection. The Guarantors expressly waive any right to require that any action be brought against the Borrower or that recourse be had to any collateral for the payment of the Note or for any payment under the Loan Commitment and/or Deed of Trust. If the Borrower defaults in the payment when due of any obligation to the Lender under the Loan Commitment, the Note or the Deed of Trust, the Guarantors, upon demand by the Lender, without notice other than such demand and without the necessity for additional action by the Lender, shall promptly and fully pay such obligation.

4. The Guarantors shall pay all costs and expenses, including the reasonable fees and charges of the Lender's legal counsel, incurred by the Lender in seeking to enforce the obligations of the Borrower under the Loan Commitment, the Note and/or the Deed of Trust and/or the obligations of the Guarantors hereunder.

5. Until such time as all obligations guaranteed hereby have been paid in full and/or fully performed, the Guarantors shall not be subrogated to any right of the Lender against the Borrower or any collateral, and any funds or other property received at any time by the Guarantors from the Borrower shall be held in trust for, and shall be transferred to, the Lender upon demand therefor.

6. Each of the Guarantors hereby waives (a) notice of acceptance of this guaranty; (b) presentment, demand and notice of dishonor; (c) notice of the financial condition of the Borrower; (d) the benefit of any homestead or other exemption; (e) extensions of time for payment of the obligations under the Loan Commitment, Note and/or Deed of Trust, and/or notice of such extensions; (f) notice of any failure of performance, breach and/or violation on the part of the Borrower; (g) indulgences of any and every kind given by the Lender to the Borrower, and (h) notice of every kind, including, but not limited to, notice of (1) any extension of time granted by the Lender to the Borrower for payment of the obligations under the Loan Commitment, the Note and/or the Deed of Trust and/or any other credit extended by the Lender to the Borrower; (2) default by the Borrower in making any payment to the Lender and/or any other extension of credit by the Lender to the Borrower; (3) the grant of any credit or additional credit from the Lender to the Borrower, (4) acceptance by the Lender of this guaranty, and/or (5) acceptance by the Lender of any partial payment of any sum mentioned above, or of any sum due in any arrangement, proceeding, reorganization, bankruptcy, composition or insolvency proceeding, and in the event of such acceptance by the Lender of partial payment, the Guarantors shall remain jointly and severally liable for any unpaid balance.

7. Each of the Guarantors hereby agrees that (a) all obligations guaranteed hereby may be renewed, extended modified or compromised and that any security for such obligations may be released or otherwise dealt with by the Lender without notice to the Guarantors and without thereby releasing them from their obligations under this guaranty agreement, and (b) the Lender may release any of the Guarantors or any other guarantor without notice to any other of the Guarantors.

8. If any amount payable under the Loan Commitment, the Note or the Deed of Trust is paid to the Lender, but, because of bankruptcy or similar laws relating to creditors' rights, such amount is repaid to the Borrower or to any trustee or receiver for the Borrower, such amount shall continue to be guaranteed hereby.

9. In the event of any default by the Borrower in its obligations under the Loan Commitment, the Note, and/or the Deed of Trust, the Lender may, in its sole discretion, proceed against the Borrower and/or any of the Guarantors and shall not be deemed to have waived any of its rights against any of them by doing so.

10. The validity of any portion of this guaranty agreement, or any portion of any agreement or obligation guaranteed hereby, shall not invalidate the remainder of the guaranty agreement.

000246

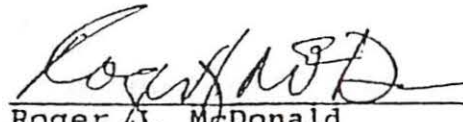
11. The Guarantors hereby consent to any and all forebearances and extensions of the time for any obligations and/or payments guaranteed hereby, to any and all changes and extensions of the time for any such payments, to any and all changes in the terms, covenants and conditions hereafter made or granted, and to any and all substitutions, exchanges and/or releases of all or any part of the collateral therefor, if any.

12. This guaranty agreement shall be governed by, and construed in accordance with, the laws of the Commonwealth of Virginia.

13. This guaranty agreement shall be jointly and severally binding upon each of the Guarantors and his or her respective heirs, personal representatives, successors and assigns, as may be or become applicable, and shall inure to the benefit of the Lender, its successors and assigns, as may be or become applicable.

14. All notices to, or demands upon, the Guarantors, or any of them, shall be in writing addressed to the Guarantors at the last known address for each Guarantor in the records of the Lender.

WITNESS the following signatures and seals as of the day, month and year first above written.

 (SEAL)
Roger J. McDonald

 (SEAL)
Lawrence T. Phillips

STATE OF VIRGINIA, at large,
CITY/COUNTY OF Richmond, to-wit:

I, the undersigned, a Notary Public in and for the jurisdiction aforesaid, do hereby certify that Roger J. McDonald and Lawrence T. Phillips, whose names are signed to the foregoing Guaranty Agreement bearing the date of the ___ day of October, 1988, have acknowledged the same before me in my jurisdiction aforesaid.

Given under my hand this 3rd day of October, 1988.

My commission expires 12/10/1990.


Notary Public

PRM4/C

EXHIBIT

B

DEED OF TRUST NOTE

\$425,000.00

Richmond, Virginia
October 3, 1988

FOR VALUE RECEIVED, the undersigned (the "Borrower") hereby promises to pay without offset to the order of SEASONS MORTGAGE CORPORATION (the "Lender," which shall include any subsequent holder hereof) at its office at 401 Southlake Boulevard, Richmond, Virginia 23236, or at such other place as the Lender may from time to time designate, in lawful money of the United States of America, the just and full principal sum of Four Hundred Twenty-Five Thousand and No/100 Dollars (\$425,000.00), with interest on the unpaid principal balance from the date of this Note until paid at the rate of eleven percent (11%) per annum for the first three years and then as otherwise provided herein. Such interest for the period of time from the date hereof through the last day of the current calendar month shall be payable in full on the date hereof. Thereafter, the principal and interest aforesaid shall be paid by the Borrower in equal monthly installments on the first day of each month (beginning December 1, 1988) for one hundred twenty (120) months as follows:

1. the first thirty-six (36) monthly installments of principal and interest shall be in the amount of Four Thousand Forty-Seven and 37/100 Dollars (\$4,047.37) based on

the initial interest rate of eleven percent (11%) per annum and a thirty (30) year amortization;

2. the initial interest rate shall be adjusted after the first thirty-six (36) monthly installments hereunder from eleven percent (11%) to an interest rate equal to three percent (3.0%) over the weekly average yield on United States Treasury Three-year Securities (the "Three-year Treasury Index"), as made available by the Federal Reserve Board, adjusted to a constant maturity, rounded up to the nearest one eighth of one percent, such adjustments to be made as of the due date of the thirty-sixth (36th) monthly installment (the "Change Date") and using the Three-year Treasury Index in effect on the date fifteen (15) days before the Change Date. The Lender will then calculate the amount of the monthly payments of principal and interest that will be sufficient to pay the unpaid principal balance owing hereunder as of the Change Date in equal monthly installments of that principal and the interest, adjusted as aforesaid, over a twenty-seven (27) year period, and the result of that calculation will be the amount of the monthly installments to be paid hereunder beginning with the first monthly installment after the Change Date and through the seventy-second (72nd) monthly payment;

3. the interest rate adjusted as aforesaid shall be again adjusted after the seventy-second (72nd) monthly installment to an interest rate equal to three percent

(3.0%) over the Three-year Treasury Index, adjusted to a constant maturity, rounded up to the nearest one eighth of one percent, such adjustments to be made as of the due date of the seventy-second (72nd) monthly installment (the "Second Change Date") using the Three-year Treasury Index in effect on the date fifteen (15) days before the Second Change Date. The Lender will then calculate the amount of the monthly payments of principal and interest that will be sufficient to repay the unpaid principal balance owing as of the Second Change Date in equal monthly installments of that principal and the interest, adjusted as provided for in this paragraph above, over a twenty-four (24) year period, and the result of that calculation will be the amount of the monthly installments hereunder beginning with the first monthly installment after the Second Change Date and through the one hundred eighth (108th) payment;

4. the interest rate adjusted as aforesaid shall be again adjusted after the one hundred eighth (108th) monthly installment to an interest rate equal to three percent (3.0%) over the Three-year Treasury Index, adjusted to a constant maturity, rounded up to the nearest one eighth of one percent, such adjustments to be made as of the date of the one hundred eighth (108th) monthly installment (the "Third Change Date") using the Three-year Treasury Index in effect on the date fifteen (15) days before the Third Change Date. The Lender will then calculate the amount of the

monthly payments of principal and interest that will be sufficient to repay the unpaid principal balance owing as of the Third Change Date in equal monthly installments of that principal and the interest, adjusted as provided for in this paragraph above, over a twenty-one (21) year period, and the result of that calculation will be the amount of the monthly installments hereunder beginning with the first monthly installment after the Third Change Date, except as otherwise herein expressly provided;

5. notwithstanding the formula contained in paragraphs numbered 2, 3 and 4 above, the interest rate shall never be less than five percent (5%) per annum, and shall never be more than seventeen (17%) per annum, except in the event of a default hereunder;

6. notwithstanding anything above to the contrary, if not sooner paid, the principal balance and any interest accrued thereon but as of that time unpaid shall be due and payable on, and in any event no later than, November 1, 1998; and

7. if the Three-year Treasury Index is at any time no longer available, the Lender shall choose a new index satisfactory to it which is based upon comparable information, and that index shall be used instead for the calculations referred to above.

Payments shall be applied first to interest accrued on the unpaid principal balance of the indebtedness evidenced

hereby and the remainder to the reduction of principal. In the event that any payment due hereunder shall not be received by the Lender within fifteen (15) days of the date it is due, a late charge of five percent (5%) of such payment may be charged by the Lender and shall become immediately due and payable. Such late charge shall apply individually to all late payments past due.

In the event that there is a default in any payment when due of any principal and/or interest to be paid hereunder and/or a default under the Deed of Trust referred to below (collectively, a "default"), subject to the provisions hereinafter, the entire principal balance of this Note and all accrued and unpaid interest thereon shall immediately become due and payable at the election of the Lender. Failure to exercise such option shall not constitute a waiver of the right to exercise such option if the Borrower is in default hereunder. The Borrower shall pay all reasonable expenses incurred by the Lender in collecting this Note, including, without limitation, the fees and charges of the Lender's attorneys.

In the event that there is a default in any payment of principal or interest hereunder or a default under the Deed of Trust, the Lender, may increase the interest rate payable hereunder, to the interest rate then in effect plus five percent (5%).

This Note may be extended or renewed at any time at the option of the Lender without notice to, or the consent of, the Borrower or of any person who has assumed the obligation hereof and without affecting the liability of the Borrower or of any such person. The Borrower and any guarantor, surety and/or endorser hereof hereby waive presentment, demand, notice of dishonor, protest, the benefit of any homestead or other exemption, and all other demands and notices in connection with the execution, delivery and performance of and under this Note.

This Note shall be governed by, and construed in accordance with, the laws of the Commonwealth of Virginia.

This Note is secured by a Deed of Trust and Security Agreement of even date herewith (the "Deed of Trust") conveying real and/or personal property located in the County of Henrico, Virginia, and reference is made thereto for rights as to acceleration of the indebtedness evidenced by this Note and for provisions as to the release of portions of the real estate described therein from the lien of the Deed of Trust.

WITNESS the following signatures and seals.

LAFAYETTE ASSOCIATES

By: *Lawrence T. Phillips* (SEAL)
Lawrence T. Phillips
General Partner

and

By: *Roger J. McDonald* (SEAL)
Roger J. McDonald
General Partner

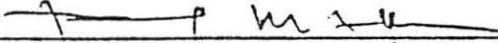
PRM4/B

Pay to the order of
RESOLUTION TRUST CORPORATION
without recourse

This 17th day of July 1990

RESOLUTION TRUST CORPORATION
as Conservator of
SEASONS FEDERAL SAVINGS BANK
successor in interest to
Seasons Savings Bank, FSB,
successor to

Lincoln Savings and Loan Association and
Ronzetti Mortgage and Investment Corporation

By: 
Ronald M. Falls, Managing Agent

000256

DEED OF TRUST AND SECURITY AGREEMENT

A. INTRODUCTION. This Deed of Trust and Security Agreement (this "Deed of Trust") made this 3 day of October, 1988, by and among LAFAYETTE ASSOCIATES, a Virginia general partnership (the "Grantor"), as the first party, and Douglas P. RUCKER, Jr., and Benjamin W. EMERSON (the "Trustees") of Henrico County, Virginia, and Richmond, Virginia, respectively, as trustees and as the second parties, provides as follows.

B. CONSIDERATION AND CONVEYANCE. For and in consideration of the acceptance of the Note hereinafter described and of the making of the loan evidenced thereby and described in the Loan Commitment mentioned below, the Grantor does hereby grant and convey, with General Warranty and English Covenants of title, unto the Trustees that certain real estate (the "Premises") located in the County of Henrico, Virginia, and described in Schedule A attached hereto and by this reference made a part hereof;

TOGETHER with all the easements, rights, privileges, remainders, reversions and appurtenances thereunto belonging or in any way pertaining, and all the estate, right, title, interest, claim or demand whatsoever of the Grantor therein and in the streets and ways adjacent thereto, either in law or in equity, in possession or in expectancy, now or hereafter acquired;

TOGETHER with all buildings, improvements and all other structures, and all replacements thereof, now or hereafter standing upon the Premises, or any part thereof, including all plant, equipment, apparatus, machinery and fixtures of any and every kind forming any part of such structures, buildings and/or improvements (collectively, the "Improvements");

TOGETHER with any and/or all personal property, fixtures, fittings, appliances, chattels, furniture, furnishings, apparatus, building materials, equipment, machinery and/or articles of personal property, and the replacements thereof, now or at any time hereafter owned by the Grantor and affixed to, attached to, placed upon, or used in any way in connection with, the complete and comfortable use, enjoyment, occupancy and/or operation of the Premises with the Improvements (collectively, the "Equipment");

TOGETHER with all leases of, and contracts relating to, the Premises, the Improvements and/or the Equipment, whether now existing or hereafter entered into, and all rents, income, revenue, issues and profits (the "Rents and Profits") arising from the Premises, the Improvements and/or the Equipment, provided that until the occurrence of an Event of Default (as herein defined) and the failure to cure the same as set forth below and the election of the holder of the Note (as herein defined) to collect the Rents and

Profits after such uncured Event of Default, the Grantor shall have the right to collect and dispose of the Rents and Profits without restriction, and provided further that this assignment shall not impose upon the Trustees or the holder of the Note any of the Grantor's obligations under such leases or contracts except for obligations which arise after the Trustees or the holder of the Note take possession of the Premises;

TOGETHER with any and all tangible or intangible property of the Grantor now or hereafter used in, arising out of, or relating to the construction, ownership or operation of the Premises, the Improvements and/or the Equipment, including, without limitation, documents, instruments, accbunts, chattel paper, general intangibles, inventory and proceeds (each of the foregoing as defined in the Uniform Commercial Code of Virginia (the "Code")), architectural and engineering plans and specifications for the Premises, the Improvements and/or the Equipment, or any portion thereof, contract rights, and any funds, letters of credit or other property which are now or hereafter provided by the Grantor to assure the payment of all indebtedness secured by this Deed of Trust and the performance of all obligations of the Grantor to the holder of the Note under the Loan Commitment (as herein defined); and

TOGETHER with all of the Grantor's rights now owned or hereafter acquired to the proceeds from the sale, exchange,

collection or other disposition or conversion, whether voluntary or involuntary, of any of the Property (as herein defined) into cash or other liquidated claims, including, without limitation, all awards, payments and proceeds, included thereon, and the right to receive the same, which may be made as a result of any casualty, any exercise of the right of eminent domain or deed of lieu thereof, the alteration of the grade of any street and any injury to or decrease in the value of the Property (as herein defined), together with reasonable counsel fees, costs and disbursements incurred by the holder of the Note in connection with the collection of such awards, payments and proceeds;

IN TRUST to secure the performance of the covenants herein contained and the payment of that certain Deed of Trust Note of even date herewith (the "Note") executed by the Grantor and payable to the order of SEASONS MORTGAGE CORPORATION (the "Lender"), evidencing a loan in the original principal amount of \$425,000.00 made by the Lender to the Grantor pursuant to that certain eight (8) page typewritten commitment letter dated September 2, 1988, and any addendum thereto, signed by both the Grantor and the Lender (together, the "Loan Commitment"). This Deed of Trust shall also secure the payment of any and all additional indebtedness of the Grantor to the Lender related to the Property whether as future advancements or otherwise,

together with any renewals or extensions of the Note and/or such additional indebtedness. The Note is payable by the Grantor by the payment on the date hereof of interest thereon from the date hereof to the last day of the current calendar month, and thereafter in equal monthly installments on the first day of each month as more fully described in the Note and briefly described as follows.

1. The first thirty-six (36) monthly installments of principal and interest shall be in the amount of Four Thousand Forty-Seven and Thirty-Seven/100 Dollars (\$4,047.37) based on the initial interest rate of eleven percent (11%) per annum and a thirty (30) year amortization; the interest rate is to be adjusted as set forth in the Note.

2. If not sooner paid the principal balance and any interest accrued thereon shall be due and payable on, and in any event no later than, November 1, 1998.

TOGETHER with and in addition to each installment of interest and/or of principal and interest payable under the provisions of the Note, the Grantor shall pay to the Lender an amount of money equal to the pro rata portion of the real estate taxes, assessments and similar charges and casualty, hazard, rent-loss and other insurance premiums next to become due, as estimated by the Lender, which amount of money shall be sufficient to enable the Lender to pay such taxes, assessments, insurance premiums and similar charges

at least thirty (30) days before they are next to become due. Any deficit shall immediately be paid to the Lender by the Grantor. The money so paid to the Lender and held by it shall not bear interest, shall not be trust funds, and, upon default, may be applied by the Lender on account of the indebtedness secured hereby. It shall be the responsibility of the Grantor to furnish to the Lender bills or invoices for all such taxes, assessments, insurance premiums and similar charges in sufficient time to be paid before penalty attaches. The rights and obligations of the Lender hereunder shall apply to, bind, and inure to the benefit of, any holder and/or assignee of the Note. In the event that there is a default in any payment when due of any principal and/or interest to be paid under the Note and/or the occurrence of an Event of Default hereunder, the entire principal balance of the Note and all accrued and unpaid interest thereon shall immediately become due and payable at the election of the Lender. The Borrower shall pay all reasonable expenses incurred by the Lender in collecting the Note, including, without limitation, the reasonable fees and charges of the Lender's attorneys.

C. THE PROPERTY. The Premises, the Improvements, the Equipment, the Rents and Profits, and all other real estate, fixtures, personal property and/or other property referred to above, as well as any interest therein now owned or held

and/or hereafter acquired by the Grantor, are herein collectively referred to as the "Property".

D. NOTEHOLDER AND NOTICE ADDRESSES. The name of the holder of the Note as of the date hereof is Seasons Mortgage Corporation, and its address, to which communications may be mailed or delivered, is 401 Southlake Boulevard, Richmond, Virginia 23236. Any notice or demand required to be sent or delivered to the Grantor shall be in writing and sent or delivered to the Grantor at its address shown on the Loan Commitment, or such other place as the Grantor shall designate in writing to the Lender and the Trustees.

E. SECURITY AGREEMENT. This Deed of Trust, in addition to creating and constituting a lien on real estate, is a security agreement and shall support any financing statement showing the Lender's interest as a secured party with respect to any portion of the Property described in such financing statement, which description is hereby incorporated by reference. The Lender, in addition to, and not in lieu or in limitation of, its rights and remedies provided herein, shall have all of the rights and remedies of a secured party under the Code. The recordation of this Deed of Trust shall also constitute a fixture filing in accordance with the provisions of the Code. The Grantor, at its expense, shall execute, deliver and record, from time to time, such further instruments as may be requested by the

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Lender to confirm the lien of, and/or the security interest created by, this Deed of Trust on or in any of the Property.

F. COVENANTS. The Grantor covenants and agrees as follows:

1. The Grantor shall pay the principal of, and interest on, the Note, together with all other sums thereunder, when and as the same shall become due, and the Grantor shall observe and perform all other terms, covenants, warranties, conditions and obligations contained in (a) this Deed of Trust, (b) the Loan Commitment, (c) any other deed of trust, security agreement, assignment of leases and all other agreements which are now, or subsequently may be, executed to secure the obligations of the Grantor to the Lender, and (d) Section 55-59, Code of Virginia, 1950, as amended.

2. The Grantor shall maintain the Property and all other property subject to this Deed of Trust in good condition and repair.

3. The Grantor shall not materially alter or demolish any of the Improvements without the prior written consent of the Lender, which consent shall not be unreasonably withheld, and shall comply with all statutes, ordinances and requirements of any governmental authority relating to the Property, and any part thereof, or the Grantor's operations thereat.

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4. The Lender may, at any time, cause an inspection by its representatives to be made of the Property, and such representatives shall be permitted reasonable access to the Property and every part thereof, subject, however, to the rights of the tenants therein. If any such inspection shows the need of restoration, repairs or maintenance and the Lender makes reasonable demand therefor, the Grantor shall proceed within thirty (30) days after such demand has been made to effect such restoration, repairs or maintenance and shall expeditiously complete the same in a good and workmanlike manner to the reasonable satisfaction of the Lender.

5. The Grantor shall keep the Property free from liens which may have priority over the lien of this Deed of Trust, except liens for taxes not yet due, and shall not allow any subordinate mortgage, deed of trust or security interest to encumber the Property without the prior written consent of the Lender which consent shall not be unreasonably withheld.

6. In the event that any proceedings to take the Property or any part thereof by exercise of the power of eminent domain are undertaken or threatened, the Grantor shall give the Lender prompt notice thereof. Any award made to the Grantor shall be paid to the Lender, and the Grantor hereby irrevocably appoints the Lender and its assigns, as may become applicable, as its attorney-in-fact to receive

and give all appropriate discharges for any such award. The power just granted is acknowledged by the Grantor to be coupled with an interest. Any such award shall, at the sole option of the Lender, be applied to the prepayment of the principal of the Note in inverse order of maturity of the installments thereof, and to the payment of accrued interest, if any. Notwithstanding the foregoing, in the event of any partial condemnation of the Property, the proceeds of which are sufficient to restore the Property to a condition in which the Property can be used for its intended purpose, and if the Grantor is not in default hereunder, the Lender shall make such condemnation proceeds available to the Grantor under the same terms and conditions and for the same purposes as insurance proceeds are made available as set forth in paragraph 9 of this Section F of this Deed of Trust.

7. The Grantor shall protect, indemnify and save harmless the Trustees and the Lender from and against all liabilities, obligations, claims, damages, penalties, causes of action, costs and reasonable expenses (including, without limitation, reasonable attorneys' fees and expenses) imposed upon, incurred by and/or asserted against, the Trustees and/or the Lender by reason of (a) any failure on the part of the Grantor to perform or comply with any of the covenants or conditions of this Deed of Trust; (b) the performance of any labor or services and the furnishing of

any materials or other property with respect to the Property or any part thereof; or (c) any accident, injury to or death of persons or loss of or damage to property occurring on or about the Property or any part thereof unless such accident, injury to or death of persons or loss of damage to property is caused by the action or omission of the Trustees or the Lender. Any amounts payable to the Lender under this paragraph which are not paid within ten (10) days after written demand therefor by the Lender shall bear interest at the rate set forth in the Note from the date of such demand. In the event that any action, suit or proceeding is brought against the Trustees and/or the Lender by reason of any such occurrence, the Grantor, upon the Lender's request, shall, at the Grantor's sole expense, resist and defend such action, suit or proceeding or will cause the same to be resisted and defended by counsel designated by the Grantor and approved by the Lender.

8. The Grantor shall keep the Premises and the Property insured with fire and extended coverage insurance for the benefit of the Lender against loss or damage by fire, casualties usually covered by extended coverage, including, without limitation, lightning, tornado and other windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, missile, vehicles, smoke, vandalism and malicious mischief, and (as, when and to the extent insurance against war risks is obtainable from the

United States of America or any agency thereof) against war risks, together with such other hazard coverage as may be reasonably requested by the Lender from time to time, all in amounts approved by the Lender and covering the Premises and the Property for their full replacement costs less any excavation and foundation costs, or the amount of the loan secured by this Deed of Trust, whichever is greater. The Grantor shall provide the Lender with satisfactory evidence of (a) public liability and property damage insurance in amounts sufficient to meet the requirements, if any, of the tenant leases assigned to the Lender as additional security and as approved by the Lender; (b) rent loss insurance, without a coinsurance provision, in an amount equal to the full monthly rentals due on all leases assigned to the Lender as additional security, for at least six (6) months; and (c) flood insurance in an amount and issued by companies or agencies satisfactory to the Lender (or evidence satisfactory to the Lender that the Premises are not located in an area designated by the Secretary of Housing and Urban Development as an area having special flood or mudslide hazards and that flood insurance is not required for the loan evidenced by the Note under the terms of any law, regulation or rule governing the Lender's activities), provided that in the event that the Premises shall at any future date be declared to be in a flood or mudslide hazard area, the requirements of this provision shall be met. When

and to the extent required by the Lender, the Grantor shall keep the Property insured against any other risk regularly insured against by persons operating like properties in the locality of the Premises for the benefit of institutional lenders. All insurance herein provided for shall contain (i) standard New York (or comparable) mortgagee clauses in favor of the Lender as "Seasons Mortgage Corporation, 401 Southlake Boulevard, Richmond, Virginia 23236"; (ii) a full replacement cost or restoration endorsement; (iii) a provision to the effect that the waiver of subrogation rights by the insured does not void the coverage; and (iv) such other special endorsements as may be required by the terms of the leases assigned to the Lender as additional security; and shall be in form and issued by companies approved by the Lender, which companies shall have the highest rating established by Best's Key Rating Guide. Regardless of the types or amounts of insurance required and approved by the Lender, the Grantor shall assign and deliver to the Lender all original policies of insurance which insure against any loss or damage to the Property as collateral and further security for the payment of the indebtedness hereby secured. Not less than fifteen (15) days before the expiration dates of each policy required of the Grantor pursuant to this paragraph, the Grantor shall deliver to the Lender a renewal policy or policies marked "premium paid" or accompanied by other evidence of full

premium payment satisfactory to the Lender; and in the event of a foreclosure hereunder, the purchaser of the Premises shall succeed to all the rights of the Grantor, including any right to unearned premiums, in and to all policies of insurance assigned and delivered to the Lender pursuant to the provisions of this paragraph.

9. In the event of any loss or damage to the Property, or any part thereof, by fire or other casualty, the proceeds payable by reason of the insurance referred to in paragraph 8 above shall be paid to the Lender. The Lender may, at its sole option, (a) apply such proceeds to the outstanding loan balance or (b) allow the proceeds to be disbursed for restoration work in accordance with such procedures as the Lender shall prescribe. Notwithstanding the above, the Lender, if Grantor is not in default under this Deed of Trust or the Note secured hereby, agrees to make the proceeds of such insurance as are received by the Lender available to Grantor to replace, repair and restore such portions of the Improvements that have been damaged or destroyed, provided that Grantor, within ninety (90) days of the occurrence of such damage or destruction: (i) obtains and delivers to the Lender a contract in form acceptable to the Lender with a contractor acceptable to the Lender setting forth a fixed price for the repair or restoration work, which contract shall provide for the repair or replacement of the damage or destruction to a condition

comparable to that as existed immediately prior to such damage or destruction, (ii) delivers to the Lender an amount of money equal to the amount by which the fixed price set forth in such contract exceeds the insurance proceeds; and (iii) otherwise at all times complies with the terms and conditions of the Note and this Deed of Trust. Provided that these conditions are met, such funds shall be held by the Lender and released to Grantor during the repair and replacement period in amount equal to the value or work performed and in place, with all of such remaining funds being disbursed to Grantor upon completion of the repair and restoration work.

10. The Grantor shall furnish to the Lender annually the then current rent roll and the then current operating statements for the Property, both in form satisfactory to the Lender, within ninety (90) days of the end of each of the Grantor's fiscal years.

11. The Lender shall have the right to approve and/or reject any property management firm employed by the Grantor to manage the Premises, the Improvements and/or any portion thereof, as well as the right to require a change in such property management firm if, in the Lender's reasonable opinion, the Premises and the Improvements are not being capably managed or managed so as to effectively maximize the income potential of the Premises and/or the Improvements, and the Grantor shall not employ such a property management

company without first obtaining the Lender's written approval thereof.

12. With respect to the Property, the Grantor shall keep the same in good condition and repair; pay all general and special taxes and assessments and other charges that may be levied or assessed upon or against the same as they become due and payable; furnish to the Lender receipts showing payment of any such taxes and assessments; pay all utility charges, assessments and debts for repair or improvements of whatever nature now existing or hereafter arising that may become liens upon or charges against the Property; comply with, or cause to be complied with, all requirements of any governmental authority relating to the Property; and promptly repair, restore, replace or rebuild any part of the Property which may be damaged or destroyed by any casualty whatsoever or which may be affected by any condemnation proceeding or exercise of eminent domain.

13. Grantor shall not commit, nor suffer to be committed, any waste of the Property; nor initiate, join in or consent to any change in any private restrictive covenant, zoning ordinance, or other public or private restrictions limiting or defining the uses which may be made of the Property, or any part thereof; nor permit any lien or encumbrance, of any kind or character and not consented to by the Lender, to accrue or remain on the Property or any part thereof.

14. The Premises complies with all requirements and conditions set forth in all zoning ordinances, all federal, state and local governmental wetland, coastal waters and environmental protection acts and any other ecological, environmental or use restrictions and all other governmental laws, rules and regulations applicable to or affecting the Premises. The Grantor shall continue to comply with the same now and in the future, and any failure to so comply shall constitute an Event of the Default as hereinafter defined. In furtherance of the foregoing and without limiting any other rights and/or remedies of the Lender, in the event that there shall be filed any lien against the Premises by any entity with respect to any of the matters specified in this paragraph 14, then Grantor agrees to cause such lien to be removed from the Premises or provide a bond satisfactory to the Lender insuring that the Lender shall continue to enjoy first lien status within sixty (60) days from the date that such lien is placed against the Premises or within such shorter period of time as the circumstances shall permit (but in all events at least five (5) days before any sale of the Premises to satisfy such lien) in the event that the holder of such lien takes the steps to cause the Premises to be sold pursuant thereto. Should Grantor cause, suffer or permit any violation of any of the foregoing laws, rules and/or regulations, or fail to remove or provide satisfactory bond

as described herein in the event of the filing of any such lien, then this Deed of Trust, the Note and all other instruments securing the Loan shall at the option of the Lender become immediately due and payable.

15. The Grantor is seized of the Premises in fee simple and has the right to convey the Premises in fee simple. Title to the Premises is marketable and free and clear of all encumbrances with the exception of those contained in Schedule B, Section 2 of the title insurance commitment submitted by the Grantor to the Lender in accordance with the Loan Commitment. The Grantor shall warrant and defend the title to the Premises against the lawful claims of all persons whomsoever.

16. The terms and provisions of the Loan Commitment are, to the extent that the terms thereof are not expressly set forth herein, incorporated herein by reference and made a part hereof, and they shall survive the closing of the loan secured and evidenced by the Note and remain in full force and effect. The terms and provisions of this Deed of Trust and/or the Note shall control over any inconsistencies with the terms and provisions of the Loan Commitment.

17. The Grantor shall maintain the Property at all times so that (a) the Property is free from "hazardous substances" as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.

§§ 9601, et seq., as amended, and the regulations promulgated pursuant thereto, (b) the Property is not subject to federal, state or local regulations or liability because of waste materials and/or debris, "PCB's" or PCB items (as defined in 40 C.F.R. § 761.3), underground storage tanks, "asbestos" (as defined in 40 C.F.R. § 763.63), or the past or present accumulation, spillage or leakage of any substance, and (c) no condition exists which is, or may be, characterized by any federal or local government or agency as an actual or potential threat or danger to the environment. The Grantor shall provide to the Lender, within five (5) days after the Grantor's receipt thereof, copies of all notices from federal or local governments and/or agencies alleging any such threat or danger or alleging violation of any environmental statute, ordinance, regulation and/or rule, or requesting information regarding the Property's compliance with the same. The Grantor shall provide to the Lender copies of all of the Grantor's responses to such notices and/or requests simultaneously with the responses to such government or agency.

G. DEFAULT.

1. There shall be an event of default hereunder ("an Event of Default") upon (1) failure of the Grantor to pay as and when due and payable any installment of principal or interest under the Note or any extension or renewal thereof of any indebtedness secured by this Deed of Trust or

(2) upon failure by the Grantor to duly observe any Covenant, representation or agreement included in this Deed of Trust, the Note, the Loan Commitment, or any other document submitted by the Grantor in connection with the indebtedness secured hereby, for a period of fifteen (15) days after written notice from the Lender specifying the nature and extent of such failure.

2. If an Event of Default occurs, the Lender shall have available to it and may exercise any and/or all of the applicable rights and remedies provided for in (1) Titles 8.9 and 55, Code of Virginia, 1950, as amended, (2) the Note, (3) the Deed of Trust, (4) the Loan Commitment, and (5) any other instrument related to the loan referred to in the Loan Commitment, and such rights and remedies shall be cumulative and in addition to (rather than in limitation of) all other rights and remedies available to the Lender, whether legal, equitable or otherwise. This Deed of Trust is given, and shall be construed, to impose and confer upon the Grantor, the Trustees and the Lender all of the duties, rights and obligations set forth in Sections 26-49, 55-59 and 55-59.1, Code of Virginia, 1950, as amended, and further to incorporate herein the following provisions of Section 55-60, Code of Virginia, 1950, as amended, by the short form references that follow:

Exemptions waived.

Renewals, extensions or reinstatement permitted.

Substitution of Trustees permitted.

Any Trustee may act; and

Subject to all upon default.

3. Upon (a) the occurrence of an Event of Default and (b) the request of the Lender, the Trustees shall forthwith declare all debts and obligations secured hereby at once due and payable and may take possession of the Property and sell the same, or any portion thereof, at public foreclosure auction sale in accordance with Title 55, Code of Virginia, 1950, as amended. Before any such sale of the Property, or any portion thereof, at public auction is made, there shall first be advertisement of the time, place and terms of such sale once a week for four successive weeks in some newspaper published or having a general circulation in the county or city which is the site of the Premises. Such advertisement shall set forth a description of that portion of the Property to be sold and shall identify the Property by street address, if any, or if none, shall give the general location of the Property with references to streets, routes or known landmarks. The Trustees shall give written notice of such sale fourteen (14) days prior thereto by personal delivery or by certified or registered mail to the other owner of the Property at its last known address as such owner and address appear in the records of the Lender. The Trustees shall also give written notice of such sale to

the Grantor at its last known address as it appears in the records of the Lender.

4. The Lender may become the purchaser of any portion of the Property so sold, and no purchaser shall be required to see to the proper application of the purchase money. The Lender and the Trustees (with the permission of the Lender) may grant any extension, forbearance or other indulgence, and may release any part of the Property from the lien hereof. In any such foreclosure or upon the enforcement of any other remedy of the Lender hereunder or under the Note, there shall be allowed and included as additional indebtedness, to the extent permitted by law, all reasonable expenditures and expenses which may be paid or incurred by or on behalf of the Lender and/or the Trustees for attorneys' fees and charges, appraisers' fees, publication costs, and costs involved in title insurance and title examination. All reasonable expenditures and expenses of the nature in this paragraph mentioned, and such reasonable expenses and reasonable fees as may be incurred in the protection of the Property and the maintenance of the lien hereof, including the fees of any attorney employed by the Lender and/or the Trustee in any litigation or proceeding affecting the Deed of Trust, the Note or the Premises, including probate and bankruptcy proceedings, or in preparation for the commencement or defense of any proceeding or threatened suit or proceeding, shall be

immediately due and payable by the Grantor, with interest thereon at the lower of the rate of eighteen percent (18%) per annum or the maximum rate permitted by applicable law, and shall be secured hereby. Unless and to the extent, if any, that such is prohibited by law, the proceeds of any such foreclosure sale shall be distributed and applied in the following order or priority: First, on account of all costs and expenses incident to the foreclosure proceedings, including all such items as are mentioned in this paragraph hereof; second, all other items which under the terms hereof constitute secured indebtedness additional to that evidenced by the Note, with interest thereon as herein provided; third, all principal and interest remaining unpaid on the Note; fourth, any remaining amounts due the Lender, its successors or assigns, as their rights may appear; and fifth, to the Grantor.

H. TRUSTEES. The Trustees shall be under no duty to take any action hereunder, except as expressly required, or to perform any act which would involve them in expense or in liability or require them to institute or defend any suit in respect hereof, unless properly indemnified to their satisfaction. All reasonable expenses, charges, counsel fees and other disbursements incurred by the Trustees in and about the administration and execution of the trusts hereby created, and the performance of their duties and powers hereunder, shall be secured by this Deed of Trust prior to

the indebtedness represented by the Note, and shall bear interest at the same rate as the Note.

I. MISCELLANEOUS PROVISIONS.

1. The Lender may at any time, without notice to any person, grant to the Grantor any indulgence, forbearance or any extension of time for the payment of any indebtedness secured hereby or allow any change or substitution of or for any of the Property or any other collateral which may be held by the Lender without in any manner affecting the liability of the Grantor or any endorser of the indebtedness hereby secured and also without in any manner affecting or impairing the lien of this Deed of Trust.

2. Any failure by the Lender to insist upon strict performance of any of the terms and provisions hereof shall not be deemed to be a waiver of any such terms and provisions, and the Lender, notwithstanding any such failure, shall have the right thereafter to insist upon the strict performance of any and all of the terms and provisions of this Deed of Trust. Neither the Grantor nor any other person now or hereafter obligated for the payment in whole or in part of the sums now or hereafter secured hereby shall be relieved of such obligation by reason of (a) the failure of the Lender to comply with any request of the Grantor, or of any other person so obligated, to take action to foreclose or otherwise enforce any of the provisions hereof or of any obligations secured hereby, (b) the

release, regardless of consideration, of the whole, or any part of, the security held for the indebtedness secured hereby, and/or (c) any agreement or stipulation between any subsequent owner or owners of the Property, or any part thereof, and the Lender to extend, from time to time, the time of payment or to modify the terms of the Note or this Deed of Trust without first having obtained the consent of the Grantor or such other person.

3. Upon the failure of the Grantor to pay any installment due under the Note or other charges above-mentioned as they become due and payable, or to pay any other of the debts or liens above-mentioned at the time above-mentioned, or to insure the Property, or to deliver the policies of insurance as herein agreed, or to perform any of the covenants and agreements herein, the Lender is hereby authorized, at its option, to insure the Property, or any part thereof, and to pay the costs of such insurance, and to pay such taxes, liens, assessments or other charges herein mentioned, or any part thereof, and to remedy the Grantor's failure to perform hereunder and to pay the costs associated therewith. The Grantor shall refund on demand all sums so paid, with interest thereon at the lower of the rate of eighteen percent (18%) per annum or the maximum rate permitted by applicable law. This Deed of Trust shall stand as security for all sums so paid, which shall become a part of the indebtedness hereby secured; provided, however, that

the retention of a lien hereunder for any sums so paid shall not be a waiver of any subrogation or substitution which the Lender might otherwise have had.

4. In the event that (a) the Grantor shall fail to keep the Property insured in the manner and at the times herein provided, (b) any installment of interests or payment of principal is not paid at or within the time required by terms of the Note, (c) the actual demolition or removal of any of the Property is threatened, (d) the Grantor fails to do any of the things herein agreed to be done, or (e) there occurs any breach of any of the terms hereof or of the Note, then, and in any of such events, whether or not the Lender has paid any of the taxes, liens or other charges, or procured the insurance, or remedied the Grantor's failure to perform, all as mentioned above, the Lender shall be entitled to exercise any or all remedies provided for or referred to in this Deed of Trust after the failure of the Grantor to cure the same to the extent, if any, permitted herein.

5. No waiver or modification of this Deed of Trust, or of any covenant, condition or provision herein contained, shall be valid unless in writing and duly executed by both the Grantor and the Lender, and no evidence of any waiver or modification shall be offered or received in evidence in any proceeding, arbitration or litigation arising out of or affecting this Deed of Trust, or any

rights or obligations hereunder, unless such waiver or modification is in writing, duly executed as aforesaid. The provisions of this section may not be waived except as herein set forth.

J. NOTICE: THE DEBT SECURED HEREBY IS SUBJECT TO CALL IN FULL OR THE TERMS THEREOF BEING MODIFIED IN THE EVENT OF SALE OR CONVEYANCE OF THE PROPERTY CONVEYED HEREBY.

1. Upon the voluntary or involuntary sale, lease, exchange, assignment, conveyance, transfer or other disposition (herein collectively called a "Disposition") of all or any portion of the Premises and/or the Improvements (or any interest therein), or all or any part of the beneficial ownership interest in the Grantor, or in the event that the Grantor conveys to any other party a security interest in any of the Property, or voluntarily or involuntarily permits or suffers the Property, or any part thereof, to be further encumbered (herein collectively called an "Encumbrance"), then the Lender may, at its sole option, enforce any and/or all of its rights, remedies and recourses as set forth in this Deed of Trust for an Event of Default; provided, however, that the Lender shall not enforce such rights, remedies and recourses if it consents in writing to the Disposition or Encumbrance in question. In connection with determining whether to grant or withhold such consent, the determination made by the Lender shall be conclusive, and it may require as conditions to its granting

such consent (1) an increase in the rate of interest payable under the Note, (2) payment of the Lender of a transfer fee, (3) payment of the Lender's reasonable attorneys' fees and charges in connection with such Disposition or Encumbrance, and/or (4) the express assumption of the payment of the indebtedness and performance of the obligations of the Grantor by the party to whom such Disposition will be made (with or without the release of Grantor from liability for such indebtedness and obligations).

K. CONCLUSION. In witness whereof, the Grantor has caused this Deed of Trust and Security Agreement to be executed and sealed by its general partners as of the day, month and year first written above.

LAFAYETTE ASSOCIATES

By: Lawrence T. Phillips (SEAL)
Lawrence T. Phillips
General Partner

and

By: Roger J. McDonald (SEAL)
Roger J. McDonald
General Partner

COMMONWEALTH OF VIRGINIA,
CITY/COUNTY OF Richmond, to-wit;

I, the undersigned, a notary public in and for the jurisdiction aforesaid, do hereby certify that Lawrence T. Phillips, whose name as general partner of Lafayette Associates is signed to the foregoing Deed of Trust and Security Agreement, has acknowledged the same before me in the jurisdiction aforesaid.

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Given under my hand this 3rd day of October, 1988.

My commission expires: 12/10/1990.

Dancy J. Heuser
Notary Public



COMMONWEALTH OF VIRGINIA,
CITY/COUNTY OF Richmond, to-wit;

I, the undersigned, a notary public in and for the jurisdiction aforesaid, do hereby certify that Roger J. McDonald, whose name as general partner of Lafayette Associates is signed to the foregoing Deed of Trust and Security Agreement, has acknowledged the same before me in the jurisdiction aforesaid.

Given under my hand this 3rd day of October, 1988.

My commission expires: 12/10/1990.

Dancy J. Heuser
Notary Public



PRM4/A

SCHEDULE A

(Legal Description of the Premises)

PARCEL 1A:

ALL that certain lot, piece or parcel of land, lying and being in Henrico County, Virginia, designated as the Eastern 20 feet of Lot 25, Plan of Putney Place, fronting on Lafayette Avenue, as shown on a plat of Putney Place, dated March 17, 1941, made by William N. Lewis, Certified Surveyor, Richmond, Virginia, recorded in the Clerk's Office of the Circuit Court of Henrico County, Virginia, in Plat Book 18, page 55;

PARCEL 1B:

ALL that certain lot, piece or parcel of land, lying and being in Henrico County, Virginia, designated as the Western 40 feet of Lot 25, Plan of Putney Place, fronting on Lafayette Avenue, as shown on a plat of Putney Place, dated March 17, 1941, made by William M. Lewis, Certified Surveyor, Richmond, Virginia, recorded in the Clerk's Office of the Circuit Court of Henrico County, Virginia, in Plat Book 18, page 55;

PARCEL 2:

ALL that certain lot, piece or parcel of land lying and being in Henrico County, Virginia, designated as Lot 26, Plan of Putney Place, fronting on Lafayette Avenue, as shown on a plat of Putney Place, dated March 17, 1941, made by William M. Lewis, Certified Surveyor, Richmond, Virginia, recorded in the Clerk's Office of the Circuit Court of Henrico County, Virginia, in Plat Book 18, page 55;

PARCEL 3:

ALL that certain lot, piece or parcel of land lying and being in Henrico County, Virginia, designated as Lot 27, Plan of Putney Place, dated March 17, 1941, made by William M. Lewis, Certified Surveyor, Richmond, Virginia, recorded in the Clerk's Office of the Circuit Court of Henrico County, Virginia, in Plat Book 18, page 55;

PARCEL 4:

ALL that certain lot, piece or parcel of land lying and being in Henrico County, Virginia, designated as Lot 28, Plan of Putney Place, fronting on Lafayette Avenue, as shown

on a plat of Putney Place, dated March 17, 1941, made by William M. Lewis, Certified Surveyor, Richmond, Virginia, recorded in the Clerk's Office of the Circuit Court of Henrico County, Virginia, in Plat Book 18, page 55;

The lots described above are more particularly described on that certain plat of survey by Leland F. DySard, Land Surveyor, of George Stephens Associates, dated September 23, 1988, and entitled "Boundary Survey Lots 25, 26, 27, and 28, Putney Place, Brookland District, Henrico Co., Virginia," a copy of which is attached hereto and to which reference is hereby made for a more particular description of such lots, and the conveyance of such lots provided for herein includes all improvements thereon and all appurtenances thereunto belonging;

BEING the same property conveyed to Glénside Associates, a Virginia Limited Partnership, by deed from Lakeside Mini Warehouse Partnership by deed dated April 16, 1986, and recorded May 12, 1986, in the Clerk's Office of the Circuit Court of Henrico County, Virginia, in Deed Book 2003 at Page 420.

PRM3/BB

000287

BILL OF SALE AND ASSIGNMENT OF LOANS

RESOLUTION TRUST CORPORATION, acting (i) in its capacity as either receiver or conservator for each Association, as more particularly set forth on Exhibit A hereto, (ii) on behalf of subsidiaries of such Associations and/or (iii) in its corporate capacity (only for certain of such Associations for which the receivership or conservatorship has been terminated and the assets of which have been transferred to Resolution Trust Corporation in its corporate capacity) ("Assignor") hereby absolutely sells, transfers, assigns, sets-over and conveys to NATIONAL ENTERPRISES INC., a corporation organized under the laws of the State of California, ("Assignee") without recourse and without representations or warranties of any kind or nature:

(a) all of Assignor's right, title and interest in and to each of the loans (the "Loans") identified in the loan schedule ("Loan Schedule") attached as Exhibit B to the Loan Sale Agreement dated as of December 10, 1992 between Assignor and Assignee relating to Loan Package Number 45, together with all promissory notes or other evidence of indebtedness and all judgments relating to the Loans, if any, and together with all instruments and documents securing such Loans and all collateral (whether real or personal property) pledged in connection therewith, if any; and

(b) all principal, interest or other proceeds of any kind with respect to the Loans (including, but not limited to, proceeds derived from the conversion, voluntary or involuntary, of any of the Loans into cash or other liquidated property; including, without limitation, insurance proceeds and condemnation awards), but excluding any payments or other consideration received by or on behalf of Assignor on or before December 10, 1992, with respect to the Loans and applied, regardless of whether timely paid.

DATED: December 15th, 1992

ASSIGNOR:

By: Dolly R. Laubach
Dolly R. Laubach
Attorney-In-Fact

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EXHIBIT

C

EXHIBIT A
POOL 45

PAGE 1

NAME OF ASSOCIATION	CAPACITY OF RESOLUTION TRUST CORPORATION
1ST ANNAPOLIS SAVINGS BANK	RECEIVERSHIP
COOPER RIVER	CONSERVATORSHIP
HABERSHAM FEDERAL S&L	RECEIVERSHIP
HOLLYWOOD FEDERAL	CONSERVATORSHIP
INVESTORS SAVINGS BANK	RECEIVERSHIP
JEFFERSON FEDERAL	RECEIVERSHIP
METROPOLITAN FEDERAL NASHVILLE	RECEIVERSHIP
PIONEER SAVINGS BANK, FSB	RECEIVERSHIP
PREFERRED SAVINGS & LOAN	RECEIVERSHIP
SEASONS SAVINGS BANK	RECEIVERSHIP
SECURITY FED SAV & LOAN ASSOC	RECEIVERSHIP
SENTRY FSA NORFOLK, VA	RECEIVERSHIP
UNITED SAVINGS BANK	RECEIVERSHIP

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EXHIBIT B

PAGE 1

LOAN SCHEDULE

PKG NO	LOAN ID	CROSS REF NUMBER	C/O CODE	COLL TYPE	C/O DATE	NAME	ST	PRINCIPAL BALANCE	ORIGINAL BALANCE
45	671890003		CO	524	920109	LAFAYETTE ASSOCIATES	VA	\$208,403.88	\$425,000.00

Total:

Count:

Total:

Count:

\$9,093,040.22

\$11,006,064.44

18

000290

RECEIPT OF PROCEEDS

Date: June 29, 1992

Received Two Hundred Eighty-Three Thousand Six Hundred Fifty-Four and 55/100 (\$283,654.55) Dollars of proceeds from the amount paid by the high bidder at the foreclosure sale held on January 9, 1992, under the Deed of Trust securing a \$425,000.00 Deed of Trust Note made by Lafayette Associates, dated October 8, 1988, payable to the order of Seasons Mortgage Corporation, now held by Resolution Trust Corporation, as Receiver for Seasons Federal Savings Bank, which amount was credited to the outstanding balance of such \$425,000.00 Deed of Trust Note.

RESOLUTION TRUST CORPORATION, as
Receiver for Seasons Federal Savings
Bank

By: Steve Cohen

Steve Cohen, Asset Manager

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AYETTE ASSOCIATES												\$208,403.88
DL 45												12/15/92
BOOK BALANCE												
PURCHASE DATE												
DATE	PAYMENT	INDEX	MARGIN	RATE	DAILY	INTEREST	NO.	INTEREST	INTEREST	INTEREST	PRINCIPAL	PRINCIPAL
RECEIVED	RECEIVED				FACTOR	PER DIEM	DAYS	DUE	PAID	ACCRUAL	PAID	BALANCE
					/360							
												421,324.83
12/1/91	0.00	5.39%	3.00%	8.39%	0.000233	98.192	0	0.00	0.00	59,864.10	0.00	421,324.83
12/16/91	0.00	5.39%	3.00%	8.39%	0.000233	98.192	15	1,472.88	0.00	61,336.98	0.00	421,324.83
1/1/92	0.00	5.40%	3.00%	8.40%	0.000233	98.309	16	1,572.95	0.00	62,909.93	0.00	421,324.83
2/1/92	0.00	5.72%	3.00%	8.72%	0.000242	102.054	31	3,163.68	0.00	66,073.61	0.00	421,324.83
3/1/92	0.00	6.18%	3.00%	9.18%	0.000255	107.438	29	3,115.70	0.00	69,189.31	0.00	421,324.83
4/1/92	0.00	5.93%	3.00%	8.93%	0.000248	104.512	31	3,239.87	0.00	72,429.18	0.00	421,324.83
5/1/92	0.00	5.81%	3.00%	8.81%	0.000245	103.108	30	3,093.23	0.00	75,522.40	0.00	421,324.83
6/1/92	0.00	5.60%	3.00%	8.60%	0.000239	100.650	31	3,120.14	0.00	78,642.55	0.00	421,324.83
7/1/92	217,557.14	4.91%	3.00%	7.91%	0.000220	92.574	30	2,777.23	2,777.23	0.00	136,137.36	285,187.47
8/1/92	0.00	4.72%	3.00%	7.72%	0.000214	61.157	31	1,895.86	0.00	1,895.86	0.00	285,187.47
9/1/92	0.00	4.42%	3.00%	7.42%	0.000206	58.780	31	1,822.19	0.00	3,718.05	0.00	285,187.47
10/1/92	0.00	4.64%	3.00%	7.64%	0.000212	60.523	30	1,815.69	0.00	5,533.75	0.00	285,187.47
11/1/92	0.00	5.14%	3.00%	8.14%	0.000226	64.484	31	1,999.01	0.00	7,532.75	0.00	285,187.47
12/1/92	0.00	5.21%	3.00%	8.21%	0.000228	65.039	30	1,951.16	0.00	9,483.91	0.00	285,187.47
1/1/93	0.00	4.93%	3.00%	7.93%	0.000220	62.820	31	1,947.43	0.00	11,431.34	0.00	285,187.47
2/1/93	0.00	4.58%	3.00%	7.58%	0.000211	60.048	31	1,861.48	0.00	13,292.83	0.00	285,187.47
3/1/93	0.00	4.40%	3.00%	7.40%	0.000206	58.622	28	1,641.41	0.00	14,934.24	0.00	285,187.47
4/1/93	0.00	4.30%	3.00%	7.30%	0.000203	57.830	31	1,792.72	0.00	16,726.96	0.00	285,187.47
5/1/93	0.00	4.40%	3.00%	7.40%	0.000206	58.622	30	1,758.66	0.00	18,485.61	0.00	285,187.47
6/1/93	0.00	4.53%	3.00%	7.53%	0.000209	59.652	31	1,849.20	0.00	20,334.82	0.00	285,187.47
7/1/93	0.00	4.43%	3.00%	7.43%	0.000206	58.860	30	1,765.79	0.00	22,100.60	0.00	285,187.47
8/1/93	0.00	4.36%	3.00%	7.36%	0.000204	58.305	31	1,807.45	0.00	23,908.06	0.00	285,187.47
9/1/93	0.00	4.17%	3.00%	7.17%	0.000199	56.800	31	1,760.79	0.00	25,668.85	0.00	285,187.47
10/1/93	0.00	4.18%	3.00%	7.18%	0.000199	56.879	30	1,706.37	0.00	27,375.22	0.00	285,187.47
11/1/93	0.00	4.50%	3.00%	7.50%	0.000208	59.414	31	1,841.84	0.00	29,217.06	0.00	285,187.47
12/1/93	0.00	4.54%	3.00%	7.54%	0.000209	59.731	30	1,791.93	0.00	31,008.99	0.00	285,187.47
1/1/94	0.00	4.48%	3.00%	7.48%	0.000208	59.256	31	1,836.92	0.00	32,845.91	0.00	285,187.47
2/1/94	0.00	4.83%	3.00%	7.83%	0.000218	62.028	31	1,922.88	0.00	34,768.79	0.00	285,187.47
3/1/94	0.00	5.40%	3.00%	8.40%	0.000233	66.544	28	1,863.22	0.00	36,632.01	0.00	285,187.47
4/1/94	0.00	5.99%	3.00%	8.99%	0.000250	71.218	31	2,207.75	0.00	38,839.76	0.00	285,187.47
5/1/94	0.00	6.34%	3.00%	9.34%	0.000259	73.990	30	2,219.71	0.00	41,059.47	0.00	285,187.47
6/1/94	0.00	6.27%	3.00%	9.27%	0.000258	73.436	31	2,276.51	0.00	43,335.98	0.00	285,187.47
7/1/94	0.00	6.48%	3.00%	9.48%	0.000263	75.099	30	2,252.98	0.00	45,588.96	0.00	285,187.47
8/1/94	0.00	6.50%	3.00%	9.50%	0.000264	75.258	31	2,332.99	0.00	47,921.95	0.00	285,187.47
9/1/94	0.00	6.69%	3.00%	9.69%	0.000269	76.763	31	2,379.65	0.00	50,301.60	0.00	285,187.47
10/1/94	0.00	7.04%	3.00%	10.04%	0.000279	79.536	30	2,386.07	0.00	52,687.67	0.00	285,187.47
11/1/94	0.00	7.44%	3.00%	10.44%	0.000290	82.704	31	2,563.84	0.00	55,251.51	0.00	285,187.47
12/1/94	0.00	7.71%	3.00%	10.71%	0.000298	84.843	30	2,545.30	0.00	57,796.81	0.00	285,187.47
1/1/95	0.00	7.66%	3.00%	10.66%	0.000296	84.447	31	2,517.86	0.00	60,414.67	0.00	285,187.47
2/1/95	0.00	7.25%	3.00%	10.25%	0.000285	81.199	31	2,517.18	0.00	62,931.84	0.00	285,187.47
3/1/95	0.00	6.89%	3.00%	9.89%	0.000275	78.347	28	2,193.73	0.00	65,125.57	0.00	285,187.47
4/1/95	0.00	6.68%	3.00%	9.68%	0.000269	76.684	31	2,377.20	0.00	67,502.77	0.00	285,187.47
5/1/95	0.00	6.27%	3.00%	9.27%	0.000258	73.436	30	2,203.07	0.00	69,705.84	0.00	285,187.47
6/1/95	0.00	5.80%	3.00%	8.80%	0.000244	69.712	31	2,161.09	0.00	71,866.93	0.00	285,187.47
7/1/95	0.00	5.89%	3.00%	8.89%	0.000247	70.425	30	2,112.76	0.00	73,979.69	0.00	285,187.47
8/1/95	0.00	6.10%	3.00%	9.10%	0.000253	72.089	31	2,234.76	0.00	76,214.45	0.00	285,187.47
9/1/95	0.00	5.89%	3.00%	8.89%	0.000247	70.425	31	2,183.19	0.00	78,397.64	0.00	285,187.47
10/1/95	0.00	5.77%	3.00%	8.77%	0.000244	69.475	30	2,084.25	0.00	80,481.88	0.00	285,187.47
11/1/95	0.00	5.57%	3.00%	8.57%	0.000238	67.890	31	2,104.60	0.00	82,586.49	0.00	285,187.47
12/1/95	0.00	5.39%	3.00%	8.39%	0.000233	66.465	30	1,993.94	0.00	84,580.42	0.00	285,187.47
1/1/96	0.00	5.20%	3.00%	8.20%	0.000228	64.959	31	2,013.74	0.00	86,594.17	0.00	285,187.47
2/1/96	0.00	5.14%	3.00%	8.14%	0.000225	64.484	31	1,999.01	0.00	88,593.17	0.00	285,187.47
3/1/96	0.00	5.79%	3.00%	8.79%	0.000244	69.633	29	2,019.36	0.00	90,612.54	0.00	285,187.47
4/1/96	0.00	5.00%	3.00%	8.00%	0.000222	63.375	31	1,964.62	0.00	92,577.16	0.00	285,187.47
5/1/96	0.00	5.00%	3.00%	8.00%	0.000222	63.375	30	1,901.25	0.00	94,478.41	0.00	285,187.47
TAXES AND INSURANCE												3,066.41
LATE FEES												3,440.30
ATTORNEYS FEES												3,500.00
ACCRUED INTEREST DUE												94,478.41
TOTAL DUE												\$389,672.59

EXHIBIT

000292

D

EXHIBIT

E

AFFIDAVIT

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

BEFORE ME, the undersigned authority, personally appeared Jon D. Fleming, who, being by me duly sworn, deposed as follows:

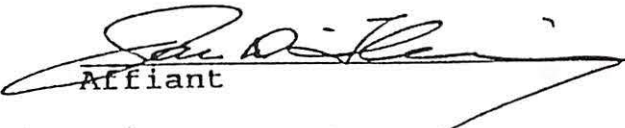
"My name is Jon D. Fleming. I presently hold the position of Asset Manager for NATIONAL ENTERPRISES, INC., a California Corporation (hereinafter referred to as "NEI"), and am custodian of the records for NEI. I am at least 18 years of age, of sound mind, capable of making this Affidavit, fully competent to testify to the matters stated herein. I have personal knowledge of the facts herein stated based upon my review of the business records of NEI.

Roger J. McDonald and Lawrence T. Phillips executed a Deed of Trust Note (a true and correct copy of the original is attached hereto as Exhibit "A") as General Partners of Lafayette Associates on October 3, 1988 in the original principal sum of \$425,000.00, payable to Seasons Mortgage Corporation. Said Note was assigned to NEI. Lafayette Associates defaulted in payment of said Note. Specifically, the maker of the Note failed to pay one or more of the monthly payments that came due. Additionally, the maker failed to pay the total amount due after the debt was accelerated. The property that this loan was secured by was foreclosed upon on December 17, 1991. The buyer was the Resolution Trust Corporation as receiver for Seasons Savings Bank. On July 30, 1992 the RTC sold the property to James H. Payne and C.E. Payne for \$275,000.00.

The unpaid balance is \$285,187.47 as of April 30, 1996, with total accrued interest of \$94,478.41 and accruing daily at \$.634 per day. The taxes and insurance due is \$3,066.41, late fees due are \$3,440.30 and attorneys fees of \$3,500.00. The total amount due as of May 1, 1996 is \$389,672.59 (hereinafter referred to as "deficiency amount").

Attached hereto are four (4) pages of records from NEI. These said four (4) pages of records are kept by NEI in the regular course of business, and it was the regular course of business of NEI, or an employee or representative of NEI with knowledge of the act, event, condition or opinion or diagnosis recorded to make record or to transmit information thereof to be included in such records, and the record was made at or near the time, or reasonably soon thereafter. The records attached hereto are the original, or exact duplicates of the original.

5/10/96
Date


Affiant

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SUBSCRIBED AND SWORN to before me this 10th day of May, 1996.



Leah Matthew
Notary Public in and for the
State of California

My commission expires:

4-9-99

Leah Matthew
Printed Name of Notary Public

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

BEFORE ME, the undersigned authority, on this day, personally appeared Jon Fleming, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated and as the act and deed of said corporation.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 10th day of May, 1996.



Leah Matthew
Notary Public in and for the
State of California

My commission expires:

4-9-99

Leah Matthew
Printed name of Notary Public

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V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

NATIONAL ENTERPRISES, INC.
Plaintiff,

v.

Case No. CL98-1414

ROGER J. MCDONALD,
Defendant.

MOTION TO CRAVE OYER

Comes now your defendant, by counsel, Roger J. McDonald and preliminarily to any further responsive pleadings which he is required to make, craves oyer and moves the Court to require the plaintiff to produce the note and all contracts referred to therein, including those agreements that establish the plaintiff as a holder of any note allegedly made by the defendant and the considerations paid for the same thereby making it a holder for value, on which point the motion for judgment is dependent and justifies the relief sought, and for all forms, variations, and other versions of said contract[s] which are alleged to have been signed by the obligor[s] and are related to the plaintiff's claim, and to lodge the original of each such document with the Clerk of the Court and to provide a true and exact copy of each such document, it being, *inter alia*, necessary as the basis of the defense to be made by the defendant that such document(s) be produced, oyer be taken of them, and that such document(s) thereby become *per se* a matter of record as fully and to all intent and purposes as if copied at large in the plaintiff's motion for judgment.

WHEREFORE, the said defendant requests that the plaintiff be

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required to produce the documents as stated hereinabove, and that when produced, over be taken of such document(s) in the manner indicated in this Motion, and that having done so that the Court grant the defendant twenty-one days from which they are delivered to defendant to file any further responsive pleadings as allowed for by the Rules of the Supreme Court of Virginia, and to amend any pleading made herein.

DEMURRER

COMES NOW Roger J. McDonald, by counsel, and demurs to the motion for judgment, and on the grounds that it fails to set forth a cause of action on a guarantee for which liability is necessarily dependent on the existence and nonpayment of a note, of which plaintiff must be a holder in order to bring this action; and he further states that the underlying note is not alleged to have been transferred to the plaintiff, nor is it alleged that the plaintiff ever possessed or had transferred to it the actual note; and further he demurs on the grounds that the cause of action on the guarantee has been brought, judgment thereon taken, and the plaintiff is barred from maintaining an additional cause of action by bringing this suit.

WHEREFORE, the defendant moves the Court to dismiss the Motion for Judgment with prejudice, and to award to the defendant his costs, attorney's fees, and such other relief as this Court deems just.

GROUND OF DEFENSE

COMES NOW Roger J. McDonald, by counsel, and sets forth for his grounds of defense, and without waiving his motion to crave

oyer filed herein, and states the following:

1. He denies the allegations set forth in para.s 1, 2, 4, 5, 8, 11 and 12 and calls for strict proof thereof;

2. He neither admits of denies the allegations in paragraphs 3, 6, and 7 and therefore denies the same and calls for strict proof thereof;

3. Any other allegation in the motion for judgment, not addressed *supra* is denied;

4. The defendant denies any other allegations not otherwise expressly addressed herein;

5. The defendant will rely on, as the facts in discovery develop or otherwise, the affirmative defenses of accord and satisfaction, estoppel, failure of consideration, fraud, illegality, laches, payment, release, res judicata, statute of frauds, statute of limitations, waiver, that the plaintiff has split its cause of action and is barred from proceeding with this action, and any other matter which may constitute an avoidance or affirmative defense.

6. The defendant reserves the right to add to, amend, or strike out any of the forgoing as the discovery, and facts and circumstances in this action, may warrant.

WHEREFORE, the defendant moves the Court to dismiss the Motion for Judgment with prejudice, and to award to the defendant his costs, attorney's fees, and such other relief as this Court deems just. Trial by jury is hereby demanded.

SUGGESTION OF NONRESIDENCY

Comes now your defendant, Roger J. McDonald and hereby states

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that upon his information and belief the plaintiff is a nonresident of the Commonwealth of Virginia, and therefor moves that this Honorable Court require the plaintiff to post a bond with surety in the amount of \$15,000.00 as required by law or establish proof that it is a resident of the Commonwealth of Virginia, said bond being for the payment of costs and damages which may be awarded to the defendant and for the fee or such fees that may become due in this suit to the officers of the Court.

ROGER J. MCDONALD

by 

Counsel

S. Keith Barker, P.C.
1500 Forest Avenue, Suite 228
P.O. Box K150
Richmond, Virginia 23288-0150
(804) 288-0550

C E R T I F I C A T E

I hereby certify that a true and exact copy of the foregoing pleading was mailed, postage prepaid on October 14, 1998 to all counsel of record, to wit:

Jon D. Becker, Esquire
Diamonstein, Becker & Staley
P.O. Box 8915
Virginia Beach, Virginia 23450



cc:
client

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V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

NATIONAL ENTERPRISES, INC.
Plaintiff,

v.

Case No. CL98-1414

ROGER J. MCDONALD,
Defendant.

TO: ALL COUNSEL OF RECORD

NOTICE OF HEARING

Please take notice that the plaintiff will move the Court to dismiss this action on the grounds set forth in the defensive pleadings filed previously and the memorandum filed herewith in support thereof on 5/21/99 at 9:00 a.m. at the Henrico County Courthouse, Parham and Hungary Springs Roads, Henrico County, Virginia, and will further move to bar the plaintiff from proceeding based on the suggestions of non-residency filed previously, until a bond is set and posted in accordance with law.

**MEMORANDUM IN SUPPORT OF
AFFIRMATIVE DEFENSES, SUGGESTION OF NONRESIDENCY
& MOTIONS OF DEFENDANT**

Background

The case before the Court was filed ca. September 24, 1998. The filing was subsequent to a previous suit by the plaintiff. The plaintiff is a California "enterprise" venture which, in the past, purchased deed of trust notes and accompanying guaranties from the Resolution Trust Corporation ["RTC"]. RTC acquired thousands of notes and guaranties from failed savings and loans, such as the one that loaned the money to Lafayette Associates.

RTC, rather than bring suit on the notes, many of which, such

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as this one, were of highly questionable validity, sold billions of dollars of such notes for pennies on the dollar. NEI conceded in the prior case the notes were the subject of such a sale. In that way RTC avoided the continuing legal fees associated with collection with little prospect of recovery.

When the first suit was filed by NEI, an assignee of RTC, it chose a state court forum because at the time of filing the federal courts in Virginia held that assignees of the RTC were bound by the state 5 year statute of limitations on a contract. Assignees could not afford themselves of RTC's choice of the state statute of limitations or 6 years under the federal Financial Institutions Reform, Recovery and Enforcement Act (FIRREA).¹ That ruling, made two years prior to NEI filing of the first suit, came in the decision of *Wamco, III, Ltd. v. First Piedmont Mortg.*, 856 F.Supp. 1076, 1083 (E.D. Va. 1994).

By filing in state court NEI's strategy was to convince the

¹ The relevant portions of FIRREA to this case are found at 12 U.S.C. § 1821(d)(14)(A) and (B):

(A) In general. Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be--

- (i) in the case of any contract claim, the longer of--
 - (I) the 6-year period beginning on the date the claim accrues; or
 - (II) the period applicable under State law;

.
(B) Determination of the date on which a claim accrues. For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of--

- (i) the date of the appointment of the Corporation as conservator or receiver; or
- (ii) the date on which the cause of action accrues.

state court that the *Wamco* ruling, which did not bind this Court, was incorrect, and that it could proceed as an assignee of RTC, with all the rights and obligations of RTC, including the federal six year statute of limitations.

After NEI's first suit, filed on July 19, 1996, the Virginia Supreme Court decided the case of *Union Recovery v. Horton*, 252 Va. 418, 477 S.E. 2d 521 (1996) on November 1, 1996. As discussed *infra*, *Union Recovery* held that an assignee of the RTC was for all practical purposes the RTC in so far as the statute of limitations was concerned.

In the first suit, CL96-808, NEI sought judgment against Lafayette Associates, Inc., Roger J. McDonald, and Lawrence Phillips. That case was the subject of a final order as to co-defendant Lawrence Phillips and a default judgment was entered against him. National Enterprises, Inc. came to the eve of the first trial against Lafayette and McDonald with no witnesses subpoenaed. It represented to the court that its counsel was not physically able to try the case. Even though McDonald and Lafayette had fully prepared for trial the case was continued.

On the eve of the next trial date, NEI attempted to get a continuance for the same reason. Again it had issued no witness subpoenas, had taken no depositions and done nothing to prepare for trial. The court denied NEI's motion for continuance. NEI, whose counsel then could try the case but had done nothing to prepare, non-suited its claim against Lafayette Associates, the alleged maker of the note, and Roger J. McDonald, the alleged guarantor of

the note. It took a nonsuit less than 48 hours before trial.

The original case, filed on July 8, 1996, was pending until it was dismissed by final order entered in August 1998.

The present case, filed in September 1998 has some differences from the previous cases. First, no action has been asserted against Lafayette Associates, the maker of the note. The statute of limitations by any calculation or based on any theory has run as to Lafayette Associates and no cause of action can now be asserted against anyone on the note. In fact, the order in the previous case held that no action could be brought in the future on the note.

In the case *sub judice*, Roger J. McDonald was sued exclusively based on liability of the guarantee. Counsel has filed defensive pleadings on his behalf which include, *inter alia*, a motion to craveoyer, a demurrer, and a grounds of defense which includes the affirmative defenses of the statute of limitations and the statute of frauds. Also, a suggestion on non-residency has been filed herein.²

Furthermore, the plaintiff does not allege that it has the original note, but rather it claims that it has the guaranty. The case against Lafayette Associates as the maker of the note³ was dismissed and an action can no longer be brought on the note given the expiration of the statute of limitations. Legally the note is a nullity. As a result, the guaranty is likewise a nullity.

²Exhibit E, in the pleadings of the plaintiff, an affidavit, established that the plaintiff is from the State of California.

³The note was labeled a "deed of trust note" but is sometimes referred to herein simply as a "note".

In the prior case the plaintiff⁴, only after the motion to
craveoyer was granted, conceded that it did not have and never had
possession of the note. The final order in the prior case held that
if the plaintiff attempted to refile the suit on the guaranty
without ever having accounted for the note, the plaintiff could
only proceed on the guaranty. In essence, the plaintiff conceded,
by signing the final order in CL96-808, that another suit was
substantively impossible.

Improbably, NEI filed suit again, however, it is now both
procedurally and substantively barred from doing so. Procedurally,
no action can now be maintained because under the present
circumstances both the state and federal statutes of limitation
bars any claim. Substantively, given its binding admission in the
final order of the prior suit, the note is a nullity and there is
no amount due under it precluding an action on the guaranty.

**THE STATUTE OF LIMITATIONS BARS THE ACTION AGAINST MCDONALD
AS A MATTER OF LAW
WITHOUT THE NECESSITY OF EVIDENCE BEING TAKEN ON THE PLEA**

The statute of limitations bars the action on the note thereby
foreclosing any action on the guaranty which is dependent on a
valid note. The state five year statute of limitations on a note
barred the first suit, and therefore is a bar to this suit. NEI's
only option now is to proceed, under the federal statute of
limitations, and only federal law governs the determination of
whether a federal statute of limitations is tolled by a nonsuit.

⁴The order was entered in the case of NEI v. Lafayette Assoc.s
and Roger J. McDonald and Lawrence T. Phillips, CL 96-808.

Both state and federal courts in Virginia hold that the period of time in which a prior suit was pending in state court does not toll a federal statute of limitations. Under the ruling in *Union Recovery v. Horton*, 252 Va. 418, 477 S.E. 2d 521 (1996), the federal statute of limitations of 6 years is available to an assignee of the RTC if the plaintiff has possession of both the note and guaranty. However, the longer statute of limitations does not allow for tolling where, as here, a plaintiff commences a suit, discontinues it and then recommences it.

In *Union Recovery v. Horton*, the Supreme Court of Virginia ruled on the assignee's assertion that it was entitled to the federal six-year statute of limitations afforded to RTC under FIRREA. In that case the defendant note makers argued that the state 5 year statute of limitations alone was available to an RTC assignee, and relied on *Wamco* to support its argument. The Virginia Supreme Court ruled that under FIRREA the assignee of the RTC had either the state statute of limitations or the 6 year period that the RTC had under FIRREA. It explained:

When RTC acquired the note and guaranty as receiver, it was entitled under FIRREA to institute actions on them under the longest period provided by the combined application of subsections A and B of 12 U.S.C. § 1821(d)(14). Under the provisions of subsection B, RTC was permitted to advance the date of accrual of the causes of action to April 10, 1992, the date of its appointment as receiver. It was further permitted to take the six-year statute of limitations of subsection A over the five-year statute of limitations available under state law. Accordingly, RTC had until April 9, 1998 to sue upon the note and guaranty.

* * *

...the sole question in this appeal is whether the statute of limitations contained in 12 U.S.C. 1821(d)(14)(A) and (B) applies to assignees of RTC, or do

these assignees take their assignments subject only to the rights which would have accrued to the failed institution for which RTC is acting as receiver, thus becoming de facto assignees of the institution.

* * *

The extended statute of limitations is merely a mechanism for providing the receiver with an adequate time to pursue those claims which the financial institution could not successfully pursue prior to its failure. As such, the receiver's right to sue within the statute of limitations period is inherent in its possession of the instruments at issue and would thus be among the "rights, remedies and benefits which are incidental to the thing assigned," WAMCO, 856 F. Supp. at 1086, and not merely a right "personal to the assignor and for [its] benefit only." Id. (citation omitted). Union Recovery at 422-424.

In this case NEI as assignee to RTC "steps into its shoes" for all purposes. It does not have greater rights than RTC, however. NEI argued in the past suit that the federal law placed it in the same position as the RTC for the application of not only federal procedural law [the 6 year limitation] but substantive law as well. It argued that substantially it was entitled to application of the D'oench Duhme doctrine to cut off certain defenses a note maker such as McDonald would have against the original holder since the note had become an asset of RTC⁵.

NEI, however, did not file the present suit within the 6 year FIRREA federal limitation. The first suit was not filed within the state 5 year limitation on notes, and thus it cannot, under FIRREA, rely on the state limitation, because it is not the longer of the

⁵The seminal case of *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956, (1942), established the federal common-law doctrine insulating the FDIC from claims arising from "side deals" between lenders and borrowers. The policy basis behind this equitable doctrine was to prevent fraudulent defenses from arising by collusion between former bank employees and their former customers.

two options. Whether the 5 year state limitation was tolled by the state tolling provision because of the pendency of the first suit is irrelevant, since the first suit was beyond 5 years at the time of filing.

Since NEI can only rely on the federally created 6 year limitation, the state tolling provisions of Code §8.01-229 has no applicability. When a party proceeds by relying on a federal statute of limitations, as here, a court must look only to federal law for any appropriate tolling provisions. *Hewlett v. Russo*, 649 F. Supp. 457 (E.D. Va. 1986). In *Hewlett* the plaintiff moved for a voluntarily dismissal of his suit without prejudice in accordance with Federal Rules of Civil Procedure 41(a)(2), which is similar in respects to Virginia Code § 8.01-380. The *Hewlett* opinion addressed the situation, *sub judice*, and held:

[p]laintiff argues that the Virginia tolling statute (Va. Code Section 8.01-229) should be applied to this action. The Virginia statute tolls a limitations period upon the commencement of a suit within the proscribed time frame. Upon taking a non-suit in Virginia (Va. Code Section 8.01-380), a plaintiff may recommence his suit within six months or within the original limitations period, whichever is larger.

* * *

In accordance with the view laid out in *Johnson*, when a **federal statute of limitations is applicable, a Court must look to federal law for any appropriate tolling provisions.** Where, as here, there are no such provisions, **it would be inappropriate for this Court to look to Virginia Code Section 8.01-229 to toll** the running of the limitations period.⁶

Virginia trial courts have applied this principle as well. In *Kelly v. Meier*, 25 Va. Cir. 312 (1991) Judge Jamborsky of the

⁶ Emphasis added throughout unless otherwise indicated.

Fairfax Circuit Court ruled:

When a federal statute of limitations is applicable, a court must look to federal law for any appropriate tolling provisions. Where there are no such provisions, it would be inappropriate for the court to look to this section [8.01-229] to toll the running of the limitations period. *Hewlett v. Russo*, 649 F. Supp. 457 (E.D. Va. 1986).

Thus, it is not necessary to even take evidence on the plea of the statute of limitations, at trial or before, as to whether the first action was filed within the six year limitation period of 12 U.S.C. § 1821(d)(14) and whether state law tolled the running during the pendency of the first suit. State tolling provisions cannot effect a federal statute of limitations. Clearly, the plea should be sustained now.

**NO CAUSE OF ACTION ON THE GUARANTY CAN BE ASSERTED
WITHOUT POSSESSION OF THE NOTE**

NEI's speculative venture to collect any sum from the defendant is substantively without basis as well. Possession of a valid note is a fundamental prerequisite to a claim on a guaranty.

The plaintiff does not now, and never at anytime had possession of the original note. In the first suit NEI represented it had the original note in San Diego, California, and did not want to send it to Virginia prior to any trial out of concern it could be lost in transit. Plaintiff's counsel travelled to San Diego, California in 1996 not long after the first suit was filed. While there he persistently asked NEI's counsel to produce the original note there at NEI's office. NEI refused, and when plaintiff pressed its motion to crave oyer, only then did NEI confess it did not have, and never had the note. This was contrary to the assertions

in its first suit.

Possession of the original note, like possession of an original dollar bill and not a copy, guards against multiple fraudulent and mistaken claims being brought against an alleged maker. NEI's counsel has conceded that he is aware of multiple assignments of the same note and mistakes by the RTC in doing so. A clear sign of a multiple assignment or mistaken allegation of a debt due on a note or guaranty is its failure to ever have possession of the original note. NEI conceded, only in the final order in the last case, that it had no action on the note.

The Virginia Supreme Court noted in its decision on a case dealing with an RTC assignee how critical possession of both the note and the guaranty is in order to sue on them. Again, in *Union Recovery v. Horton*, 252 Va. 418, 477 S.E. 2d 521 (1996), the Supreme Court emphasized the need to have possession of both instruments to bring such an action. It held that "...the receiver's right to sue within the statute of limitations period is inherent in its possession of the instruments at issue and would thus be among the rights, remedies and benefits which are incidental to the thing assigned." *Union Recovery, supra* at 424.

This most recent pronouncement of the law is axiomatic in Virginia commercial law. Without possession of the note, or without a valid note, no action on the guaranty is proper since there is no debt to guaranty. In *Bourne v. Board of Supvrs.*, 161 Va. 678, 683-684, 172 S.E. 245 (1934) the Supreme Court explained:

In the case of *Goodrich Rubber Co. v. Fisch*, 141 Va. 261, 127 S.E. 187, 188, Chief Justice Campbell, in defining a

guaranty, quotes a distinguished law writer as follows:
"A guaranty is an independent contract, by which the guarantor undertakes, in writing, upon a sufficient undertaking, to be answerable for the debt, or for the performance of some duty, in case of the failure of some other person who is primarily liable to pay or perform."

[2] In 12 R.C.L. p. 1053, the nature of a guaranty is thus defined: "Generally a guaranty relates to the payment of a sum of money or the collectability thereof, though it may constitute an assurance of the genuineness of an obligation or the liability of the obligee. Being a collateral engagement for the performance of the undertaking of another, it imports the existence of two different obligations, one being that of the principal debtor and the other that of the guarantor. If there is no obligation on the part of the principal, there is none on the guarantor."

NEI never had possession of the note, and therefore never had any rights to enforce the note.⁷ The guaranty, by statute, is not

⁷The linchpin to NEI's standing to bring this action on the guaranty is establishing the existence of a valid note and whether it is a "transferee" and pursuant to Code §8.3A-203(b) thereby "step[s] into the shoes of the RTC". Since the plaintiff does not allege possession of the note, by law it is does not qualify as a "transferee". The reason is simple, and grounded on the definitions and official comments underlying the applicable UCC provisions.

First, Code § 8.3A-309 does not have any technical limitations which limit its bar to standing to either "transferees" or "holders". It has a broad application, and applies to any "person not in possession" of the instrument on which suit is brought. It limits the standing of a person not in possession of the note to sue, by clearly and simply stating:

- (a) A person not in possession of an instrument is entitled to enforce the instrument if
 - (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred,
 - (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and
 - (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

Without satisfying the first prong of the standing requirement

even a negotiable instruments under Code §§8.3A-103 and 104, and their predecessors.

Here, given the plaintiff's failure to allege it ever had the note from the outset, it was not, by definition, a "transferee" of the RTC, and hence has no right to maintain an action on the note.⁸

NEI recognized in this suit that the validity of the deed of trust note was essential to this action. It alleged in ¶1 of the suit that the guaranty made Mr. McDonald "liable [sic] for the debts of Lafayette Associates with respect to the Deed of Trust Note ... a copy of which is ... incorporated herein...." Lafayette has no "liability on the note", and therefore McDonald has no

under Code § 8.3A-309(a)(i) there is no requirement to even go to the conjunctive requirements of the statute. Here the plaintiff was never in possession of the instrument which was mandatory in order to enforce it.

⁸ The Code provision applicable to transfers state:
§ 8.3A-203. Transfer of instrument; rights acquired by transfer.

(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

Hence transfer means what the plain definition of the term imports - physical delivery of the instrument. The UCC reinforces the concept of actual physical delivery by holding that it makes no difference whether the instrument is signed, in order for a "transfer" to occur. As §8.3A-203(b) notes:

(b) **Transfer** of an instrument, **whether or not the transfer is a negotiation**, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

liability on the guaranty.

Even if NEI did have possession of the original note now, the note is worthless, any action on it is barred by the statute of limitations, since this action was not maintained within any statute of limitations whether the period was 5 years or 6 years, and there is no tolling provision that would save the present suit.

BAR OF SPLITTING CAUSE OF ACTION

The defendant also demurred on the basis that the plaintiff impermissibly "...maintain[ed] an additional cause of action by bringing this suit". As noted *supra*, the plaintiff previously brought suit on the note and guaranty and obtained judgment on both against Lawrence T. Phillips. It has now sued on one of the same instruments upon which it previously obtained judgment. As noted in *Michie's Jurisprudence*, ACTIONS, § 16. Effect of Splitting Cause of Action:

A demand arising from an entire contract cannot be divided and made the subject of several suits, and if several suits are brought for a breach of such a contract, a judgment upon the merits in either will bar a recovery in the others, notwithstanding the second form of action is not identical with the first or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case.

BOND BASED ON SUGGESTION OF NON-RESIDENCY

The defendant has previously filed a suggestion of non-residency with the Court and requested that a bond with surety be posted in order for the plaintiff to further proceed. Before the plaintiff can be heard on its motions, by statute, it must post a bond with surety. The pleadings, discovery and affidavit establish

the plaintiff's status as a nonresident. Defendant suggest on the record that the plaintiff was a non-resident. Therefore, Code §14.1-185 is applicable and provides that:

In any suit or action, except when such poor person is plaintiff, there may be a suggestion on the record in court, or, if the case be at rules, on the rule docket, by a defendant, or any officer of the court, that the plaintiff is not a resident of this Commonwealth and the security is required of him. After sixty days from such suggestion, the suit or action shall, by order of the court, be dismissed, unless, before the dismissal, the plaintiff be proved to be a resident of the Commonwealth or security be given before the court, or the clerk thereof, for the payment of the costs and damages in the court in which the suit or action is instituted which may be awarded to the defendant, and of the fees due, or to become due, in such suit or action to the officers of the court.

Here the plaintiff failed to post a bond or prove it was a Virginia resident "[a]fter sixty days from such suggestion" filed in September 1998. The plaintiff had ample time to schedule a hearing for the Court to set a bond, and simply refused to act. Thus the action must be dismissed on that basis as well.

CONCLUSION

NEI, the California plaintiff, has "stepped into the shoes" of RTC for all practical purposes. It allegedly bought a guaranty without the note and embarked on a highly speculative venture to try to sue on an obligation that is over a decade old. It went to within 48 hours of trial twice in the prior action during the course of litigation that it prolonged over 2 years.

As the prior record shows, each time the defendant was prepared to try the suit, subpoenaed witnesses, and spent enormous resources the plaintiff did not so much as prepare for trial or

subpoena witnesses it would need for trial. Plaintiff fully asserted that as an assignee, federal law, not state law, applied to it substantively to cut off defenses under the *D'oench Duhme* doctrine, just as if it were the RTC. It also argued that the federal procedural rules were applicable. With full knowledge and reliance on federal law it nonsuited the action rather than go to trial with no witnesses or preparation and lose its suit. It put off the ultimate ruling of dismissal with prejudice, but it knew or should have known that the state tolling provision had no applicability to a state federal statute of limitations period of 6 years. As such, it is barred procedurally from going forward.

It is likewise barred substantively from going forward as it did not sue on the note in this action, and it has no ability to enforce the guaranty since it never had possession of the note. Further, it took a judgment against Phillips in the first suit, and cannot maintain this action. Defendant Roger McDonald prays this action be dismissed with prejudice against him.

ROGER J. MCDONALD,

by 
Counsel

S. Keith Barker, P.C.
1500 Forest Avenue, Suite 228
P.O. Box K150
Richmond, Virginia 23288-0150
(804) 288-0550

C E R T I F I C A T E

I hereby certify that a true and exact copy of the foregoing pleading was mailed, postage prepaid and faxed [1-757-498-0520 and 648-4450 on May 14, 1999 to all counsel of record, viz.

Jon D. Becker, Esquire
Diamonstein, Becker & Staley
309 Lynnhaven Parkway
Virginia Beach, Virginia 23452

John Russell, Esquire
Shuford, Rubin, & Gibney
700 East Main Street
Richmond, Virginia 23219

A handwritten signature in cursive script, appearing to read "Jon D. Becker", is written over a horizontal line.

COMMONWEALTH OF VIRGINIA
FOURTEENTH JUDICIAL CIRCUIT

BUFORD M. PARSONS, JR.
JUDGE
GEORGE F. TIDEY
JUDGE
L.A. HARRIS, JR.
JUDGE



LOCATION:
PARHAM AND
HUNGARY SPRING ROADS
MAILING ADDRESS:
P.O. BOX 27032
RICHMOND, VA 23273-7032

CIRCUIT COURT OF THE COUNTY OF HENRICO

May 25, 1999

John B. Russell, Jr., Esquire
Shuford, Rubin & Gibney, P.C.
P.O. Box 675
Richmond, Virginia 23218

S. Keith Barker, Esquire
S. Keith Barker, P.C.
P.O. Box K-150
Richmond, Virginia 23288-0150

Re: National Enterprises, Incorporated v. Roger J. McDonald.
Case No. CL98-1414


Dear Mr. Russell and Mr. Barker:

I will not allow the defendant to put on evidence unless he denies the genuineness of the guaranty and states his reasons under oath and in a separate statement.

This will not affect the other defenses that he has alleged.

Unless the plaintiff states to the contrary, I am assuming that they are relying on the Virginia Statute of limitations of five years rather than the federal statute.

Very truly yours,


George F. Tidey
Judge

GFT/sm

000315

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO
NATIONAL ENTERPRISES, INCORPORATED,

Plaintiff,

v.

Case Number: ~~CL98-1502~~
CL98-1414

ROGER J. MCDONALD

Defendant.

ORDER

This cause came on May 21, 1999, and upon consideration of the motions and the argument of counsel, it is hereby ADJUDGED, ORDERED, and DECREED that:

1. plaintiff's motion to compel discovery is denied, with the condition that the defendant shall not be allowed to put on evidence unless he denies the genuineness of the guaranty and states his reasons under oath and in a separate statement;

2. the defendant's motion to dismiss the action on his pleas of the statute of limitation based on the pleadings is denied, and the defendant, to the extent that he complies with paragraph 1 herein above, may present evidence on the plea which shall be tried with the case in chief by a jury on March 7 and 8, 2000 at 10:00 a.m.;

3. it appearing to the Court that the plaintiff in this action did not file suit against the same parties herein as it preceded against National Enterprises, Inc. v. Lafayette Associates, et al., CL96-808, it is ORDERED that the discovery filed by and between National Enterprises, Inc. and Roger J.

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McDonald shall be binding in this action.

The Clerk of this Court is directed to send a certified copy of this order to all counsel of record.

ENTER: 101 6199

Sergeant Tuls
JUDGE

I ASK FOR THIS:

[Signature]
SEEN & objected to:

[Signature]

A COPY TESTE:
YVONNE G. SMITH, CLERK
[Signature]
DEPUTY CLERK

000317

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

NATIONAL ENTERPRISES, INC.

Plaintiff,

v.

Case No. CL98-1414

ROGER J. MCDONALD,

Defendant.

NOTICE OF HEARING

Please take notice that on April 28, 2000 at 9:00 a.m., Roger J. McDonald, by counsel, will move this Honorable Court to reconsider its rulings made at the conclusion of the trial of this matter and to enter a summary judgment on his behalf.

MOTION TO ENTER SUMMARY JUDGMENT ON
BEHALF OF DEFENDANT AND TO RECONSIDER PRIOR RULINGS

Comes now the defendant, Roger J. McDonald, by counsel, and moves this Honorable Court to reconsider the prior rulings made at the trial of this matter, to enter summary judgment on his behalf on the issue of the statute of limitations and enforceability of a guarantee when the parties seeking to enforce the guarantee do not have and have not had possession of the original note.

ROGER J. MCDONALD,

by


Counsel

S. Keith Barker, P.C.
1500 Forest Avenue, Suite 228
P.O. Box K150
Richmond, Virginia 23288-0150
(804) 288-0550

C E R T I F I C A T E

I hereby certify that a true and exact copy of the foregoing

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pleading was served in accordance with Part 1 of the Rules on April 18, 2000 to:

John Russell, Jr., Esquire
Becker, Russell and Becker, PLC
7400 Beaufont Springs Drive
Richmond, Virginia 23225



000319

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

NATIONAL ENTERPRISES, INC.
Plaintiff,

v.

Case No. CL98-1414

ROGER J. MCDONALD,
Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO RECONSIDER PRIOR
RULINGS AND ENTER SUMMARY JUDGMENT FOR DEFENDANT

Comes now the defendant, Roger J. McDonald, and submits this brief in support of his motion for summary judgment and to reconsider the rulings made by the court at trial. The trial was held on March 7, 2000. The court ruled against the defendant on [1] the issue of the statute of limitations, [2] the plaintiff's ability to sue on the guarantee without ever having possession of the note and after losing its suit against the maker, and [3] on the admissibility of evidence.

The court had a prior case involving the parties to this suit and other parties not involved in this suit. That case was styled *National Enterprises, Inc. v. Lafayette Associates, a Virginia General Partnership, Roger J. McDonald, and Larry Phillips*, Case No. CL96-808. A default judgment was taken against Phillips in the prior suit. Lafayette Associates, which was sued on the alleged note won on its defenses and was dismissed with prejudice by the final order. The note was never in plaintiff's possession and the court indicated in an interim letter ruling that Lafayette could not be pursued, but McDonald could be on the guarantee. The

Court would not, however, enter an interim order to that effect, when an order was submitted by defense counsel confirming the apparent ruling. Finally, when NEI nonsuited CL 96-808 language was placed in the order stating suit could be brought on the guarantee but not on the note to make clear Lafayette had been dismissed on the merits previously¹. NEI agreed and endorsed the order. The order restated that the law of the case applied to any future suit, which could only be brought on the guarantee. Without that language, NEI could sue Lafayette again after the first nonsuit, as there had been no record, insofar as an order was concerned, on that point until the final order was entered.

The non-suit order established that NEI could not, at least unless it appealed that substantive ruling to the Supreme Court, sue Lafayette on the note. The present suit was instituted in the month following the nonsuit order. NEI did not sue Lafayette. In this suit, it sued only McDonald. The statute of limitations defense was asserted, and case authority was cited to the court and argued on May 21, 1999.

The court made no clear ruling on the statute of limitations defense after the May 1999 hearing. By a letter dated May 25, 1999, it appeared to indicate it ruled in favor of the defendant's argument of record related to the inability of a state court action to toll a federal statute of limitations. By letter dated May 25, 1999, it stated "[u]nless the plaintiff states to the contrary, I am assuming that they are relying on the Virginia

¹ The order stated, "the plaintiff shall be allowed to proceed on the guarantee but not on the note..." See the attached pleadings in CL96-808 related thereto.

Statute of limitations of five years rather than the federal statute."

The defendant had argued at the May 1999 hearing that the statute of limitations was not tolled because plaintiff relied on the federal statute of limitations. The case law presented in Mr. McDonald's prior brief clearly held that when a plaintiff relies on a federal statute of limitations then the state statute of limitations tolling provision did not apply. Therefore, the 6 year federal statute of limitations had expired. Since the statute of limitations plea was an affirmative defense, the court provided in its order entered on October 6, 1999 that the defendant could "present evidence" on the plea of the statute of limitations "which shall be tried with the case in chief by a jury on March 7 and 8, 2000 at 10:00 a.m."²

STATUTE OF LIMITATIONS

At trial NEI offered into evidence as plaintiff's exhibit 4 a guarantee dated October 3, 1988. Trans. at p. 26. The court admitted into evidence, without objection from the defendant, Defendant's exhibit 2, a letter dated October 18, 1990. Trans. p. 62. That letter clearly established that Seasons, which was the original note holder and guarantee holder, demanded that "[t]he total amount of the loan, principal, interest, and late charges now past due equals \$430,392.10." It further stated that there was a "failure to make" payments which was "an Event of Default", and Seasons stated that it "hereby demands full payment of all amount due, within fifteen (15) days of the date of this letter."

Indeed the only testimony at trial established September 18, 1990 as the date of default. The only witness who testified about this point stated:

Q It is your testimony that Mr. McDonald did not make full payment of the note on November 4, 1990 in accordance with the demand that was made of him to do so in the September 18, 1990 letter; is that correct?

A. That is my position. Trans. p. 69.

NEI's exhibit began by noting no payment after "9/4/90" on Plaintiff's exhibit 10, and the witness testified that the only other payment made was a credit in July 1992 of \$217,557.00 as shown on exhibit 10. He testified, by way of explanation, as follows:

Q You are clear that this exhibit that you prepared, Exhibit No. 10, indicates that a credit should be given towards the note of \$217,557.14 on July 1, 1992; isn't that true?

A Yes.

Q And that is the only credit that you made; correct?

A Yes, sir.

Q It is your testimony that you are not aware of any other credits that should be applied; correct?

A Subsequent to September 1990?

Q September 1990, when that September 18, 1990 demand letter was sent; correct.

A True.

Trial trans. at 72.

The plaintiff never "stated to the contrary", that it was not relying "on the Virginia Statute of limitations of five years" as required by the court in its May, 1999 letter ruling. Moreover, plaintiff moved into evidence, Plaintiff's exhibit 11 the first lawsuit, which was filed July 19, 1996. As such, no suit was filed by September 18, 1995. By the plaintiff's own evidence it was barred by the Virginia statute of limitations of five years.

² All emphasis added unless otherwise noted.

This point was clearly made at the trial and appears in the trial transcript at pp. 84-85.

Moreover, even if Lafayette could be sued on the note, the statute of limitations has expired on the note by any calculation, since no additional suit was ever brought on it as of March, 2000. Where the statute of limitations is a bar to the note, it is a bar to the enforcement of the guarantee. The Restatement Of The Law, Third, *Suretyship and Guaranty*, 1996 [ROL] restates this principle as follows³:

§ 43. Delay in Enforcement; Running of Statute of Limitations as to Underlying Obligation:

Notwithstanding § 50, if the obligee fails to institute action against the secondary obligor on the secondary obligation until after the obligee's action against the principal obligor on the underlying obligation is barred by the running of the statute of limitations as to that action, the secondary obligor's rights and duties with respect to the principal obligor and the obligee are the same as if, on the day that the statute of limitations expired, the obligee had released the principal obligor from its duties pursuant to the underlying obligation without preserving the secondary obligor's recourse against the principal obligor. Accordingly, the principal obligor is discharged from duties to the secondary obligor as provided in § 39(a), and the **secondary obligor is discharged from duties to the obligee** as provided in § 39(c)(ii) and § 39(c)(iii).

Comment:

a. *General principle.* When an obligee takes affirmative action, by way of a release, to free the principal obligor from its duties to the obligee on the underlying obligation, this Restatement provides that the release also may discharge duties of the principal obligor to the secondary obligor and of the secondary obligor to the obligee. See § 39. While, generally, the obligee has no duty to pursue the principal obligor at all (see § 50), when the obligee allows the statute of limitations as to its cause of action against the principal obligor to expire without taking any action, the effect on the parties is quite similar to that of a release of the principal obligor. Therefore, this section applies the

³ Throughout the Restatement it refers to a note maker as the "principal obligor" and a guarantor as the "secondary obligor".

rules governing release of the principal obligor with respect to the underlying obligation to situations in which the principal obligor is discharged by expiration of the statute of limitations.

In contrast to the extensive authority submitted by the defendant on this issue, NEI did not cite a single case or statute.

PLAINTIFF'S ABILITY TO SUE ON THE GUARANTEE

The plaintiff's evidence was that it used no care or caution at federal government auctions to determine if the note it thought it was buying even existed. NEI's agent testified on cross-examination:

Q There was nothing that prevented a buyer from actually inspecting the actual documents or walking away from the sale, was it? In other words, you weren't forced to buy any documents, it was your company's decision to buy notes without looking at the actual original notes; correct?
A That is true. Trans. at p. 49.

The plaintiff's witness also made it plain that NEI did not have the original note at the time it was seeking judgment on the guarantee. Trans. p. 55. Nevertheless, he testified he was certain he knew what the original note would presently state if it were presented, and averred:

Q Now, you had a document and I would like the sheriff to show you a document, Exhibit No. 2, it says deed of trust note. Prior to your testimony today and telling this jury that is the note, have you looked at each and every one of those pages?
A Yes.
Q And are you telling this jury, under oath, that that is what the note looks like today wherever the original is?
A Yes, sir.
Q Are you telling this jury --
Well, that is fine. I take it at your word that that

is your testimony. Are you sure of that?

A Yes.

Q Is that based on the fact that you have seen the original note recently?

A That is the note provided to us by the Resolution Trust Corporation. Trans. pp. 55-56

The unrefuted evidence was to the contrary. The original note, if it could be produced, was marked differently than the plaintiff's copy of it in an earlier state. After the NEI copy was made, the commissioner of accounts marked on the face of the note the balance, if any, owed. Trans. p. 90. The plaintiff's witness, who testified unequivocally that Plaintiff's Exhibit 2 was identical to what the note would look like if it could be produced at the time of trial, established through further examination that he had no knowledge on the subject. He candidly admitted he did not know what a commissioner of accounts was, what that official did in reference to foreclosures, and he never reviewed the records on file in the record room pertaining to the deed of trust note accounting.

The defendant's expert provided unrefuted testimony that the note admitted as plaintiff's exhibit 2 could not have been in the form of the copy that plaintiff allegedly obtained in 1994 from an RTC auction and which plaintiff introduced into evidence. Tr. 92. Nevertheless, NEI grounded its claim on exhibit 2, and the evidence established that the hearsay document was obviously unreliable.

As a fundamental principle of law the ability to collect on a guarantee is grounded on the liability on a note. The decision in

Lambert v. Barker, 232 Va. 21 (1986) clearly held that a maker had every right to require the original note to be presented before paying on it. If the maker did not and paid a note without obtaining the original then the maker was liable to pay a second time when the original was presented. Hence a holder of an original guarantee of a copy of a note occupies a position of even lower status.

The Restatement Of The Law, Third, *Suretyship and Guaranty*, 1996 [ROL] restates this principle clearly:

§ 34. When Defenses of Principal Obligor May Be Raised by Secondary Obligor as Defenses to Secondary Obligation

(1) Except as provided in subsection (3), the secondary obligor may raise as a defense to the secondary obligation any defense of the principal obligor to the underlying obligation except:

(a) discharge of the underlying obligation in bankruptcy proceedings;

(b) unenforceability of the underlying obligation due to the principal obligor's lack of capacity. ROL p. 143.

As the comments to §34 explain:

Comment:

a. *Defenses.* * * * Thus, to the extent that the principal obligor can raise a defense to its duty pursuant to the underlying obligation, the secondary obligor should be able to raise that defense to its secondary obligation; this is so even if the principal obligor chooses not to raise the defense.

Since the first suit ended in favor of Lafayette on the merits ["the plaintiff shall be allowed to proceed on the guarantee but not on the note..."], the plaintiff effectively precluded any cause of action it may have had on the guarantee. By refileing and proceeding only on Mr. McDonald's guarantee, NEI had

no cause of action, given that it lost its suit on the note.
Restatement Of The Law, Third, Suretyship and Guaranty, 1996 §67
[judgment in favor of principal obligor bars obligee [noteholder]
from asserting claim against secondary obligor [guarantor].

Virginia law is completely in accord with the Restatement.
Bourne v. Board of Supvrs., 161 Va. 678, 683-684, 172 S.E. 245
(1934) the Court held:

In the case of *Goodrich Rubber Co. v. Fisch*, 141 Va. 261, 127 S.E. 187, 188, Chief Justice Campbell, in defining a guaranty, quotes a distinguished law writer as follows:

"A guaranty is an independent contract, by which the guarantor undertakes, in writing, upon a sufficient undertaking, to be answerable for the debt, or for the performance of some duty, in case of the failure of some other person who is primarily liable to pay or perform."

[2] In 12 R.C.L. p. 1053, the nature of a guaranty is thus defined: "Generally a guaranty relates to the payment of a sum of money or the collectability thereof, though it may constitute an assurance of the genuineness of an obligation or the liability of the obligee. Being a collateral engagement for the performance of the undertaking of another, it imports the existence of two different obligations, one being that of the principal debtor and the other that of the guarantor. If there is no obligation on the part of the principal, there is none on the guarantor."

Accordingly, the plaintiff had no action on the note.

In contrast to the extensive authority submitted by the defendant on this issue, NEI did not cite a single case or statute.

ADMISSIBILITY OF EVIDENCE

The plaintiff evidence, such that it was, consisted of copies, in many instances incomplete or unsigned, from third

parties who had no stake in the suit. No witness from the law firms or banks, who were otherwise available to be subpoenaed, was summonsed by the plaintiff to come to trial. Defense counsel noted that he had a continuing objection to the bill of sale, assignment of loan, deed of trust note, and documents generated from entities, not a party to the litigation. That would include plaintiff's exhibits 1, 2, 5, 6, 7 and other such documents fell into the category of hearsay documents. None of the records were "entries" in NEI's records which it generated. The Supreme Court has stated such evidence must be rejected when proffered in a very similar case. In *Mika v. Planters Bank & Trust Co.*, 241 Va. 415, 404 S.E.2d 222 (1991), the trial court admitted a letter to show a debit which was generated by an entity which was not a party to the suit. The Court held:

...we consider whether the letter was admissible under the modern Shopbook Rule, adopted in Virginia as a recognized exception to the hearsay rule, allowing admission in evidence of verified regular entries, without requiring proof of the original observers or record keepers. See *Ford Motor Co. v. Phelps*, 239 Va. 272, 275, 389 S.E.2d 454, 457 (1990). We conclude that the letter is not the type of "verified regular entry" contemplated by the Shopbook Rule. It was not an "entry" in Planters Bank's records. It was not an "entry" in the Bank of Oman's records. It was merely incorporated by reference in one of a "batch" of documents gathered together by a credit card center to justify a "Charge-Back." This incorporation by reference was utterly insufficient as a guarantee of trustworthiness or reliability to warrant admission of this hearsay document.

Likewise, in this case NEI introduced into evidence documents which neither it nor the RTC generated. It had various copies of documents from other sources, the reliability of which were proven by the defendant's evidence to be unreliable. The records in this

case were not generated or kept in the normal course of business of NEI and were thus not capable of introduction through NEI. "Automatic" Sprinkler Corp. v. Coley & Petersen, Inc., 219 Va. 781, 792, 250 S.E.2d 765, 773 (1979); Hooker v. Commonwealth, 14 Va. App. 454, 456, 418 S.E.2d 343, 344 (1992). "Admission of such evidence is conditioned, therefore, on proof that the document comes from the proper custodian and that it is a record kept in the ordinary course of business made contemporaneously with the event by persons having the duty to keep a true record." "Automatic" Sprinkler, 219 Va. at 793, 250 S.E.2d at 773; see also Kettler & Scott, Inc. v. Earth Tech. Cos., 248 Va. 450, 457, 449 S.E.2d 782, 786 (1994). In order to admit a business record into evidence, it must be "verified by testimony of the [entrant of the record] or of a superior who testifies to the regular course of business." Here no such testimony was presented, and the evidence of the plaintiff should not have been admitted. Further the evidence, insofar as copies were used, were not admissible under the best evidence rule, Code §8.01-391.


In contrast to the extensive authority submitted by the defendant on this issue, NEI did not cite a single case or statute.

CONCLUSION

For the forgoing reasons the law, and the evidence as set forth in the transcript, warrant reconsideration of the rulings made at trial. Moreover, in light of the authority, summary

judgment should be entered in favor of the defendant and the action dismissed.

ROGER J. MCDONALD,

by 
Counsel

S. Keith Barker, P.C.
P.O. Box K150
Richmond, Virginia 23288-0150

C E R T I F I C A T E

I hereby certify that a true and exact copy of the foregoing pleading was served in accordance with Part 1 of the Rules on April 20, 2000 to:

John Russell, Jr., Esquire
Becker, Russell and Becker, PLC
7400 Beaufont Springs Drive
Richmond, Virginia 23225



V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

NATIONAL ENTERPRISES, INCORPORATED,
Plaintiff,

v.

Case Number: CL96-808

LAFAYETTE ASSOCIATES, et al.,
Defendants.

TO:

Jon D. Becker, Esquire
Diamonstein, Becker & Staley
309 Lynnhaven Parkway
Virginia Beach, Virginia 23452

NOTICE OF HEARING

PLEASE TAKE NOTICE, that on January 10, 1997 at 9:00 a.m. the defendants, Lafayette Associates, and Roger J. McDonald, by counsel, will move the Court, in accordance with their motion hereinbelow to dismiss the plaintiff's suit with prejudice, and for such other relief as has been requested in the prior notices filed in this action.

MOTION TO DISMISS

COMES NOW the defendants, by counsel, and move this Honorable Court to dismiss the plaintiff's suit with prejudice on the following grounds:

1. The plaintiff has filed answers to requests for admission in this action [exhibit 1], after the suit was filed, which admit that it is not in possession of the original note on which it sues and further fails to deny that it was ever in possession of the original note but its answer states only that the assignor, its predecessor in interest, was; a failure to deny has the effect of an admission.

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2. Code § 8.3A-309 requires, that in order for a suit to be brought, without possession of the instrument by the plaintiff, that three conditions be met, and states:

- (a) A person not in possession of an instrument is entitled to enforce the instrument if
 - (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred,
 - (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and
 - (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

3. Without satisfying the first prong of the standing requirement under Code § 8.3A-309(a)(i) there is no requirement to even go to the conjunctive requirements of the statute.

4. Plaintiff was not in possession of the instrument and entitled to enforce it when it lost possession of it, and indeed was never in possession of it;

WHEREFORE, the plaintiff has no standing to bring this suit as a matter of law and statute, and your defendants ask that it be dismissed with prejudice.

LAFAYETTE ASSOCIATES
by 
Counsel

S. Keith Barker, P.C.
P.O. Box K150
Richmond, Virginia 23288-0150
(804) 288-0550

C E R T I F I C A T E

I hereby certify that a true and exact copy of the foregoing notice was mailed, postage prepaid on January 6, 1997 to all counsel of record, and faxed a copy to him.



000333

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO
NATIONAL ENTERPRISES, INCORPORATED

Plaintiff,

vs.

AT LAW NO.: CL96-808

LAFAYETTE ASSOCIATES, et al.,

Defendants.

PLAINTIFF'S ANSWERS TO DEFENDANTS' FIRST
DISCOVERY TO PLAINTIFF OF OCTOBER 30, 1996

Comes now your defendants, Lafayette Associates, by Roger J. McDonald, General Partner, and Roger J. McDonald, individually, by counsel, and propounds the following discovery requests to the plaintiff pursuant to Part IV of the Rules of the Supreme Court of Virginia to be answered within twenty-one (21) days from the date of service.

DEFINITIONS AND INSTRUCTIONS

1. The term "document" shall mean and include whether stored in electronic form and capable of reproduction or in tangible form any and all statements, notations, contracts, agreements, letters, reports, books, ledgers, drawings, sketches, photographs, telegrams, sound recordings, book of account, catalogs, checks, check stubs, and written statements of witnesses or other persons having knowledge of the pertinent facts, whether or not such documents are claimed to be privileged against discovery on any grounds.

2. Whenever an Interrogatories, Request for Admission, or Request for Production of Document asks for the description or identification of a document, such identification or description shall include, but not be limited to, the nature and contents

RESPONSES TO REQUESTS FOR ADMISSIONS

* * *

4. Admit that the plaintiff is not now in possession of the original note.

ANSWER: Admitted.

5. Admit that the plaintiff has never been in possession of the original note.

ANSWER: Plaintiff, National Enterprises, Incorporated, does not have possession of the original Note; however, the assignor did have possession of the original Note.

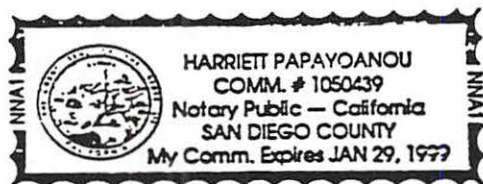
ANSWERS TO INTERROGATORIES

1. Identify each and every person who is in possession of documents, which are requested in the Requests for Production of Documents above, but of which you do not have the originals or

* * *

000335

I hereby affirm that the foregoing Answers to Defendants Interrogatories and Request for Production and Request for Admissions are true and correct to the best of my knowledge, information and belief.



[Signature]
Name Jon D. Fleming
Title Senior Asset Manager

STATE OF California
~~COUNTY~~ OF San Diego, to wit:

Subscribed and sworn to before me this 7th day of November, 1996, by Jon D. Fleming.

Harriett Papayouanou
Notary Public

My Commission Expires: 1-29-97

NATIONAL ENTERPRISES, INCORPORATED

By [Signature]
Of Counsel

Jon D. Becker, Esquire
DIAMONSTEIN, BECKER & STALEY, P.L.C.
P.O. Box 8915
Virginia Beach, VA 23450
(757) 340-7600

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the forgoing pleading was mailed, via first class mail, postage prepaid, to S. Keith Barker, Esquire, P.O. Box K150, Richmond, Virginia 23288-0150 on the 20th day of NOVEMBER, 1996.

Jon D. Becker

000336

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

NATIONAL ENTERPRISES, INCORPORATED,
Plaintiff,

v.

Case Number: CL96-808

LAFAYETTE ASSOCIATES, et al.,
Defendants.

TO:

Jon D. Becker, Esquire
Diamonstein, Becker & Staley
309 Lynnhaven Parkway
Virginia Beach, Virginia 23452

NOTICE OF HEARING

PLEASE TAKE NOTICE, that on February 14, 1997 at 9:00 a.m. the defendants, Lafayette Associates, and Roger J. McDonald, by counsel, will move the Court, in accordance with their motion to dismiss the plaintiff's suit with prejudice, for want of standing and, in the alternative, to enter an order requiring the plaintiff to give over of the contract(s) on which the suit is based, and to rule on such other motions that have been filed and requested in the prior notices filed in this action, including, inter alia, their request for a bond under Code § 14.1-185 (nonresidency) and their request for a bond under Code § 8.01-32 (lost note).

LAFAYETTE ASSOCIATES

by *S. Keith Barker*
Counsel

S. Keith Barker, P.C.
P.O. Box K150
Richmond, Virginia 23288-0150

C E R T I F I C A T E

I hereby certify that a true and exact copy of the foregoing notice was mailed, postage prepaid on February 12, 1997 to all counsel of record, and faxed to him.

S. Keith Barker

000337

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO
NATIONAL ENTERPRISES, INCORPORATED,

Plaintiff,

v.

Case Number: CL96-808

LAFAYETTE ASSOCIATES, et al.,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS

Defendants filed a motion to dismiss this suit in the first week of January, 1997. The motion was based on the plaintiff's concession that it is attempting to sue on a lost note, which the plaintiff never possessed. The plaintiff has filed its memorandum with the Court in response. This memorandum is filed in reply.

The plaintiff does not contest in its recently filed "Memorandum in Opposition to Defendants' Motion to Dismiss" that its reply to the defendants' requests for admissions conclusively establishes that it is not in possession of the original note on which it sues. Nor does it contest the fact that the plaintiff was never in possession of the original note. Code § 8.3A-309 sets forth strict requirements, which apply to maintaining an action without possession of the instrument on which a plaintiff sues.

The plaintiff's memorandum seeks to avoid the bar to standing posed by Code § 8.3A-309. It asserts that the plaintiff is excused from the statutory standing requirements by two decisions recent- *National Enterprise, Inc. v. R.G. Moore*, (E.D. Va. 12/16/96), and

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Union Recovery v. Horton, 1996 Va. LEXIS 103, (November 1, 1996). However, on close inspection, neither decision is related to the bar to standing of §8.3A-309.

A. THE STANDING ISSUE IS NOT ADDRESSED BY AUTHORITY ON WHICH PLAINTIFF RELIES

Neither decision on which the plaintiff relies in this action addresses the issue before the court - the central requirement that the party who brings suit on an instrument must possess the instrument. For example, in *National Enterprise, Inc. v R.G. Moore*¹, the federal magistrate judge rendering the decision recited the fact that National Enterprise, in that case, indeed was "the holder of the note," See decision at p. 2.

The decision by the Virginia Supreme Court in *Union Recovery Limited v. Horton*, 1996 Va. LEXIS 103, (November 1, 1996), was not concerned with the issue of possession of a note and standing to bring suit. Rather, that case addressed the applicability of the six year statute of limitations afforded to transferees of RTC. No issue was before the court as to whether there, in fact, was a transfer of the instrument to a plaintiff or physical possession by the plaintiff bringing suit.

The decision in *NEI v. R.G. Moore*, on which plaintiff relies, does make clear, however, that the rights of a plaintiff bringing suit are dependent upon his receiving "transfer" of that note. The

¹This is an unpublished decision by a federal magistrate, a copy of which is attached to plaintiff's memorandum. In some instances the magistrate's citations are incomplete and erroneous. See e.g. the citation to *National Bank and Trust Co. of Charlottesville v. Castle*, at p. 9. Nota bene: emphasis is supplied throughout the defendants' memorandum, unless otherwise indicated.

term "transfer" has significant meaning under the Uniform Commercial Code. It is clear, in this case, that there was no "transfer" of the note; nor was there a "negotiation" of the note. Both words are terms of art which have specific meaning under the Uniform Commercial Code. Indeed, the magistrate recognized that fact in *Castle* by stating that "under Virginia Code § 8.3A-203(b) the transfer of an instrument vests in the transferee 'any rights of the transferor to enforce the instrument'...." *NEI v. R.G. Moore* at p.9, 1st full para.

In determining whether a "transfer" has occurred under Code § 8.30-203(b), which would enable plaintiff to maintain this action, it is important to note that it concedes, by its responses to the requests for admission, that it never was, and is not presently a party in possession of the note. Thus, it is not a "transferee" by definition, and has no rights as a "transferee" to bring the suit.

B. LACK OF POSSESSION, NEGOTIATION OR TRANSFER DEPRIVES PLAINTIFF OF STANDING TO BRING SUIT

In analyzing the authority on which plaintiff stakes its argument, it is important to recognize that the issue before the court is not related to the statute of limitations, with which *Horton* was exclusively concerned. Rather the motion to dismiss is based on the plaintiff's admission that it never had possession of the note on which it has sued. Thus neither the decision in *Union Recovery Limited* nor *National Enterprise* have any applicability to the issue before this court.

Further the plaintiffs the plaintiff's argument that the linchpin to its standing to bring this action is whether it is a

"transferee" and pursuant to Code §8.3A-203(b) thereby "step[s] into the shoes of the RTC",² does not accurately address the legal issue related to the bar of §8.3A-309. Even if that were the issue, given plaintiff's admissions in discovery that it never obtained the note on which it sues, by law, it cannot bring this suit even if the case turned on whether it met the legal definition of a "transferee".

First, plaintiff's "transferee" analysis is incorrect because Code §8.3A-309 does not have any technical limitations which confine its bar to standing to "transferees" or "holders". The standing bar has broad application, and applies to any "person not in possession" of the instrument on which suit is brought. It limits the standing of a person not in possession of the note to sue, by clearly and simply stating:

- (a) A person not in possession of an instrument is entitled to enforce the instrument if
 - (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred,
 - (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and
 - (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

Here the plaintiff was not in possession of the instrument and entitled to enforce it when the instrument was lost. Indeed plaintiff concedes it was never in possession of the note on which it sues.

The plaintiff attempts to avoid the clear and simple bar of

² Plaintiff's Memorandum at pp. 3-4.

Code §8.3A-309 by constructing an elaborate "transfer" argument based on the authority on which it relies which states "the transfer of an instrument vests in the transferee any right of the transferor to enforce the instrument". Plaintiff's Memorandum at p. 3, second and third lines from the bottom.

The plaintiff's theory of its "right" to sue on a note, lost by a predecessor in interest, of which the plaintiff has never had possession, is completely unsupported by the authority on which it relies. Plaintiff's argument fails because it is not a transferee under the UCC and thus has no right, "to enforce the instrument". The UCC provision applicable to transfers holds:

§ 8.3A-203. Transfer of instrument; rights acquired by transfer.

(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

Hence transfer means what the plain definition of the term imports - physical delivery of the instrument. The UCC reinforces the concept of actual physical delivery by holding that it makes no difference whether the instrument is signed, in order for a "transfer" to occur. As §8.3A-203(b) notes:

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

By definition a "transfer" and "negotiation" are related but different concepts. A "negotiation" is a "transfer" viz. the

physical act of delivery coupled with the signature by the party making the physical delivery. UCC § 8.3A-201(b) notes that when the payee is not "bearer", as in the case *sub judice*, a "negotiation"

. . . requires transfer of possession of the instrument and its indorsement by the holder.

The official comments emphasize the importance of actual physical delivery of the instrument, whether or not it is endorsed, as it notes:

2. Subsection (b) states that transfer vests in the transferee any right of the transferor to enforce the instrument "including any right as a holder in due course." * * * Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 3-308 that the transferee, by producing the instrument, is entitled to payment. * * *

Here, given the plaintiff's admission it has never had actual physical delivery of the note, it was not, by definition, a "transferee" of the RTC. Hence plaintiff does not have standing, even under its erroneous theory of the case that "the transfer of an instrument vests in the transferee any right to enforce the instrument". Since it never obtained physical possession of the instrument, it was never a transferee, and thus never had vested in it the "right to enforce the instrument".³

C. PLAINTIFF IS UNABLE TO MAINTAIN AN ACTION ON THE GUARANTEE

This court's ruling on issue of plaintiff's standing to bring suit on the note is made simple by the Plaintiff's concession on

³The defendants do concede that the dismissal of this suit does not prevent the last person in possession of the note from maintaining an action on it, or the presentation by defendants of any defenses to a claim should such an action be filed.

page 4 of its memorandum that it "... is not seeking to enforce the Note, but rather to enforce the Guarantee". Plaintiff Memorandum at p. 4. Plaintiff's counsel claims that plaintiff has the "original" guarantee⁴, and the defendants "therefore cannot assert any reason why Plaintiff may not enforce the Guarantee." Id. Plaintiff's memorandum claims:

In itself, the Guarantee is an instrument. * * * Pursuant to Va. Code §8.3A-203, the transfer of an instrument... vests in the transferee any right of the transferor to enforce the instrument,....Id.

To the contrary, without the note (which plaintiff now concedes is not the basis of its suit), the plaintiff has no ability to sue on the guarantee. The reason is well grounded on both statute and case law in Virginia.

The plaintiff's argument fails, in part, because it characterizes the guarantee as an "instrument". It is not, however, by statutory definition. Code §8.3A-103 provides the definitions that are set forth in all of Title 8.3A of which §8.3A-203 (the section *supra*, on which plaintiff relies) is a part and states as follows:

§ 8.3A-103. Definitions.

(b) Other definitions applying to this title and the sections in which they appear are:

* * *

"Instrument," § 8.3A-104.

* * *

Furthermore that Code section states, in pertinent part, as follows:

⁴Of which oyer is sought, viz. production of the original in order to determine the genuineness of the plaintiff's claim.

- § 8.3A-104. Negotiable instrument.
(b) "Instrument" means a negotiable instrument.

The Code defines "negotiable instrument" as:

(a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it: (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder; (2) is payable on demand or at a definite time; and (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

This guarantee, Exhibit B, is not an "unconditional promise or order to pay a fixed amount of money". Rather by its terms it is a conditional promise by the guarantors to make a payment[s] if the borrowers/makers of the note do not make "full and prompt payment... of all obligations payable by the Borrower to the Lender pursuant to the Loan Commitment and the Note ... as well as the performance by the Borrower of its various obligations...." Exhibit B to the Motion for Judgment, p. 2, ¶1.

Exhibit B meets the quintessential definition of a guarantee as noted by the Virginia Supreme Court in *Bourne v. Board of Supvrs.*, 161 Va. 678, 683-684, 172 S.E. 245, (1934), in which the Court restated:

In the case of *Goodrich Rubber Co. v. Fisch*, 141 Va. 261, 127 S.E. 187, 188, Chief Justice Campbell, in defining a guaranty, quotes a distinguished law writer as follows: "A guaranty is an independent contract, by which the guarantor undertakes, in writing, upon a sufficient

undertaking, to be answerable for the debt, or for the performance of some duty, in case of the failure of some other person who is primarily liable to pay or perform."

[2] In 12 R.C.L. p. 1053, the nature of a guaranty is thus defined: "Generally a guaranty relates to the payment of a sum of money or the collectability thereof, though it may constitute an assurance of the genuineness of an obligation or the liability of the obligee. Being a collateral engagement for the performance of the undertaking of another, it imports the existence of two different obligations, one being that of the principal debtor and the other that of the guarantor. If there is no obligation on the part of the principal, there is none on the guarantor."

In the case *sub judice*, there is "no obligation on the part of the guarantor" given the fact that the plaintiff concedes that it "is not seeking to enforce the Note, but rather to enforce the Guarantee." Without seeking to establish an obligation on the note, *a fortiori* it cannot establish liability on the guarantee, which is subservient and dependent on the validity and enforcement of the note for legal viability.

**D. NECESSITY OF BOND ON SUGGESTION OF NON-RESIDENCY &
NECESSITY OF BOND TO MAINTAIN AN ACTION ON THE LOST NOTE**

Plaintiff concedes that "Code § 14.1-185 requires that a plaintiff, except when a plaintiff is a poor person, post security within 60 days of a suggestion of non-residence." Plaintiff's memorandum at p. 5.

The plaintiff notes that the bond under that code section is to insure payment of costs which may be awarded against a plaintiff, and concludes that the request for a bond in the amount of \$450,000 is not supported by that Code section.

Plaintiff's argument, however, fails to either recognize or distinguish between the two distinct bond sections and two distinct

motions made by the defendants under two different Code. The only Code section which plaintiff addresses in its memorandum falls under Title 14.1 related to an action brought by any non-resident plaintiff. In contrast, the other code section, which plaintiff does not address, falls under Title 8.01 and is related to bond to be given on an action brought on a lost instrument. Contrary to plaintiff's assertion, defendants did not seek to establish a \$450,000 bond under Code §14.1-185. Rather, it sought a cost bond of \$15,000 under Code §14.1-185. Defendants' "Suggestion of Nonresidency" filed ca. October 31, 1996 requested a "bond with surety in the amount of \$15,000" based on the plaintiff's non-residency. Plaintiff has never taken issue with this amount for a cost bond under Title 14.1.

Separate and distinct from defendants' request for a \$15,000 cost bond, based on their "Suggestion of Nonresidency" filed ca. October 31, 1996, is defendants' request that the plaintiff post a bond of \$450,000 based on its suit grounded on a lost instrument. Assuming, *arguendo*, that plaintiff can sue on a lost instrument that it never possessed, it must by law post a bond to cover the loss which may occur to the defendants who are subject to a later suit based on the original note produced by another plaintiff. The plaintiff acknowledges that there are a number of cases where RTC's sloppy administration of liquidations of banks has resulted in the same note being sold multiple times, exposing defendants to multiple suits. The plaintiff's make no argument that a \$450,000 bond under code §8.01-32, as suggested in defendants' brief filed

ca. 1/7/97, at p. 3, is inappropriate. Hence an order requiring such a bond, if this matter is allowed to go forward, would be appropriately entered.

CONCLUSION

The plaintiff is unable to maintain an action on the note. Indeed, plaintiff concedes, part way through its memorandum, that it does not ground the suit on the copy of the note which it attached to the motion for judgment. Having narrowed its cause of action to the guarantee, there can be "no obligation on the part of the guarantor to the plaintiff in this suit, given the fact that this plaintiff is not seeking to enforce the Note. The obligation of the guarantor, if any, is to the party who has standing to bring a suit on the note.

LAFAYETTE ASSOCIATES

by 
Counsel

S. Keith Barker, P.C.
P.O. Box K150
Richmond, Virginia 23288-0150
(804) 288-0550

C E R T I F I C A T E

I hereby certify that a true and exact copy of the foregoing pleading was mailed, postage prepaid on February 12, 1997 to all counsel of record.



V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

NATIONAL ENTERPRISES, INC.

Plaintiff,

v.

Case No. CL96-808

LAFAYETTE ASSOCIATES, et al.

Defendants.

ORDER

THIS DAY CAME the plaintiff and defendant, both by counsel, and argument having been made ore tenus on February 14, 1997; the Court having ruled:

1. That the plaintiff can proceed on the Guarantee instrument;
2. That the Motion to Dismiss is Denied as to defendant Roger J. McDonald; and
3. That the plaintiff post a bond of \$250.00 cash or surety; it is therefore

ADJUDGED, ORDERED AND DECREED that defendant's Motion to Dismiss Roger J. McDonald is overruled, and the case proceeding only on the guarantee, the defendant Lafayette Associates is hereby DISMISSED from this action; further that the plaintiff be allowed to proceed on the Guarantee instrument against Roger J. McDonald; and further that the plaintiff post a bond of \$250.00 cash or surety. The Clerk of this Court is directed to send a certified

000349

copy of this order to all counsel of record.

ENTER: / /

JUDGE

I ASK FOR THIS:

p.q.

SEEN & OBJECTED TO AS TO ADVERSE
RULINGS FOR THE REASONS SET FORTH
ON THE RECORD AND IN THE PLEADINGS
AND AS TO THE SUFFICIENCY OF THE BOND:

Stephen J. Barber

p.d.

COMMONWEALTH OF VIRGINIA
FOURTEENTH JUDICIAL CIRCUIT

BUFORD M. PARSONS, JR.
JUDGE

JAMES E. KULP
JUDGE

GEORGE F. TIDEY
JUDGE

L.A. HARRIS, JR.
JUDGE



LOCATION:
PARHAM AND
HUNGARY SPRING ROADS

MAILING ADDRESS:
P. O. BOX 27032
RICHMOND, VA 23273

CIRCUIT COURT OF THE COUNTY OF HENRICO
February 14, 1997

Jon D. Becker, Esquire
Diamonstein, Becker & Staley, P.L.C.
Post Office Box 8915
Virginia Beach, Virginia 23450

S. Keith Barker, P.C., Esquire
Post Office Box K150
Richmond, Virginia 23228-0150

Re: National Enterprises, Incorporated v. Lafayette Associates and Roger J. McDonald.
Case No. CL96-808

Dear Mr. Becker and Mr. Barker:

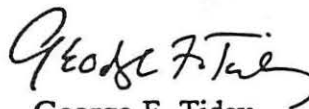
I have reviewed the memorandums filed by each of you.

I feel that the plaintiff can proceed on the Guarantee instrument. The Motion to Dismiss is denied.

I do not feel that it is necessary for a bond to be posted at this time.

I ask Mr. Becker to prepare the order.

Very truly yours,


George F. Tidey
Judge

GFT/sm

000351

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO
NATIONAL ENTERPRISES, INCORPORATED,

Plaintiff,

vs.

AT LAW NO.: CL96-808

LAFAYETTE ASSOCIATES, et al.,

Defendants.

ORDER

THIS DAY CAME the plaintiff and defendant, both by counsel, argument having been made ore tenus on February 14, 1997; the Court having ruled:

1. That the plaintiff can proceed on the Guarantee instrument;
 2. That the Motion to Dismiss is Denied; and
 3. That the plaintiff post a bond of \$250.00 cash or surety;
- it is therefore

ADJUDGED, ORDERED and DECREED that defendant's Motion to Dismiss is overruled; further that the plaintiff be allowed to proceed on the Guarantee instrument; and further that the plaintiff post a bond of \$250.00 cash or surety.

ENTERED: 4-30-97

George F. Tully
JUDGE

I ASK FOR THIS:

Jon D. Becker, Esquire
Counsel for Plaintiff

Original in Mr. Becker's possession
with Mr. Becker's signature (61)

A COPY TESTE:
YVONNE G. SMITH, CLERK
Yvonne G. Smith
DEPUTY CLERK

000052

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

NATIONAL ENTERPRISES, INCORPORATED,
Plaintiff,

v.

At Law No.: CL98-1414

ROGER J. MCDONALD,
Defendant.

FINAL ORDER

On the 7th day of March, 2000, appeared both parties, by counsel, for the trial on this matter. A jury of seven members was impaneled and sworn and testimony and documentary evidence was received and heard on behalf of the plaintiff. At the conclusion of the plaintiff's evidence, the defendant made a Motion to Strike the plaintiff's evidence. After hearing argument out of the presence of the jury, the Court denied the motion. The defendant then presented his case through the testimony of a witness and the introduction of documentary evidence. The plaintiff then made a Motion to Strike the defendant's evidence, which Motion the Court denied. The plaintiff then presented evidence in rebuttal. At the conclusion of all of the evidence, the defendant renewed his Motion to Strike and the Court denied same. The plaintiff then renewed its Motion to Strike the defendant's evidence and for Summary Judgment. The Court, having heard argument by counsel, granted the plaintiff's Motion. The Court then discharged the jury. The defendant duly noted his exceptions to the adverse rulings of the Court as stated in the record.

Wherefore it is hereby ORDERED that judgment shall be entered against the defendant and in favor of the plaintiff in the amount of \$462,839.60 together with

Book 100
Page 681
Doc Date 5-2-00
Time 4:00 p.m.
Cost Yes
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interest at the judgment rate from March 7, 2000. Further, based upon the sworn affidavit submitted by plaintiff's counsel the Court awards plaintiff the additional sum of

\$ 14,834.00 in costs and attorneys' fees, for a total judgment in the amount of

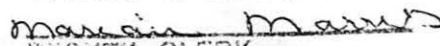
\$ 477,673.00


The Clerk is directed to sent attested copies of this Order to counsel of record.

Enter: 4128100


Judge

We ask for this:

A COPY TESTE:
TYONNE G. SMITH, CLERK

DEPUTY CLERK


John B. Russell, Jr., VSB #17991
Becker, Russell & Becker, P.L.C.
7400 Beaufont Springs Drive
Suite 300
Richmond, VA 23225
(804) 327-6876

Seen and Objected to: For the REASONS previously
Stated and made part of the Record. (GT)

S. Keith Barker, Esquire
1500 Forest Avenue, Suite 228
P. O. Box K150
Richmond VA 23288-0150

000354

copy of this order to all counsel of record.

ENTER: / /

JUDGE

I ASK FOR THIS:

p.q.

SEEN & OBJECTED TO AS TO ADVERSE
RULINGS FOR THE REASONS SET FORTH
ON THE RECORD AND IN THE PLEADINGS
AND AS TO THE SUFFICIENCY OF THE BOND:

Spencer

p.d.

ST
a
t
DJ
>

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

NATIONAL ENTERPRISES, INC.

Plaintiff,

v.

Case No. CL96-808

LAFAYETTE ASSOCIATES, et al.

Defendants.

ORDER

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COMMONWEALTH OF VIRGINIA
FOURTEENTH JUDICIAL CIRCUIT

BUFORD M. PARSONS, JR.
JUDGE

JAMES E. KULP
JUDGE

GEORGE F. TIDEY
JUDGE

L.A. HARRIS, JR.
JUDGE



CIRCUIT COURT OF THE COUNTY OF HENRICO
February 14, 1997

LOCATION:
PARHAM AND
HUNGARY SPRING ROADS
MAILING ADDRESS:
P. O. BOX 27032
RICHMOND, VA 23273

Jon D. Becker, Esquire
Diamonstein, Becker & Staley, P.L.C.
Post Office Box 8915
Virginia Beach, Virginia 23450

S. Keith Barker, P.C., Esquire
Post Office Box K150
Richmond, Virginia 23228-0150

Re: National Enterprises, Incorporated v. Lafayette Associates and Roger J. McDonald.
Case No. CL96-808

Dear Mr. Becker and Mr. Barker:

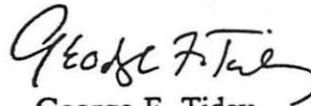
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I do not fee that it is necessary for a bond to be posted at this time.

I ask Mr. Becker to prepare the order.

Very truly yours,


George F. Tidey
Judge

GFT/sm

000351

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO
NATIONAL ENTERPRISES, INCORPORATED,
Plaintiff,

vs.

AT LAW NO.: CL96-808

LAFAYETTE ASSOCIATES, et al.,
Defendants.

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argument having been made ore tenus on February 14, 1997; the Court
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it is therefore

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proceed on the Guarantee instrument; and further that the plaintiff
post a bond of \$250.00 cash or surety.

ENTERED: 4-30-97

George F. Tully
JUDGE

I ASK FOR THIS:

Jon D. Becker, Esquire
Counsel for Plaintiff

Original in Mr. Becker's possession
with Mr. Becker's signature

A COPY TESTE:
YVONNE G. SMITH, CLERK
Yvonne G. Smith
DEPUTY CLERK

000352

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

NATIONAL ENTERPRISES, INCORPORATED,
Plaintiff,

v.

At Law No.: CL98-1414

ROGER J. MCDONALD,
Defendant.

FINAL ORDER

On the 7th day of March, 2000, appeared both parties, by counsel, for the trial on this matter. A jury of seven members was impaneled and sworn and testimony and documentary evidence was received and heard on behalf of the plaintiff. At the conclusion of the plaintiff's evidence, the defendant made a Motion to Strike the plaintiff's evidence. After hearing argument out of the presence of the jury, the Court denied the motion. The defendant then presented his case through the testimony of a witness and the introduction of documentary evidence. The plaintiff then made a Motion to Strike the defendant's evidence, which Motion the Court denied. The plaintiff then presented evidence in rebuttal. At the conclusion of all of the evidence, the defendant renewed his Motion to Strike and the Court denied same. The plaintiff then renewed its Motion to Strike the defendant's evidence and for Summary Judgment. The Court, having heard argument by counsel, granted the plaintiff's Motion. The Court then discharged the jury. The defendant duly noted his exceptions to the adverse rulings of the Court as stated in the record.

Wherefore it is hereby ORDERED that judgment shall be entered against the defendant and in favor of the plaintiff in the amount of \$462,839.60 together with

Book 100
Page 681
Doc Date 5-2-00
Time 4:00 P.M.
Cost Yes
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Ret

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interest at the judgment rate from March 7, 2000. Further, based upon the sworn affidavit submitted by plaintiff's counsel the Court awards plaintiff the additional sum of

\$ 14,834.⁰⁰ in costs and attorneys' fees, for a total judgment in the amount of

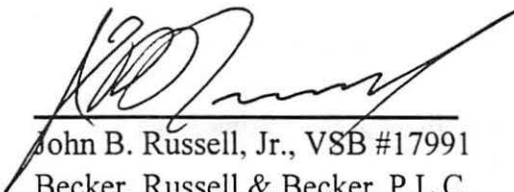
\$ 477,673.⁴⁰

The Clerk is directed to sent attested copies of this Order to counsel of record.

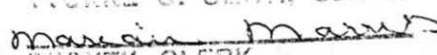
Enter: 4128100


Judge

We ask for this:



John B. Russell, Jr., VSB #17991
Becker, Russell & Becker, P.L.C.
7400 Beaufont Springs Drive
Suite 300
Richmond, VA 23225
(804) 327-6876

A COPY TESTE:
VIVIANE G. SMITH, CLERK

DEPUTY CLERK

Seen and Objected to: For the REASONS previously
Stated and made part of the Record. (GT)

S. Keith Barker, Esquire
1500 Forest Avenue, Suite 228
P. O. Box K150
Richmond VA 23288-0150

000354

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

NATIONAL ENTERPRISES, INCORPORATED,
Plaintiff,

v.

At Law No.: CL98-1414

ROGER J. MCDONALD,
Defendant.

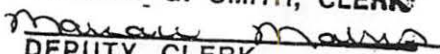
ORDER

On the 28th day of April, 2000, appeared both parties, by counsel, on various post-trial motions of the defendant. After having read and considered the motions and memoranda filed by counsel and having heard and considered argument of counsel, it is hereby ORDERED that defendant's Motion to Reconsider Prior Rulings and Enter Summary Judgment for Defendant is denied; and defendant's Motion to Require Indemnifying Bond Pursuant to Code §8.01-32 and Enjoin Collection on Judgment During Pendency of Appeal Period is also denied. Defendant's exceptions to these rulings were noted.

The Clerk is directed to sent attested copies of this Order to counsel of record.

Enter: 57 15100


Judge

A COPY TESTE:
YVONNE G. SMITH, CLERK

DEPUTY CLERK

000355


172

We ask for this:



John B. Russel, Jr., VSB #17991
Becker, Russell & Becker, P.L.C.
7400 Beaufont Springs Drive
Suite 300
Richmond, VA 23225
(804) 327-6876

Seen and Objected to:



S. Keith Barker, Esquire
1500 Forest Avenue, Suite 228
P. O. Box K150
Richmond VA 23288-0150

CL98-1414

000356

ASSIGNMENTS OF ERROR

The petitioner presents the following assignments of error to the action of the trial court:

1. The trial court erred by allowing judgment on a guaranty by a successor in interest to the guaranty, who never received or held the note to which it pertained.

2. The trial court erred by allowing judgment on the guaranty, by the plaintiff/successor in interest to the guaranty, when liability on the note had been previously adjudicated in favor of the maker in a prior suit brought by the plaintiff/successor/guarantee.

3. The trial court erred by ruling, as a matter of law, that the statute of limitations did not bar suit on the guaranty and/or by applying a Virginia tolling statute to a federal statute of limitations.

4. The trial court erred by admitting hearsay evidence at trial.

5. The trial court erred by awarding plaintiff attorney's fees where the plaintiff presented no evidence at the jury trial related to the nature and value of legal services.